

**DELICTUAL LIABILITY FOR DISTURBING THE AIRWAVES –
THE LAW OF DELICT MOVING INTO THE 21ST CENTURY**

eBotswana (Pty) Ltd v Sentech (Pty) Ltd
2013 6 SA 327 (GSJ)

1 Introduction

The proliferation in recent times of judgments in the field of delict touching upon the subject of pure economic loss has shown that our judges are not shy to venture into the field of developing new rules and dogma to cater for situations that could never have arisen in the heyday of Roman or Roman-Dutch law. Developments in the field of science and technology have created possibilities of causing harm to others in ways that the old jurists would never have contemplated in their wildest dreams.

Aquilian liability, originating from the *lex Aquilia*, a plebiscite passed in the Roman *Comitia centuriata* in 287 BC to address the delict of *damnum iniuria datum*, originally catered for the redress of patrimonial harm flowing from the physical damaging of corporeal things. Since Justinian times a slow process of development began to award the *actio legis Aquiliae* in cases where no physical damage occurred, for example by means of the stratagem of the *actiones in factum* and *actiones utiles*. There is an abundance of literature on how this action developed through the Middle Ages from a so-called *actio mixta*, possessing qualities of both a civil and a criminal action, to a remedy applied exclusively to redress civil damage – a so-called *actio rei persecutoria*. Our main institutional writers, such as Grotius (*Inleidinge tot de Hollandse rechtsgeleerdheid* 3 32 12) and Johannes Voet (*Commentarius ad Pandectas* 9 2 12) recognised the Aquilian remedy as a general remedy “in respect of any kind of patrimonial loss suffered

by the plaintiff” (Van den Heever *Aquilian damages in South African law* (1944) 32; for an excellent modern sketch of the development of Aquilian liability, see Zimmermann *The law of obligations – Roman foundations of the civilian tradition* (1990) 953ff).

A peek into any modern textbook on the South African law of delict will reveal that our law has developed Aquilian liability to cater even for so-called “pure economic loss”, that is, to enable a plaintiff to claim redress for harm suffered under circumstances where a South African court, sitting forty years ago, would not have entertained any notion of awarding damages. Neethling and Potgieter (*Neethling-Potgieter-Visser The law of delict* (2010) 290–291) offer a useful three-fold scheme explaining the circumstances under which one can claim *ex delicto* for the redress of pure economic loss, namely: first, where the patrimonial loss in question did not result from damage to property or impairment of personality (such as damage flowing from unlawful competition or negligent misrepresentation); secondly, such loss may entail financial loss that in fact flows from damage to property or impairment of personality, but which does not involve the property or personality of the plaintiff; and, thirdly, cases where damage was caused to the plaintiff’s property or person, but was not caused directly by the defendant. (See also Boberg *The law of delict – Vol I: Aquilian liability* (1984) 107ff; Van der Walt and Midgley *Principles of delict* (2005) 46; Loubser *et al The law of delict in South Africa* (2012) 228–233.)

In the context of the delictual remedy for pure economic loss our courts experienced difficulties in determining whether the defendant’s conduct had been wrongful or unlawful. This was to be expected, seeing that a too lenient approach could lead to an unmanageable situation where each and every act or omission causing factual harm to another could entail civil liability, thus raising the spectre of the opening of the floodgates of litigation. It was eventually realised that policy considerations play a crucial role in deciding whether compensation will be granted in any particular case, but the difficulty lay in assigning such policy decision to its correct niche or, stated slightly differently, to the correct “element” of delict. In the ground-breaking judgment of *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 1 SA 461 (SCA) the Supreme Court of Appeal chose to answer the policy questions in the context of the wrongfulness element and in fact developed a brand new test for wrongfulness in this regard. Harms JA held that “conduct is wrongful if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission” (468E). There has been stringent criticism of this “new” test (see, eg, Neethling and Potgieter 78ff), but also laudatory remarks, such as that uttered by Brand JA in an article written as a tribute to Harms JA (Brand “The contribution of Louis Harms in the sphere of Aquilian liability for pure economic loss” 2013 *THRHR – Essays in honour of Louis Harms* 57 69), which he concludes as follows: “After all this, I believe the time has come to accept that what Harms JA said in *Telematrix* is the right exposition of the law. I thank the author for the succinctness and clarity of that exposition.”

It is not my intention to enter into this fray in this brief case note, although it would appear that the pendulum is swinging in a direction pointing towards the acceptance of the “new” approach to establishing wrongfulness in the context of pure economic loss. As will be pointed out, the new approach to wrongfulness in this context did not feature at all in the judgment under discussion here,

rendering it unfit as a platform for evaluating the newest developments. (For the most recent contribution in this field, see Neethling and Potgieter's rejoinder to Brand's article "Wrongfulness in delict: A response to Brand JA" 2014 *THRHR* 116.) In this case, the court followed a more "traditional" approach to the solution of the wrongfulness issue, in the process showing that such approach can still cater for quite novel situations.

2 Facts and judgment

Sentech (Pty) Ltd (the first respondent), a state-owned entity, is the provider of broadcasting signals for the South African Broadcasting Corporation (SABC) (the second respondent). The channels operated by the SABC, SABC 1, 2 and 3, are being televised via a signal from Sentech's satellite (known as the "Vivid Platform") which is received by viewers' satellite dishes and thence transmitted to their TV decoders and televisions. However, these signals have been spilling into the south-eastern part of Botswana, which is the most densely populated region of our neighbouring country where its capital and commercial centre, Gaborone, is situated. A practice had developed in Botswana according to which television viewers in the southern region bought cheap decoders (so-called "Philibao" decoders), readily available in the local shops, enabling them to receive the signals, intended for the SABC, transmitted by Sentech's Vivid Platform.

