

A NEW PROPOSED CONSTITUTIONAL  
METHODOLOGY FOR EFFECTING  
TRANSFORMATION IN THE SOUTH AFRICAN  
LAW OF DELICT

by  
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Submitted in fulfilment of the requirements for the degree  
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University of Pretoria

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## Declaration of Originality

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## Thesis Summary

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The problem identified in this thesis is the haphazard methodology that features in constitutional application to the South African common law of delict. Conventionally, the Constitution is said to apply either ‘directly’, ‘indirectly’ or ‘not at all’ to common-law problems. How judges are supposed to choose between those three possibilities is unclear. In light of a number of recent delict cases, the author observes that the uncertainty, coupled with a conservative political commitment to ‘contemporary common-law purism’, has resulted in judges preferring the option of ‘constitutional avoidance’ instead of the direct- and indirect-application models. On the other hand, the author also notes with concern the radically alternative approach of ‘constitutional over-excitement’ where judges overlook established common-law rules and instead turn to a pure application of constitutional principles. The author argues that these competing approaches tend to valorise one source of law at the expense of an integrated reading of various sources. This invariably leads to an uncritical acceptance of either the common law or the Constitution. The author contends that the competing problems of constitutional avoidance and over-excitement in the law of delict could be addressed by turning to the transformative method of adjudicative subsidiarity that places the Constitution’s commitment to human rights at the centre of common-law disputes (thus rejecting a blind veneration of the common law) while being humbly mindful of the limits of constitutionalism. The author finally evaluates judicial performance in a broader spectrum of delict cases since democratisation that further demonstrates the need for the application of adjudicative subsidiarity.

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# Personal Acknowledgements

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My grandfather, John Ferris, was an industrial union leader in England many years ago. On his deathbed in 2015 I asked him what the most important lessons were that he had learnt in 91 years. He told me three things: (1) Live with a spirit of thankfulness; (2) always show tolerance to others; and (3) fight for those who are suffering. This page is intended to adhere to the first point; the remainder of this thesis is, to a great extent, based on the remaining two.

My parents, Riana and André, ensured that nothing would stand in the way of providing their children with quality education. They have sacrificed so much for me to realise my dream of completing this thesis. But they have also taught me many things beyond a formal education that certainly underlie this study: The notions of altruism, selflessness and humanity – the commandment of Love – are all ideas that I can't seem to remove from my work. I am grateful for all the sacrifices and the life lessons. This success is yours. Many other members of the Zitzke family have also engulfed me with their love and encouragement, notably Ronelle, Jean, Landi, Christia, Ernst, Eduan, Victor and Nadéne. Special mention must also be made of Lisa, who taught me about creativity and imagination, but passed away before the completion of this project.

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PART ONE

INTRODUCTION & RESEARCH

PROBLEM

# Introducing the Study

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## 1 INTRODUCTION

Things change. And that is quite normal.<sup>1</sup> This thesis is intended to explore the changing landscape of the South African law of delict in light of the Constitution.<sup>2</sup> By ‘law of delict’ I mean that part of South African law that is concerned with wrongful and culpable conduct that causes harm to another.<sup>3</sup> Following the Roman legal tradition,<sup>4</sup> the South African law of delict has habitually been classified as forming part of ‘private law’ defined as that part of the law that regulates the legal relationships between non-state actors but, for purposes of this study, I shall avoid forcing the law of delict into that mould for two reasons: Firstly, even though the South African law of delict does provide remedies for civil wrongs committed by and against private parties it also provides the legal principles relevant to establishing the compensatory liability of

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<sup>1</sup> In the South African legal context see eg DP Visser ‘The Legal Historian as Subversive or: Killing the Capitoline Geese’ in DP Visser (ed) *Essays on the History of Law* (1989) 19; and AJ van der Walt ‘Legal History, Legal Culture and Transformation in a Constitutional Democracy’ (2006) 12 *Fundamina* 1, 6.

<sup>2</sup> The Constitution of the Republic of South Africa, 1996.

<sup>3</sup> See M Loubser & JR Midgley (eds) *The Law of Delict in South Africa* (2<sup>nd</sup> Ed, 2012) 7; and J Neethling & JM Potgieter *Neethling-Potgieter-Visser Law of Delict* (7<sup>th</sup> Ed, 2015) 4.

<sup>4</sup> See eg G van Niekerk ‘The Endurance of the Roman Tradition in South African Law’ (2011) 4 *Studia Universitatis Babeş-Bolyai Jurisprudentia* 20. South African law has a fascinating legal history that can briefly be abridged as follows: Before the time of colonial conquest, the local people in South Africa followed their own indigenous customary laws. In 1652 the Dutch East India Company formed a refreshment station in the Cape of Good Hope and later imposed the Dutch conception of law onto the South African legal system which comprised Dutch legislation, custom and Roman law in the absence of legislation or custom. Thus it was called ‘Roman-Dutch’ law. After a spate of territorial conflicts, by 1806 the British took control of the Cape and because of the British precedent set in *Campbell v Hall* (1774) 1 Cowp 204, 98 ER 1045 Roman-Dutch law remained largely intact with major alterations being made only in the context of procedural law and some aspects of commercial law. In 1948 the notion of apartheid was formally legislated. By 1961 South Africa became an independent Republic free from British rule but only in 1993 did South Africa get to know human rights with the introduction of the Constitution of the Republic of South Africa Act 200 of 1993 which was further taken up in the 1996 Constitution. See in this regard eg HR Halo & E Kahn *The South African Legal System and its Background* (1968) 567ff; DH van Zyl *Geskiedenis van die Romeins-Hollandse Reg* (1979) 420ff; and PhJ Thomas, CG van der Merwe & BC Stoop *Historical Foundations of South African Private Law* (2<sup>nd</sup> Ed, 2000) 95ff.

the state.<sup>5</sup> Secondly, as this study will show in due course, the South African Constitution requires a strong form of constitutional application to traditional ‘private law’ matters, including delictual disputes, which means that a rigid distinction between private and public law is no longer desirable.<sup>6</sup>

The definition of the law of delict provided above shows that there are at least five elements of a delict in South African law that are briefly elaborated on here. (1) *Conduct* can take on the form of a voluntary and human ‘positive act’ or ‘omission’. (2) *Wrongfulness* has recently been explained by the Constitutional Court as an enquiry into whether the legal convictions of the community (or the *boni mores*), constitutionally understood, regard the conduct of the alleged wrongdoer as being acceptable.<sup>7</sup> If the conduct has taken on the form of a positive act and a subjective right has been infringed, wrongfulness is presumed unless it can be rebutted.<sup>8</sup> If the conduct takes on the form of an omission, the enquiry specifically relates to whether the alleged wrongdoer bore a legal duty not to cause harm to the victim.<sup>9</sup> If the conduct causes pure economic loss, then the enquiry is often said to relate to the reasonableness of imposing

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<sup>5</sup> Section 1 of the State Liability Act 20 of 1957 makes it clear that the principles of delict apply in the determination of the compensatory liability of the state. See eg F du Bois ‘State Liability in South Africa: A Constitutional Remix’ (2010) 25 *Tulane European and Civil Law Forum* 139; C Okpaluba & PC Osode *Government Liability: South Africa and the Commonwealth* (2010) 1ff; Loubser & Midgley (note 3 above) at 264ff; and L Boonzaier ‘State Liability in South Africa: A More Direct Approach’ (2013) 130 *South African Law Journal* 330.

<sup>6</sup> See eg J van der Walt ‘Die Toekoms van die Onderskeid tussen die Publiekreg en die Privaatreg in die Lig van die Horisontale Werking van die Grondwet (Deel 1)’ (2000) *Journal of South African Law* 416; continued in J van der Walt ‘Die Toekoms van die Onderskeid tussen die Publiekreg en die Privaatreg in die Lig van die Horisontale Werking van die Grondwet (Deel 2)’ (2000) *Journal of South African Law* 605.

<sup>7</sup> This succinct definition was first provided by Van der Westhuizen J in *Loureiro and Others v iMyula Quality Protection (Pty) Ltd* [2014] ZACC 4, 2014 (3) SA 394 (CC), 2014 (5) BCLR 511 (CC) (‘*Loureiro CC*’) paras 34, 53 & 56. That aspect of *Loureiro CC* has since been (directly and sometimes indirectly) cited with approval by the same Court in *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2014] ZACC 28, 2015 (1) SA 1 (CC), 2014 (12) BCLR 1397 (CC) (‘*Country Cloud CC*’) para 21, *H v Fetal Assessment Centre* [2014] ZACC 34, 2015 (2) SA 193 (CC), 2015 (2) BCLR 127 (CC) (‘*Fetal Assessment Centre CC*’) para 53, *DE v RH* [2015] ZACC 18, 2015 (5) SA 83 (CC), 2015 (9) BCLR 1003 (CC) (‘*DE v RH*’) para 18; and *Oppelt v Head: Department of Health Provincial Administration, Western Cape* [2015] ZACC 33, 2016 (1) SA 325 (CC), 2015 (12) BCLR 1471 (CC) (‘*Oppelt CC*’) para 51.

<sup>8</sup> See eg the factual construction in *Loureiro CC* (note 7 above) discussed in more detail in Chapter 2 below.

<sup>9</sup> See eg the factual constructions in *Fetal Assessment Centre CC* (note 7 above) and *Oppelt CC* (note 7 above) discussed in more detail in Chapter 2 below.

liability.<sup>10</sup> (3) *Fault* can take on the form of either intent or negligence and must be satisfied in all cases except in matters where strict liability is imposed on an alleged wrongdoer.<sup>11</sup> However, in order for a person to act with fault he or she must have the capacity to act culpably. Only if a person has the capacity to act culpably can one enquire whether he or she acted with intent or negligence.<sup>12</sup> Intention involves the direction of will to do harm coupled with knowledge of wrongfulness.<sup>13</sup> Intention is traditionally only required for the causing of non-patrimonial harm (called the *animus iniuriandi*). For all other cases, negligence will suffice. In the leading case of *Kruger v Coetzee* the Appellate Division tested negligence by asking whether a reasonable person in the position of the alleged wrongdoer would have reasonably foreseen the possibility of harm and, if that is the case, whether the reasonable person would have taken reasonable measures to prevent the harm and, if so, the alleged wrongdoer failed to take those preventative steps.<sup>14</sup> If these questions are answered in the affirmative, negligence has been established. (4) *Causation* comprises of two legs: Factual causation serves to determine whether the harm would have ensued if the alleged wrongdoer refrained from the complained of commission or omission. If the harm would not have ensued but for the alleged wrongdoer's conduct, that conduct factually caused the harm. Additionally, the conduct must be the legal cause of the harm, which is determined with reference to various flexible policy considerations that have developed through the cases.<sup>15</sup> (5) *Damage* (variably also called 'harm' or 'loss') is either patrimonial or non-patrimonial in nature. Patrimonial damage is the diminution of patrimonial interests 'measurable

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<sup>10</sup> See eg the factual construction in *Country Cloud CC* (note 7 above) discussed in more detail in Chapters 2 & 5 below.

<sup>11</sup> Strict liability or 'no-fault liability' features most famously under the doctrine of vicarious liability. In this regard see the prolific case of *K v Minister of Safety and Security* [2005] ZACC 8, 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC) (*K v Minister CC*) discussed in more detail in Chapter 4 below.

<sup>12</sup> On delictual capacity see Loubser & Midgley (note 3 above) at 104; and Neethling & Potgieter (note 3 above) at 131ff. Factors excluding capacity include youthfulness, mental illness, and arguably intoxication and provocation.

<sup>13</sup> See Loubser & Midgley (note 3 above) at 109ff; and Neethling & Potgieter (note 3 above) at 132ff.

<sup>14</sup> *Kruger v Coetzee* 1966 (2) SA 428 (A) (*Kruger v Coetzee*) 430E-G. A brief note on the structure of South African courts: In the past, Magistrates Courts were the lowest courts, followed by various divisions of the Supreme Court which also had the Appellate Division as the highest court in South Africa. Today, the old Magistrates Courts are divided into District and Regional Courts, with the various High Court divisions replacing the Supreme Court. The Supreme Court of Appeal has replaced the Appellate Division and the Constitutional Court is the highest court in all legal matters even though its jurisdiction was originally limited to constitutional disputes (see section 167 of the Constitution in this regard).

<sup>15</sup> The Constitutional Court in *Lee v Minister of Correctional Services* [2012] ZACC 30, 2013 (2) SA 144 (CC), 2013 (2) BCLR 129 (CC), 2013 (1) SACR 213 (CC) affirmed these principles of factual and legal causations.

in monetary terms' while non-patrimonial damage is suffered when a personality interest is disturbed.<sup>16</sup> The prime remedy that victims of delicts rely on is a monetary claim for damages that can have the purpose of compensating the victim for patrimonial damage or provide satisfaction for non-patrimonial harm. Even though other remedies do notionally exist a perusal of the law reports will demonstrate they are infrequently relied on.<sup>17</sup>

From the above elementological exposition it should be apparent that there is not a closed list of specific delicts (as one might find in the Anglo-American system of torts) but that South Africa follows a generalising approach whereby the five general elements must be met for any delictual claim to succeed.<sup>18</sup> This notion of the law of delict is derived from what is known as the South African common law.<sup>19</sup> 'Common law' in this context – not to be confused with the English common law – is, in the narrow sense, the Roman-Dutch law brought to our shores by the Dutch colonists, as complimented by the minor legal reforms brought about by the British colonists from 1806 onwards.<sup>20</sup> For this reason the South African legal system has been described as belonging to the 'mixed legal family' because it has a combined civil law (Roman) and English law basis.<sup>21</sup>

The Roman-Dutch rules have undergone a number of judicial alterations or developments over the years and because South Africa follows a system of precedent, those changes have stuck and the precedents that have applied or developed the common law may be regarded as the most accessible source of common law.<sup>22</sup> In addition to the common law and judicial precedent, the other binding sources of South African law include the supreme Constitution,<sup>23</sup> legislation,<sup>24</sup> custom,<sup>25</sup> and customary (or indigenous) law.<sup>26</sup> Foreign law and

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<sup>16</sup> See Loubser & Midgley (note 3 above) at 49ff; and Neethling & Potgieter (note 3 above) at 224ff.

<sup>17</sup> For an overview of the various remedies see Neethling & Potgieter (note 3 above) at 267ff; and Loubser & Midgley (note 3 above) at 399ff.

<sup>18</sup> See Loubser & Midgley (note 3 above) at 15ff; and Neethling & Potgieter (note 3 above) at 4ff.

<sup>19</sup> The five elements have been extracted and developed from the ancient Roman *actio legis Aquiliae* and *actio iniuriarum* as well as the Roman-Dutch action for pain and suffering. See in this regard Neethling & Potgieter (note 3 above) at 8ff; and Loubser & Midgley (note 3 above) at 13ff.

<sup>20</sup> See eg Van Niekerk (note 4 above) at 21 and the sources cited there.

<sup>21</sup> See eg Thomas, Van der Merwe & Stoop (note 4 above) at 7

<sup>22</sup> This is what first-year law students are taught in South Africa today. See eg T Humby, L Kotzé & A du Plessis *Law and Legal Skills in South Africa* (2012) 144.

<sup>23</sup> Section 2 of the Constitution declares itself to be 'the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'.

modern scholarly writings on the law may be consulted by courts in a merely persuasive capacity.<sup>27</sup> Thus, our legal system and, private law in particular, is largely uncodified.

The 1993 and 1996 Constitutions brought about a non-racial democracy in South Africa for the first time. As a recent report by the South African Institute for Advanced Constitutional Law reminds us, the principal aims of the constitutional project included or include (a) the formation of a peace treaty in the face of imminent threat of civil war that the country faced in the 1980s and early 1990s; and (b) the transformation of South African politics and law relating to accountability, democracy, unity and the achievement of social justice.<sup>28</sup> An important objective of the Constitution as the supreme law of South Africa is thus to ensure that any laws that are inconsistent with it are struck down (in the case of legislation, common law and customary law) or developed (in the case of common law and customary law) to suit the new democratic order. For this reason and others the Constitution has been described as a ‘transformative’ one.<sup>29</sup> It is transformative because, on an ideological level, its project is located somewhere between a legal ‘reformation’ and ‘revolution’. In Klare’s words, transformative constitutionalism is:<sup>30</sup>

a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a

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<sup>24</sup> Legislation is either passed nationally by the National Assembly (that have absolute territorial application throughout South Africa as elaborated on in sections 72-82 of the Constitution) or by the National Council of Provinces (passed specifically for the provinces relating to matters like roads and abattoir regulation as provided for in section 104 of the Constitution and Schedules 4 & 5) or by Municipal Councils (relating to the administration of municipalities as provided for in section 156 of the Constitution). Interestingly, for international treaties to become law in South Africa, the treaties must be incorporated in South African national legislation, following section 231 of the Constitution.

<sup>25</sup> Custom relates to local practices that have developed into rules of law. See the *locus classicus* in this regard: *Van Breda v Jacobs* 1921 AD 330.

<sup>26</sup> Customary law comprises of the various laws of African communities that inhabited South Africa before the time of colonisation that has developed over time. Customary law is said to apply only between members of a specific cultural community. See eg C Rautenbach & JC Bekker *Introduction to Legal Pluralism in South Africa* (4<sup>th</sup> Ed, 2014).

<sup>27</sup> Humby, Kotzé & Du Plessis (note 22 above) at 142 & 146.

<sup>28</sup> D Bilchitz, D Glaser & A Konstant ‘Determining the Internal Goals of South Africa’s Constitution’ in D Bilchitz (ed) *Assessing the Performance of the South African Constitution* (2016) 35ff.

<sup>29</sup> The first scholar to coin the term ‘transformative constitutionalism’ as the South African constitutional project was K Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146.

<sup>30</sup> *Ibid* at 150.



country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.

Applied to the sources of South African law, transformative constitutionalism does not involve the abolition of every single old law *ipso iure* but it also does not allow courts to remain passive in the process of transforming South African law and by implication South African society as well. It is the role of delict 'lawyers'<sup>31</sup> in this transformative project that will be evaluated in this study.

The Constitution brought about great change in our country. And that process of change is quite normal. However, the Constitution's impact on the law of delict has not always been regarded as being normal or even desirable. It is against this backdrop that the research problem explored in this study should be understood.

## 2 THE RESEARCH PROBLEM IN BASIC TERMS

The problem identified and unpacked in this thesis is the haphazard methodology applied to the harmonisation of the Constitution of the Republic of South Africa and the law of delict. Conventionally, the Constitution is said to apply either 'directly', 'indirectly' or 'not at all' to legal problems. Direct constitutional application involves the invocation of constitutional rights to strike down laws or conduct while indirect constitutional application involves the use of constitutional values to effect the development of the common law or the interpretation of statutes and the no-application model speaks for itself.<sup>32</sup> How judges are supposed to choose between those three possibilities is unclear.

In light of a number of recent delict cases, this study aims to show that the uncertainty in this area of law, coupled with a conservative political commitment to what shall be called 'contemporary common-law purism' has resulted in judges preferring the option of 'constitutional avoidance' instead of the direct- and indirect-application models. On the other hand, I also note with concern the radically alternative approach of 'constitutional over-excitement' where judges overlook established common-law rules and instead turn to a pure

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<sup>31</sup> Throughout this study the term 'lawyers' includes attorneys, advocates, judges, legal academics and law students.

<sup>32</sup> See eg A Cockrell 'Private Law and the Bill of Rights: A Threshold Issue of Horizontality' in *Bill of Rights Compendium* (OS, 1996) 3A4; H Cheadle 'Chapter 3: Application' in H Cheadle, D Davis & N Haysom *South African Constitutional Law: The Bill of Rights* (2<sup>nd</sup> Ed, OS, 2002) 5ff; S Woolman 'Chapter 31: Application' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Ed, OS, 2006) 10ff; IM Rautenbach & EFJ Malherbe *Constitutional Law* (5<sup>th</sup> Ed, 2009) 336ff; I Currie & M de Waal *Bill of Rights Handbook* (6<sup>th</sup> Ed, 2013) 29ff; and P de Vos & W Freedman (eds) *Constitutional Law in Context* (2014) 329ff.

application of constitutional principles to delictual disputes. I argue that these competing approaches tend to valorise one source of law at the expense of an integrated reading of various sources. This leads to an uncritical acceptance of either the common law or the Constitution.

