Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck
2007 2 SA 118 (SCA)

Vicarious liability of employer for delict of employee – plea of necessity – test for determining who qualifies as employee

1 Introduction

It would appear that the stream of judgments dealing with the question of an employer's vicarious liability continues unabated. Whereas most of the recent reported judgments hinge upon a decision regarding the question whether the employee in question caused damage to the plaintiff in the course and scope of his/her employment with the defendant (see, eg, *K v Minister of Safety and Security* 2005 6 SA 419 (CC); *Minister of Safety and Security v Luiters* 2006 4 SA 160 (SCA); 2007 2 SA 106 (SCA); *MEC for Public Works Eastern Cape v Faltein* 2006 5 SA 532 (SCA)), the case now under discussion places the defence of necessity, raised by the employer as a result of the circumstances under which his employee caused damage to the plaintiff, in the spotlight. Nugent JA did mention that, throughout the trial, the appellant (defendant) had denied that his employee had been acting within the course and scope of his employment – which would have placed that requirement for such liability squarely within the firing line – but then simply mentioned that "that denial has since been abandoned" (121G). In essence the judgment thus entails an application of another basic tenet of an employer's vicarious liability, namely that the employee in question must have committed a delict, which in turn implies that any defence of which the employee may avail him/herself, lies at the employer's disposal (Neethling *et al Law of Delict* (2006) 341).

This judgment is relevant, mainly in the context of the treatment of the defence of necessity, in the sphere of delict. Secondly, it draws a definite distinction between what is understood to be an employee for the sole purpose of determining the vicarious liability of such employee's employer on the one hand, and who is to be regarded as an employee for purposes of applying section 35(1) of the Occupational Injuries and Diseases Act (130 of 1993, in terms of which no action may be instituted by an employee against his/her employer for the recovery of damages with regard to an occupational injury), on the other hand. It would seem that the latest developments in the law of delict, where a broad view is taken concerning the determination of who an employee is for purposes of the employer's vicarious liability (see, in particular, *Midway Two Engineering & Construction Services v Transnet Bpk* 1998 3 SA 528 (SCA)), are not necessarily compatible with the established principles of labour law in terms of which a narrower view of the concept of employee is taken for purposes of ascertaining whether compensation is to be paid to such person in terms of the Occupational Injuries and Diseases Act.

2 Facts and Judgment

The appellant (defendant)) is a poultry farming concern. Attached to its farm is a retail shop. This shop was raided, seemingly in typical "cop-and-robber" style, by a group of armed men who took the respondent (plaintiff), who acted as cashier in the store, hostage when they became aware that security personnel had been alerted to their actions. Holding a firearm to her head, they forced her to accompany them, while shouting to the security personnel that they would shoot her if they did not keep their distance. Thereupon the criminals forced her into the back-seat of a customer's car. Two of the gang members took up situations on either side of her, while one jumped into the driver's seat and sped away, causing the car to sway wildly on the loose gravel road. Two of the appellant's security personnel who had witnessed the scene fired shots from their handguns, endeavouring to hit the tyres to force the car to stop. One of the bullets struck the back of the vehicle, penetrating the back seat and wounding the respondent in the arm. When the robbers became aware of the respondent's injury, they drove into a nearby township and fled away in panic. The wounded cashier thereupon claimed damages from the defendant on the basis of its vicarious liability for the alleged wrongful and negligent conduct of the security officer who wounded her.

In the South Eastern Cape High Court the parties agreed that the judge should try only the question concerning the defendant's possible liability, leaving the determination of *quantum* for a later stage, should a verdict in favour of the plaintiff follow. Plaskett J found in favour of the plaintiff, in the process refusing a special plea introduced by the defendant at a later stage, in terms of which it was alleged that section 35(1) of the Occupational Injuries and Diseases Act precluded her delictual claim against the defendant (*Rieck v Crown Chickens (Pty) Ltd t/a Rocklands Poultry* (2005) 26 *ILJ* 1240).