This situation detrimentally affected eBotswana. The SABC had no licence to broadcast these signals in Botswana and Sentech had no right to transmit these signals into Botswana. eBotswana is one of three licensed broadcasters in Botswana. In terms of the local law, the other two broadcasters are the only ones entitled to compete lawfully with eBotswana. Notwithstanding the fact that eBotswana was a free broadcaster, it was alleged that the fact that pirate viewing of the SABC channels took place on a regular basis deprived it of many of its viewers. It was further alleged that this decline in viewer numbers had a negative financial impact on its operations, as viewership formed the basis in terms of which its advertising revenue is determined.

eBotswana brought an application by way of motion proceedings "to prevent private viewing based on a delictual action under the *actio legis Aquiliae*" (331D), claiming "that it is entitled to declaratory orders that Sentech's failure to take the necessary steps to prevent private viewing of the SABC channels in Botswana is unlawful and in breach of the duty of care (*sic*) allegedly owed to eBotswana and which renders Sentech liable to it for damages" (331E). In addition, eBotswana applied for a mandatory order forcing Sentech to take the necessary steps to prevent private viewing of the SABC channels (331F). The issue of *quantum* was left for later adjudication, depending on the success of the mandatory order sought. For reasons not relevant to this discussion, the SABC was joined as second respondent and the Independent Communications Authority of South Africa (ICASA) as third respondent.

After a carefully formulated introduction (330C–331H) and exposition of the nature of the application (331D–331H) and the legal issues involved (331I–333D), the court touched upon some issues pertaining to hearsay evidence (333E–336E) and new matter raised in the applicant's replying affidavit (336F–J). These latter two issues are not relevant to this discussion and will therefore not be treated at all. Spilg J then gave a minute account of the relevant facts (337A–338I), before considering whether the applicant had successfully proved the

elements of delict, on which basis its application relied. The bulk of this judgment deals with the wrongfulness issue (338J–342B), on which the court ultimately concluded that Sentech owed eBotswana a legal duty to secure the encryption of the SABC television signals, and that its failure to do so constituted wrongfulness on its part (342B).

Thereupon the fault requirement was put to the test (342C–343D) in that the court tested Sentech’s wrongful conduct against the requirements for negligence. Spilg J had no difficulty in finding that “the requirements for *culpa* have been met” (343D).

The court’s very brief treatment of the requirements for factual and legal causation (343D–G) hinged on the question whether the fact that viewers bought decoders before they could “pirate” the Sentech signals was indicative of a *novus actus interveniens*, breaking the causal chain. Having concluded that such purchases were in fact foreseeable by someone in Sentech’s position, the court concluded that “the requirements for both factual and legal causation are satisfied” (343G).

The fifth requirement for delictual liability, namely, that the applicant should have suffered damage (343G–I) was dealt with swiftly: “In my view it is axiomatic that loss of advertising revenue would arise, having regard to that sector’s dependency on advertising revenue which is affected by viewership figures, whether pursuant to dedicated market research or assumed.”

The court thus found in favour of the applicant and *inter alia* issued the following orders:

- (a) It declared the first respondent liable in delict “for its failure to take all reasonable steps necessary to prevent pirate viewing in Botswana” (344G).
- (b) It directed the first respondent “to take all reasonable steps necessary to ensure that viewers in Botswana are prevented . . . from pirate viewing of the SABC1, SABC 2 and SABC 3 signal carried on the Vivid Platform” (344H).
- (c) It declared Sentech to be liable to eBotswana for all the damage it had suffered since 25 March 2009.

3 Critical evaluation

3.1 Introduction

In his introductory paragraphs (paras 1–6) Spilg J in fact characterised the basis on which the application was brought by explaining the practicalities of the issuing of TV licences by all countries, touching especially on the relevant factors for determining the number of licences to be issued (330E–G). It was stressed that the limited number of licences issued in state-regulated industries, such as the TV and cell phone industries, in effect guarantees the holders of such licences a monopolistic environment affording them protection from undue competition, as the state carefully regulated the entry of further entrants into these specific markets (330G–H). In view of the fact that the first respondent had not been licensed to broadcast within the national boundaries of Botswana, it was in fact competing illegally with eBotswana. Although Sentech’s actions were not specifically designed to enhance its own financial position *vis-à-vis* that of eBotswana, which would trigger the rules pertaining to indirect and/or direct infringement of a competitor’s goodwill forming part of the law of unlawful

competition (see, eg, Neethling *Van Heerden-Neethling Unlawful competition* (2008); Neethling and Potgieter 309ff; Van der Walt and Midgley 97), those actions were in fact analogous to “normal” acts of undue competition. One can therefore safely assume that this is an instance where the respondent’s acts could be characterised in the light of the fact that they did not cause damage to property or an infringement of personality, but merely had a negative effect on the applicant’s financial position, thus falling squarely within the ambit of Neethling and Potgieter’s first category of their three-fold scheme in which the ambit of pure economic loss is described (see para 1 above).

Under the heading “Nature of application” the court explained that the motion proceedings were “based on a delictual action under the *actio legis Aquiliae*” (331D). This is in effect a rather inelegant shorthand way of informing the reader that the application had been brought in terms of the rules contained in the (developed) *lex Aquilia* in respect of a delictual *act* (not *action*, which refers to a specific legal remedy). In passing, one may note that the procedure followed by the parties in this specific case follows the “ever growing practice of launching proceedings by way of motion which had previously only been initiated by way of action” (Harms “Civil procedure: Superior courts” 4 *LAWSA* (2012) 19); traditionally one would have expected normal action proceedings, that is, the institution of the *actio legis Aquiliae* (although the name would of course feature nowhere in the pleadings). The outcome of the case would suggest that this course of action by the applicant proved to be prudent, as it probably saved a considerable amount of legal costs and the issue was resolved more expeditiously, even more so in the light of the fact that the quantum issue was also deferred for later adjudication (331F; see also the comments in this regard under the heading “The orders sought” (343J–344F)).

3.2 *The issues*

In view of the adoption of motion proceedings in this case, the court at the outset emphasised that the applicant had to establish a clear right to enable it to be entitled to both a declaratory and a mandatory order (331I). What it meant by that, is clearly illustrated by the judge’s statement that the important issue which has to be resolved is whether the applicant has a claim in terms of the law of delict: “If not, the requirement of a clear right will not be satisfied” (332B). The same idea is conveyed by two other *dicta* which, on face value, strike one as being rather strange formulations if one views the historical background of Aquilian liability in a proper context: The first *dictum* reads as follows: “The case is formulated under the *lex Aquilia*” (331I). What is obviously meant is that the case is formulated with reference to the principles that have developed from the original measures contained in the *lex Aquilia*. The second *dictum* reads: “In the present case the requirement for final mandatory relief . . . forms part of the enquiry into *whether the applicant enjoys a clear right under the Aquilian action*” (331J–332A, own emphasis). As in the case of the first *dictum*, the italicised phrase is an inelegant effort to express a wider idea, namely, that application of Aquilian principles have to show that the applicant had proven all the elements of a delict to afford it patrimonial relief on account of the damage it had suffered. Although these comments might be regarded as overly critical and mere “nit-picking”, one has to expect a court to be more careful when expounding the theoretical bases of its findings.