I contend that the competing problems of constitutional avoidance and over-excitement in common-law development could be addressed by turning to the transformative method of adjudicative subsidiarity that places the Constitution's commitment to human rights at the centre of common-law disputes (thus rejecting a blind veneration of the common law) while being humbly mindful of the limits of constitutionalism. The remainder of the study will evaluate judicial performance in a broader spectrum of delict cases since democratisation that further demonstrates the need for the application of adjudicative subsidiarity.

### 3 THE JURISPRUDENTIAL APPROACH

#### 3.1 Introducing the Jurisprudential Approach

In this study I combine two theoretical approaches to unpack the research problem. I regard transformative constitutionalism as a valuable discourse framework for purposes of thinking about the Constitution's possible impact on other sources and areas of law. I am simultaneously interested in thinking about the tenets of transformative constitutionalism as the practical tools for applying a critical legal approach to the South African law of delict. In this section transformative constitutionalism, critical legal studies in South Africa and the link between the two will be explained.

#### 3.2 Transformative Constitutionalism

The long-term project of transformative constitutionalism, as Klare first describes it, resounds with Mureinik's notion of the Constitution as a bridge between the authoritarian past, characterised by the public and private abuse of power, towards a 'culture of justification' whereby all uses of power must be justified in terms of the law and specifically the supreme Constitution.<sup>33</sup> However, in critical spirit, the bridge should not be thought of as one that can easily be crossed from one side to the other and that a definitive moment can be reached when we can say that the perfect democratic society has arrived, or that there is only one path towards

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<sup>33</sup> E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31, 31-32.

a society worth striving for.<sup>34</sup> As Modiri laments, in many material ways the lives of the majority of South Africans have not necessarily changed since the period of democratisation and so the bridge has certainly not been crossed. Even though the Constitution has brought about many exciting changes in South African society, politics and law, the Constitution has not been particularly successful in addressing issues of poverty, racism, sexism, homophobia and the intersections of those and other categories. For that reason Modiri argues that the idea that we find ourselves in an era called *post-apartheid* South Africa is to be approached with scepticism because many people's lived experience is that apartheid is not over (for that reason reference to post-apartheid South Africa will be replaced with 'post'-apartheid South Africa).<sup>35</sup> Be that as it may, for purposes of this study the notion of the culture of justification is especially important because it implies that lawyers (and courts in particular)<sup>36</sup> have to justify why they choose to engage the Constitution in a particular matter or not.

In my view, the detailed theory of transformative constitutionalism is best conceptualised by thinking about it as both a 'political' and 'legal-interpretative' project. Politically, Klare describes our Constitution as being 'post-liberal'. Post-liberalism involves a step away from classical liberalism that emphasises individual liberty and protection from state interference coupled with constitutionalism.<sup>37</sup> Even though the South African Constitution recognises the importance of freedom, individual rights, state non-interference and constitutionalism, the liberal elements of the Constitution are limited by the constitutional provisions that promote

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<sup>34</sup> See eg H Botha 'Metaphoric Reasoning and Transformative Constitutionalism (Part 1)' (2002) *Journal of South African Law* 612; H Botha 'Metaphoric Reasoning and Transformative Constitutionalism (Part 2)' (2003) *Journal of South African Law* 20; and AJ van der Walt 'Dancing with Codes: Protecting, Developing and Deconstructing Property Rights in a Constitutional State' (2001) 118 *South African Law Journal* 258.

<sup>35</sup> See eg J Modiri 'The Grey Line In-Between the Rainbow: (Re)thinking and (Re)talking Critical Race Theory in Post-Apartheid Legal and Social Discourse' (2011) 26 *SA Public Law* 177; J Modiri 'Towards a "(Post-) Apartheid" Critical Race Jurisprudence: "Divining our Racial Themes"' (2012) 27 *SA Public Law* 232; J Modiri 'The Colour of Law, Power and Knowledge: Introducing Critical Race Theory in (Post-) Apartheid South Africa' (2012) 28 *South African Journal on Human Rights* 405; J Modiri 'Race as/and the Trace of the Ghost: Jurisprudential Escapism, Horizontal Anxiety and the Right to be Racist in BOE Trust Limited' (2013) 16 *Potchefstroom Electronic Law Journal* 581; and J Modiri 'Race, Realism and Critique: The Politics of Race and AfriForum v Malema in the (In)equality Court' (2013) 130 *South African Law Journal* 274.

<sup>36</sup> See I Currie 'Judicious Avoidance' (1999) 15 *South African Journal on Human Rights* 138, 139ff.

<sup>37</sup> Klare (note 29 above) at 151-156.

substantive (redistributive) equality,<sup>38</sup> affirmative state duties,<sup>39</sup> the horizontal application of the Bill of Rights,<sup>40</sup> participatory governance,<sup>41</sup> multiculturalism,<sup>42</sup> and historical self-consciousness.<sup>43</sup>

It is Klare's contention that the post-liberal politics of the Constitution will be best realised if a post-liberal reading strategy of the Constitution is followed. Traditional legal-liberal interpretation may take on the form of legal positivism and/or legal formalism. Legal positivism takes on many different forms but ultimately involves a strict separation of law and morality (read: politics) with the liberal motivation that the legislature should be shown respect with strong judicial deference.<sup>44</sup> Legal positivism's separation of law and morality or politics is often practiced through legal formalism that approaches the law in a mathematical fashion where facts plus rules yield self-revealing conclusions ( $F + R = C$ ).<sup>45</sup> As Dugard argues, these approaches to legal problems played a key role in the upholding of the apartheid legal regime in South Africa because its unjust laws simply continued to exist without any real testing right being conferred or exercised by the judiciary.<sup>46</sup> As admirable as the tradition of legal formalism may appear to be, to our knowledge, no country in the world has appointed computers as judges. The movement of American legal realism once inspired Dugard to criticise legal liberalism in apartheid South Africa from the perspective that all judges hold certain 'inarticulate premises' that unavoidably inform their judgement.<sup>47</sup> Inarticulate premises are factors relating to a judge's 'subconscious preferences and prejudices' that arise from the sociological and psychological conditions of the judge. Building onto the realist movement's critique of formalism, critical scholars, like Klare, have maintained that the law (the Constitution in particular) is filled with ambiguous phrases and gaps. Following Kennedy,<sup>48</sup> Klare notes that post-liberal adjudication involves facing a tension

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<sup>38</sup> See section 9 of the Constitution read with Chapter 7 below.

<sup>39</sup> See section 7 of the Constitution read with Chapter 3 below.

<sup>40</sup> See section 8 of the Constitution read with Chapters 6, 7 and 8 below.

<sup>41</sup> See section 234 of the Constitution.

<sup>42</sup> See sections 6, 15 and 18 of the Constitution.

<sup>43</sup> See the Preamble of the Constitution that makes various references to past injustices and the need to address them as well as Chapter 5 below.

<sup>44</sup> See eg J Dugard 'Judicial Process, Positivism and Civil Liberty' (1971) 88 *South African Law Journal* 181, 183.

<sup>45</sup> Klare (note 29 above) at 169.

<sup>46</sup> Dugard (note 44 above) at 187ff.

<sup>47</sup> Ibid.

<sup>48</sup> D Kennedy 'Freedom and Constraint in Adjudication: A Critical Phenomenology' (1986) 36 *Journal of Legal Education* 518.

between ‘freedom and constraint’.<sup>49</sup> On the one hand judges are given considerable freedom in deciding how to interpret words and phrases in legal texts while on the other hand they are unavoidably constrained by the actual text. Thus, even though legal texts may be open to interpretation, they cannot mean whatever we want them to. In order to adjudicate any problem, a judge’s discretion in light of the tension between freedom and constraint would indeed be informed by factors extrinsic to the black-letter law. Those factors may be sociological or psychological as the realists propose, or they could even relate to a judge’s politics (‘politics’ in this context should be understood to mean ideology or some type of substantive commitment to what the law should be and do).<sup>50</sup> A post-liberal strategy to legal interpretation, which would inform transformative adjudication, thus recognises three things.

Firstly, it acknowledges that the formalist method of legal analysis forms part of our ‘legal culture’ (in other words the practices that lawyers regard as normal and inescapable)<sup>51</sup> and that it is just as political as more critical strategies to legal interpretation. Even though formalism and positivism may be regarded by many as a mathematical or scientific method for legal analysis free from politics and morality, it is informed by classical-liberal political motivations and ‘blind application’ of the law promotes the politics inherent in the laws themselves.<sup>52</sup> In other words, if a rule does not require a person to act in a given scenario to protect another from harm one might align that rule with a libertarian or laissez-faire conception of political morality. If a rule requires people to look after one another and live in caring symbiosis that rule could be said to fit a political mould closer to socialism. The politics inherent to laws themselves can also refer to the maintenance of hierarchies of power. For example, if a rule were to protect private property in ‘post’-apartheid South Africa without reference being made to redistribution of land formerly disposed by conquest and apartheid, that rule would maintain the power imbalance between wealthy white and poor black people. If a judge simply applies that rule, it has material political implications. What Klare wishes to point out to South African lawyers is that the law is inherently political and that we can no longer justify our blind acceptance of the law under the

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<sup>49</sup> Klare (note 29 above) at 149. See also in this regard AJ van der Walt ‘Tentative Urgency: Sensitivity for the Paradoxes of Stability and Change in Social Transformation Decisions of the Constitutional Court’ (2001) 16 *SA Public Law* 1; and H Botha ‘Freedom and Constraint in Constitutional Adjudication’ (2004) 20 *South African Journal on Human Rights* 249.

<sup>50</sup> Klare (note 29 above) at 157-158.

<sup>51</sup> Ibid at 166ff. See JC Froneman ‘Legal Reasoning and Legal Culture: Our “Vision” of Law’ (2005) 16 *Stellenbosch Law Review* 3; and Van der Walt (note 1 above).

<sup>52</sup> Ibid at 149.

guise of political neutrality. For purposes of this study the acknowledgement of the political nature of law and legal interpretation in a transformative democracy is important because there seems to be a misconception in the minds of many South African lawyers that constitutional law and human rights are politically charged versions of law while the common law is politically neutral and that 'pure' common-law adjudication is therefore desirable. Additionally, legal formalism is based on the false premise that there is only one answer to every legal problem. As Klare argues, many lawyers are familiar with the experience of realising that there are often different ways of getting to the same answer or that there are different ways of getting to different answers.<sup>53</sup> Hopefully this study will show, in some way, why the critique of formalism is indeed valuable.

Secondly, post-liberal transformative adjudication recognises that judges do make law in the process of interpretation. Michelman, commenting on the South African Constitution in its early years, notes that the ambiguities and gaps in the Constitution tacitly shows that constitutional drafters intended for judges to create law through the process of interpretation.<sup>54</sup> At first glance this may appear to fly in the face of a constitutional democracy, popular sovereignty, the rule of law and the separation of powers doctrine. However, if the legislature (that drafted the Constitution) tacitly delegated some of its legislative powers to the judiciary then judge-made law is democratic because it reflects the will of the people to vest judges with the authority to make law.<sup>55</sup> In this study the law-making function of judges is placed under the spotlight as it relates to the constitutional imperative for the development of the common law. Section 173 of the Constitution clearly confers the power on judges to develop the common law. Section 8 makes it clear that it may be necessary to develop the common law in order for constitutional rights to be given effect to and section 39(2) provides that judges must promote the spirit, purport and objects of the Bill of Rights when developing the common law. Thus, the constitutional drafters clearly intended for the common law to be developed along constitutional lines and therefore judge-made law in this area is not to be pushed aside as undemocratic law.

Thirdly, as already alluded to above, post-liberal transformative adjudication is attentive to the trap that many South African lawyers fall into with regard to our legal culture. Our legal culture not only tends to support formalism and positivism but it also shows blind veneration for

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<sup>53</sup> Klare (note 29 above) at 160.

<sup>54</sup> F Michelman 'Constitutional Authorship, "Solomonic Solutions", and the Unoriginalist Mode of Constitutional Interpretation' (1998) *Acta Juridica* 208, 220ff.

<sup>55</sup> *Ibid.*

the South African common law. The common law is regarded by many as being both magnificent and necessary.<sup>56</sup> With that philosophy it would seem that there is an uncritical acceptance of the common law as it stands with little to no space for reflection on the social impact of the common law in a transforming democracy. In this regard Davis and Klare have argued that the constitutional provisions that require the development of the common law impose an obligation on judges to audit the common law continuously, in all judgments made with reference to the common law.<sup>57</sup> In this study, the potential of the removal of the veil of the common law's objectivity and political neutrality through the spectacles of transformative constitutionalism will be explored.

### 3.3 Critical Legal Studies in South Africa

Even though a great deal has been written about critical legal studies abroad,<sup>58</sup> this discussion is limited to the way in which critical legal studies has been received in South African jurisprudence. More specifically I am interested in how the movement has been understood by two South African legal philosophers who have dedicated much of their scholarship to the development of a critical 'post'-apartheid jurisprudence, namely Van Marle and Le Roux.<sup>59</sup> Critical legal studies is, broadly understood, a movement of legal research and teaching founded in the 1970s and is primarily based on the twin tenets of a rejection of legal-liberal thought and an enchantment with radical politics and egalitarianism.<sup>60</sup>

Van Marle and Le Roux conceptualise the critical legal studies movement in terms of two main themes. One practice of 'crits' (as critical legal scholars are often referred to) is to deconstruct or 'trash' the law. This they call the 'internal critique'.<sup>61</sup> Another practice, identified by Van Marle and Le Roux as the 'external critique', revolves around the political commitments

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<sup>56</sup> I have previously reflected on my undergraduate experience at one of the foremost South African law schools in E Zitzke 'Stop the Illusory Nonsense! Teaching Transformative Delict' (2014) 46 *Acta Academica* 52.

<sup>57</sup> D Davis & K Klare 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 *South African Journal on Human Rights* 403, 426.

<sup>58</sup> See eg the overviews of the movement provided in A Hunt & P Fitzpatrick *Critical Legal Studies* (1987); M Kelman *A Guide to Critical Legal Studies* (1987); and R Bauman *Critical Legal Studies: A Guide to the Literature* (1996).

<sup>59</sup> K van Marle & W le Roux 'Critical Legal Studies' in C Roederer & D Moellendorf *Jurisprudence* (2006).

<sup>60</sup> *Ibid* at 246.

<sup>61</sup> *Ibid* at 251ff.

of crits and how those commitments might influence the way in which they look at the law and try to ‘reconstruct’ it after its demolition.<sup>62</sup>

The internal critique exposes the political nature of law in at least three ways. The first law-as-politics argument presented by Van Marle and Le Roux is based on the work of Kennedy.<sup>63</sup> Kennedy famously argued in the American context that an intriguing relationship exists between the form and substance of ‘private’ law. On the form axis one must differentiate between ‘rules’ and ‘standards’. Rules are thought to be clear and precise formulations of the law while standards are less rigid formulations that are more open to interpretation.<sup>64</sup> On the substantive axis a differentiation is made between two main political commitments. There is ‘individualism’ that favours the protection of the individual’s interests and there is ‘altruism’ that favours the interests of the community and has an element of self-sacrificial ring to it.<sup>65</sup> For Kennedy rules very often tend to favour individualism while standards tend to favour altruism.<sup>66</sup> The impression is also created that ‘rights’ are equally individualistic as ‘rules’ and therefore that the transformative potential of rights should be treated with scepticism.<sup>67</sup> Exposing the tension between the political commitments and so also the forms of law renders law and adjudication, to some extent, illegitimate. The tension is popularly referred to as the ‘fundamental contradiction’ or as ‘radical indeterminacy’ because it is this tension that makes law so unpredictable and uncertain, once again showing the impossible goal of perfect legal certainty promoted by legal formalism.<sup>68</sup> However, this is not the only version of political inconsistencies in the law.

The second law-as-politics theory, I have previously argued,<sup>69</sup> features in Unger’s take on the political tension in law that can be read as complimentary to the tension identified by Kennedy.<sup>70</sup> For Unger rules tend to favour the individual while exceptions to the rules often correlate with a socialist vision for politics.<sup>71</sup> What both scholars emphasise is an inherent

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<sup>62</sup> Ibid at 259ff.

<sup>63</sup> D Kennedy ‘Form and Substance in Private Law Adjudication’ (1976) 89 *Harvard Law Review* 1685.

<sup>64</sup> Ibid at 1687ff.

<sup>65</sup> Ibid at 1713ff.

<sup>66</sup> Ibid at 1751ff.

<sup>67</sup> Van Marle & Le Roux (note 59 above) at 256ff.

<sup>68</sup> Ibid at 253ff.

<sup>69</sup> Zitzke (note 56 above).

<sup>70</sup> RM Unger ‘The Critical Legal Studies Movement’ (1983) 96 *Harvard Law Review* 561. Also published as a book, RM Unger *The Critical Legal Studies Movement* (1983). References that follow refer to the original article.

<sup>71</sup> Ibid at 567ff.



contradiction of the political foundations of the law – one that cannot be tamed or mastered, which results in lawyers being faced with a political dilemma in all legal disputes. For example, in the context of property law, if a judge must decide whether a particular matter should favour the section 25 ‘right to property’ or the exception to the right being ‘expropriation in the interest of justice’, the judge would be making a political decision by favouring one of the two options.

The third law-as-politics thesis is based on the Marxist notion of ‘false consciousness’ whereby various forms of hierarchy are regarded as being normal and acceptable, thereby entrenching existing inequalities instead of dismantling them.<sup>72</sup> For example, in the context of the law of delict this may relate to the hierarchy created by the rules relating to defamation whereby people who are regarded as being ‘more important’ in society than others will succeed with larger claims for non-patrimonial damages. Hierarchies can however also be created between sources of law. I have already alluded to the fact that many South African lawyers tend to valorise the common law above all else, even above the supreme Constitution.<sup>73</sup> It is not difficult to see why placing the common law above the Constitution has certain political implications. The common law is effectively the Afrikaner version customary law that is imposed on the entire nation. The Constitution and its Bill of Rights are primarily regarded as law inspired by the historic Freedom Charter of the African National Congress (ANC) which is a political party predominantly supported by black South Africans. Exposing the various types of hierarchies in the law thus also creates the space for political legal analysis.

The external critique of law is not necessarily followed by all members of the critical legal studies movement. Many crits regard the internal critique or trashing as a perfectly legitimate activity on its own. However, factions in critical scholarship have recognised that despite the law’s radical indeterminacy, the law nevertheless has significant consequences for people and sometimes the most vulnerable people in society must turn to the law for help.<sup>74</sup> I teach legal philosophy students that crits who focus on deconstruction without considering the possibility of reconstruction are really telling (for example) the victims of patriarchal violence, such as Alix

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<sup>72</sup> Van Marle & Le Roux (note 59 above) at 259.

<sup>73</sup> See eg D Moseneke ‘Transformative Constitutionalism: Its Implications for the Law of Contract’ (2009) 20 *Stellenbosch Law Review* 3, 13; J van Doren ‘Critical Legal Studies and South Africa’ (1989) 106 *South African Law Journal* 648, 658; and A van Blerk ‘Critical Legal Studies in South Africa’ (1996) 113 *South African Law Journal* 86, 103.

<sup>74</sup> Van Marle & Le Roux (note 59 above) at 259.