On appeal to the Supreme Court of Appeal the court upheld the judgment of the trial court in respect of the question as to the appellant's liability, as well as to the non-applicability of the measures contained in section 35(1) of the Occupational Injuries and Diseases Act to the matter.

3 Critical Evaluation

3 1 *Plea of Necessity*

3 1 1 Use of Sources

The main defence relied upon by the appellant was one of necessity, in that it was alleged on its behalf "that it was reasonable to shoot at the vehicle to avoid the risk that Rieck [the respondent] might be killed and accordingly . . . the conduct of the employee [security guard] concerned was neither wrongful nor negligent" (121J).

Nugent JA commenced his evaluation of the present position with a statement, basic and well-known in South African academic circles, that "[t]o cause bodily injury to another by a positive act is generally wrongful and will be visited with delictual liability if the actor was negligent" (122A). It is lamentable that the first source referred to in this context is a

textbook on the English law of negligence (Millner *Negligence in Modern Law* (1967) 27), seeing that standard South African text books (see, in particular, Boberg *The Law of Delict Volume I – Aquilian Liability* (1984) 32; Neethling *et al* 41) as well as numerous judgments of our courts (see, eg, *Malahe v Minister of Safety and* Security 1999 1 SA 528 (SCA) 540H; *Local Transitional Council of Delmas v Boshoff* 2005 5 SA 514 (SCA) 522A; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 1 SA 461 (SCA) 468D–E, to name but three at random) reflect the same notion. Only after this reference a relevant quotation from the *Telematrix* case followed (122B). One can appreciate that a comparative survey of foreign principle may under certain circumstances yield positive results in an area where the own law is not settled or uncertain, but to refer to "comparative English law" (122A) from the outset raises serious doubts, in particular as it has been pointed out on numerous occasions that the English tort law principles relating to the "duty of care" doctrine are not suited to our law of delict, which observes a strict differentiation between the delictual elements of wrongfulness and fault, which differentiation is lacking in that system of tort law (see, eg, Boberg 31; Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1989) 129–130 especially authorities referred to in n 68; Van der Walt and Midgley *Principles of Delict* (2005) 78–79; Neethling, *et al* 137). This propensity towards favouring common-law secondary sources to the detriment of South African, or even other civil-law materials, is further demonstrated by Nugent JA's references to well-known and easily available English and Australian text books: For the proposition that proportionality of interests is a requirement for successfully employing the defence at hand, he first refers (123E n 11) to Fleming *The Law of Torts* (1998) 129 (where the author discusses the standard of care under the heading of the tort of negligence) and *Clerk & Lindsell on Torts* (2006) par 8-121 (which deals with the criteria of reasonableness in the context of *negligence*) and 8-126 (entitled "Acting in emergency" – in the context of negligence), before mentioning Boberg's monumental treatise (788) (123E n 12). One of the underlying reasons for the present uncertainty concerning the relationship between the elements of wrongfulness and fault (in particular negligence) and the question whether a decision in respect of wrongfulness is logically anterior to that of fault, can in all probability be tracked to this renewed practice of applying English source materials to the field of *Aquilian* liability. This is a theme which could form the basis of a very interesting historical and comparative study on a master's, or even doctoral level.

3 1 2 Classification of Defence of Necessity

Nugent JA continued to observe that "there are circumstances in which even positive conduct that causes bodily harm will not attract liability" (122C), such as where circumstances of necessity exist. He then adopted the definition of necessity formulated by Van der Walt and Midgley (127), which reads: "An act of necessity can be described as lawful conduct directed against an innocent person for the purpose of protecting an interest of the actor or a third party (including the innocent person) against a dangerous situation."

The judge also quoted definitions to the same effect from other standard South African text books (Neethling *et al* 80 (he refers to 86–87 of the previous edition); Van der Merwe and Olivier 81; and Boberg 787–788; to which one could add the exposition by Price 1954 *Butterworths SALR* 15).