In the second part of the court's exposition under this heading, Spilg J laid the table for the court's inquiry into every so-called "element" of Aquilian liability. It is trite that a court will have to determine whether the requirements for every *element of delict* have been established before it can make a finding that a delict has indeed been committed, which would then serve as a basis for the awarding of damages in terms of the principles regarding the application of the rules pertaining to the *actio legis Aquiliae*. This very idea was formulated in the following words, that can at best be described as an inaccurate abbreviated version of my previous sentence: "Each element of the *actio legis Aquiliae* has been put in issue" (332C). The court erred in referring to the elements of the *action*, instead of the elements of the *delict*." The relevant "elements" were then related *seriatim*, commencing with a wrongful act or omission and ending with damage (332D–333A).

Some of the initial comments made in respect of wrongfulness afford an indication of the court's ultimate approach to this vexing element of delict. The court proceeded from the basis that the onus of proving wrongfulness rested squarely on the applicant "as the alleged duty is not one owed to the general public and involves (on analysis) pure economic loss" (332D). Unfortunately, this led the court to conclude that "the applicant must go further and allege and prove that Sentech owed it a legal *duty of care* to act in a particular way" (*ibid*; italics supplied). The first case cited as authority for this formulation is *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) 833D–834A, a groundbreaking case in which Rumpff CJ "forcibly" developed our common law to entertain a claim for negligent misrepresentation and in which judgment he found it useful to take a lead from the English concept of "duty of care", but only in as far as the so-called "duty issue" – an aspect similar to the wrongfulness issue in our law – was concerned. It is noteworthy that the court there referred to the fact that the duty of care concept is "n ending in ons gemene reg" (833C) and that the chief justice found its sole utility in its approach to how legal policy should be accommodated as a pointer in the search for wrongful conduct. One cannot in the least say that the duty of care concept was in that judgment formally received from English law as a principle worthy of general application in our own law of delict – on the contrary, as will later be pointed out in more detail (see para 3 3 below). The second case relied upon is *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) 497B 498G–499A. The first reference in that case merely contains the general proposition that most delictual actions arise from conduct that is *prima facie* unlawful, "such as the causing of (physical) damage to property or injury to the person". The second reference merely reflects the court's acceptance of Rumpff CJ's exposition in *Administrateur, Natal* of the law in respect of the determination of wrongfulness in terms of the "duty to take care" model; therefore, no new insights are gained on the strength of that authority. The third and last case referred to as authority in this context is *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) paras 12 19. In this case, Brand JA gave a concise explanation of the concept of pure economic loss, explaining that wrongfulness in such cases depends upon the existence and infringement by the defendant (respondent) of a *duty* owed to the plaintiff. Noteworthy in this recent judgment, is that the term "duty of care" was avoided.

Immediately after this there follows a reference to case law dealing with omissions, revealing that the court viewed Sentech's conduct as an omission for

purposes of establishing its possible liability *ex delicto* (332F). Should I be correct in making this assumption, this provides a classic example of Van der Walt and Midgley's warning (66) that "[t]he mere fact that linguistic alternatives enable us to describe the positive occurrence [*in casu* the broadcasting of encrypted data] in a negative way . . . [*in casu* Sentech's failure or omission to stop encrypted signals from spilling into the southern part of Botswana] is legally irrelevant in the determination of the nature of the conduct". Van der Walt and Midgley explain their sound observation by employing the example of a motorist speeding through a red traffic light. The analogy between that example and the facts of the present case speaks for itself. This approach by the court does not, however, necessarily point towards an erroneous application of the duty approach towards determining wrongfulness in the instant case, because it can be followed both where one is confronted by situations where the defendant's conduct is in the form of an omission, and where the type of damage for which redress is sought (either as a result of the defendant's positive act or omission) can be described as "pure economic loss". As has already been pointed out, the set of facts *in casu* was justifiably characterised as one evidencing a situation of the causing of pure economic loss.

The court thereupon referred to fault, in the guise of negligence, that had to be established (332F). It was rightly pointed out, with reference to *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 SA 827 (SCA) paras 19 21–22, that the reasonableness tests for wrongfulness and negligence are "substantially different".

The following element that Spilg J mentioned was that of causation. He reduced the court's investigation into this element into a two-fold enquiry: first, whether the purchase of a decoder to encrypt Sentech's signals by a viewer in Botswana could be viewed as a *novus actus interveniens* which breached the causal chain between Sentech's conduct and the ultimate damage suffered by eBotswana (without making out whether this referred to factual or legal causation); and, secondly, whether legal causation had been established by application of the "policy considerations of foreseeability of harm and remoteness of damage" (332H–333A).

Strangely enough, the court did not place the crucial element of damage in the spotlight as an independent element of delict in its overview of the issues involved. This is probably due to the fact that it had already expressed itself on the nature of the damages claimed *in casu* when the element of wrongfulness was put forward and the opinion was expressed that "the alleged duty is not one owed to the general public and involves (on analysis) pure economic loss" (332D). It would thus appear that the court "incorporated" the damage element into the wrongfulness element for purposes of its preliminary exposition, which runs counter to accepted dogma in the modern South African law of delict, in terms of which wrongfulness and damage are two independent elements of delict. It is well worth remembering that a wrongful act need not necessarily cause harm (cf Neethling and Potgieter 216–217). However, at the end of the judgment this element is indeed isolated, when it is treated in two brief paragraphs under the title of "damages" (343G–I; see critical remarks on the terminology employed by the court in para 3 6 below).

The last issue relevant to this discussion raised by the court in its treatment of the nature of the application, was formulated as follows by Spilg J:

“It should also be noted that eBotswana relies on the conduct complained of being not only wrongful but also unlawful. This suggested that the applicant intended to rely independently on an infraction of the national laws of Botswana amounting to unlawfulness for purposes of our domestic law . . . No argument was developed on that basis. Accordingly it appears that the foreign national laws of Botswana would only have relevance in regard to determining whether the conduct complained of was wrongful according to our common law” (333B–C).