Carmichele,<sup>75</sup> to go read some radical feminist books by Andrea Dworkin or Catherine MacKinnon until the pain subsides because the law will never help them. However, as Alix Carmichele explains in an interview, her delictual claim against the state for its failure to protect her from a dangerous man with a track record of violent behaviour was about making a clear and unequivocal political statement, through the use of law, against the violence perpetrated against women on a daily basis in our country.<sup>76</sup> Unger refers to the strategic use of law to promote politically leftist aims as ‘deviationist doctrine’.<sup>77</sup> Thus, deviationist doctrine involves recognition of the political nature of law and the strategic use of the altruistic side of law in a way that might help those that require the law’s protection.<sup>78</sup> Alix Carmichele might have been successful in doing this but that does not mean that the law will always be able to effectively help the needy. South African lawyers that aim to reach out to vulnerable people in society by means of the law have therefore opted to take a so-called ‘double-handed approach’ where one hand is placed on the law books and we try to make the best of the doctrine that we have, while the other hand reaches out into the ether being mindful of law’s limits and that the law will not always help those in need.<sup>79</sup> In this study I shall think about the relevant provisions in the Constitution as deviationist doctrine to simultaneously disrupt common-law veneration and to push the South African law of delict in a more altruistic direction, where appropriate, while being attentive to the limits of the Constitution, the common law and law in general. As Du Bois explains, the Constitution holds the potential to ‘humanise’ private law by providing us with a non-libertarian account of the ‘common good’.<sup>80</sup>

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<sup>75</sup> See *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22, 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) (*Carmichele CC*) as discussed in Chapter 3 below.

<sup>76</sup> See the video of the interview available at <http://www.iamwomanseries.com/our-stories/episodes-19-24/alix-carmichele/>.

<sup>77</sup> Unger (note 70 above) at 576.

<sup>78</sup> See eg H Collins ‘Roberto Unger and the Critical Legal Studies Movement’ (1987) 14 *Journal of Law and Society* 387,404ff; D Williams ‘Law, Chess and Ideals’ (1989) 23 *University of San Francisco Law Review* 399,402ff; J Snowden ‘The Justification Story: Law as Integrity and Deviationist Doctrine’ (1991) 9 *Journal of Law & Religion* 49, 54ff; and D Jabbari ‘From Criticism to Construction in Modern Critical Legal Theory’ (1992) 12 *Oxford Journal of Legal Studies* 507,53ff.

<sup>79</sup> H Botha ‘Equality, Plurality and Structural Power’ (2009) 25 *South African Journal on Human Rights* 1, 37.

<sup>80</sup> F du Bois ‘Private Law in the Age of Rights’ in E Reid & DP Visser (eds) *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (2014) 36.

### 3.4 Transformative Constitutionalism as Critical Legal Scholarship in South Africa

Van Marle has argued that transformative constitutionalism shows three noteworthy points of correlation with critical legal studies.<sup>81</sup> Transformative constitutionalism's 'tension between freedom and constraint' links with the radical indeterminacy identified by the crits;<sup>82</sup> Klare's critique of South African legal culture shows similarity with the critical concern regarding 'false consciousness';<sup>83</sup> and Klare's identification of the Constitution as a post-liberal document concurs with the crits' commitment to egalitarianism and the denunciation of classical liberal models of democracy.<sup>84</sup> For these three reasons I aim to employ transformative constitutionalism as critique, while being mindful of its limits.

Former Chief Justice Pius Langa has indicated that although transformative constitutionalism is a suitable theory for purposes of describing our Constitution, the theory's realisation is limited by at least five practical barriers.<sup>85</sup> Firstly, a massive gap still exists between the rich and the poor in South Africa with the consequence that there is unequal access to justice with the rich having easier access to legal representation.<sup>86</sup> Secondly, legal education in South Africa still fails to inspire many students with the constitutional dream because of an uncritical acceptance of the common law and the rejection of human rights as non-corporate (and therefore unimportant) law.<sup>87</sup> Thirdly, legal practice in South Africa is largely uncommitted to constitutional transformation and therefore a business-as-usual approach to the law is followed with little to no consideration being given to the Constitution in legal analysis.<sup>88</sup> Fourthly, regardless of how hard courts and the other branches of government try to transform the law, true social transformation (in the sense of attitudinal change and reconciliation) cannot be

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<sup>81</sup> K van Marle 'Transformative Constitutionalism as/and Critique' (2009) 20 *Stellenbosch Law Review* 286. See also U Baxi 'Preliminary Notes on 'Transformative Constitutionalism' in O Vieira, U Baxi & F Viljoen *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (2013); and K van Marle & S Motha (eds) *Genres of Critique: Law Aesthetics and Liminality* (2013).

<sup>82</sup> Van Marle (note 81 above) at 289.

<sup>83</sup> Ibid at 290.

<sup>84</sup> Ibid at 291. On the egalitarian aims of transformative constitutionalism see M Pieterse 'What Do We Mean When We Talk about Transformative Constitutionalism?' (2005) 20 *SA Public Law* 155, 159ff; and D Moseneke 'The Fourth Bram Fischer Memorial Lecture' (2002) 18 *South African Journal on Human Rights* 309, 313ff.

<sup>85</sup> P Langa 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* 351.

<sup>86</sup> Ibid at 355.

<sup>87</sup> Ibid at 355-356.

<sup>88</sup> Ibid at 356-357.

effected by the law alone.<sup>89</sup> Fifthly, one of the biggest barriers to social transformation relates to the failure on the part of the beneficiaries of apartheid to create a climate suitable for reconciliation. This does not necessarily mean that apartheid's beneficiaries must be punished severely for their privilege but that the beneficiaries must at least play an active role in the process of reconciliation by making contributions towards building a South Africa united in our diversity.<sup>90</sup>

A sixth prominent barrier that stands in the way of realising the goals of transformative constitutionalism is the theory's inability to properly address the issue of poverty and the realisation of socio-economic rights. Sibanda argues that the right to property as enshrined in section 25 of the Constitution does not provide for a mechanism radical enough for purposes of redistributing land to the dispossessed majority of South Africans. Furthermore, Sibanda argues that the constitutional socio-economic rights are made conditional to the availability of resources of government and thus the realisation of the Constitution's transformative aims for our society is impeded.<sup>91</sup>

The seventh barrier identified for purposes of this thesis is the notion that the Constitution itself is a project of Western, imperial re-colonisation. Ramose argues that the Constitution's supremacy clause results in a rejection of the sovereignty of the South African people and imposes a Western standard on their conduct and laws. Moreover, to the extent that the Constitution fails to restore the territorial sovereignty of the original kingdoms found in South Africa and to the extent that it has failed to disrupt apartheid spatiality (because living

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<sup>89</sup> Ibid at 358. This obstacle to transformation is taken further by A Kok 'Is Law Able to Transform Society?' (2010) 127 *South African Law Journal* 59.

<sup>90</sup> Langa (note 73 above) at 359.

<sup>91</sup> S Sibanda 'Not Purpose-Made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty' (2011) 22 *Stellenbosch Law Review* 482, 488ff. F Michelman 'Liberal Constitutionalism, Property Rights, and the Assault on Poverty' (2011) 22 *Stellenbosch Law Review* 706 disagrees with Sibanda's contention that the Constitution is 'too liberal' to deal with poverty. See also Sibanda's reply to Michelman in S Sibanda 'Not Quite a Rejoinder: Some Thoughts and Reflections on Michelman's "Liberal Constitutionalism, Property Rights and the Assault on Poverty"' (2013) 24 *Stellenbosch Law Review* 329.

spaces are still divided between ‘mostly white’, ‘mostly black’, ‘mostly Indian’ and ‘mostly coloured’) it is a fundamentally flawed project.<sup>92</sup>

These seven practical and theoretical shortcomings of the theory of transformative constitutionalism do not constitute a closed list. By using this theoretical approach I therefore do not propose that it is a perfect theory or that it holds all the answers to South Africa’s problems. However, using this theory will probably be the most critical approach opened up for purposes of the South African law of delict to date. Furthermore, as Langa suggests, mindfulness of the obstacles posed to transformative constitutionalism is important because it reminds us to strive continuously towards overcoming those obstacles and to extend our legal imagination to new and unexplored ideas for transforming South African society and law.<sup>93</sup>

## 4 A NOTE ON SOURCES AND STYLE

### 4.1 On Sources

Whenever the basic principles of a specific part of the law of delict is explained, reference will often be made to the two latest books on the South African law of delict which are Neethling and Potgieter’s *Neethling-Potgieter-Visser Law of Delict*<sup>94</sup> and Loubser and Midgley’s *Law of Delict in South Africa*.<sup>95</sup> I take note of the incredible contribution to the field made by older sources on the law of delict but those have largely been taken up or responded to in the two most recent works.<sup>96</sup>

Basic principles of South African constitutional law will usually be discussed with reference to Woolman and Bishop’s *Constitutional Law of South Africa*<sup>97</sup> because the volume is available online as well as in a loose-leaf edition and some of its chapters have been updated as

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<sup>92</sup> See eg MB Ramose ‘An African Perspective on Justice and Race’ (2001) *polylog* (available at <http://them.polylog.org/3/frm-en.htm>); MB Ramose *African Philosophy through Ubuntu* (2002); MB Ramose ‘In Memoriam: Sovereignty and the ‘New’ South Africa’ (2007) 16 *Griffith Law Review* 310; MB Ramose ‘Reconciliation and Reconciliation in South Africa’ (2012) 5 *Journal on African Philosophy* 20; and MB Ramose ‘Ubuntu: Affirming a Right and Seeking Remedies in South Africa’ in L Praeg & S Magadla *Ubuntu: Curating the Archive* (2014).

<sup>93</sup> Langa (note 85 above) at 360.

<sup>94</sup> Neethling & Potgieter (note 3 above).

<sup>95</sup> Loubser & Midgley (note 3 above).

<sup>96</sup> The older sources on the South African law of delict include: RG McKerron *The Law of Delict* (7<sup>th</sup> Ed, 1971); PQR Boberg *The Law of Delict* (1984); NJ van der Merwe & PJJ Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (6<sup>th</sup> Ed, 1989); J Burchell *Principles of Delict* (1993); and JC van der Walt & JR Midgley *Principles of Delict* (3<sup>rd</sup> Ed, 2005).

<sup>97</sup> S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Ed, OS, 2006).

recently as 2016. It will therefore be the main secondary source on constitutional law. Reference will also variously be made to *The Bill of Rights Compendium*,<sup>98</sup> *South African Constitutional Law: The Bill of Rights*,<sup>99</sup> *The Bill of Rights Handbook*<sup>100</sup> and *Constitutional Law in Context*<sup>101</sup> that I regard as being the prominent sources in this area of law. It should be noted that reference to the Constitution of the Republic of South Africa, 1996 will hereafter be ‘the Constitution’. I specifically avoid the problematic terms ‘Interim Constitution’ and ‘Final Constitution’ because no Constitution is ever truly ‘final’ and thus all constitutions are ‘interim’ or ‘temporary’. If the prevention of ambiguity requires it, reference will be made to the ‘1993 Constitution’ or the ‘1996 Constitution’ respectively.

The nature of this study involves an in-depth analysis of the South African legal position and for that reason a comparative study will not be explored in this thesis except for situations in which South African case law discusses foreign law. Thorough and interesting comparative studies on the interaction between human rights and delict or torts have however been conducted in the past.<sup>102</sup>

## 4.2 On Style

For purposes of style and referencing, I rely on a modified version of the style guidelines for the *Constitutional Court Review* journal. Complete journal titles are provided in each journal reference with the purpose of making the work accessible to readers who might be unfamiliar with South African sources. Multiple-barrel citations are given for case law where more than one citation is available. The capitalised ‘Court’ refers to the Constitutional Court while ‘court’ refers to any other court or the courts in general.<sup>103</sup>

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<sup>98</sup> *Bill of Rights Compendium* (OS, 1996).

<sup>99</sup> H Cheadle, D Davis & N Haysom *South African Constitutional Law: The Bill of Rights* (2<sup>nd</sup> Ed, OS, 2002)

<sup>100</sup> Currie & De Waal (note 32 above).

<sup>101</sup> De Vos & Freedman (note 32 above).

<sup>102</sup> See eg A Clapham *Human Rights in the Private Sphere* (1993); J Wright *Tort Law & Human Rights* (2001); D Friedmann & D Barak-Erez *Human Rights in Private Law* (2002); and D Oliver & J Fedtke (eds) *Human Rights and the Private Sphere* (2007).

<sup>103</sup> More information on the *Constitutional Court Review* journal and previous volumes thereof are available at <http://www.constitutionalcourtreview.co.za/>.

## 5 OUTLINE OF CHAPTERS

In Chapter 2 the research problem will be unpacked in more detail together with the new proposed methodology for effecting transformation in the South African law of delict. It therefore seeks to discern what the implications of various constitutional provisions are for the transformation of the common law of delict. The remaining chapters will consider the progress made by our courts in applying the Constitution to the law of delict.

Part Two of the thesis will consider those cases where the state is the alleged wrongdoer. It comprises of: Chapter 3 that will discuss the seminal Constitutional Court case of *Carmichele CC*<sup>104</sup> and the broader framework that it creates for purposes of constitutional interaction with the common law; Chapter 4 that considers the doctrine of vicarious liability as the mechanism for holding the state accountable for the deeds of its employees in light of the prolific case of *K v Minister CC*;<sup>105</sup> Chapter 5 that looks at the role that constitutional values have played and should play in the determination of the state's delictual liability with specific reference to the values of historical self-consciousness and state accountability.

Part Three of the thesis will turn to those cases where a private party is the alleged wrongdoer. Chapter 6 provides an analysis of the case of *Khumalo v Holomisa*<sup>106</sup> in relation to a number of recent decisions. That discussion will aim to evaluate the constitutional framework for holding private parties delictually liable. Chapter 7 investigates the role that the constitutional right to equality has played in private delictual disputes and Chapter 8 examines different ways of conceptualising the constitutional right to dignity and its impact on the law of delict to date. Part Four simply comprises of Chapter 9 which will provide some concluding reflections on the study.

Reference to case law, legislation, journal articles and international instruments reflect the law as it stood in May 2016.

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<sup>104</sup> *Carmichele CC* (note 75 above).

<sup>105</sup> *K v Minister CC* (note 11 above).

<sup>106</sup> *Khumalo v Holomisa* [2002] ZACC 12, 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC).

# Judicial Ad Hocery and a Call for Adjudicative Subsidiarity in the South African Law of Delict\*

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## 1 INTRODUCTION

In this chapter the phenomenon of judicial ad hocery with regard to the interaction between the law of delict and the Constitution will be problematised. In § 2 it will be explained why it can be said that judicial ad hocery is a prominent phenomenon in the context of constitutional application to common-law disputes. In that discussion it will be shown that the current and prominent constitutional-application models in South Africa take on the form of either ‘direct application’, ‘indirect application’ or ‘no application’. It will be shown that lawyers are provided with little to no guidance on how to choose between the three competing models. It will be argued that the lack of guidance provided to lawyers often results in them aligning themselves with one of two schools of thought that I identify for purposes of critique: They either adhere to the approach of ‘constitutional avoidance’ or to ‘constitutional over-excitement’.

The problem of constitutional avoidance is explained and illustrated in § 3 and can be subdivided into three categories invented and developed in this thesis. Avoidance is either ‘constitutionally wanting’, ‘constitutionally heedless’ or, in exceptional cases, ‘anti-constitutional’. To be clear from the start, a constitutionally wanting approach to the common law features when reference is made to the Constitution in the process of reasoning through a delictual problem but the substantive impact of the Constitution on the case is either not acknowledged or is not observed at all. Thus, the Constitution is used to ‘window dress’ the delictual problem but the Constitution does no more than that. Constitutional heedlessness occurs when lawyers

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\* This chapter reflects the contents of three articles that I published while conceptualising this thesis: See E Zitzke ‘RH v DE 2014 (6) SA 436 (SCA): A Case of Anti-Constitutionalism in Common-Law Development?’ (2015) 48 *De Jure* 467; E Zitzke ‘Realist Evolutionary Functionalism and Extra-Constitutional Grounds for Developing the Common Law of Delict: A Critical Analysis of Heroldt v Wills 2013 (2) SA 530 (GSJ)’ (2016) *Journal of Contemporary Roman-Dutch Law* 103; and a forthcoming piece that was originally presented at the seventh Constitutional Court Review conference in December 2015, E Zitzke ‘Avoiding Two Extremes: Constitutional Avoidance and Over-Excitement in the Common Law’s Development’ (2016) 7 *Constitutional Court Review* (copy on file with the author).



do not mention the Constitution in their reasoning in delictual cases at all. However, constitutional heedlessness does not involve the explicit rejection of the Constitution's potential impact on the matter at hand. Thus, the Constitution is silently side-stepped without any explanation why it has been side-stepped. Anti-constitutionalism, on the other hand, occurs when lawyers attempt to justify why the Constitution should find no application to the problem at hand, even though the Constitution notionally could play a role in that particular matter. Anti-constitutionalism therefore involves an active rejection of the Constitution's possible application. It will be argued that avoidance, in all three forms, is informed by an underlying conservative political commitment to, what I shall call, 'contemporary common-law purism' that can easily be exploited due to the uncertainty that exists in the South African law of constitutional application. Contemporary common-law purism is a paradigm that aims to cleanse and insulate the common law from human rights.

In § 4 the diametrically opposite approach of constitutional over-excitement, which occurs when relevant common-law rules are overlooked or misunderstood and lawyers aim to apply the Constitution in its pure form to delictual disputes, will be considered and problematised. Thus, with constitutional over-excitement the common-law rules and principles are relegated in favour of the mere application of the Constitution in its stead. The chapter concludes with § 5 suggesting that 'adjudicative subsidiarity' might be a useful tool for the implementation of a transformative method that does not fall into the traps of avoidance or over-excitement.

## 2 THE CURRENT AD HOC APPROACHES TO THE APPLICATION OF THE CONSTITUTION TO THE COMMON LAW OF DELICT

Consult any good South African textbook on constitutional law and you will find reference being made to two conventional models of South African constitutional application. Those are the 'direct' and 'indirect' models.<sup>1</sup> Both the direct and indirect application can occur vertically (in

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<sup>1</sup> See eg A Cockrell 'Private Law and the Bill of Rights: A Threshold Issue of Horizontality' in *Bill of Rights Compendium* (OS, 1996) 3A4; H Cheadle 'Chapter 3: Application' in H Cheadle, D Davis & N Haysom *South African Constitutional Law: The Bill of Rights* (2<sup>nd</sup> Ed, OS, 2002) 5ff; S Woolman 'Chapter 31: Application' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Ed, OS, 2006) 10ff; IM Rautenbach & EFJ Malherbe *Constitutional Law* (5<sup>th</sup> Ed, 2009) 336ff; I Currie & M de Waal *Bill of Rights Handbook* (6<sup>th</sup> Ed, 2013) 29ff; and P de Vos & W Freedman (eds) *Constitutional Law in Context* (2014) 329ff.

other words between the state and a non-state party) or horizontally (that is between non-state parties inter se).

Direct application has meant different things to different people. Under the 1993 Constitution, the Constitutional Court regarded direct application as the striking down of a common-law rule due to inconsistency with the Bill of Rights.<sup>2</sup> On Bhana's interpretation direct application in South African law has come to mean the invocation of constitutional *rights* (as opposed to constitutional *values*) in the development of the common law.<sup>3</sup> Furthermore, Bhana contends that direct application is conventionally thought of as the implication of section 8 of the 1996 Constitution that requires courts to give effect to constitutional rights through the application or development of the common law or through the application of legislation to the dispute at hand.<sup>4</sup> On the other hand, Dafel suggests that direct application could either be 'weak' (in the sense that Bhana conceives of the concept) or it could be 'strong' in the sense that in some matters claimants could place sole reliance on the Constitution (without recourse to the common law or legislation) to challenge another party's conduct.<sup>5</sup> Authors like Rautenbach,<sup>6</sup>

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<sup>2</sup> *Du Plessis and Others v De Klerk and Another* [1996] ZACC 10, 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC) ('*Du Plessis*') paras 51-53.