It is noteworthy that all the academic sources referred to above portray necessity as a ground of justification, thus excluding the wrongfulness of *prima facie* unlawful conduct on the defendant's part. Nugent JA stressed the objective nature of the test to determine the existence of necessity, noting in particular that it is insufficient if the actor merely held a belief that he was "justified in acting as he did" (122D). This is a fortunate reminder that it is to be avoided to ask whether the defendant "had reasonable grounds for thinking" that he could act as he did: this unfortunate formulation, in the context of private defence, from the old judgment of *R v Attwood* 1946 AD 331 340, was unfortunately accepted as correct by Ponnan JA in the recent case of *Mugwena and Another v Minister of Safety and Security* 2006 4 SA 150 (SCA) 158B–C) (for a critical evaluation, see Scott "Deliktuele vorderings teen die polisie" 2007 *TSAR* 188 193 *et seq*). Hopefully the present judgment will contribute to dispelling this subjective approach.

In referring to the objective nature of the test for determining the presence or absence of necessity, Nugent JA referred to the same sources quoted above. It should be borne in mind that all the writers he referred to regard the term "objective" in the context of necessity as a ground of justification as "objective *ex post facto*", thereby denoting a diagnostic objective test, more in the sense of an arm-chair test with hindsight, in contrast with the other well-known objective test of the *diligens paterfamilias*, which is prognostic in nature in that it transfers the adjudicator of the defendant's conduct back into the shoes of the defendant to the time and place when the event that caused the damage occurred (see Neethling, Potgieter and Visser 141–144). In spite of his reliance on modern South African authors for defining necessity, as well as for stressing the objective nature of the test for ascertaining it, he expressed the opinion that the correct jurisprudential niche for this defence in the South African law of delict has still to be ascertained; in the process Nugent JA acknowledges that all his academic sources regard necessity as a ground of justification (122 n 6). To his mind this could largely be ascribed to developments in the field of criminal law (122F). A single reference to Boberg (975 *et seq*) where that author points out that the vast majority of his contemporaries regard necessity as a ground for excluding wrongfulness and then continues to place the opinions of three authors, according to which circumstances of necessity can point to the lack of fault on the actor's part (Labuschagne "Noodtoestand" 1974 *Acta Juridica* 73, "Noodweersoordadigheid" *Gedenkbundel HL Swanepoel* (1976) 152; Van der Westhuizen "*S v Motleleni* 1976 1 SA 403 (A); *Chetty v Minister of Police* 1976 2 SA 450 (W)" 1976 *De Jure* 371; Bertelsmann "Noodtoestand: die regverdigingsgrond en die skulduitsluitingsgronde" 1981 *THRHR* 413), justified Nugent JA to express himself as follows (122F–123A):

> "On the other hand, it also seems at times to have been suggested that it [necessity] might operate instead to avoid a finding of negligence . . . It is

> not necessary in the present case to question the correct jurisprudential niche that is occupied by necessity in the scheme of delictual liability. Whether it operates to justify conduct that would otherwise be wrongful, or to avoid a finding of negligence, the test for whether it operates at all calls for an objective evaluation."