The first observation to be made of these statements is that the distinction that the court drew between wrongfulness and unlawfulness seems to be meaningless, as these terms are normally regarded as synonyms. Loubser *et al* 136 correctly point out that “[t]he terms ‘wrongfulness’ and ‘unlawfulness’ are interchangeable” (see also Boberg 30; and cf Neethling and Potgieter 33; Burchell *Principles of delict* (1993) 38ff; Snyman *Criminal law* (2002) 92ff; cf Brand 60 *in fin* 64). In the recent past, the Supreme Court of Appeal confirmed this interpretation in the *Telematrix* case when Harms DP said in respect of the term “wrongful” that “‘unlawful’ is the synonym and is less of an euphemism”. However, in all fairness to the court, one has to concede that a measure of uncertainty does exist in respect of these terms. This appears from an interesting exposition in Hiemstra and Gonin *Drietalige regswoordeboek/Trilingual legal dictionary* (1992) *sv* “unlawful”:

“Die onderskeid in Engels tussen **unlawful**, **wrongful**, **illegal**, **illicit** en **illegitimate** is ewe vaag as in Afrikaans tussen *wederregtelik*, *onregmatig* en *onwettig* . . . Die uitdrukking **wrongfully and unlawfully** in aktes van beskuldiging is tautologies en behoort in Afrikaans bloot met *wederregtelik* weergegee te word. *Onwettig* (**illegal**, **illicit**) is grotendeels sinoniem met *wederregtelik* (**unlawful**) maar het meer bepaald betrekking op handelinge opsetlik in stryd met ‘n verbod in ‘n wet” (128–129).

It is therefore suggested that the word “unlawful” in the quotation above should be replaced with the word “illegal”, or even “illicit”, in conformity with the general usage, the cue provided in the *Telematrix* case and the suggestion proposed by Hiemstra and Gonin in respect of their explanation of the Afrikaans term “onwettig”, in particular, if one observes the court’s reference to the “infraction of the national laws of Botswana”.

In the second place, the question arises as to why the applicant abandoned its argument based on the purported transgression of Botswana law by the respondent as a determinant of wrongfulness for purposes of civil liability. The applicability of foreign law brings with it the onus of proving the content of foreign law, seeing that foreign law is, in terms of our private international law, to be regarded as a matter of fact, and not of law, attracting the normal rules pertaining to proving facts on a balance of probabilities, unless section 1(1) of the Law of Evidence Amendment Act 45 of 1988 applies which determines that “[a]ny court may take judicial notice of the law of a foreign state . . . in so far as such law can be ascertained readily and with sufficient certainty”. (See, in general, Forsyth *Private international law – The modern Roman-Dutch law including the jurisdiction of the high courts* (2012) 108ff.) In spite of suggestions that a special status should be accorded to the laws of our neighbouring states with a common Roman-Dutch basis (cf Forsyth 115–118), the law is still unsettled in this regard and perhaps the prospect of expensive litigation involving expert witnesses was too daunting. One can only speculate as to the real reason why the applicant avoided sticking to its initial intended strategy.

The last sentence in the above quotation from this judgment introduces a further interesting aspect of conflict of laws. To my mind, one cannot simply state that foreign legal rules may have a bearing on the determination of wrongfulness in a local court: as soon as a foreign element in a set of facts present itself to a local court with competent jurisdiction, the legal issue has to be classified in order to reveal the applicable conflicts rule. In this case the issue is doubtlessly of a delictual nature, triggering the common-law rule of South African conflicts law that a delict is governed by the law of the state where the delict was committed, the so-called *lex loci delicti commissi* (Van Bynkershoek *Obs* 1286 1438; Van der Keessel *Prealectiones ad Hugonis Grotii introductionem* 1 2 27; see further Forsyth 350ff; Edwards and Kahn “Conflict of laws” 2(2) *LAWSA* 289 370–371) which, *prima facie*, would appear to be South African law seeing that Sentech operates in South Africa. However, the issue is far from certain. One of the gripping questions involving determination of the *locus delicti*, that is the localising of a delict in a specific place (country), is whether one should have regard to the place where the action takes place, or the place where the consequences of the action materialise. In this regard, Forsyth 354 refers to the leading institutional writer, Paulus Voet, who had already asked the question: “What if someone shot an arrow in his own territory and killed somebody else with it in another territory?” (see, in this regard, Edwards and Kriel *The selective Paulus Voet – De statutis et eorumque concursu liber singularis* (2007) 11 1 8 (245 263)). If one were to accept that the *locus delicti* is indeed the place where the harmful effect of the initial act manifests itself and that the law of such place governs the issue (the *lex causae*), then the onus to prove the content of such law rests with the party averring it (for argument’s sake, the applicant in the case at hand). However, should such party fail to discharge the onus, our law contains a presumption that the foreign law is identical to the local law (*lex fori*) (see Forsyth 119 and authorities cited in fn 62). *In casu* that would have the effect that, in the absence of proof of the content of the applicable laws of Botswana, the court would have to apply South African law – which in fact happened. The judgment is silent on these issues, but the ideas just expressed are an endeavour to point out that a choice of law issue was most definitely involved.

3 3 *The court’s application of the law in respect of the delictual elements*

3 3 1 Wrongfulness

The major part of this judgment was dedicated to determining whether Sentech’s conduct was wrongful. The court commenced its discussion of this element by expressing itself as follows in respect of delictual liability in general:

“Delictual liability occurs where the law has historically recognised the existence of a duty of care owed by reason of the negligent act or omission of one person in relation to another. The case of bodily injury inflicted negligently consequent upon a motor-vehicle accident is an obvious illustration. But delictual liability is not confined to those cases only. Our common law will attach liability in delict where it considers that a duty of care ought to be owed in the circumstances of the case.”