<sup>3</sup> D Bhana 'The Role of Judicial Method in the Relinquishing of Constitutional Rights through Contract' (2008) 24 *South African Journal on Human Rights* 300, 309; The preference for *rights* over *values* in this context is strongly supported by S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762. Cf F Michelman 'On the Uses of Interpretive "Charity": Some Notes on Application, Avoidance, Equality and Objective Unconstitutionality from the 2007 Term of the Constitutional Court of South Africa' (2008) 1 *Constitutional Court Review* 1.

<sup>4</sup> D Bhana 'The Horizontal Application of the Bill of Rights: A Reconciliation of Section 8 and 39 of the Constitution' (2013) 29 *South African Journal on Human Rights* 351, 358ff. Section 8 reads as follows: The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court – (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1). (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

<sup>5</sup> M Dafel 'The Directly Enforceable Constitution: Political Parties and the Horizontal Application of the Bill of Rights' (2015) 31 *South African Journal on Human Rights* 56, 81.

<sup>6</sup> IM Rautenbach 'The Bill of Rights Applies to Private Law and Binds Private Persons' (2000) *Journal of South African Law* 296, 301ff.

Friedman<sup>7</sup> and Davis (in his more recent work)<sup>8</sup> have argued that the starting point for matters relating to constitutional application should be section 8. What these authors are not clear about is when one should even consider the question of whether the Constitution could or should apply to a specific matter.

Indirect application under the 1993 Constitution involved the incremental development of the common law along constitutional lines.<sup>9</sup> Thus, in terms of indirect application, a court could not strike down a common-law rule but could change it in some other way if it fell short of constitutional imperatives. For Bhana indirect application has been understood to mean the infiltration of constitutional *values* (as opposed to constitutional *rights*) into the common law in light of section 39(2) of the 1996 Constitution that requires courts to promote the spirit, purport and objects of the Bill of Rights when developing the common law.<sup>10</sup> Roederer,<sup>11</sup> Davis (in the earlier years)<sup>12</sup> and most recently Davis in partnership with Klare<sup>13</sup> have argued that section 39(2) should be the starting point for determining constitutional application to common-law disputes. The argument is that common-law rules are always being developed when courts use those rules to make judicial pronouncements because the rules are always being interpreted and extended to new factual scenarios. The important common thread in these authors' writings is that the

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<sup>7</sup> N Friedman 'The South African Constitution and the Common Law: Revisiting Horizontality' (2014) 30 *South African Journal on Human Rights* 63, 66ff.

<sup>8</sup> D Davis 'Where is the Map to Guide Common Law Development?' (2014) 25 *Stellenbosch Law Review* 3, 13ff; and D Davis 'Twenty Years of Constitutional Democracy: A Preliminary Reflection' (2015/16) 60 *New York Law School Review* 40, 51ff.

<sup>9</sup> *Du Plessis* (note 2 above) at para 60.

<sup>10</sup> Bhana (note 4 above) at 359ff.

<sup>11</sup> C Roederer 'Post-Matrix Legal Reasoning: Horizontality and the Rule of Values in South African Law' (2003) 19 *South African Journal on Human Rights* 57; C Roederer 'The Transformation of South African Private Law After Ten Years of Democracy: The Role of Torts (Delict) in the Consolidation of Democracy' (2006) 37 *Columbia Human Rights Law Review* 447; C Roederer 'Working the Common Law Pure: Developing the Law of Delict (Torts) in Light of the Spirit, Purport and Objects of South Africa's Bill of Rights' (2009) 26 *Arizona Journal of International & Comparative Law* 427; and C Roederer 'Remnants of Apartheid Common Law Justice: The Primacy of the Spirit, Purport and Objects of the Bills of Rights for Developing the Common Law and Bringing Horizontal Rights to Fruition' (2013) 29 *South African Journal on Human Rights* 219.

<sup>12</sup> D Davis 'How Many Positivist Legal Philosophers Can Be Made to Dance on the Head of a Pin?' (2012) 129 *South African Law Journal* 59.

<sup>13</sup> D Davis & K Klare 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 *South African Journal on Human Rights* 403.

common law is ultimately always being developed and therefore section 39(2) should always inform all common-law disputes.

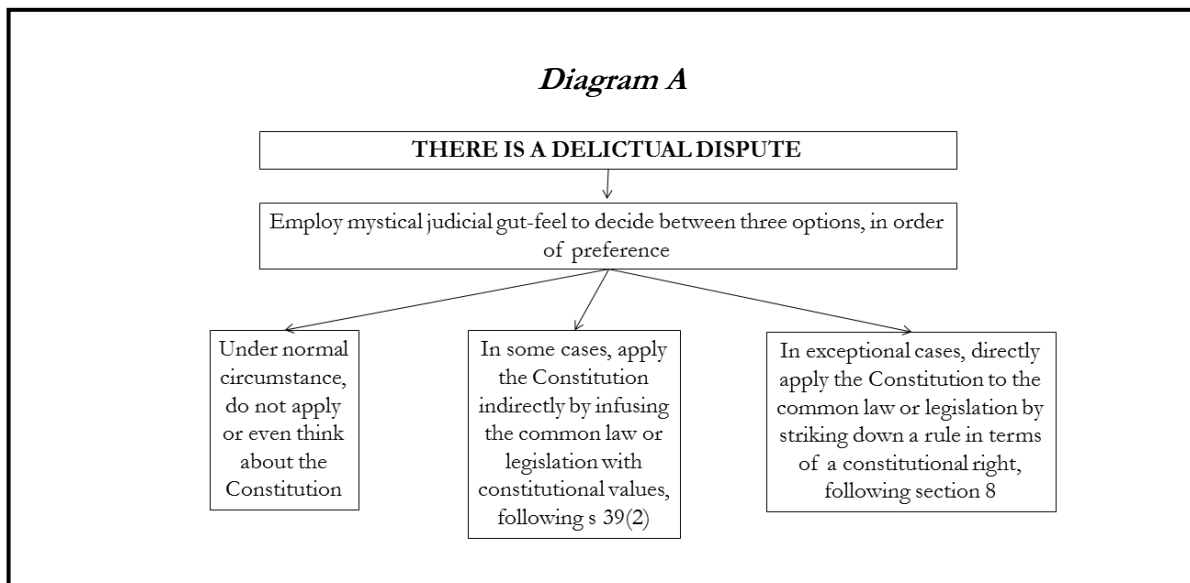
It is clear that the tension between direct and indirect horizontal application can give rise to confusion. As a second-year law student studying constitutional law and human rights I never understood the fuss about the distinction between the two models and what the practical differences are between the two. Nothing has changed in the last five years and my scepticism about the direct/indirect distinction has grown rather than faded. Confusion is added to this area of the law because of the debates on the ‘correct’ singular constitutional provision that should be relied upon to determine constitutional application in delictual disputes and the vagueness on the question of when one should consider the issue of constitutional application at all. The notion that interrelated constitutional provisions could and should be enclosed from one another in this context has likewise left many South African lawyers in deep states of mystification about the Constitution’s scope of application, specifically as it relates to the common law.

The conflict between the direct and indirect application models arguably stems from the jurisprudential tension between what can loosely be referred to as the liberal and critical approaches to law. Liberals tend to favour the promotion of rights while critics tend to favour the promotion of values. As Kennedy showed many years ago, the politics underscoring this conflict in thought is the belief that the protection of rights shows a commitment to individualism while the endorsement of standards (or, for the South African audience, values) shows a commitment to altruism.<sup>14</sup> Section 8 of the Constitution speaks about the protection of constitutional rights while section 39(2) speaks about the spirit, purport and objects of the Bill of Rights. It is not inconceivable that the cluster of ‘direct application, the protection of rights and section 8’ is in conflict with the cluster supporting ‘indirect application, the advancement of values and section 39(2)’ because of the liberal/critical dispute.

However, there is a third and often unspoken category which involves ‘no application’ that would seem to apply if neither direct nor indirect models can apply to a given issue. The no-application model therefore results in an avoidance of the Constitution and, as illustrated in the third section below, this model seems to be the preferred approach to the interplay between the Constitution and the common law. The decision-making process between direct, indirect and no constitutional application is illustrated in Diagram A that follows on the next page.

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<sup>14</sup> See eg the *locus classicus* in this regard: D Kennedy ‘Form and Substance in Private Law Adjudication’ (1976) 89 *Harvard Law Review* 1685.



At least one of the reasons why the no-application model seems to be supported by so many academics and practitioners could be the fact that it is so difficult to make sense of the constitutional-application issue. Instead of trying to make sense of the technical difficulties in deciding whether to apply the constitution directly or indirectly, many (if not most) delict scholars and practitioners prefer to opt for the business-as-usual approach where the Constitution does not apply. Alternatively, the lack of guidance given to scholars and practitioners as to when to consider the issue of constitutional application creates the space for the no-application model to flourish. As I explain in more detail in the third section below, the impression can be created that those abiding by the no-application model as a general rule uphold the school of thought of contemporary common-law purism whereby the common law is cleansed and insulated from human rights because of conservative political commitments, even though the sincere motivation behind the movement of constitutional avoidance might be a concern for legal certainty.

As it has already been noted, the problem with these three models is that lawyers are given virtually no guidance as to when each model should be utilised. The little guidance has resulted in a severe bout of judicial ad hocery in the context of the Constitution's application to the common law and, as will be shown below, this is especially true for the Constitution's influence on the law of delict. After exploring the problem of ad hocery that takes on the form of either constitutional avoidance or constitutional over-excitement, I shall suggest a reading of the Constitution that collapses the direct/indirect distinction where various constitutional provisions are read together as a complex whole (avoiding the section 8/section 39(2) conflict) and where the Constitution should at least be considered, if not applied, in all delictual disputes

in a way that constitutional rights and constitutional values are complementarily used in symbiosis. The goal is to use constitutional values as a safeguard against the potentially individualistic effect that a pure application of constitutional rights might have. The method that is proposed is therefore a ‘transformative’ one as Klare and Davis conceive the term – the Constitution will be at the heart of all delictual issues.<sup>15</sup>

In this way I intend to think about the Constitution as holding the key to deviationist doctrine<sup>16</sup> that could potentially be used to achieve two goals. Firstly to challenge the supremacy and veneration of the South African common law<sup>17</sup> (while simultaneously being wary of deifying the Constitution) and secondly to use the Constitution as a transformative document in a strategic way to attempt to push the law of delict in a more egalitarian and perhaps altruistic direction.<sup>18</sup> Critical legal scholars have tried to promote the application of section 39(2) and the infusion of constitutional values into all delictual disputes, without succeeding in convincing delict scholars and practitioners who are absorbed in the Roman-Dutch tradition and legal formalism. Perhaps if we want to achieve the aim of challenging Roman-Dutch law supremacy we must beat private lawyers at their own game of technical legal analysis. Thus, my reading of the Constitution will be technical and wordy. However, I accept that it cannot be formalist in the true sense of the word because formalism presupposes that there is one correct answer to every problem, while the interpretation that I suggest is but one possible reading of the Constitution. My aim is therefore to convince private law scholars and practitioners that there may be a way of reading the Constitution that requires it to be placed central to all legal enquiries.

### 3 CONSTITUTIONAL AVOIDANCE

#### 3.1 The Philosophical Underpinnings of Constitutional Avoidance in Common-Law Matters

In the middle of Pretoria’s Church Square stands a monument dedicated to the late President Paul Kruger, protected by four bronze guards. It is a monument dedicated to a man who once

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<sup>15</sup> Davis & Klare (note 13 above) at 412.

<sup>16</sup> The notion of ‘deviationist doctrine’ is explained in Chapter 1 above.

<sup>17</sup> In some of the earliest writings about critical legal studies in South Africa the blind acceptance and veneration of Roman-Dutch private law has been identified as a barrier to the transformation of South African law and society. See eg J van Doren ‘Critical Legal Studies and South Africa’ (1989) 106 *South African Law Journal* 648, 658 & 660ff; and A van Blerk ‘Critical Legal Studies in South Africa’ (1996) 113 *South African Law Journal* 86, 103ff.

<sup>18</sup> Davis & Klare (note 13 above) at 404ff.

warned that the jurisprudential tradition of natural law was conceived in the womb of the devil.<sup>19</sup> For Kruger and others, natural law broadly involves the recognition of a higher set of norms against which all laws could be tested. More specifically, for Kruger, the recognition of natural law involved a compromise of the supremacy of the legislature (then called the ‘Volksraad’) by affording judges a right to test legislation against a higher set of norms.<sup>20</sup> By rejecting the notion of natural law, Kruger aimed to protect the pride of the Volksraad. Under the influence of Kruger’s support for parliamentary sovereignty coupled with the British influence of legal positivism in South African legal scholarship and practice,<sup>21</sup> as well as the maintenance of white supremacy and racialised capitalism,<sup>22</sup> the country was in a position to legalise the atrocity of apartheid where a higher set of norms protecting the rights to (among others) life, freedom and security of the person, equality and dignity were unknown to the majority of South Africans subject to oppressive legislation.<sup>23</sup> If one accepts that the aforementioned rights are all relevant to the natural law tradition,<sup>24</sup> apartheid law involved a clear refusal of any appeal to natural law.

At this point it is important to stress that Kruger’s stance on natural law specifically related to its rejection as it may have applied to legislation. Despite the rejection of a natural legal theory for statutory interpretation, it appears that many scholars have historically been (and still are) of the view that the rights relevant to the modern developments in the natural law tradition are implicit in the rules of Roman and Roman-Dutch law that form the basis of South African common law.<sup>25</sup> Therefore, many would have regarded (and possibly still would regard) it difficult to attempt to eliminate the natural law tradition from the common law because the latter is inherently pervaded by principles of the former.

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<sup>19</sup> J Dugard ‘Judicial Process, Positivism and Civil Liberty’ (1971) 88 *South African Law Journal* 181, 184.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid at 184-185.

<sup>22</sup> S Terreblanche *A History of Inequality in South Africa: 1652-2002* (2002) 3-22.

<sup>23</sup> For an overview, also see ibid at 297ff.

<sup>24</sup> Dugard (note 19 above) at 197.

<sup>25</sup> Dugard (note 19 above) at 183. The influential Dutch jurist Hugo de Groot (1583-1645) is regarded as the father of Dutch humanism and natural law that influenced the Roman-Dutch law that was imposed on South Africa. See in this regard DH van Zyl *Geskiedenis van die Romeins-Hollandse Reg* (1979) 191-193; PhJ Thomas, CG van der Merwe & BC Stoop *Historical Foundations of South African Private Law* (2<sup>nd</sup> Ed, 2000) 57, 70, 72; and WB le Roux ‘Natural Law Theories’ in C Roederer & D Moellendorf *Jurisprudence* (2004) 40-41. The most recent work on the similarities between the South African common law and human rights is by G van Niekerk ‘The Endurance of the Roman Tradition in South African Law’ (2011) 4 *Studia Universitatis Babeş-Bolyai Jurisprudentia* 20, 21ff.

Since the eras of Kruger and apartheid a lot has changed in South African law. South Africa now has a supreme Constitution with a justiciable Bill of Rights that has opened the door for the natural law tradition to thrive in South Africa on all fronts.<sup>26</sup> Furthermore, it is widely accepted today that the Constitution could affect the development of the common law.<sup>27</sup> However, the establishment of a supreme Constitution with a Bill of Rights and its potential impact on the common law was not unequivocally supported by private-law scholars from the start.

At the time of democratic transition in South Africa there were some members of legal academia (and interestingly for present purposes, delict scholars in particular) who took a clear stance against the introduction of a Bill of Rights or, as a minimum, a stance against the potential infiltration of human rights into the esteemed common law.<sup>28</sup> The rejection of human rights in this context ultimately involved an implicit rejection of a specific brand of the natural law tradition.<sup>29</sup> This is true because it is widely accepted that the institution of human rights is

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<sup>26</sup> The formative document that solidified the democratic transition in South Africa, and the concomitant democratic legal reforms, is the 1993 Constitution.

<sup>27</sup> Since the decision in *Du Plessis* (note 2 above) it has been South African law that the Constitution could have a ‘radiating’ effect on the common law as section 35(3) of the 1993 Constitution required that the spirit, purport and objects of the bill of rights had to be considered when applying or developing the common law. The seminal decision in *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22, 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) (*‘Carmichele CC’*) confirmed that common-law developments have to be congruent with the spirit, purport and objects of the Bill of Rights in terms of section 39(2) of the 1996 Constitution.

<sup>28</sup> See JM Potgieter ‘The Role of the Law in a Period of Political Transition: The Need for Objectivity’ (1991) 54 *Journal of Contemporary Roman-Dutch Law* 800; PJ Visser & JM Potgieter ‘Some Critical Comments on South Africa’s Bill of Fundamental Rights’ (1994) 57 *Journal of Contemporary Roman-Dutch Law* 493; J Neethling & JM Potgieter ‘Laster: Die Bewyslas, Mediaprivilegie en die Invloed van die Nuwe Grondwet’ (1994) 57 *Journal of Contemporary Roman-Dutch Law* 513; and the critique of these views by H Botha ‘Privatism, Authoritarianism and the Constitution: The Case of Neethling and Potgieter’ (1995) 58 *Journal of Contemporary Roman-Dutch Law* 496. See also PJ Visser ‘A Successful Constitutional Invasion of Private Law’ (1995) 58 *Journal of Contemporary Roman-Dutch Law* 745 and the denunciation of those views by G Carpenter & CJ Botha ‘The “Constitutional Attack on Private Law”: Are the Fears Well Founded?’ (1996) 59 *Journal of Contemporary Roman-Dutch Law* 126.

<sup>29</sup> This is the implication of the critique levelled by Botha (note 28 above) at 498.



derived from the modern developments in natural law theory.<sup>30</sup> Therefore, even though President Kruger had been dead for roughly 90 years at that stage, his cenotaphic warning against natural law was still being followed, albeit in slightly modified terms. Now natural law, in its human-rights form, was peculiarly to be rejected when it came to working with the South African common law.

This is a peculiar theoretical rejection because, as I have already shown above, the divorce of natural law and common law seems to be a difficult task if it is accepted that natural law is inextricably linked to the rules of common law. As a counter-argument, Visser once favoured such a divorce, contending that the natural law found in Roman-Dutch law is distinct from and superior to the ‘backward’ and ‘savage’ hogwash of the ‘vague and ambiguous’ human rights intended for the South African democratic transformation.<sup>31</sup> However, Visser eventually relaxed his concerns after he realised that he and similar thinkers had lost the battle against the introduction of fundamental rights in South Africa.<sup>32</sup> Visser’s colleagues, Neethling and Potgieter are now proponents of the school of thought that regards the common law and human rights as reconcilable, possibly because of the shared theoretical foundation of the two sets of rights.<sup>33</sup> To their observation I add that if the common law can be developed and the Roman-Dutch conception of natural law (that underlies the common law) has theoretically developed into human rights, then the common law and human rights are not only reconcilable but it is also desirable to update the common law in light of human rights.

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<sup>30</sup> In South African literature, Van Zyl (note 25 above) at 194-195 links the work of De Groot with the thought of Hobbes and Locke (the latter being responsible for the conceptualisation of natural rights). Thomas, Van der Merwe & Stoop (note 25 above) at 111-115 as well as Le Roux (note 25 above) at 41-47 regard these modern developments of natural law theory as instrumental to the establishment of human rights. However, the link between the natural law tradition and the birth of human rights is largely recognised in work relating to the theory of human rights. See for example R McInery ‘Natural Law and Human Rights’ (1991) 36 *American Journal of Jurisprudence* 1; M Discher ‘A New Natural Law Theory as a Ground for Human Rights?’ (1999-2000) 9 *Kansas Journal of Law & Public Policy* 267; C Perello ‘On Supernatural Law: About the Origins of Human Rights and Natural Law in Antiquity’ (2014) 20 *Fundamina* 15; and A Sangiuliano ‘Towards a Natural Law Foundationalist Theory of Universal Human Rights’ (2014) 5 *Transnational Legal Theory* 218.