To my mind the use of a technical term such as "necessity" in an absolute sense creates the dilemma of having to opt for a classification of a specific defence, on the basis of circumstances of danger or compulsion, as either a ground for justifying the lawfulness of *prima facie* wrongful conduct, or a ground for excluding fault. One should avoid "labelling" a *situation* giving rise to a defendant's causing of detriment to an innocent third party under circumstances of danger or compulsion as "*necessity*" and then endeavouring to decide once and for all whether this "label" bears the stamp of a defence in the sphere of wrongfulness, or of fault. Remembering that our law of delict is more of the "generalising" than the "casuistic" kind (see Neethling *et al* 4) – where general principle dictates in stead of rules made for a specific situation (delict) – one should bear in mind that a ground of justification represents nothing more than the crystallised *boni mores* (Neethling *et al* 70). Thus, where the defendant whose conduct under duress or danger caused the plaintiff's detriment can be excused because his actions were objectively speaking justified in accordance with the legal convictions of the community, one can conclude that he acted lawfully: for the sake of convenience it has become customary to describe such conduct as being justified by *necessity*. This term is indeed used by the vast majority of South African academics, as well as in the criminal jurisprudence, to denote a *ground of justification*. This is also the orthodox view in the modern Dutch (see Asser-Hartkamp *Verbintenissenrecht* (2002) 47 76; Schut *Onrechtmatige Daad volgens BW en NBW* (1985) 61) and German law of civil wrongs (see Markesinis *A Comparative Introduction to the German Law of Torts* (1994) 68 477). In my view the academic opinion concerning necessity as a ground of justification is not exclusively based upon "a view that seems largely to draw upon analogous principles that have been developed in criminal law" (122F), but is equally justified on the basis of the comparative law method. (It is noteworthy that the criminal-law principles of grounds of justification, including compulsion ("overmacht", of which necessity "noodtoestand" is a *species*), that are mentioned in their criminal code as defences excluding wrongfulness, have influenced the modern Dutch law of delict to accept that these grounds exclude wrongfulness: Asser-Hartkamp 47 *et seq*. For us a reference to modern Dutch private law, which has the same background as our law, could be of more value than copiously referring to common-law sources which differ from ours in background and development.) Unfortunately a study of the Roman-law foundations of the *Aquilian* action does not help us out of this dilemma, since it is doubtful whether Roman lawyers distinguished between wrongfulness and fault (negligence) as elements of a delict, as we do today (see Feenstra *Romeinsrechtelijke Grondslagen van het Nederlands Privaatrecht – Inleidende Hoofdstukken* (1980) 157; however, even modern historical sources like Zimmermann *The Law of Obligations – Roman Foundations of the Civilian Tradition* (1990) 1000–1003) tend to treat necessity as justifying otherwise wrongful conduct,

thus classifying it under the category of grounds of justification excluding wrongfulness).

Where the defendant fails with the defence of necessity as a ground of justification, the circumstances of danger or compulsion can, however, assist him in building a defence based on the absence of fault. Certainly, in these circumstances one can assume that the defendant lacked consciousness of wrongfulness, which points to a lack of intent (*dolus malus*) on his part (it is beyond doubt that consciousness of wrongfulness is a definite component of intent in modern days: Van der Walt and Midgley 157–158, notably references in n 2; Neethling *et al* 112; Boberg 268). Furthermore, the circumstances referred to may further have the effect that the actor lacked negligence: thus, in the case of putative necessity or, simply, where the actor was placed in a situation of imminent peril through no blameworthiness on his own part, he "will not be held negligent merely because he failed to take what afterwards appears to have been the best course. This so-called 'doctrine of sudden emergency' is merely an application of the reasonableness criterion to the actor's circumstances, for the reasonable man similarly placed may well have made the same error" (Boberg 334; see also Van der Merwe and Olivier 132 *et seq*; Van der Walt and Midgley 190; Neethling *et al* 134–135; the common-law textbooks of Clerk and Lindsell and Fleming referred to by Nugent JA (123E n 11) treat exclusively with sudden emergencies as basis for a defence excluding negligence – see discussion *supra*). This doctrine is nowhere in South African literature – neither in academic writing, nor in reported judgments – portrayed as a species of necessity. The academic writers referred to tend to point out that application of the doctrine of sudden emergency operates in the sphere of determining negligence, and is not tantamount to an application of the defence of necessity, where the reasonableness test is applied *ex post facto*.