Close scrutiny of these *dicta* reveals a stark similarity with the definition of the tort of negligence in English law, for example as formulated in the leading English case of *Blyth v Birmingham Waterworks* (1856) 11 Ex 781 784, which reads as follows: “Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.” In *Lochgelly Iron and Coal Co v M’Mullan*

[1934] AC 1 25 this definition is augmented by the following words: “In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing” (see also Heuston and Buckley *Salmond and Heuston on the law of torts* (1996) 195ff; Dugdale *et al Clerk and Lindsell on torts* (2006) 383ff; Brazier *Street on torts* (1993) 212ff). The court’s reference to *Lillicrap (supra)* to enable it to cite Fleming *The law of torts* (4 ed 139) as authority for the rules guiding the determination of the existence of a duty of care, is a further confirmation of Spilg J’s application of the English rules governing the tort of negligence. Final proof of this is to be found in the example of someone who is injured in a motor car accident due to negligent driving: our law simply regards the causing of damage to property and injury as *prima facie* unlawful, without “converting” the driver’s inadvertent positive act into a breach of a duty of care. Furthermore, one should not lose sight of recent pronouncements by the Supreme Court of Appeal, warning against the introduction of the Anglo-American duty of care concept which tends to blur our clear distinction between the delictual elements of wrongfulness and negligence. It is well worth remembering that the Supreme Court of Appeal has on several occasions in the recent past warned against the introduction of the English law pertaining to the tort of negligence, by application of the “duty of care” doctrine, as this would distort our own law (*Telematrix* 468C per Harms JA). The same judge expressed himself in much stronger terms in *Steenkamp v Provincial Tender Board Eastern Cape* 2006 3 SA 151 (SCA) 159H–I:

“The constant use of the phrase ‘duty of care’ is unfortunate. It is a term that, in our legal setting, is inherently misleading and its use may have led the trial court somewhat astray. This appears from, especially, the concluding part of the ratio mentioned where the emphasis in relation to wrongfulness was placed on foreseeability of harm as if it were a *sine qua non* for wrongfulness. The approach adopted appears to be similar to that under the English tort of negligence. There the questions to answer in order to establish a duty of care are: (i) Was the damage to the plaintiff reasonable foreseeable? (ii) Was the relationship between the plaintiff and the defendant sufficiently proximate? (iii) Is it just and reasonable to impose a duty of care?”

The last sentence of the above quotation from the case under discussion also warrants a brief comment: An overview of the literature clearly shows that the mere existence of a duty to prevent harm as such cannot point to wrongfulness on the part of the person on whom such duty rests; wrongfulness only ensues (and then only wrongfulness, not necessarily liability) when such duty is infringed. This formulation of wrongfulness as a breach of a duty is so incomplete that it is in fact meaningless. That the court’s formulation was no mere *lapsus calami* appears a few paragraphs later when Spilg J stated that the first requirement in terms of our law was to determine “whether Sentech owed eBotswana a legal duty of care, a duty which it is alleged arises to prevent the possible infliction of purely patrimonial loss to a lawfully licensed television station” (340B) and then continued: “If that is so [viz that a ‘duty of care’ exists] then wrongfulness, as one of the requirements of delictual liability, is established provided that it is not too remote” (340C). One searches in vain for the term “breach” of duty, which is in fact the hallmark of wrongfulness according to this formula. Furthermore, it is not at all clear what the word “it” refers to. Logically it should be harm or damage, but taken on face value it is not at all clear. It is only when, in

the next sentence, the court referred to “remoteness” as an element of legal causation (again without mentioning the term “damage”) that one gains the impression that it had “remoteness of damage” in mind – otherwise that last sentence would be utterly meaningless. To my mind, these types of errors are to be expected when an argument proceeds from such flawed concepts as the “duty to take care” which has no place in our modern South African law of delict. Regrettably, an exposition of the law along these lines merely creates confusion and fails to contribute meaningfully to the advancement of theory in our law of delict dealing with the redress of pure economic loss.

The next aspect of the court’s treatment of wrongfulness that merits some comment, is its statement that “[w]hether or not a duty of care arises in the particular circumstances is determined by the *boni mores* of society” (339C), later repeated in somewhat different terms when Spilg J – after having referred to a long passage from Anglo-American textbook by Fleming (referred to above under para 3 1) – stated that “the enquiry must take into account general considerations of reasonableness based on the convictions of the community as determined by the court” (340H). This is in conformity with the approach of Harms JA in the seminal case of *Telematrix* (468D–469A), who also proceeded from the basis that in cases dealing with the “negligent causation of pure economic loss” an act or omission is not *prima facie* wrongful, but that policy considerations (synonymous with the concepts of *boni mores* and legal convictions of the community) should dictate whether the plaintiff should be entitled to compensation by the defendant for any such loss suffered. The policy considerations considered by the court for this purpose are somewhat haphazardly spread over 14 paragraphs (paras 42–55; 339C–342A) and appear to be as follows:

- (a) The values enshrined in the Bill of Rights (Chapter 2 of the Constitution, 1996) (339C–E): Apart from a list of cases cited as authority for the fact that our societal values are informed by the Bill of Rights, the court did not elaborate on this factor.
- (b) The “treaties, conventions and protocols” governing the modern technology of utilising satellites to transmit and receive data across international borders (339F): The court mentioned the all-important Convention of the International Telecommunications Union which (in regulation 428A) enjoins a member state such as South Africa to adopt “all means available” to reduce the radiation of satellite signals over another country (341D). Where these international instruments have become part of South African municipal law by legislative transformation, they are no more than ordinary statutory provisions, which form one of the recognised categories of factors that a court will consider in applying the *boni mores* criterion in the process of ascertaining the legal duty in respect of an action based on the causing of pure economic loss. Somewhat later the court furnishes examples of such international instruments to which South Africa is a party (see 341C–E). Even in the absence of transformative legislation, the so-called monist approach to assigning the correct niche for international law in relation to municipal law would, in any event, regard treaty law as part and parcel of South African law – unless, of course, it conflicts directly with our internal common or statutory law (see, eg, Neethling and Potgieter 296 and authorities referred to in fn 174; and cf Dugard *International law – A South African perspective* (2011) 42–43 48).
- (c) In the absence of the international instruments referred to in (b), the court mentioned the reality of commercial development and exploitation

internationally, in particular where regional bodies and accords require South Africa to co-operate in regional economic development, as a factor (339G). Spilg J then proceeded with the following cautionary remarks:

“I wish to emphasize that this conclusion does not elevate the foreign country’s domestic law to a statutory injunction which our courts must apply. Rather it is our own norms which include our relationship with fellow nation states whose territorial sovereignty we respect that in my view is one of the factors that ought to influence us as to the *boni mores* of our society” (339G).