<sup>31</sup> Visser (note 28 above) at 748-749.

<sup>32</sup> See PJ Visser ‘Geen Afsonderlike Eis om “Grondwetlike Skadevergoeding” Nie’ (1996) 59 *Journal of Contemporary Roman-Dutch Law* 695; and PJ Visser ‘Enkele Gedagtes oor die Moontlike Invloed van die Fundamentele Reg op Lewe in die Deliktereg’ (1997) 30 *De Jure* 135. This turn in Visser’s thought is discussed more fully by AJ van der Walt ‘Transformative Constitutionalism and the Development of South African Property Law (Part 1)’ (2005) *Journal of South African Law* 655, 661.

<sup>33</sup> J Neethling & JM Potgieter *Neethling-Potgieter-Visser Law of Delict* (7<sup>th</sup> Ed, 2015) 18.

One rationale for the initial fears regarding the infiltration of the Constitution into the common law of delict might be related to concerns of legal certainty. However, from a critical perspective, it is particularly intriguing to consider the possible political underpinnings of the initial state of constitutional panic during the period of democratisation in South Africa. For critical scholars the enquiry is often less about the actual state of mind of a particular judge or commentator and more about the perceived ideological effect of a particular judgment or piece of commentary. In this regard note must be taken of the phenomenon of traditional common-law purism. Various South African legal historians have noted that from around 1950 some judges and academics aimed to purify the South African common law from English influences in an attempt to return the common law to its original Roman-Dutch glory.<sup>34</sup> The motivations behind traditional common-law purism could have been many but, as Eduard Fagan reminds us, even though decisions or approaches might not be made with consciously political motives, they have manifest political implications.<sup>35</sup> The political underpinnings of traditional common-law purism must be viewed against the backdrop that it featured most prominently during the heyday of apartheid (that officially started around 1948) and Afrikaner supremacy. It is therefore not unimaginable that the purist movement originally contained conservative anti-English (or even anti-everything-not-white-and-Afrikaans) sentiments.<sup>36</sup> By the time that democratisation was approaching, traditional common-law purism was on its deathbed in light of the reality that English law was being referred to more often in South African courts, even though Roman-Dutch law still formed (and still forms) the predominant component of our common law.<sup>37</sup> However, it would seem that common-law purism was resuscitated and given new spirit on its deathbed. The element that the common law would have to be purified from would no longer be English law but would now be human rights. Although the motivations behind this contemporary form of common-law purism may have been multifarious, it is not unlikely that

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<sup>34</sup> See eg G Mulligan 'Bellum Juridicum (3): Purists, Pollutionists and Pragmatists' (1952) 69 *South African Law Journal* 25; Van Zyl (note 25 above) at 478ff; E Cameron 'Legal Chauvinism, Executive-Mindedness and Justice – LC Steyn's Impact on South African Law' (1982) 99 *South African Law Journal* 38; D Dyzenhaus 'L. C. Steyn in Perspective' (1982) 99 *South African Law Journal* 380; DP Visser 'Daedalus in the Supreme Court – The Common Law Today' (1986) 49 *Journal of Contemporary Roman-Dutch Law* 127; and Thomas, Van der Merwe & Stoop (note 25 above) at 105ff.

<sup>35</sup> E Fagan 'Roman-Dutch Law in Its South African Historical Context' in R Zimmerman & DP Visser *Southern Cross: Civil Law and Common Law in South Africa* (1996) 33, 64.

<sup>36</sup> *Ibid.*

<sup>37</sup> See eg Van Niekerk (note 25 above) at 20ff.

onlookers can construe this movement as a political one motivated by anti-ANC, anti-black and/or conservative anti-human-rights sentiments.<sup>38</sup>

Beguilingly, the trepidation in delict scholarship regarding the merger of human rights and the common law may have slowed down after the Constitution became operative, but the anxiety did not come to a complete stop. Even after the widely celebrated pronouncement in *Carmichele CC* that set the blueprint for a constitutional infusion of the common law,<sup>39</sup> there have been some delict commentators whose works show moments of discomfort with the way in which the Constitution has been used to transform the common law.

The clearest stance against a Constitutional colonisation of the common law is found in the latest work by Johan van der Walt. Van der Walt, who once seemed enthusiastic about the potential of *Carmichele CC*<sup>40</sup> and the horizontal effect of the Bill of Rights in general,<sup>41</sup> later expressed the view that the common law could have been able to provide Ms Carmichele with the necessary relief against the state's negligence because the common law recognised the assortment of rights relating to bodily integrity.<sup>42</sup> Most recently, Van der Walt has taken a radical turn whereby he has rejected the infiltration of constitutional reasoning in common-law matters except for certain exceptional circumstances where a counter-majoritarian difficulty arises.<sup>43</sup> Concisely, it is Van der Walt's stance that the common law can provide enough protection to the

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<sup>38</sup> See especially JM Potgieter 'Gedagtes oor die Nie-Christelike Aard van Menseregte' (1989) 53 *Journal of Contemporary Roman-Dutch Law* 386; JM Potgieter 'Menseregte – Verwyder die Skyn van Christelikheid' (1990) 54 *Journal of Contemporary Roman-Dutch Law* 413; and Visser & Potgieter (note 28 above).

<sup>39</sup> *Carmichele CC* (note 27 above). This decision is celebrated by N Botha 'The Role of International Law in the Development of South African Common Law' (2001) 26 *South African Yearbook of International Law* 253, 259; J Neethling & JM Potgieter 'Toepassing van die Grondwet op die Deliktereg' (2002) 65 *Journal of Contemporary Roman-Dutch Law* 265, 272; M Pieterse 'The Right to be Free from Public or Private Violence after Carmichele' (2002) 119 *South African Law Journal* 27, 39; B Leinius & JR Midgley 'The Impact of the Constitution on the Law of Delict' (2002) 119 *South African Law Journal* 17, 27; G Carpenter 'The Carmichele Legacy - Enhanced Curial Protection of the Right to Physical Safety' (2003) 18 *SA Public Law* 252, 266; J Neethling 'Die Carmichele-Sage Kom tot 'n Gelukkige Einde' (2005) *Journal of South African Law* 402, 409; and D Davis & K Klare (note 13 above) at 462-467.

<sup>40</sup> J van der Walt 'A Special Relationship with Women' (2002) *Journal of South African Law* 148, 156.

<sup>41</sup> J van der Walt *Law and Sacrifice: Towards a Post-Apartheid Theory of Law* (2005).

<sup>42</sup> J van der Walt 'Horizontal Application of Fundamental Rights and the Threshold of the Law in View of the Carmichele Saga' (2003) 19 *South African Journal on Human Rights* 517, 524.

<sup>43</sup> J van der Walt *The Horizontal Effect Revolution and the Question of Sovereignty* (2014) 1-33.

rights of parties without necessarily invoking the Constitution.<sup>44</sup> Van der Walt's position involves a clear rejection of constitutional application to private parties and for that reason I shall describe his view as an 'anti-constitutional' strategy for the common law. His approach is anti-constitutional because he is explicit about the fact that the Constitution should have virtually no substantive role to play in common-law disputes and that lawyers should intentionally and explicitly avoid the Constitution in private-law cases where possible.

A less radical stance of constitutional reservation is reflected in Anton Fagan's philosophy of common-law development. Even though Fagan does not appear to be completely opposed to the essential idea of constitutional scrutiny of the common law,<sup>45</sup> he contends that both *Carmichele CC*<sup>46</sup> and *K v Minister of Safety and Security*<sup>47</sup> were incorrectly decided insofar as the interaction between the common law and the Constitution is concerned. Drawing from a joint reading of Fagan's critiques on the two judgments, I abstract the following three principles summarising his assessment as it is relevant for this discussion:<sup>48</sup> Firstly, not all rules are developed whenever they are applied.<sup>49</sup> Secondly, the Constitution should only play a role in the developmental process and does not feature in the pure (non-developmental) application of the common law.<sup>50</sup> Thirdly, the Constitution does not impose duties on state functionaries – it only imposes duties on the state represented by the relevant Ministers – but even if the Constitution does impose duties on state functionaries, it would be unfair to hold state employees bound to

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<sup>44</sup> This also appears to be the view of the court in *RH v DE* [2014] ZASCA 133, 2014 (6) SA 436 (SCA) ('*RH v DE*'). The stance of the Supreme Court of Appeal on common-law development expressed in *RH v DE* was overturned on appeal. See *DE v RH* [2015] ZACC 18, 2015 (5) SA 83 (CC), 2015 (9) BCLR 1003 (CC) ('*DE v RH*') paras 16-21.

<sup>45</sup> In A Fagan 'The Secondary Role of the Spirit, Purport and Objects of the Bill of Rights in the Common Law's development' (2010) 127 *South African Law Journal* 611, 621-622 Fagan clearly indicates his support for the fact that the common law could be developed on constitutional grounds: Either because a right in the bill of rights requires development (per section 8 of the Constitution), because the interests of justice so require (per section 173 of the Constitution), or because the common law requires the development (per section 39(3) of the Constitution). Furthermore, Fagan is transparent about the fact that if the common law is to be developed on one of the above three grounds, section 39(2) of the Constitution should take effect and the spirit, purport and objects of the Bill of Rights must be promoted.

<sup>46</sup> *Carmichele CC* is critiqued in A Fagan 'Reconsidering Carmichele' (2008) 125 *South African Law Journal* 659.

<sup>47</sup> *K v Minister of Safety and Security* [2005] ZACC 8, 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC), [2005] 8 BLLR 749 (CC) ('*K v Minister CC*') is critiqued in A Fagan 'The Confusions of K' (2009) 126 *South African Law Journal* 159.

<sup>48</sup> This summary is inescapably incomplete as every line in Fagan's work contains a point of substance. However, for purposes of this piece the short condensation will have to do.

<sup>49</sup> Fagan (note 47 above) at 187, 190.

<sup>50</sup> This is the subtext in Fagan (note 45 above) at 621ff and Fagan (note 47 above) at 178ff.

constitutional obligations while non-state employees are not.<sup>51</sup> An abridgment of these summative points could be the following: The Constitution will be and should be an unnecessary consideration in most delictual matters. Therefore, being constitutionally heedless will, following Fagan, be the normal approach to dealing with delictual issues. Thus, Fagan's approach to common-law disputes would not necessarily encourage lawyers to go out of their way to intentionally or explicitly discredit the potential effect of the Constitution on the matter but they would do no wrong to fail to mention and engage the Constitution.

Scott, even though celebratory of the Constitution's effect on cases relating to state negligence,<sup>52</sup> has recently critiqued the equitisation of the common law's development in cases where only non-state actors are involved.<sup>53</sup> His argument is that the Constitution has a devastating effect on private law because common-law development has the potential to disrupt a predictable set of rules that are necessary for purposes of legal certainty leading to effective commercial planning and strategising. Scott's claim is ultimately that the Constitution could be useful in delictual cases against the state but the invocation of the supreme law of South Africa could be problematic in all other cases. In cases involving non-state parties *inter se*, constitutional heedlessness would not be a bad thing in Scott's eyes.

As I have already alluded to earlier in this discussion, Neethling and Potgieter appear to form part of a more constitutionally optimistic paradigm. The duo indicates in their delict textbook that it should be accepted that the common law is in line with the Constitution unless the opposite is clearly apparent. They reason that there is a presumption in favour of constitutional compliance of the common law because the rights recognised in the Constitution are supported by the rights recognised at common law.<sup>54</sup> Even though this stance is significant, it is clear that the professors do not intend to complicate common-law reasoning with an approach

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<sup>51</sup> Fagan (note 46 above) at 664-671 and Fagan (note 47 above) at 192. See also the similar argument made by S Wagener 'K v Minister of Safety and Security and the Increasingly Blurred Line between Personal and Vicarious Liability' (2008) 125 *South African Law Journal* 673.

<sup>52</sup> See for example: TJ Scott 'Vicarious Liability for Intentional Delicts – The Constitutional Factor Clinches Liability' (2013) *Journal of South African Law* 348, 361; and TJ Scott 'Staatsaanspreeklikheid vir Opsetsdelikte van die Polisie – Die Hoogste Hof van Appél Kry Nogmaals Bloedneus' (2012) *Journal of South African Law* 541, 557.

<sup>53</sup> TJ Scott 'Delictual Liability for Adultery: A Healthy Remedy's Road to Perdition' in JM Potgieter, J Knobel & RM Jansen (eds) *Essays In Honour of / Huldigingsbundel vir Johann Neethling* (2015) 421, 434. See also his concerns with regard to the equitisation of private property law in TJ Scott 'Effect of the Destruction of a Dwelling on the Personal Servitude of Habitatio' (2011) 74 *Journal of Contemporary Roman-Dutch Law* 155 especially at 168ff.

<sup>54</sup> Neethling & Potgieter (note 33 above).

that places constitutional scrutiny at the heart of every delictual dispute. Their approach is to be welcomed insofar as they illuminate the theoretical compatibility of the common law and the Constitution but, to the extent that they desire a ‘business as usual’ approach,<sup>55</sup> I distance myself from their line of enquiry because it comes down to a failure to heed to the Constitution in most delictual disputes.

Also writing from a position of constitutional enthusiasm, Loubser and Midgley dedicate a record 11 pages of their delict textbook to the interaction between delict and the Constitution.<sup>56</sup> What is interesting to note is that despite the fact that they would like to take the Constitution seriously, they do not provide much guidance as to when exactly the Constitution should ‘actively’ be considered in delictual disputes.<sup>57</sup> It would appear that the Constitution applies sometimes, whenever it is necessary. When it would be necessary, is a question that is left to mystic, judicial intuition.<sup>58</sup> Furthermore, the Constitution plays no apparent role in their ‘systematic approach to delictual problem solving’.<sup>59</sup> Again, the approach of these authors is not as constitutionally heedful as it perhaps could be. In fact, these authors can be said to follow the third strand of constitutional avoidance that can be described as being ‘constitutionally wanting’. Thus, for Loubser and Midgley, the Constitution is important. However, from their view, it is unclear what the substantive role of the Constitution should be in delictual matters. Their textbook might be window-dressed in light of the Constitution very well but substantively the effect of the Constitution will probably not be felt if their methodology is followed.

Despite the intricacies of each scholar’s argument detailed above, the rudimentary common thread in their work is that the Constitution should not and/or will not have a substantive role to play in most delictual disputes, because, it seems, natural law in its human rights form is not all that important for the transformation of the common law, or the transformation of the common law is itself unnecessary. The implied support for the approach of constitutional avoidance in all of these scholars’ work leaves one wondering to what extent

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<sup>55</sup> This phrase is borrowed from D Davis *Democracy and Deliberation: Transformation and the South African Legal Order* (1999) at 127 which is specifically invoked against Neethling & Potgieter’s textbook in D Davis ‘Legal Transformation and Legal Education: Congruence of Conflict?’ (2015) *Acta Juridica* 172, 186ff.

<sup>56</sup> M Loubser & JR Midgley (eds) *The Law of Delict in South Africa* (2<sup>nd</sup> Ed, 2012) Chapter 2.

<sup>57</sup> *Ibid* at 35.

<sup>58</sup> I take note that these authors rely on the case of *S v Thebus and Another* [2003] ZACC 12, 2003 (6) SA 505 (CC) para 28 in forming their argument. See however the critique of judges being given the scope to consider the Constitution in whichever cases they like by Davis & Klare (note 13 above) at 464.

<sup>59</sup> Loubser & Midgley et al (note 56 above) at 23-26.

the larger-than-life monument of President Kruger, with its ‘forceful presence’ and ‘air of steadfast resolution’ that ‘embodies the authority of... political dominance’ is then still being visited with admiration today.<sup>60</sup>

To summarise my contention thus far: The general trend of aggression towards the natural law tradition in South Africa that stemmed from the early 20<sup>th</sup> century, originally directed against its application to legislation, is still alive and kicking today even though it is now directed against its application to the common law. It should further be clear that I regard the natural law tradition as being foundational to both the Roman-Dutch part of our common law and human rights. I regard natural law in its human rights form as an important development that should likewise be reflected in the common law’s development to enable the spirit of the common law to be transformed so that the common law can be kept alive – ‘kept alive’ not only in the sense of having legal validity, but social validity too.<sup>61</sup> The merger of common law and human rights is foundational to a transformative theory and methodology for the South African common law. With the above as a backdrop, there are at least three reasons that justify the application of a transformative theory and method for the common law in general, and delictual disputes in particular, that I now turn to explore. These are also corollary reasons why the paradigm of constitutional avoidance is undesirable.

(1) *The ‘Africanist Legitimacy’ Reason:* This first reason has two legs. Firstly, the incorporation of an Africanist conception of human rights (that the 1996 Constitution embodies) into the common law is important to ensure the legitimacy of the common law. Secondly, if the Africanist conception of rights is to be taken seriously, an extensive horizontal application of human rights must be fundamental to that enterprise. As to the first leg, the common law was imposed on the South African legal system by conquest.<sup>62</sup> What is fundamentally white customary law has become the universal (by that I mean the ‘*ipso iure* applicable’) law in South Africa – in order for any other type of customary law to be applied by a court, a whole host of

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<sup>60</sup> The quoted phrases are derived from the description of the statue by P Labuschagne ‘Memorial Complexity and Political Change: Paul Kruger’s Statue’s Political Travels through Space and Time’ (2011) 26 *South African Journal of Art History* 142, 145.

<sup>61</sup> C Douzinas & A Geary *Critical Jurisprudence: The Political Philosophy of Justice* (2005) 18.

<sup>62</sup> Van Niekerk (note 25 above) at 21.

requirements for its application need to be proven by the litigants,<sup>63</sup> leaving one wondering whether it can ever be 'law' properly so-called. In a country where the majority of the population is not white, it is strange to imagine voluntary complicity in this state of affairs. I would speculate that issues of legal certainty and the closely related issues of national and transnational commercial stability probably played a key role in the decision taken during the negotiations for South Africa's transition in the early 1990s to maintain the common law as a source of universal law insofar as it is consistent with the Constitution.<sup>64</sup> The inference that I draw from this negotiated position (which is a settlement somewhere in between a complete endorsement and rejection of the common law) is that the common law can remain legitimate only if it is subject to a continuous constitutional audit so that a 'new' and ever-evolving South African common law can be established that is justified in its universal application.<sup>65</sup> If one accepts that the common law of South Africa fits quite comfortably in the classical-liberal segment of natural legal thought, one might be tempted to argue that the reconciliation of constitutional rights and the common law is a superfluous endeavour because of the shared philosophical foundation between the two. However, the (South) African notion of constitutional rights differs in some respects from the classical liberal paradigm and for that reason has been referred to as being 'post-liberal'.<sup>66</sup> One of the most important differences is that the Africanist notion of human

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<sup>63</sup> Section 1 of the Law of Evidence Amendment Act 45 of 1988 allows courts to take judicial notice of customary law as long as it is readily ascertainable, sufficiently certain and not in conflict with the principles of public policy or natural justice. Evidence may be lead to prove the content of the customary law rule in question. The same caveats do not necessarily apply to the common law which is assumed to be ascertainable and certain (despite a great deal of uncertainty that still exists as to the precise definitional components of the common law – see Van Niekerk (note 25 above) at 21 – and already imbued with the principles of public policy and natural justice as I have already shown earlier in this piece.

<sup>64</sup> Section 39(3) provides that '[t]he Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or confereed by common law... to the extent that they are consistent with the Bill' and Schedule 6 Item 2(1) provides that '[a]ll that that was in force when the new Constitution took effect continues in force subject to (a) amendment or repeal; and (b) consistency with the new Constitution'.

<sup>65</sup> Davis & Klare (note 13 above) at 426 stress that the mission of the development clauses in the Constitution is to carry out an 'audit and re-invention of the common law'.