The same line of thought as suggested above may be found in the comprehensive, but unfortunately unpublished, doctoral thesis of Van der Westhuizen (*Noodtoestand as Regverdigingsgrond in die Strafreg* (UP 1979), where it is stated in the English summary (730):

> "It appears that necessity is essentially a matter of conflict of interests. Interests must be evaluated and contrasted, and conduct which protects the greater against the lesser is lawful, since it is not the breach of a right but rather the exercise of a right [*viz*, on the basis of necessity; this is in conformity with the view of Price (2 15) referring to a *jus necessitates* – a right of necessity]. An *emergency* may, however, lead to serious fear or other psychological or even physical factors which are not without judicial relevance. Thus it is assumed that it may also lead to the absence of other elements of the offence, such as the act or fault" (italics supplied).

To conclude the discussion on this point, it is suggested that at this stage of the development of the South African law of delict it would be a retrogressive step to endeavour to find "the correct jurisprudential niche" for necessity. It is suggested that the current academic approach is jurisprudentially sound: one simply has to be precise in the application of the correct terminology. Thus, one could say that an *emergency* created by circumstances of danger, fear or compulsion which prompts an actor to infringe the interests of an innocent third party can lay the foundation of a

defence excluding wrongfulness – this we can at best denote as the defence of "*necessity*". One applies the *boni mores* test or that of the "crystallised *boni mores*" (eg specific rules that have developed, like that the sacrificed interest should not exceed the value of the protected one etc) in this case. Should the defendant succeed with it, then *cadit quaestio*. However, if he should fail, the *emergency* can also lay the basis of a further defence, namely that the element of fault is lacking – in the context of negligence this defence is best known as that of "*sudden emergency*". The *diligens paterfamilias* test, also objective but slightly more subjective than that of the *boni mores* should be utilised here. This is the proverbial "second bite at the cherry" by the defendant. Van der Westhuizen (730, quoted above) even intimates that a state of emergency can exclude conduct ("the act"). He thus offers the defendant a "third bite at the cherry". This will surely be the case where the element of voluntariness, which is a vital component of conduct for purposes of delictual liability (see Van der Walt and Midgley 64; Neethling, Potgieter and Visser 23), is eliminated by the fear caused in the defendant's mind by the circumstances of danger or duress. (This last avenue will in practice probably be the first to be taken, seeing that conduct is the most basic of delictual elements.)

3 1 3 Exclusive Application of *Diligens Paterfamilias* Test

Nugent JA continued his judgment by describing the test which he will employ in this case, as follows (122H–123B):

> "Whether it [*viz* necessity] operates to justify conduct that would otherwise be wrongful, or to avoid a finding of negligence, the test for whether it operates at all calls for an objective evaluation. For the classic test for negligence, as it was articulated by Holmes JA in *Kruger v Coetzee*, itself requires not only that the harm was foreseeable, but also that a reasonable person would have guarded against it occurring.
>
> [13] Thus, whatever the correct jurisprudential approach, a person who causes bodily injury by a positive act will avoid liability for the harm that he caused, on either approach, only if a reasonable person in the position in which he found himself would have acted in the same way."

It is suggested that these statements present grave difficulties from a jurisprudential point of view: The judge simply applied the pure, classic negligence test from the seminal judgment in *Kruger v Coetzee* (1966 2 SA 428 (A) 430E–H) to determine whether the defendant "will avoid liability", emphatically stating that this will be so "on either approach". The implication from this is unavoidable: that the reasonable person test is the criterion for ascertaining the presence or absence of a ground of justification, as well as a ground excluding fault. The further unavoidable implication is that the test of the *diligens paterfamilias* determines both wrongfulness and negligence *in casu*. If this were correct, it would be tantamount to saying that the elements of wrongfulness and negligence have been completely conflated and that it is thus jurisprudentially meaningless to distinguish between these two well-recognised delictual elements. Although Neethling has recently suggested ("The conflation of wrongfulness and negligence: is it always such a bad thing for the law of delict" 2006 *SALJ* 204 213) that

> "since certain factors relevant for the determination of negligence, particularly foreseeability and preventability of harm, may also be relevant for the determination of wrongfulness, and vice versa, a certain degree of conflation of those two elements . . . is inevitable".