Whenever the presence of a foreign element in a set of facts to be considered by a court of law triggers the operation of a conflicts rule of the *lex fori* indicating a foreign legal system as applicable law for resolving the case before it, a judge is bound to apply foreign law, unless there are certain factors precluding such application, such as the fact that the foreign rule is repugnant to the forum’s legal policy, or that a connecting factor has been fabricated *in fraudem legis et cetera* (see Forsyth 120ff). In fact, application of the rules of a country’s private international law invariably entails the ultimate application of foreign legal rules, if countries regard foreign legal systems as of equal standing with their own law – this has in fact been the position for centuries! There is no harm in this in that application of foreign rules in this respect does not constitute an affront to the state’s sovereignty at all: foreign law is applied simply because the local sovereign allows it (see, in general, Forsyth 29 68–70). Therefore, if certain Botswana statutes would be indicated as the applicable *lex causae* (eg because it is the *lex loci delicti commissi*) in terms of a South African conflicts rule, they can simply be applied. This does not equate to “elevating” such foreign law above our own rules.

- (d) The court also accorded much importance to Sentech’s own indication that it would remedy the situation of spilling of satellite signals “while fully aware of the . . . cost implications” (341A), that indicated “recognition of some responsibility, even if not an obligation to remedy the situation” (*ibid*). An important basis on which this consideration rests, is the recognised element of *knowledge* on the respondent’s (defendant’s) part, namely, subjective foresight that his conduct is causing or would cause harm to the applicant (plaintiff). Neethling and Potgieter (293 and cases referred to in fn 164) correctly point out that this is probably the most important guiding element which plays “perhaps even a decisive role in the determination of the legal duty”. In addition, Sentech’s indication brings the established factors of the availability of practical measures to remedy the situation and also the respondent’s professional knowledge and competence into play (Neethling and Potgieter 294 and case law referred to in fn 168 and 169).
- (e) Akin to the previous consideration, the court referred next to Sentech’s general responsibility to provide secure encryption of its television signals which it had accepted as a part of its manifesto (341B): It is unthinkable that Sentech would have accepted such responsibility if it did not possess the means to discharge it. This again points towards the presence of two more fundamental bases of this consideration, namely, Sentech’s ability to take practical measures to remedy the situation, as well as the professional knowledge and experience of its personnel which have over the years received recognition by our courts (see the references provided in (d) above).

- (f) Somewhat belatedly, the court accorded weight to the fact that it was Sentech who had created the situation enabling its encrypted signals to be decrypted in Botswana (341F): It is suggested that this fact does not really refer to the wrongfulness element as such, but to two other requirements for delictual liability, namely, that the defendant (respondent in the instant case) should by its *act or omission* have *caused* harm (the elements of conduct and factual causation).
- (g) A further consideration that the court regarded as important was Sentech's express acknowledgement of the risk of hacking attaching to the employment of an encrypted system (341G): This is, just as the consideration mentioned under (d) above, merely a reflection of Sentech's knowledge or subjective foresight as a determinant of wrongfulness. However, coupled with this, the court referred to the fact that "the present situation is endemic, the decoders are inexpensive, can be readily procured, and are already enabled to unscramble the signal" (141H). It is suggested that in expressing it thus, the court, in addition, alluded to the fact that a reasonable person in the shoes of Sentech would have foreseen that harm could be caused to eBotswana by reason of the fact that viewers in that country could easily access Sentech's encrypted signals. The court's approach in this respect resembles that of Harms JA in *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA) 324 where he expressed himself as follows: "The greater the foreseeability, the greater the possibility of a legal duty to prevent harm existing." This clearly refers to foreseeability as a factor to be considered in determining wrongfulness. This deviates from a *dictum* in the later judgment of *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 163 that foreseeability should rather be considered as a factor when determining whether legal causation has been established (see Neethling and Potgieter 294). (It is noteworthy that Brand JA in his abovementioned article on the contribution of Harms JA in this field (64) suggests that foreseeability should in fact not be a consideration in determining wrongfulness "since foreseeability is a requirement of negligence and also plays a role in the determination of legal causation, [and] a defendant will not be held liable for harm which was not reasonably foreseeable". One can surely anticipate some future development in this respect to find its way into the pages of our law reports.)
- (h) The next consideration that was mentioned in this respect was a documentary confirmation by Sentech that it had already planned to remedy the situation by providing a more secure encrypted system (341I): This can, like the elements mentioned in (d), (e) and the first part of (g) above, be construed as a reflection of the consideration of knowledge or subjective foresight, the availability of practical measures and the provider's technical know-how as determinants of wrongfulness.
- (i) The penultimate factor that was taken into account was that the class of affected persons (potential claimants) was not unlimited (341J): The fact that there were only three potential claimants, namely, the licensed broadcasters in Botswana, excludes the risk that Sentech may be exposed to the possibility of indeterminate liability. This so-called "floodgates of litigation" argument entails that where circumstances are present that create the possibility of a defendant being subjected to multiple claims, such defendant has no legal duty to avoid damage. This factor is usually referred to as

“extent of loss” and is well established as one of the considerations in the process of determining wrongfulness in actions to claim redress for pure economic loss (see Neethling and Potgieter 295–296 and authority referred to in fn 172 and 173). In addition, this also encapsulates the consideration of the availability of practical measures to the defendant to prevent the loss, as well as that of professional knowledge and competence, both of which have received recognition in our case law as established factors in determining wrongfulness in this context.

- (j) Finally, the court considered Sentech’s concession that readily available and cheap decoders that can be utilised to decrypt its encrypted signals to attest to the foreseeability of the actual harm that ensued, and also to the fact that Sentech possessed actual knowledge of the possible harm; as an afterthought the court even alluded to the risk involved in Sentech’s operation, which necessitated an upgrade of the system (342A): This exposition reveals no less than three of our recognised considerations in this regard, namely knowledge and foreseeability, reflected in some of those previously mentioned by the court and as has already been pointed out (see (d)–(e) and (g)–(h) above); to this the court finally added the element of risk, which is also one of the recognised considerations for determining wrongfulness in this context (Neethling and Potgieter 295 and authority referred to in fn 171).