<sup>66</sup> K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 151, 153-156 argues that the South African Constitution is 'post-liberal' because of its concern with social rights, substantive equality, positive state duties, horizontality, multi-culturalism, historical self-consciousness and participatory governance. It is post-liberal in the sense that it breaks free from the classical idea of liberal constitutionalism.



rights envisages a communitarian definition of human dignity.<sup>67</sup> It is communitarian in the sense that the African Charter on Human and Peoples' Rights (Banjul Charter) (1981) is the only regional human rights instrument that explicitly and actively imposes duties on individuals to respect and protect rights of other individuals.<sup>68</sup> The imposition of duties is significant because it demonstrates a concern for the values of 'cooperation, interdependence and collective responsibility'<sup>69</sup> as opposed to the individualistic ring to dominant Western notions of human dignity.<sup>70</sup> It may be that the concern with humane duties and mutual respect is a necessary check on the common law to ensure its legitimacy in 'post'-apartheid South Africa that was and is in such desperate need of reconciliation. One of the core aims of the democratic transition was to prevent South Africans from continuously turning a blind eye towards both 'privatised' and 'public' injustices. The sense of duty promoted in the Africanist notion of human rights gives rise to the second leg of the reason under discussion. That is that horizontally applicable human rights need to be properly appreciated in order for the Africanist version of human rights to be given manifested validity by upholding a spirit of solidarity, generosity, unity and cohesion in South African common law.<sup>71</sup>

(2) *The 'Deconstructive Substantive Equality' Reason:* Another aspect of the Africanist conception of human rights that is post-liberal is the acknowledgement of substantive equality as a legally genuine virtue.<sup>72</sup> The horizontal application of the Bill of Rights is important for purposes of recognising substantive equality in the South African context because it opens up the possibility for courts and other people who work with law to address the racist, patriarchal and economically oppressive effects of colonialism, apartheid and neo-colonialism.<sup>73</sup> In other words, horizontality opens up the possibility to 'deconstruct' (or to 'map and critique') the law.<sup>74</sup>

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<sup>67</sup> J Cobbah 'African Values and the Human Rights Debate: An African Perspective' (1987) 9 *Human Rights Quarterly* 309, 324. See also Chapter 8 below.

<sup>68</sup> Chapter II (Articles 27-29) of the African Charter. See also M Mutua 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1995) 35 *Virginia Journal of International Law* 339, 340, 359ff.

<sup>69</sup> Cobbah (note 67 above) at 320.

<sup>70</sup> Cobbah (note 67 above) at 324.

<sup>71</sup> D Chirwa 'In Search of Philosophical Justifications and Suitable Models for the Horizontal Application of Human Rights' (2008) 8 *African Human Rights Law Journal* 294, 303.

<sup>72</sup> Mutua (note 68 above) at 353.

<sup>73</sup> See J van der Walt 'Blixen's Difference: Horizontal Application of Fundamental Rights and the Resistance to Neo-Colonialism' (2003) *Journal of South African Law* 311.

<sup>74</sup> C Albertyn & D Davis 'Legal Realism, Transformation and the Legacy of Dugard' (2010) 26 *South African Journal on Human Rights* 188, 205.

It allows for mapping the law in that the entire body of law can be carefully re-examined and re-imagined along the lines of social justice.<sup>75</sup> Horizontality also creates a ‘legal’ mouthpiece for critiquing the law because it does away with the public-private divide that Marxists, feminists, queer theorists and critical race theorists argue serves to maintain various power imbalances in society – power imbalances that the transformative Constitution aims to substantively equalise.<sup>76</sup> Individuals need to respect each other in their ‘private’ dealings with one another and the law should accommodate that respect and sense of duty that stems from a transformed vision of legal morality.<sup>77</sup> Deconstruction as mapping and critique in this context, at first glance, seems to be contrary to legal certainty and would have a lot of people up in arms. However, Davis and Klare have averred that a transformative theory for the common law is ‘attentive to the values of stability, predictability and administrability’ because there will be many cases where the common law is constitutionally acceptable as it stands for the particular facts of a particular case.<sup>78</sup> However, common-law solutions are not timeless. They should always be subject to ‘reconsideration and contestation as experience progresses, understanding deepens, and/or circumstances change’.<sup>79</sup> This is the crux of a transformative theory for the common law.

(3) *The ‘Single System of Law’ Reason*: This last reason is inspired by André van der Walt’s interpretation of the often quoted extract from *Pharmaceutical Manufacturers Association of South Africa* to the effect that there is one system of law in the democratic South Africa: Law that is subject to the Constitution as all law derives its force from the Constitution.<sup>80</sup> In other words, the common law (just like any other source of law) is not to be divorced from the Constitution. It is my argument that if the supremacy of the Constitution is to be taken seriously and judges are expected to properly justify their decisions whether to accept or alter the current common-law rules, then the Constitution should substantively feature in all common law disputes, whether it be to justify the current form of the rule or to develop it. Davis and Klare similarly

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<sup>75</sup> H Cheadle & D Davis ‘The Application of the 1996 Constitution in the Private Sphere’ (1997) 13 *South African Journal on Human Rights* 44.

<sup>76</sup> Cheadle & Davis (note 75 above) at 45 and Chirwa (note 71 above) at 300-302.

<sup>77</sup> Davis & Klare (note 13 above) at 411.

<sup>78</sup> Ibid at 412.

<sup>79</sup> Ibid at 412.

<sup>80</sup> Van der Walt has written extensively on this topic, but his theory on the single system of law features most prominently in his book AJ van der Walt *Property and Constitution* (2012) 19-112 where he quotes and analyses the implications of *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1, 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) (‘*Pharmaceutical Manufacturers*’) para 44.

contend that a transformative method to resolving common-law problems would not necessarily involve a complete rewrite of the common law in each case. All that should be required is for a lawyer to seriously and earnestly contemplate, at the start of each case, what potential constitutional provisions could influence the common law at stake in the dispute. Complimentarily, Van der Walt understands the single-system-of-law principle to mean that the common law must promote the spirit, purport and objects of the Bill of Rights in a way that advances both vested rights (whether derived from the common law, legislation or the Bill of Rights) and the transformative goals of the Constitution.<sup>81</sup> If all law, including the common law, sings the same song (albeit sometimes in harmony and not in a monotone manner), the result is a single system of law.<sup>82</sup> From the discussion thus far, it should be clear that the single system of law principle and its concern with realising substantive constitutional rights in the context of private common law can only be brought to fruition if a new transformative method is employed whereby all common-law disputes are constitutionally framed.<sup>83</sup>

To conclude this introductory discussion to constitutional avoidance, I emphasise that the implication of the above three reasons is that constitutional avoidance is an approach that stifles the transformative project of, firstly, affording the common law legitimacy through the incorporation of Africanist human rights jurisprudence into it, secondly, of deconstructing the common law through mapping and critique and, thirdly, of promoting the single system of law principle that has been developed by the Constitutional Court to advance the supremacy of the Constitution. However, constitutional avoidance still appears to be prevalent in various academic writings as I have detailed above. In the sub-sections that follow I shall demonstrate how constitutional avoidance, in its three forms, also features in recent judicial pronouncements. The discussions are specifically limited to seminal judgments since the later part of 2013 when this study was first conceptualised. I start with the constitutionally wanting approach because it is the mildest form of avoidance. I then proceed to consider constitutional heedlessness, followed by the anti-constitutional approach to delictual disputes.

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<sup>81</sup> Van der Walt (note 80 above) at 20-21.

<sup>82</sup> Van der Walt (note 80 above) at 26.

<sup>83</sup> Davis & Klare (note 13 above) at 412; see also the ideas developed by Bhana (note 3 above) at 303 in the context of the common law of contract.

## 3.2 The Constitutionally Wanting Approach

### 3.2.1 *Introducing Constitutionally Wanting Reasoning*

In this sub-section the decision in *Heroldt v Wills*<sup>84</sup> will be identified as a prime example of the constitutionally wanting approach to common-law disputes. To echo the definition of the constitutionally wanting approach provided earlier, the High Court in *Heroldt* mentioned the Constitution and window-dressed the matter in human-rights terms but it fell short of properly applying the substantive provisions of the Constitution to the matter at hand and the court fell into the trap of pure common-law, extra-constitutional reasoning.

### 3.2.2 *The Problem in Heroldt*

Early in 2012 Warren Heroldt became aware of a Facebook post (authored by his old friend Nicole Wills) implying that he is an irresponsible alcoholic who abuses drugs and is a bad father. Heroldt sought prohibitory and mandatory interdicts, respectively ordering Wills to refrain from making any Facebook comments about Heroldt in future and to remove the post already made.<sup>85</sup> As to the prohibitory interdict, Willis J recognised that judges should avoid a crystal ball-*cum*-sledgehammer approach: Judges should not place absolute prohibitions on the right to freedom of expression in a prospective manner. Perhaps some of the future comments of the respondent about the applicant could have valid grounds of justification that would best be evaluated at the specific juncture that they are made.<sup>86</sup> Even though the judgment is not articulated in these terms, I argue that this finding is defensible in light of section 36 of the Constitution. The limitation clause requires one to consider, among other things, the extent of the limitation of a specific right. For example, in *Mail & Guardian Media v Chipu* it was held that it would be very difficult to justify an absolute limitation of the right to freedom of expression in an open and

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<sup>84</sup> *Heroldt v Wills* 2013 ZAGPJHC 1, 2013 (2) SA 530 (GSJ), 2013 (5) BCLR 554 (GSJ), [2013] 2 All SA 218 (GSJ) (*Heroldt*). Some law reports have abbreviated the case as *H v W*. See J Neethling 'Facebook en Persoonlikheidsbeskerming' (2014) 11 *LitNet Akademies* 40, 45ff; A Roos & M Slabbert 'Defamation on Facebook: *Isparta v Richter*' (2014) 17 *Potchefstroom Electronic Law Journal* 2845, 2849ff; and P Singh 'Social Media and the Actio Injuriarum in South Africa – An Exploration of New Challenges in the Online Era' (2014) 35 *Obiter* 616ff.

<sup>85</sup> *Heroldt* (note 84 above) at paras 1-2.

<sup>86</sup> *Ibid* at paras 40-42.

democratic society, especially if there are other notionally less restrictive means of achieving the same goal.<sup>87</sup>

As to the mandatory interdict, a more difficult issue arose. According to the old case of *Setlogelo v Setlogelo* there are three requirements for the granting of an interdict.<sup>88</sup> Firstly, a clear right must be identified. Secondly, that clear right must have been unlawfully infringed. Thirdly, there ought to be no similar protection that can be effected by another ordinary remedy – this requirement has been used to qualify an interdict as a remedy of last resort. Applying these requirements to the facts at hand, the court explained that the applicant had clear rights to dignity and privacy that were infringed without any grounds of justification, in other words, the infringement was unlawful.<sup>89</sup> But it is with the third requirement where the applicant faced, at first glance, a material obstacle. The historically more consistent remedy that the applicant could rely on here would be to claim damages.<sup>90</sup> Alternatively, the applicant could contact Facebook’s administrators and request them to remove the defamatory post.<sup>91</sup> Willis J indicated that the rationale for the historic reluctance to grant interdicts in defamation cases is the protection of the free flow of information or, in constitutional terms I would suggest, the protection of freedom of expression as complimented by the right to access to information. Willis J showed that this underlying policy was once informed by the financial and practical consequences of stopping the printing presses of media houses.<sup>92</sup> It is the court’s reasoning that society’s needs and realities have changed due to the technological advancement and the pervasiveness of electronic social media across the globe.<sup>93</sup> Thus, this societal change is used by the court as the justification for the common law’s development and framework within which the law had to be developed so that the mandatory interdict could be granted to the applicant here.

In this discussion I problematise the above approach to common law development that I argue can be described as being both ‘evolutionarily functionalist’ (in the American legal realist sense of the word) and ‘constitutionally wanting’. The approach fits in the realist paradigm of evolutionary functionalism in the sense that Gordon understands it – that the law develops to

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<sup>87</sup> *Mail & Guardian Media Ltd v Chipu NO* [2013] ZACC 32, 2013 (6) SA 367 (CC), 2013 (11) BCLR 1259 (CC) para 91.

<sup>88</sup> *Setlogelo v Setlogelo* 1914 AD 221(‘*Setlogelo*’) 227.

<sup>89</sup> *Heroldt* (note 84 above) at paras 26-30.

<sup>90</sup> *Ibid* at para 31.

<sup>91</sup> *Ibid* at para 38.

<sup>92</sup> *Ibid* at para 34.

<sup>93</sup> *Ibid* at para 31.

satisfy the functional needs of society in that the law becomes more useful to society by bringing about certainty and stability in the spirit of technological change, common law purity and legal efficiency.<sup>94</sup> I am, like Gordon, to some extent critical of this approach because it supposes that the managers of law can deal with societal changes by developing the law at a level of political neutrality simply by relying on a self-revealing, obvious and politically objective process of determining a coherent and harmonious version of the *boni mores*.<sup>95</sup> Of course I do not completely reject realism as a philosophical school and as a useful source of conceptual tools that can be used to fight against formalist legal thought that fails to recognise the contestability of law and the dangers of vacuous legal interpretation. However, the part of realist thought that I take issue with here is the assumption that the functional evolution of law is objectively deterministic and necessary.<sup>96</sup> In other words, I reject the idea that a specific societal change provides a single option of how the law must be developed to accommodate that change. In contrast to this I argue that various conflicting options, incompatible because of a hostility of varying social interests (read: political values), can be presented to a judge when faced with the reality that something in society has changed.<sup>97</sup> This is because there is no uniform version of the ‘law and society interplay’ and the incredible aspect of being human is not about blindly adapting to the current environment, but rather our ability to reimagine our world (and the law that regulates it) and to think beyond the present.<sup>98</sup> Furthermore, the approach is constitutionally wanting because despite a number of remarks on the Constitution, the Constitution does not play a clear substantive and ideological role in the process of the common law’s development. Extra-constitutional grounds are relied on to decide *whether* the common law should be developed and I hope to show here that extra-constitutional reasoning was employed in the actual process of *how* the common law was developed, resulting in an evolutionarily functionalist method for the common law’s development. It will be my argument that the granting of the mandatory interdict instead of damages is defensible for a number of reasons. However, it is the extra-constitutional process of reasoning that leads the court to this conclusion that I will critique and illustrate how the analysis of the court could have been more constitutionally vivacious which would have resulted in a more critical approach to the development of the common law.

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<sup>94</sup> R Gordon ‘Critical Legal Histories’ (1984) 36 *Stanford Law Review* 57, 64.

<sup>95</sup> *Ibid* at 68.

<sup>96</sup> *Ibid* at 63.

<sup>97</sup> *Ibid* at 70.

<sup>98</sup> *Ibid* at 71.

In unpacking this problem, I firstly pose the questions whether our law supports the position that common-law development can and should be sparked by extra-constitutional reasons and, if so, what the relationship is and should be between extra-constitutional and constitutional grounds for the common law's development. I answer this question by conducting a historiographic investigation into the grounds for common-law development in South African law starting at the common law itself, followed by the legal positions under the 1993 and 1996 Constitutions respectively. With the above as backdrop, I then analyse the approach to common-law development followed in *Heroldt*, arguing that the ground for development relied on in this case could have taken constitutional form and, at the very least, the actual development that was brought about could have (and should have) had brighter constitutional lustre in a way that perceptively responds to the concerns raised by Gordon in his theory on critical legal histories against evolutionary functionalism. I aim to indicate that the method and outcome of this case was not 'necessary' (in the deterministic sense of the word), even though the outcome may be desirable.

### 3.2.3 *Grounds for Developing the Common Law*

More than 100 years ago in *Blower v Van Noorden* Innes CJ made it clear that the South African common law, and specifically the law of delict, could be developed by a court. Such developments would have to occur at times to 'keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions'.<sup>99</sup> In this sense the law is kept 'alive' and 'effective' through incremental changes effected by the courts, while acknowledging that 'radical' changes to law are best dealt with by the legislature.<sup>100</sup> The power that the old Supreme Court had to develop the common law stemmed from the fact that it had the inherent jurisdiction to regulate its own procedure and to adjudicate any unlawful infringements of rights.<sup>101</sup> I shall refer to the ground for development established in *Blower* as the 'original ground for development'.

This original ground for development was not constitutionally mandated. *Blower* was decided August-September 1909 after the Anglo-Boer War ended but before the South Africa Act of 1909 created the Union of South Africa. Terreblanche explains that during this time the

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<sup>99</sup> *Blower v Van Noorden* 1909 TS 890 ('*Blower*') at 950.

<sup>100</sup> *Ibid.*

<sup>101</sup> See eg C Theophilopoulos, CM van Heerden & A Boraine *Fundamental Principles of Civil Procedure* (2<sup>nd</sup> Ed, 2012) 57.

Transvaal was granted ‘responsible self-government’ with its own constitution by the British authorities.<sup>102</sup> From a holistic reading of the Transvaal Constitution Letters Patent 1906, it did not make any reference to the development of the common law. The same can be said about the South African Constitutions of 1909,<sup>103</sup> 1961,<sup>104</sup> and 1983.<sup>105</sup>

The original, extra-constitutional ground for common-law development remained eminent for many years to follow. For example, the philosophy on development laid out in *Blower* led to the highly influential decision in *Minister van Polisie v Ewels*<sup>106</sup> to the effect that ‘the stage of development’ had been reached in which the *boni mores* criterion would be used to determine the wrongfulness of omissions.<sup>107</sup> Two years before he took office as Chief Justice, Corbett also expressed his support for the fact that the common law should adjust to meet the ‘ever-changing needs of society’<sup>108</sup> and by 1993 Van Aswegen provided an overview of 24 delictual cases where the rules of common law were developed on the basis of policy considerations ultimately sparked by the original ground provided in *Blower*.<sup>109</sup>

Even though American legal realist thought had not yet existed at the time, the principle in *Blower* mimics evolutionary functionalism in the way that I have described it in the problem statement above: When society changes, judges need to change the common law accordingly in an objectively ‘natural and proper’ way that is mystically apparent to the judiciary.<sup>110</sup> The way in which the principles of common-law development are expressed in *Blower*, *Ewels* and related cases creates the impression that the developments in question simply had to happen. It is not that the courts in these cases explicitly denied that the law’s development could have taken many different directions, but it is because of the failure to explicitly recognise different potentialities in the law’s development that these judgments have the objective and deterministic ring of

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<sup>102</sup> Terreblanche (note 22 above) at 246.

<sup>103</sup> South Africa Act 9 Edw. VII c. 9 of 1909.

<sup>104</sup> The Republic of South Africa Constitution Act 32 of 1961.

<sup>105</sup> The Republic of South Africa Constitution Act 110 of 1983.

<sup>106</sup> *Minister van Polisie v Ewels* [1975] ZASCA 2, 1975 (3) SA 590 (A) (‘*Ewels*’) 597.

<sup>107</sup> See eg K O’Regan ‘The Best of Both Worlds? Some Reflections on the Interaction between the Common Law and the Bill of Rights in Our New Constitution’ (1999) 2 *Potchefstroom Electronic Law Journal* 1, 4-5; and F du Bois ‘Getting Wrongfulness Right: A Ciceronian Attempt’ (2000) *Acta Juridica* 1, 7.

<sup>108</sup> MM Corbett ‘The Role of Policy in the Evolution of Our Common Law’ (1987) 104 *South African Law Journal* 52.

<sup>109</sup> A van Aswegen ‘Policy Considerations in the Law of Delict’ (1993) 56 *Journal of Contemporary Roman-Dutch Law* 171.