Nugent JA, writing in a non-judicial capacity ("Yes, it is always a bad thing for the law: a reply to Professor Neethling" 2006 *SALJ* 557 562), has taken him to task by reiterating the need for clearly distinguishing between the elements of wrongfulness and negligence:

> "My contention is that whether conduct is capable of attracting liability at all (whether the conduct is wrongful) and whether it has indeed attracted liability in the particular case (whether the conduct is negligent) are distinct questions that call for distinct answers. To purport to answer the first question by asking the second question twice is no answer to the first question at all."

This exposition is to be lauded as jurisprudentially sound. However, it would seem that Nugent JA did not follow his own suggestion. In the present case he did not "answer the first question" (concerning the presence or absence of wrongfulness) by "asking the second question" (as to negligence) twice – he goes even further, asking, in fact, the second question and then declaring by necessary implication that it does not matter whether that question pertains to wrongfulness or fault. This conclusion is further strengthened by his criticism of Neethling *et al* (88 n 269 (82 n 333 in the latest edition of their textbook)) who distinguish between the objective *ex post facto* test for wrongfulness and the prognostic objective negligence test in criticising the case of *S v Pretorius* (1975 2 SA 85 (SWA)) in which the court allowed a defence of putative necessity to succeed as a ground of justification, in stead of a ground excluding negligence, which reads as follows (123 n 9):

> "It seems to be suggested by *Neethling et al* . . . that the belief in which the defendant acted might be relevant to whether he acted negligently, but not to whether his conduct was wrongful. In my view that cannot be correct. *The law judges what is reasonable according to a single standard that is applied in the context within which the conduct occurred*"(italics supplied).

So there we have it: a "single standard" for ascertaining reasonableness in the spheres of wrongfulness and negligence, the standard being that of the *diligens paterfamilias*! This can surely not be correct in view of the development of the concept of the *boni mores* as criterion for wrongfulness since the ground-breaking judgment of Rumpff CJ in *Minister van Polisie v Ewels* (1975 3 SA 590 (A)). These words would also clearly seem to fly in the face of the judge's own convictions concerning the need for clearly separating issues of wrongfulness and negligence expressed in his above-mentioned academic contribution. Even the arguments of Fagan ("Rethinking wrongfulness in the law of delict" 2005 *SALJ* 90) who holds that the "standard academic view", according to which wrongfulness should be determined by means of an *ex post facto* reasonableness test, is wrong in light of our case law and that the test as applied by the majority of judges is *ex ante facto* (prognostic) do not go as far as to apply the two-tier negligence test *eo nomine*, as formulated in *Kruger v Coetzee*, in the context of determining wrongfulness. The problem with the line of argument followed by Nugent JA is that he declared, in so many words, that

this test is to be applicable "on either approach" (*viz*, regarding necessity as either a ground of justification, or as a ground excluding fault – negligence *in casu*: 123B). As pointed out above, this implies a total conflation of the elements of wrongfulness and fault (negligence).

Interestingly enough, Nugent JA then continued to mention "considerations that are to be brought to account in determining whether the conduct was reasonable [*viz* compatible with the standard of the reasonable person]" (123C), relying primarily on the exposition of Van der Walt and Midgley (127) and Boberg (788) (see 123C–F). It is suggested that those authors, in the passages referred to, treat necessity in the context of a ground of justification, excluding wrongfulness. Van der Walt and Midgley in particular go out of their way to point out (in the context of private defence, which they also regard as a ground of justification and where *dicta* from the law reports also tend to obscure the difference in the reasonableness tests for wrongfulness and negligence) that if one would wish to employ the standard of a reasonable person to the determination of wrongfulness, it is not the same criterion as that employed to ascertain negligence (129):

> "However, in determining wrongfulness, courts are required to look *a posteriori* at all the circumstances, and should not look at the situation from any party's point of view. The situation is more akin to that of a reasonable person in the position of a bystander."