After having referred to and considering all these factors, one can fully support the court’s finding on wrongfulness:

“In my view Sentech owed to persons in the position of eBotswana that hold valid television broadcast licences in Botswana a duty to secure the encryption of the SABC television signals, and that its failure to do so, knowing that large numbers of cheap Philibao decoders have been able to receive the signals in viewable form, is wrongful.”

Here the court correctly pointed out that wrongfulness is established as soon as a duty has been established *and breached* (thus not repeating its incomplete descriptions of wrongfulness in this context, to which I have alluded above). It would appear that the consideration of knowledge or subjective foresight weighed heaviest in the court’s final decision on this aspect, which accords with accepted practice (as pointed out under (d) above).

3 3 2 Fault

Having decided that the respondent’s conduct was wrongful, the court then went about determining whether fault in the form of negligence had been present. Without any reference to a definition or formula of negligence, the court digressed mainly on one aspect of *culpa*, namely, the foreseeability aspect, which one can describe as the first step (or question) in determining the presence or absence of negligence. The well-established test for negligence was authoritatively formulated by Holmes JA in the judgment of *Kruger v Coetzee* 1966 2 SA 428 (A) 430E–F and needs no introduction, for that formulation is arguably one of the most repeated in our case law. In essence, the test can be reduced to three basic questions: (a) Would a reasonable person in the shoes of the defendant reasonably have foreseen the harm? (b) If so, would a reasonable person have taken reasonable steps to prevent such harm? (c) If so, did the defendant fail to take such steps? If the answer to the last question is also in the positive, the defendant’s conduct can be described as negligent.

Spilg J referred to the two approaches to reach an answer to the first question, namely, the abstract (or absolute) and the relative (or concrete) approach (342C–D). Without explaining how these two approaches differ, he relied mainly on the judgment of Scott JA in *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* (paras 21–22; 838I–840G) where that judge explained the difference which one can summarise as follows: In terms of the abstract approach, harm – *any harm* – must be foreseeable by the reasonable person in the defendant’s position at the time the relevant act or omission occurred; according to the relative approach, the question is whether the reasonable person would have foreseen the general nature and manner in which the consequences *that actually ensued* manifested themselves (see, in general, Neethling and Potgieter 141–144; Loubser *et al* 120–124; Boberg 274ff 390; Neethling and Potgieter “Nalatigheid, juridiese kousaliteit en die regsplig van die staat om die reg op fisies-psigiese integriteit te beskerm” 2004 *TSAR* 764 766–768; cf Van der Walt and Midgley 177ff). However, it is not certain which approach the court preferred, or whether it made a choice at all in this regard. The court’s reference to the words of Scott JA in *Sea Harvest* (paras 21 and 22) could suggest that Spilg J favoured the abstract approach, in particular where he stated that “[i]t is to be noted that foreseeability is formulated as more properly falling within the ambit of causation” (342C), intimating that it is left to the device of legal causation to counter the possibility of liability for consequences which are too remote. However, the court preferred to take a cue from *Sea Harvest* (paras 21–22; 839G 839J–840A) where Scott JA made it clear that the difference between the abstract and concrete approaches is more apparent than real and that “the true criterion for determining negligence is whether in the particular circumstances the conduct complained of falls short of the standard of the reasonable person”, concluding that no matter which of the two approaches is adopted, there will always remain some “grey areas” that “require a measure of flexibility and a need to limit the broadness of the enquiry where circumstances demand” (342H). It is suggested that the court’s ultimate finding that the harm *in casu* had been foreseeable could be the product of either of the approaches, although the absence of the term “foreseeability” in its subsequent treatment of legal causation could be interpreted as if the concrete approach was followed. It is further suggested that application of any of the approaches in the present set of facts would yield the same result in respect of a finding regarding the presence or absence of negligence, which in fact reduces the entire reference to the different approaches to a mere storm in a teacup!

The court concluded its treatment of the foreseeability tier of the negligence test by taking a closer look at the precise attributes of the reasonable person (*in casu* rather anachronistically referred to as the reasonable “man” (342I)) to be placed in Sentech’s shoes. There is nothing remarkable in its application of what one may describe as the reasonable expert test, bearing in mind the technical nature of Sentech’s entire operation. The court based its decision that “the test of reasonableness must also be informed by the special position held by Sentech and the specialist knowledge required in order to enable it to properly perform its functions” and that the criterion to be employed in this case is “that of a reasonable man exercising the general level of skill and diligence required of someone engaged with those responsibilities” (342I) on the precedent set in the leading case of *Durr v Absa Bank Ltd* 1997 3 SA 448 (SCA) 463G–J which is a modern reflection of the old adage “*imperitia culpa adnumeratur*” (lack of skill is tantamount to negligence). (For the true interpretation of this maxim, see Scott

“Die reël *imperitia culpa adnumeratur* as grondslag vir die nalatigheidstoets vir deskundiges in die deliktereg” *Petere fontes: LC Steyn gedenkbundel* 124; Neethling and Potgieter 140–141; Van der Walt and Midgley 176; cf in general Loubser *al* 134–135). On closer inspection it would appear that this entire exposition on the foreseeability test was in fact superfluous, as the court went on to state that Sentech’s documentation reflected its knowledge “of the degree and extent of the risk created by the ‘hacking’ of encrypted signals through decoders and the gravity of the consequences (342J–343A). This shows that Sentech in fact acknowledged that it had subjectively foreseen the harm caused by its operation, making it redundant to go into the details of the foreseeability tier of the negligence test in this regard. This view is strengthened by the court’s subsequent statement that Sentech expressly acknowledged that it had been foreseeable that viewers in Botswana could easily procure cheap decoders to decrypt its signals (343C). However, a perplexing aspect of this subsequent statement is the court’s reliance on *OK Bazaars (1929) Ltd v Standard Bank of South Africa Ltd* 2002 3 SA 688 (SCA) para 33 (699F–G), where Nugent J dealt exclusively with foreseeability in the context of legal causation, and *not* in the context of negligence. It is submitted that the aspect of foreseeability in relation to distant consequences, such as the harm flowing from the purchase of cheap decoders in the case under discussion, in fact fits in more properly under a discussion of legal causation and that the court should have treated it exclusively under that heading.