<sup>110</sup> Gordon (note 94 above) at 59.



evolutionary functionalism. The unempiricism of this approach in South African law has been criticised before.<sup>111</sup> However, I venture a step further and suggest that the unempiricism is not necessarily perfectly tameable, as contradictions and varying possibilities in law (especially the law of delict) are very often present in legal materials, no matter how hard we try to make the law seamless.<sup>112</sup> Therefore, following the approach established in *Blower*, a judge would always be faced with a number of pushes and pulls on the questions of whether the law ought to be developed and, if so, how it should be developed, even though that judgment creates the impression that these questions can be answered in a rather uncontroversial manner. At the brink of our democratic transition an ideological dimension was added to these pushes and pulls on the thorny questions relating to the common law's development.

It was only with the dawning of the 1993 Constitution that the issue of common-law development in South Africa became constitutionally infused. The novel impact of a Bill of Rights held the potential for common law to be developed along new lines. The early case law on this issue was divided around the question of whether fundamental rights bound private parties among themselves,<sup>113</sup> but Kentridge J writing for the majority of the Constitutional Court in *Du Plessis* brought clarity with his highly technical and rigorously comparative reading of the 1993 Constitution.<sup>114</sup> The conclusion reached in *Du Plessis* was that a fundamental right could only be directly invoked by an individual against the state (with the purpose of having a common-law provision struck down) but no such direct application was available to private parties engaged in a dispute inter se.<sup>115</sup> At most, the values embodied in the Bill of Rights would

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<sup>111</sup> See Du Bois (note 107 above) at 3 & 8 and the authorities cited there.

<sup>112</sup> See eg E Zitzke 'Stop the Illusory Nonsense! Teaching Transformative Delict' (2014) 46 *Acta Academica* 52, 53ff.

<sup>113</sup> See the authority summarised in *Du Plessis* (note 2 above) at para 32 and the early suggestions on this issue proffered by HA Strydom 'The Private Domain and the Bill of Rights' (1995) 10 *SA Public Law* 52.

<sup>114</sup> See eg L Du Plessis 'Enkele Gedagtes oor die Historiese Interpretasie van Hoofstuk 3 van die Oorgansgrondwet' (1995) 58 *Journal of Contemporary Roman-Dutch Law* 504; J van der Walt 'Justice Kriegler's Disconcerting Judgment in *Du Plessis v De Klerk*: Much Ado About Direct Horizontal Application (Read Nothing)' (1996) *Journal of South African Law* 732; L Wolhuter 'Horizontality in the Interim and Final Constitutions' (1996) 11 *SA Public Law* 512; S Woolman & D Davis 'The Last Laugh: *Du Plessis v De Klerk*, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and The Final Constitutions' (1996) 12 *South African Journal on Human Rights* 361; J van der Walt 'Perspectives on Horizontal Application: *Du Plessis v De Klerk* Revisited' (1997) 12 *SA Public Law* 1; and J van der Walt 'Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-Operative Relation between Common-Law and Constitutional Jurisprudence' (2001) 17 *South African Journal on Human Rights* 341.

<sup>115</sup> *Du Plessis* (note 27 above) at para 49.

have had a ‘radiating’ effect on the common law that applied to private disputes inter se in the sense that section 35(3) of the 1993 Constitution enjoined a court to have ‘due regard to the spirit, purport and objects of [the Bill of Rights]’ when it applied or developed the common law. The effect of fundamental rights would be ‘indirect’ because the common law could not be declared unconstitutional and consequently struck down, but the common law could be incrementally developed in a manner that reflected the spirit, purport and objects of the Bill of Rights.<sup>116</sup> In this regard Kentridge J relied on the case of *R v Salituro* which indicated that Canadian judges have the power to develop the common law on social, moral and economic grounds but that those judges are prohibited from striking down a common-law rule.<sup>117</sup> The Canadian judges are simply instructed to interpret the common law ‘consistent with Charter principles’.<sup>118</sup>

From this analysis of *Du Plessis*, it would appear that the original ground established in *Blower* would survive in the new democratic dispensation. The ‘changing conditions’ and the need for law to remain relevant to the society that it serves resonates with the ‘social, moral and economic’ grounds for development that Kentridge J appropriated from *Salituro*. On one of the possible interpretations of *Du Plessis*, even though the common law could primarily be developed on moral, social and economic grounds, the 1993 Constitution was not completely irrelevant for developmental endeavours because at a secondary level any development and application of the common law had to accord with the new constitutional principles. I say this is but one of the possible interpretations of *Du Plessis*, because this theoretical distinction between primary and secondary levels of analysis in the common law’s development became more blurred than clear in some of the cases that followed after *Du Plessis* under the 1993 Constitution.

In *Rivett-Carnac v Wiggins* Davis AJ held that even though section 35(3) of the 1993 Constitution did not abolish the principle of *stare decisis*, it nevertheless required judges to carefully ‘examine the common-law rules afresh and if necessary to ensure that the content thereof accords with the principles of [the Constitution]’.<sup>119</sup> Davis AJ relied on the work of Corbett cited above to explain that the ‘values and norms of society have now been reduced to written form’.<sup>120</sup> Later it is stated even more explicitly that the Constitution gives content to the

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<sup>116</sup> Ibid at paras 58 and 60.

<sup>117</sup> *R v Salituro* (1992) 8 CRR (2d) 173 ([1991] 3 SCR 654) (*‘Salituro’*).

<sup>118</sup> *Du Plessis* (note 27 above) at para 61.

<sup>119</sup> *Rivett-Carnac v Wiggins* 1997 (3) SA 80 (C) 87B-E.

<sup>120</sup> Ibid at 87H-J.

vague notion of the ‘changing mores of society’ and that the Constitution is therefore the guidebook to determining the *boni mores*.<sup>121</sup> From this it can be deduced that the very idea of changing societal norms must be informed by the Constitution. Thus, here *Du Plessis* was interpreted to mean that the common law could be developed simply because it lacked constitutional muster. A very rigid and clear distinction between the ‘moral, social and economic’ grounds for development and the 1993 Constitution’s role in the development of the common law was not adhered to as the former is shaped and given content to by the latter. Following the basic tenor of the argument developed in *Rivett-Carnac*, the court in *McNally v M & G Media* held that it was, in principle, possible that the common-law strict liability of media houses in defamation cases had to be reconsidered in light of the introduction of freedom of expression in South Africa’s new human rights culture.<sup>122</sup> But it was only in *National Media v Bogoshi* where the ‘common good’, as informed by the newly afforded importance to the right to freedom of expression (and the related interest that society has in the free flow of information), dictated that the strict liability of the media had to be relaxed.<sup>123</sup>

The shortened version of the ground for common-law development under the 1993 Constitution, on my interpretation, is therefore that the original ground for development in principle remained intact but had itself been developed to take cognisance of the fact that the morality of South African society was now informed by constitutional aspirations. In a sense, this approach mimics evolutionary functionalism as it still sees the need for the law to develop to be relevant for society. Nevertheless, this approach contains a vitally important change in thinking: Judges are not simply required to keep the law up to date because of small changes in the community. Judges now had to envision a new path of the law with transformative constitutional aspirations that are inherently political and ideological in nature. The test for development no longer involved a tapping into the ‘objective and deterministic’ *spiritus mundi* of white South Africa. The test now involved balancing conflicting rights and interests in the Constitution in a way that best promoted an open and democratic South Africa based on the values of human dignity, equality and freedom. To what extent has this position changed or remained the same under the 1996 Constitution?

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<sup>121</sup> Ibid at 89I-J.

<sup>122</sup> *McNally v M & G Media and Others* 1997 (4) SA 267 (W), [1997] 3 All SA 584 (W), 1997 (6) BCLR 818 (W) 275F-H.

<sup>123</sup> *National Media Ltd and Others v Bogoshi* [1998] ZASCA 94, 1998 (4) SA 1196 (SCA), [1998] 4 All SA 347 (A) (‘*Bogoshi*’) 1210G.

One of the most interesting South African private-law debates took place in the boxing ring of horizontality under the 1996 Constitution. As I indicated above, under the 1993 Constitution most of the debate leading up to *Du Plessis* revolved around the question of *whether* fundamental rights should play a role in private relationships at all, with only a few observations on the mechanics of horizontality. Post-*Du Plessis* and after 1996 the debate shifted to the mechanics of *how* fundamental rights should impact on private relationships regulated by the common law. The seminal case of *Carmichele CC* laid the blueprint for common-law development in terms of the 1996 Constitution.

In *Carmichele CC* a unanimous Constitutional Court held, after surveying the totality of constitutional provisions that are in some way linked to the development of the common law, that ‘where the common law deviates from the spirit, purport and objects of the bill of rights the courts have an obligation to develop it by removing that deviation’.<sup>124</sup> The Court then proceeded to explain that ‘where a court develops the common law, the provisions of s 39(2) of the Constitution oblige it to have regard to the spirit, purport and objects of the bill of rights’.<sup>125</sup> Even though the Court took cognisance of the fact that courts should not usurp the role of the legislature, it noted the *Salituro*-dictum that had been adopted in *Du Plessis* to the effect that judges should not allow a rule whose social foundation has fallen away to be perpetuated, with the added qualification that South African judges have a vastly different responsibility when it comes to the development of the common law. This is so because our Constitution has radically altered the normative framework of our law and requires judges to be alert of the pressing need to ensure that the common law is consonant with this new framework.<sup>126</sup> The duty of judges to consider the constitutional validity of the common law as it stands is ‘general’ in the sense that a court may in some instances raise the issue of its own volition.<sup>127</sup>

According to the court a two-stage method is involved in the process of developing the common law. Firstly one considers whether the common law needs to be developed in light of the ‘s 39(2) objectives’.<sup>128</sup> If the common law must be developed, the second stage involves an evaluation of exactly how the law should be developed to give effect to the section 39(2)

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<sup>124</sup> *Carmichele CC* (note 27 above) at para 33.

<sup>125</sup> *Ibid* at para 35.

<sup>126</sup> *Ibid* at paras 36 and 54.

<sup>127</sup> *Ibid* at para 39.

<sup>128</sup> *Ibid* at para 40.

objectives,<sup>129</sup> which could include, for example, either an accentuation of a specific aspect of a common law provision or a redefining thereof.<sup>130</sup> Complicating the issue, the Court then proceeded to indicate that in the context of an enquiry into the wrongfulness of state omissions, '[b]efore the advent of the [1993 Constitution], the refashioning of the common law in this area entailed "policy decisions and value judgments" which had to "reflect the wishes, often unspoken, and the perceptions, often but dimly discerned, of the people"', but that these concepts 'might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution'.<sup>131</sup> I argue that these statements cloud the grounds for development because it suggest on the one hand that the original ground for development is a relic of a pre-fundamental rights paradigm (suggested by the phrase 'before the advent of the 1993 Constitution'), while on the other hand it does not unequivocally command the bolstering of the original ground with the new constitutional values. The Constitution 'might' play a role, but it is not to say that it 'must'.

Thus, it is not completely clear whether constitutional non-compliance has replaced the original ground, or whether it acts in tandem with that ground (bearing in mind that in *Carmichele CC* it was proposed that the common law ultimately had to be developed because it was said to fall short of the section 39(2) objectives). I contend that there are at least three ways to deal with this ambiguity in *Carmichele CC* that I take further here. However, what all three approaches to the ambiguity have in common is the following: There is no academic or precedential authority (after *Du Plessis* at least) that completely rejects the possibility of the common law being developed on some type of constitutional ground. In *Carmichele CC* it was held that the constitutional ground for development is based on section 39(2), but the reliance on that section can be and has been critiqued by employing an analytical reading of the Constitution which rather locates the authority for a constitutional ground for development in an integrated reading of sections 2, 8 and 173 in conjunction with Schedule 2 item 1 thereof.<sup>132</sup> Be that as it may, what *Carmichele CC* implies, in the broadest of terms that most authors agree to, is that at least one of the grounds for the common law's development can be a constitutional one.

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<sup>129</sup> Ibid.

<sup>130</sup> Ibid at para 57.

<sup>131</sup> Ibid at para 56.

<sup>132</sup> This is my own conclusion derived from the views of Woolman (note 3 above); Fagan (note 45 above); Bhana (note 4 above); and Friedman (note 7 above).

The first approach to the ambiguity is what I shall call the ‘Faganian construction’ based on Fagan’s thought-provoking work on the spirit, purport and objects of the Bill of Rights.<sup>133</sup> Even though Fagan does not specifically attack this segment of the judgment as being ambiguous, in his reflection on section 39(2) of the Constitution he argues that three primary grounds exist for the development of the common law.<sup>134</sup> Firstly, as per section 8 (and not section 39(2)) of the Constitution, he suggests that in order to further a right in the Bill of Rights the common law may be developed. The second ground proposed by Fagan is grounded in section 173 and can be phrased that the common law should be developed if it is in the interests of justice to do so.<sup>135</sup> The last ground for development he suggests is sparked by a rule of the common law itself, as supported by section 39(3) of the Constitution that preserves common law rights and freedoms that are consistent with the Bill of Rights.<sup>136</sup> Even though Fagan does not provide a lengthy explanation of what he means with his statement that the common law can be developed because of the ‘rules of common law’, I argue that it is possible to interpret that statement as lending support to the original ground for development introduced at common law in 1909. It therefore seems that Fagan would not support the suggestion that the original ground for the common law’s development has been abolished by *Carmichele CC* or the Constitution. To be clear, Fagan therefore suggests that the common law can be developed either for the sake of furthering a constitutional right, because of justice or because of the common law itself and it is only after one has established that the common law should be developed for one of these reasons that the secondary role of the spirit, purport and objects of the Bill of Rights kicks in, because the application of section 39(2) is limited to ‘when’ the common law is actually being developed.<sup>137</sup> Fagan, to my mind, would therefore implicitly reject the reading of the ambiguous part of the judgment that regards the phrase ‘before the advent of the 1993 Constitution’ as laying the original ground at common law to rest. There have however been critical legal scholars who have painted a very different picture of the Faganian construction.

For that reason, the second approach to the *Carmichele CC*-ambiguity is what I shall refer to as the ‘critical construction’. The critics trash Fagan’s notion that ‘the interests of justice’ can be regarded as a ground for development that is completely removed from the furtherance of a fundamental right. They suggest that the promotion of fundamental rights surely cannot be said

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<sup>133</sup> Fagan (note 45 above) at 611.

<sup>134</sup> Ibid at 622.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid at 621.

to be so divorced from the promotion of justice that it is a separate ground for development.<sup>138</sup> They criticise Fagan’s ‘positivist’ reading for failing to comply with the purposive approach to constitutional interpretation that our Constitutional Court endorses.<sup>139</sup> Instead the crits propose that the conclusion, to which I also adhere, about the position under the 1993 Constitution is the more defensible approach to the interaction between the Constitution and the original ground for development – in other words, that the original ground has itself been developed in the sense that our changing social fabric or *boni mores* should be informed and shaped by the Constitution.<sup>140</sup> Their argument is that there can be no other more important source of South African morality when compared to the supreme, transformative Constitution. I suggest that this is a point indirectly supported in *S v Makwanyane* where it was held that regardless of public opinion on the matter, capital punishment is in conflict with our supreme law that reflects our new democratic social fabric.<sup>141</sup> That social fabric is not informed by the values of hatred and vengeance, even though those may factually exist in the minds and hearts of many South Africans, but it is informed by a new culture of reconciliation. In a nutshell, even though we may still use the phraseology of the *boni mores* or the changing fabric of society, those phrases now mean our constitutionally-informed morality. There is therefore in effect one very broad constitutional ground for the development of the common law, which may be expressed in different ways, but boils down to the fact that in deciding *whether* and *how* the common law should be developed, the Constitution should play an integral role.

Adding to the arguments presented by the crits, I propose that their interpretation is more consistent with the historical progression of the grounds for common-law development that I have laid out here thus far. Furthermore, even though crits are more well-known for pointing out uncertainties rather than solving them, the stance of the critical paradigm to the grounds for development can be utilised in a strategic manner to resolve the *Carmichele CC*-contradiction that is pointed out above. My proposition is that the Court in *Carmichele CC* could have meant that before the 1993 Constitution a purely extra-constitutional version of legal morality was utilised as the ground for development, but since then things have changed. Even

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<sup>138</sup> C Roederer 2013 (note 11 above) at 244 & 246-247.

<sup>139</sup> D Cornell & N Friedman ‘In Defence of the Constitutional Court: Human Rights and the South African Common Law’ (2011) 5 *Malawi Law Journal* 1, 3ff; and Davis (note 12 above) at 59ff; and Roederer (note 138 above) at 245ff.

<sup>140</sup> Davis & Cheadle (note 75 above) at 45; Davis & Klare (note 13 above) at 424; and Davis (note 12 above) at 64.

<sup>141</sup> *S v Makwanyane* [1995] ZACC 3, 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), [1996] 2 CHRDL 164 (CC), 1995 (2) SACR 1 (CC) paras 87-89.

though the phraseology in *Carmichele CC* is unfortunate in its suggestion that the role of the Constitution is tentative in determining what the social fabric of South Africa today is, it is possible that there are certain pre-1993 judicial pronouncements that could comfortably fit into the mould of the current normative framework of the Constitution. Certainly a great deal of pre-1993 South African legal morality was warped and corrupt, but there may have been some judgments that were subversive to the oppressive political system of the day that can be meaningfully used in the democratic dispensation today. To determine to what extent past judgments are consistent with the Constitution those indices of the *boni mores* would have to be constitutionally justified in each new case. In that sense then, the Constitution will not always dispose of every single precedent created before the Constitution came into effect. Thus, even though the critics argue that every precedent should be tested against the supreme law for compliance with it, the Constitution will not necessarily ‘supplement’ or ‘replace’ every single past manifestation of the *boni mores*. In this way, the Constitution stays central to the developmental exercise (where it plays a role both at the level of determining *whether* the law needs developing and, if it does, *how* it should be developed) and sense can be made of the ambiguity in *Carmichele CC*.

The third approach to the ambiguity is the ‘amalgamated construction’ employed by the Supreme Court of Appeal that becomes apparent upon a joint reading of two cases following on *Carmichele CC*. This approach is amalgamated in the sense that it shows elements of both of the previous constructions. In *Minister of Safety and Security v Van Duivenboden* a similar issue arose in respect of the determination of the wrongfulness of omissions by state functionaries.<sup>142</sup> Reaffirming that wrongfulness is determined by the legal convictions of the community which can differ from society to society,<sup>143</sup> Nugent JA emphasised the importance of considering the legal convictions specifically prevalent in the South African community.<sup>144</sup> The South African community’s legal convictions ‘must necessarily now be informed by the norms and values of our society as they have been embodied in the 1996 Constitution’, because in order for a norm to have legal validity, it must be consistent with the Constitution.<sup>145</sup> A few months later in *Van Eeden v Minister of Safety and Security* Vivier ADP was also faced with the challenge of giving

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<sup>142</sup> *Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79, 2002 (6) SA 431 (SCA), [2002] 3 All SA 741 (SCA) (*‘Van Duivenboden’*).

<sup>143</sup> *Ibid* at para 13.

<sup>144</sup> *Ibid* at para 16.

<sup>145</sup> *Ibid* at para 17.



content to the 'legal convictions of the community'.<sup>146</sup> In this regard, it was emphasised that the legal convictions of the community do not refer to the social, moral, ethical or religious convictions of the average person roaming the streets of South Africa. The determination of the legal convictions of the community refers to the convictions of legal policy makers such as the judiciary and the legislature,<sup>147</sup> which means that the 'norms, values and principles contained in the Constitution' must necessarily be incorporated into the content of the *boni mores*.<sup>148</sup> However, a new twist is added to this principle adopted from *Van Duivenboden*. The Constitution is not the 'exclusive embodiment' of the *boni mores*. The *boni mores* criterion has not been abolished and will continue to keep the law of delict in step with the changing times. Even so, all principles and rules of delict must be consistent with the supreme law.<sup>149</sup>

The inference to be drawn from this is that the Supreme Court of Appeal is of the view that there may be aspects of the *boni mores* that are found extrinsic to the Constitution, but those aspects must at least be consistent with the Constitution. Yet, on a holistic perusal of this judgment and despite the comment militating against constitutional over-excitement, the *boni mores* in this case were determined in light of various constitutional provisions and not from extra-constitutional sources. As mentioned above, if one reads *Van Duivenboden* and *Van Eeden* together, a combination of the Faganian and critical constructions can be observed. The amalgamated construction is in harmony with Fagan's line of attack in that it does not regard the Constitution as the sole embodiment of our social fabric and shows reverence to the original ground for development at common law. Simultaneously this construction has a critical flair because it still recognises the supremacy of the Constitution albeit on slightly different terms when compared to the view that the crits holds on the matter.