It is suggested that this exposition goes a long way in reconciling the opinions of those who propagate a pure, impersonal *ex post facto* test for wrongfulness, and those who maintain that the test is that of a reasonable person. The explanation offered by Van der Walt and Midgley accords more with the former, but offers an "escape" in the sense that personal circumstances of the actor can be taken into account – in essence it steers a middle course between two extremes.

The court concluded its judgment on necessity by evaluating the firing of the shots by the security guard (123F–124F). Many factors were weighed against another, like the fact that robbers sometimes kill hostages without apparent reason (123G), but that this has not yet become the norm ((123H); furthermore, that the immediate risk of wounding the victim by shooting at the departing vehicle must be weighed against the risk of future harm of the victim if abducted by the criminals (124B–D). This process of determining the nature of the security guard's action by the court was more in the nature of an *ex post facto* evaluation than of asking what a reasonable person would have done in the heat of the moment. The process followed here by Nugent JA to ascertain the reasonable course of action expected from the security guard rather resembles a determination of the conduct of Van der Walt and Midgley's "reasonable person in the position of a bystander". However, the judge's final conclusion boils down to a pure application of the foreseeability and preventability negligence test as formulated in *Kruger v Coetzee supra* (124F): "The harm was clearly foreseeable, and ought reasonably to have been avoided by refraining from shooting at the vehicle, and in the circumstances it was negligent to have caused it."

This *dictum* again takes the court's discussion of necessity out of the sphere of wrongfulness and places it squarely within the realm of negligence. This leaves one rather perplexed, for it can be argued – if one were inclined to reject the "standard academic view" of the construction of a delict which regards wrongfulness of conduct as a *sine qua non* for finding negligence on the actor's part – that a finding of negligence does not necessarily imply wrongfulness on the actor's part: it can at most be an indication of it (*cf* Fagan 139 *et seq*); and if wrongfulness has not been proved, no liability can follow. The confusion is more than Babylonian!

An alternative view to the determination of negligence *in casu*, which will yield the same result, is to hold that the ordinary reasonable person would not have foreseen and prevented the wounding of the respondent, but that a person with specific expertise in the field of security work would have done so: the *regula iuris* (of D 50 17 132) "*imperitia culpae adnumeratur*" introduces the "reasonable expert" test in the sphere of determining negligence (see Scott "Die reël *imperitia culpae adnumer*atur as grondslag vir die nalatigheidstoets vir deskundiges in deliktereg" in *Petere Fontes: LC Steyn-Gedenkbundel* (1980) 124 for a detailed analysis). It is suggested that the evaluation of the risks faced by the security guard by Nugent JA accords more closely with what is to be expected of an expert in the field, than of the reasonable person without training in security work.

3 2 *Plea Based on Section 35(1) of the Compensation for Occupational Injuries and Diseases Act*

It was contended on the appellant's behalf that the respondent was precluded from claiming in delict from the appellant, by section 35 of the Compensation for Occupational Injuries and Diseases Act (130 of 1993), which reads as follows: "No action shall lie by an employee . . . for the recovery of damages in respect of any occupational injury . . . resulting in the disablement . . . of such employee against such employee's employer" (see 124G).

The obvious reason for this statutory measure is that the compensation fund established under the Act is applied for the payment of compensation, the cost of medical aid and the like (s 16(1)).

The appellant's counsel argued that in a relationship where a labour broker made the services of an employee available to a client, as in the instant case, the latter becomes the employer of the employee, for as long as the employee's services are made available to the client (126E–F). Support for this argument was found in the interpretation by Thompson and Benjamin *South African Labour Law* (1965) vol 2 H1-15 para 12 of the definition of "employer" in the Act (s 1), which definition refers, *inter alia*, to:

> "(b) if the services of an employee are lent or let or temporarily made available to some other person by his employer, *such employer* for such period as the employee works for that other person" (italics supplied).