The court did not address the second or “preventability” tier of the reasonable person test for negligence in any detail at all. One can, however, infer from the court’s brief reference to the fact that Sentech had undertaken “in various forums, including publicly” (343A) to take steps to remedy the situation and had acknowledged its capability of doing so and for referring to a paragraph in the recent judgment of *McIntosh v Premier, KwaZulu-Natal* 2008 6 SA 1 (SCA) para 14, that the second leg of the negligence inquiry was cursorily applied. Again, it would appear that it was in fact unnecessary for the court to refer to authority for a summary of the requirements for this second leg of the test, seeing that the respondent had acknowledged its capacity to take steps to remedy the situation. The court’s final verdict that the requirements for establishing *culpa* had been met, comes as no surprise.

3 3 3 Factual and legal causation

The court did not waste much ink on the aspect of causation. Although Spilg J specifically referred to factual causation in his heading (343D), he merely dealt with legal causation, and then only in respect of the aspect of *novus actus interveniens*, mentioning that he had already dealt with the foreseeability aspect thereof under the headings of wrongfulness and fault (*ibid*). His finding on the question whether the purchase of a decoder by a viewer in Botswana could constitute a new intervening cause followed the precise line of thought displayed in his general treatment of the foreseeability stage of the negligence test (discussed at some length in 3 3 2 above): “The consequent damages (*sic*) to the holder of a lawful licence to broadcast television programmes in neighbouring states, including Botswana, could not have been unanticipated by a person involved in this industry, such as Sentech” (343F). As pointed out above, the court pointed out that the respondent had subjective foresight of the harm that could ensue from its operations, which made a finding on the basis of a reasonable person’s foreseeability superfluous. One can fully support the court’s finding of both factual and legal causation in this case.

3 3 4 Damage or harm

There is nothing contentious in the court's finding that "it is axiomatic that loss of advertising revenue would arise, having regard to the sector's dependency on advertising revenue" (343H). As has already been pointed out, the question of *quantum* did not come up for judgment, although the court expressed the view that the losses incurred by eBotswana would be "significant". The finding that the applicant did in fact prove that it had suffered damage, is obviously correct.

It is noteworthy that the court consistently referred to harm as "damages" and not "damage". This error has become so common nowadays, that it is virtually impossible to turn the pages of any recent law report without encountering this usage. One could even gain the impression that "damages" has become a synonym for "damage". However, a brief glimpse into the vast English tort literature and some dictionaries and lexicons will quickly dispel such impression. A reference to only two sources will suffice. In *The Oxford dictionary, thesaurus and word power guide* (2001) "damage" is defined as "physical harm reducing the value, operation, or usefulness of something", whereas "damages" is described as "financial compensation for loss or injury". (Although the word "physical" in the definition of "damage" portrays too narrow a description of harm in a legal-technical sense, one should bear in mind that this dictionary is of a general nature and not focused on legal terminology.) From a South African perspective, one can do no better than consulting Hiemstra and Gonin's *Drie-talige regswoordeboek/Trilingual legal dictionary*. "Damage" is described there as "beskadiging, skade", whereas "damages" is formulated as "skadevergoeding, vergoeding van skade". It is obviously easier for the Afrikaans speaker to avoid confusion between "skade" and "skadevergoeding", than for an English speaker to distinguish between "damage" and "damages", seeing that a single letter "s" is the only mark of difference between the two English terms. However, that does not justify or excuse the proliferation of this misuse of terminology. It should be avoided at all cost.

4 Conclusion

It is apparent that the *crux* of this judgment lies in the court's approach to the wrongfulness question. The court approached the issue from the angle of establishing whether a duty rested on the respondent to avoid harm befalling the applicant, which is the normal procedure in cases dealing with pure economic loss as well as omissions. As was pointed out (in para 3 2 above), this set of facts does not reveal an instance of delictual liability for an omission, but provides a sterling example of liability for the causing of pure economic loss. Especially since the ground-breaking judgment of Harms JA in the *Telematrix* case, the determination of wrongfulness has revealed itself as the most problematic aspect of this kind of claim and a new test has even been introduced to assist judges in coming to grips with the intricacies of solving the wrongfulness question. The new test for determining wrongfulness, namely, the reasonableness of holding someone liable for consequences negligently caused, was not applied in this judgment; the court proceeded along more traditional lines and considered various factors or considerations as indicators of the existence of a duty that had rested on the respondent, and which had been infringed (see the discussion in para 3 3 1 above). One can imagine that an argument could have developed along the lines of "would it be reasonable to hold Sentech liable for the harm it had caused to eBotswana" and, in the case of a positive answer, to conclude that

Sentech had acted wrongfully, whereas a negative answer would point towards lawful conduct. This judgment has shown that the new formula need not be applied in each and every case and that the “traditional” approach can still effect a correct judgment.

If one would consider whether this set of facts reveals any infringement of a subjective right on the part of eBotswana, you could justifiably lodge an investigation into its right to goodwill (as a species of the genus intellectual property rights). To my mind, it would have been possible to develop an argument in this vein, although it would run counter to the accepted approach of our courts to determine wrongfulness in cases dealing with pure economic loss. Neethling and Potgieter 291 allude to this possibility and there is much food for thought in their explanation of the matter:

“It is an accepted premise in our law that wrongfulness lies either in the infringement of a *subjective right*, or in the breach of a *legal duty* to avoid damage (norm or duty violation). This also applied to liability for pure economic loss. Infringement of a subjective right occurs fairly often in this regard, as in the case of unlawful competition, where the right to goodwill is involved . . . Nevertheless, according to the courts, the wrongfulness of an act causing pure economic loss almost always lies in the breach of a legal duty. This approach is acceptable, as long as one bears in mind that, where a subjective right is in fact involved, wrongfulness may just as well lie in the infringement of this right, being the converse of a legal duty.”

With the advantage of available time and hindsight I have pointed out what I perceive as a fair amount of errors in this judgment, not only regarding points of law, but even points of terminology (eg on the erroneous use of “unlawful” and “damages”: see paras 3 2 and 3 3 4 above). In the light of the time constraints and other obstacles that our judges have to confront during the normal course of their taxing profession, the academic should always be very careful in his or her critical analysis of any judgment, less an unrealistic standard is set. This case note was written bearing this in mind.

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