It was suggested by the appellant's counsel that the words "such employer" refers to "some other person", and not to the immediately preceding "employer", which would have brought the respondent into an

employer-employee relationship with the appellant. Nugent JA rejected this argument as being inconsistent with the plain wording of subsection (b) of the definition of "employee" in the Act, as well as on the ground that accepting it would reverse the legal position that has prevailed in the sphere of workmen's compensation for well over a century (126G–H; see 124I–125H for a brief historical review). The court concluded its decision on this point as follows (127E–F):

> "[T]he Act contemplates that an employee generally has only one employer at any time, which is the person with whom he is in a contractual relationship of employment, even when he performs his contractual obligations for some other person. The appellant was admittedly not such a person and is not immunised against actions for damages by s 35."

This decision is doubtlessly correct, as it plainly concerns the interpretation of an uncomplicated statutory measure. The interesting point is that an employee can in fact have an employer different from the one with whom he has concluded a contract of service in terms of the law pertaining to vicarious liability. This was clearly decided by Nienaber JA in *Midway Two Engineering & Construction Services v Transnet Bpk* (28G) where, in respect of a labour relationship akin to the present, it was decided that the person to whom the services of the employee had been made available was to be regarded as the latter's employer, and not the labour broker with whom the employee had concluded a contract of service. The basis of this decision hinged on application of the "control" test (28B–G) which forms part and parcel of the law of vicarious liability (*cf* Neethling, Potgieter and Visser 339–340). The implication of this state of affairs is that if the respondent had committed a delict or acted with contributory negligence while performing her duties as cashier on the appellant's property, such conduct would have been imputed to the appellant and not to the labour broker who made her services available to the appellant, in any subsequent legal process. One can surmise that the legal position as posited in a judgment like *Midway Two* could have influenced the appellant's counsel in the presentation of their argument on this point. The fact remains, however, that Nugent JA's judgment pertains only to the interpretation of the relevant statutory measure: "What is in dispute is only what is meant by that term [*viz* "employer"] as it is used in the Act" (124H).

Although this is not mentioned in the judgment, it appears from the judgment of the court *a quo* (1246) that the respondent had in fact received an amount of R5 631, 43 as compensation from the workmen's compensation fund for defraying medical expenses and like costs, because "[i]t is also common cause that she was an employee: she was 'a person who had entered into or works under a contract of service' . . . with an employer". She thus complied with the definition of "employee" as circumscribed in section 1 of the Act, but this does not imply at all that the appellant is her "employer", even for purposes of making an award from the fund. Her only employer, in terms of the Act, was the labour-broker with whom she had concluded a contract of service.

4 Conclusion

This judgment does not bring clarity in the field of necessity as a defence in the field of delict. In fact, it creates uncertainty in respect of a topic that

has hitherto appeared jurisprudentially problem free, if regard is had to the orthodox exposition in leading text books. A further complicating factor is the deepening of the confusion concerning the relationship between wrongfulness and negligence brought about by the court's line of argumentation. The approach by the Supreme Court of Appeal in this judgment does not in any way "contribute in a constructive manner to bring about more clarity to the distinction between wrongfulness and negligence in our law of delict" and it fails to "facilitate an elimination of the present confusion between these two elements" (Neethling and Potgieter "Wrongfulness and negligence in the law of delict: a Babylonian confusion?" 2007 *THRHR* 120 130). In fact, it contributes to the present "Babylonian confusion" (with acknowledgement to Neethling and Potgieter *loc cit*).

The judgment brings home the truth that a rule which obtains in one field of law, does not necessarily hold good in another: thus the concept of "employer" (and, conversely, "employee") may vary according to whether it is applied in labour law, or in the law of delict. In the instant case the *ratio legi*s was lucidly recounted to explain this apparent discrepancy.

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