With these three possible approaches to understanding the *Carmichele CC* ambiguity concerning the grounds for common-law development in mind, what is interesting is that at a glance over most cases where the common law of delict has been developed it would appear that the critical construction is the dominant approach followed in that area of law. None of the cases unequivocally reject the amalgamated construction developed by the Supreme Court of Appeal, but in all delictual cases that I have surveyed, except for *Heroldt* under scrutiny in this discussion

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<sup>146</sup> *Van Eeden v Minister of Safety and Security* [2002] ZASCA 132, 2003 (1) SA 389 (SCA), [2002] 4 All SA 346 (SCA) (*'Van Eeden'*).

<sup>147</sup> *Ibid* at para 10.

<sup>148</sup> *Ibid* at para 12.

<sup>149</sup> *Ibid*.

and the case of *RH v DE*, the Constitution has been invoked as the primary ground for developing the common law with no reference to the possibility of extra-constitutional grounds entering the scene. Most recently in *DE v RH* the Constitutional Court, following its earlier judgments in *Barkhuizen v Napier*<sup>150</sup> and *Loureiro v iMvula Quality Protection*,<sup>151</sup> has expressed its unequivocal support for the critical construction in that public policy *must* be determined with reference to the values enshrined in the Bill of Rights because the *boni mores* are ‘deeply rooted in our Constitution’.<sup>152</sup> It therefore appears that the realist version of evolutionary functionalism is not the general trend followed in the common law’s development. What then should we do with *Heroldt*?

### 3.2.4 *A Specific Analysis of the Development in Heroldt*

In *Heroldt* the court noted the fact that the interrelated common-law rights to privacy, freedom of expression and dignity have been confirmed in the Constitution,<sup>153</sup> and that the common law must be developed ‘in accordance with the principles enshrined in our Constitution’.<sup>154</sup> At first one might read this as constitutional enthusiasm and predict a powerful, ideological argument on how the common law should be developed to better give effect to those constitutional rights or because the common law as it stands is deficient in promoting the objectives of the development clauses. However, the court quickly turned to extra-constitutional grounds to develop the common law and extra-constitutional logic for how it should be developed.

Willis J indicated that neither the Roman Emperor Justinian nor the constitutional drafters could have predicted the existence and impact of Facebook on our daily lives,<sup>155</sup> and these technological (and concurrent social) changes require appropriate responses from the courts.<sup>156</sup> After dedicating about 30% of the judgment to an exposition of the technological functioning of Facebook and related social networking sites,<sup>157</sup> the court made it clear that the reason why the common law had to be developed in this case was because the court in *Setlogelo*

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<sup>150</sup> *Barkhuizen v Napier* [2007] ZACC 5, 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC) (‘*Barkhuizen*’).

<sup>151</sup> *Loureiro and Others v iMvula Quality Protection (Pty) Ltd* [2014] ZACC 4, 2014 (3) SA 394 (CC), 2014 (5) BCLR 511 (CC) (‘*Loureiro CC*’).

<sup>152</sup> *DE v RH* (note 44 above) at para 18.

<sup>153</sup> *Heroldt* (note 84 above) at paras 7 & 26.

<sup>154</sup> *Ibid* at para 8.

<sup>155</sup> *Ibid* at para 7.

<sup>156</sup> *Ibid* at para 8.

<sup>157</sup> *Ibid* at paras 10-23.

back in 1914 could not have foreseen how quick, easy and cheap it would be in 2013 to interdict a respondent to remove a defamatory post on Facebook<sup>158</sup> – a situation that is markedly different to the practical and economic consequences for interdicting a newspaper to halt the printing press.<sup>159</sup> Thus, the law had to be developed to keep up with evolving technology and society and the ever-changing political and economic climate to ensure ‘credibility’, which will have the knock-on effect of ensuring ‘legitimacy’, ‘acceptance’ and ‘obedience’, in that order.<sup>160</sup> Ultimately the ground for the development in *Heroldt* was thus the socio-technological advancement that Facebook has brought about.

In addition to this (seemingly addressing the *whether* and *how* questions simultaneously), the court was of the view that the stance against the gratuitous granting of interdicts in cases involving personality infringements has always been informed by a concern about the ‘social consequences of stopping the free flow of information’ *à la Bogoshi*.<sup>161</sup> The court went so far as to suggest that because of the importance of the free flow of information a different outcome may have been reached if the respondent was a media house,<sup>162</sup> but here the applicant succeeded in obtaining the interdict compelling the respondent to remove the defamatory post from Facebook on the reasoning that no other similar remedy was available that would as effectively assist the applicant without ‘expense, drama, trauma and delay’, even though the standard remedy in cases of this nature would have been to award damages to the applicant.<sup>163</sup> The court’s view on the ground for developing the common law and the manner in which it was developed raises two further issues.

The first issue is the court’s decision to develop the common law on the basis of the ‘changing times’ in an evolutionarily functionalist manner. One cannot regard the law as being completely divorced from the society that it governs. Of course society has an impact on shaping the law just as the law has a material impact on the lives of the people that are subject to it. However, the approach of evolutionary functionalism is subject to a few points of criticism that I borrow from Gordon. There is no ‘uniform evolutionary path’ that the law follows across the

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<sup>158</sup> Ibid at para 31.

<sup>159</sup> Ibid at para 34.

<sup>160</sup> Ibid at paras 31-32.

<sup>161</sup> Ibid at para 34.

<sup>162</sup> Ibid at para 35.

<sup>163</sup> Ibid at para 39.

world.<sup>164</sup> In other words, sometimes the same social circumstances (at different points in time and place) can produce different legal outcomes, so the law does not uniformly and objectively respond in a predetermined way to specific social conditions. The reason why legal outcomes can differ despite similar social changes in different places (or why different legal arguments present themselves in one place and at one time) is because the law's development is not politically or ideologically objective.<sup>165</sup>

Applying this critical approach to the common law's development to the finding in *Heroldt*, the court was in reality confronted with choices as to *whether* and *how* the common law should be developed. It would be erroneous to assume that allowing the interdict here was the only possible response that the court could have given to the 'changing times'. Perhaps the 'changing times' could have dictated that because of the pervasiveness of social media and the potential for abuse of private power now in the hands of private individuals, a person who has defamed another on a social networking site should be required to pay a hefty sum of damages to the injured party. It is widely accepted that the functions of the awarding of damages for personality infringements include the fictitious reparation of a person's bruised ego and a type of sanction against the injurious conduct that translates into a deterrent for potential committers of *iniuria*.<sup>166</sup> With that in mind, why not stick to the ordinary rule that an award for damages is the historically more consistent and more effective remedy to ensure that the South African people will be deterred from committing delicts on social media? The message to people using social media in South Africa could very well be that they can defame as they please as long as they remove it when someone complains with no consequences for the damage already done. If the 'changing times' is not an empirical standard that produces clear-cut and indisputable solutions to legal developmental problems, what actually determines a judge's decision on why and how the common law should be developed?

For Gordon, the various possibilities that judges may have to choose from as to what route the common law should take is unavoidably influenced by ideology.<sup>167</sup> This is consistent with the old critical perspective on law that the options that legal problems give us are shaped around political foundations. For the early crits, the choice is either in favour of an individualistic

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<sup>164</sup> Gordon (note 94 above) at 100.

<sup>165</sup> *Ibid* at 101.

<sup>166</sup> J Neethling, JM Potgieter & PJ Visser *Neethling's Law of Personality* (2<sup>nd</sup> Ed, 2015) 59-60.

<sup>167</sup> Gordon (note 94 above) at 101.

outcome or an altruistic one.<sup>168</sup> Extending this basic theme here, the choice could involve supporting a particularly individualistic, capitalist, commodified vision of the forceful protection of a person's most intimate right, the right to human dignity, versus a more altruistic, reconciliatory and friendly vision of the restoration of harmony in the community. Even if a judge does not consciously attach a political dimension to his or her interpretation of law, it exists as an 'inarticulate premise' as Dugard would call it.<sup>169</sup> Thus, of course we can admit that the reality of Facebook presents the possibility of legal creativity to our courts. However, relying on economic, political, social and technological advancements cannot in and of themselves present clear reasons why the common law should be developed and certainly not why it should be developed in a specific manner either. Indeed, it is true that sometimes the pattern that the law's development might follow seems consistent with recurring themes, but critical insight into the issue shows that such a consistency exists as being 'normal' exactly because lawyers are conditioned to believe that certain professional responses and modes of reasoning are 'normal' according to a particular legal culture.<sup>170</sup> A critical approach to legal history involves a rejection of the belief in the normality and determinism of the law's development and replaces that belief with a hope in the possibility of the ability of human beings, not to adapt to their current circumstances, but to reimagine their current circumstances in a way that envisions a better social reality for all.

It can further be illustrated why the original ground for development (in other words, the evolutionarily functionalist approach) should yield to a constitutionally inspired one. Our national political and social circumstances may at this stage of our history indicate that the extravagant usage of state funds for personal purposes is quite acceptable and that checks and balances in our democracy can be effectively dealt with internally by the executive without unnecessary interference from third parties. On the other hand, the Constitution provides that accountability and the concomitant necessity for the separation of state powers are fundamental aspects of our constitutional democracy that aim to prevent the abuse of power.<sup>171</sup> It follows

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<sup>168</sup> For a more detailed explanation of the political tensions identified by the early critics, as applied to the law of delict in South Africa, see eg Zitzke (note 112 above) at 55-60.

<sup>169</sup> Dugard (note 19 above) at 187.

<sup>170</sup> See Gordon (note 94 above) at 101-102 and Klare (note 66 above) at 166.

<sup>171</sup> On the importance of the value of accountability and its interplay with the separation of powers doctrine see the observations made by Z Motala 'Towards an Appropriate Understanding of the Separation of Powers, and Accountability of the Executive and Public Service under the New South African Order' (1995) 112 *South African Law Journal* 503.

logically that the Constitution, being the supreme law, should be the standard against which the political and social climate is measured. The vague notions of society and technology cannot dictate what our legal morality must mean. We should not allow these extra-constitutional hashtags (without constitutional verification) to shape and give content to a constitutionally mandated power that courts have to develop the common law. This is why the original ground for development at common law paints an inaccurately deterministic vision for our shared legal morality, which is also not the main approach used in the development of the South African common law of delict today. The critical and amalgamated grounds for development are powerful because both, albeit in different ways, recognise the ideological tensions at work in answering the question whether the common law ought to be developed. Relying on Klare,<sup>172</sup> I argue that the moment that the Constitution enters this enquiry the possibility is created for a frank acknowledgement of the ideological and political task of legal interpretation involving the tension between judicial freedom and constraint, which many common-law lawyers regard as being inapplicable to ‘pure common law’ matters.<sup>173</sup> In *Carmichele CC* Ackermann and Goldstone JJ acknowledged that it was by no means apparent in what way the common law should have been developed in light of the Constitution and that various different options could have been pursued in this regard.<sup>174</sup> The inference to be drawn from reading Klare with *Carmichele CC* is that the Constitution can be effectively used to militate against the myopic and limiting approach of evolutionary functionalism. By using one of the alternative approaches to the original ground, law is not completely divorced from the materiality of South African society, but at the same time one recognises that there are ideological considerations as to whether those social changes should dictate concomitant legal change.

If the critical approach had been employed in *Heroldt*, the same result could have been reached because the heart of the Constitution and our new political dispensation would bleed for litigants who wish to reconcile and make peace instead of attempting to destroy each other financially through a battle for damages.<sup>175</sup> Twisting the phraseology of section 8, the granting of

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<sup>172</sup> Klare (note 66 above) at 149.

<sup>173</sup> Zitzke (note 112 above) at 55ff.

<sup>174</sup> *Carmichele CC* (note 27 above) at para 57.

<sup>175</sup> I draw here specifically on the work of Davis & Klare (note 13 above) at 411 who regard the development clauses of the Constitution as a mandate for the infiltration of the value of *ubuntu* into all forms of law, including the common law. See also C Himonga, M Taylor & A Pope ‘Reflections on Judicial Views of Ubuntu’ (2013) 16 *Potchefstroom Electronic Law Journal* 369 and their interpretation of *ubuntu* as a reconciliatory value opposed to vengeance and domination. Chapter 8 below deals with *ubuntu* in more detail.

an interdict instead of damages would give better effect to the fundamental rights of the applicant when compared to an order for damages. If the amalgamated approach had been employed here, one could argue that the socio-technological change brought about by Facebook has opened the space for interdicts to be practical and effective in cases dealing with social media, but this practical point only deserves legal recognition because better effect can be given to the Constitution's transformative vision by granting the interdict. But here is a further problem in the reasoning in *Heroldt*.

The second issue with the approach in *Heroldt* is the invalid policy argument offered as the rationale for the common law's development. As indicated above, the policy reason provided by the court for developing the common law here is the 'historic importance' afforded to the free flow of information in cases involving the media (according to the court, as per *Bogoshi*) as contrasted to the current situation where a private individual is the wrongdoer. This policy decision played out as an argument in favour of the granting of an interdict where the wrongdoer is an individual, but a suggestion to the effect that the interdict would not be granted where the wrongdoer is a media house. This argument is disagreeable for two reasons. Firstly, *Bogoshi* cannot be invoked as the authority for a long alleged history of media freedom. Any good South African media law textbook starts off with the recognition of the importance of the media in an open and free democracy as contrasted to pre-1994 South Africa.<sup>176</sup> Historically, it would be more consistent to present a case for the fact that the Constitution brought about a transformed consciousness of the role that a responsible media has to play in ensuring public access to information and good governance. It is erroneous to view access to information and freedom of the press as principles with a longstanding track record in our country. The stronger policy argument applicable to the facts and issues of this case would be that in the past our law commodified dignity to the extent that it could virtually only be protected in monetary terms to bring solace to the injured party.<sup>177</sup> Today our law finds itself in a new normative framework founded on the value of reconciliation and the establishment of a community that coexists peacefully despite our differences and for that reason our law needs development. The ease of effecting this ideological change through the law applicable to the case at hand is but one of the bolstering considerations as to why the law should be developed, but these technological considerations are not our primary concern. Thus, the change in technology has created the opportunity and the space for the law to be developed – it has sparked the opportunity for a new

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<sup>176</sup> See eg D Milo & P Stein *A Practical Guide to Media Law* (2013) vi.

<sup>177</sup> This argument is developed more fully in Chapter 8 below.

set of facts to be presented to a court for the first time – but it is not the reason for the need for legal development. The need for development is established on ideological, constitutionally transformative grounds. My suggestion is not completely in conflict with the judgment read as a whole. Willis J recognised the important role that the law could play in building friendships and restoring harmony instead of destroying already damaged relationships further by the imposition of delictual damages as remedy. This is the actual crux of the policy considerations in the case at hand and this should have been the more coherent and effective constitutional reasoning of the court in *Heroldt*. The second reason why I disagree with the policy argument presented by the court on freedom of expression and access to information is the unfair distinction the court drew between individuals and the media. To recap, due to the fact that the South African citizens have a right to the free flow of information and media freedom, the court suggested that the media, when publishing information electronically, will possibly not be interdicted to remove injurious content from the web. Taking a step back, one will recall that the test in *Setlogelo* requires a court to determine whether a legal interest has been infringed and then whether that infringement is unlawful. If we bear in mind that the media is allowed to publish infringing content that is reasonable or content that is true and in the public interest, it is strange to think that the media should be allowed to publish wrongfully injurious material (that is, without a valid legal excuse) simply because South African citizens have an interest in having a free flow of information. That free flow of information is always limited by the rights of other persons to dignity and privacy, which is why unreasonable infringements or those made either untruthfully or without any public benefit can lead to a successful delictual claim. Surely the media should not be allowed to infringe wrongfully on the personality rights of others and simply pay damages as an *ex post facto* remedy, while private individuals are not entitled to commit wrongful infringements to start off with. An opposite finding would be incompatible with the equality clause as it would effectively empower the media to abuse its influential and far-reaching publishing power.<sup>178</sup> The same rule should apply to all infringers of personality rights: Because our Constitution now requires people to live in peaceful harmony instead of in comfortable structures of domination, a wrongdoer may be interdicted to either be prevented from publishing unlawfully injurious content or to remove unlawfully defamatory material already published, even though the possibility of damages might in principle still exist.

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<sup>178</sup> See section 9 of the Constitution and Chapter 7 below where I provide an overview of the constitutional right to equality.



### 3.2.5 *Concluding Thoughts on Heroldt and Constitutionally Wanting Reasoning*

The outcome in *Heroldt* is welcomed and sits comfortably in the normative framework of our Constitution. However, the court fell into the trap of failing to recognise that the law does not develop along politically objective and deterministic grounds. By failing to explicitly recognise that the common law's development presents us with competing answers to the questions of *whether* and *how* the common law should be developed, like the early cases on the topic where the original ground for development at common law was applied, the court failed to recognise that the law's development occurs along a trajectory of competing political interests. Consequently the judgment appears to be evolutionarily functionalist according to the American legal realist historians' thought about the development of law. It is suggested that the invocation of the Constitution in some way in both questions, the *whether* and *how* questions, of common-law development holds the potential to open up the possibility of a clearer recognition of the political nature of law – an idea that was foreign to pre-apartheid and apartheid South Africa where legal positivism reigned supreme – which is at least a small step in the direction of culturing a critical approach to the common law's development and historiographic studies under a transformative dispensation.

## 3.3 **Constitutional Heedlessness**

### 3.3.1 *Introducing Constitutional Heedlessness*

To recapitulate, constitutional heedlessness involves a circumvention of the potential impact of the Constitution on the common law in a specific matter where the Constitution should play a role. However, constitutional heedlessness does not involve an express rejection of the Constitution's potential impact. In other words, the Constitution is side-stepped by following a traditional, business-as-usual approach to dealing with the common law in a specific matter. At the same time, the court deciding the case or the commentator on the specific issue does not go out of the way to fight off the Constitution or explicitly push it aside – if the court or commentator did that, they would be employing an anti-constitutional approach, as discussed below. What we are dealing with in cases of constitutional heedlessness is therefore simply neglecting to take the Constitution seriously in common-law matters. After reflecting on the decisions in *iMvula Quality Protection v Loureiro*,<sup>179</sup> *H v Kingsbury Foetal Assessment Centre*,<sup>180</sup> *Country*

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<sup>179</sup> *iMvula Quality Protection (Pty) Ltd v Loureiro and Others* [2013] ZASCA 12, 2013 (3) SA 407 (SCA), [2013] 2 All SA 659 (SCA) ('*Loureiro SCA*').

<sup>180</sup> *H v Kingsbury Foetal Assessment Centre* [2014] ZAWCHC 61 ('*Foetal Assessment Centre HC*').

*Cloud Trading v MEC, Department of Infrastructure Development, Gauteng*<sup>181</sup> and *Department of Health, Provincial Administration: Western Cape v Oppelt*,<sup>182</sup> it could be argued that these cases all demonstrate the approach of constitutional heedlessness. *Loureiro CC*,<sup>183</sup> *Foetal Assessment Centre CC*<sup>184</sup> and *Oppelt CC*<sup>185</sup> serve as examples where constitutional heedlessness in the courts below was remedied in the respective appeals to the Constitutional Court, while *Country Cloud SCA* serves as an example where, for the purposes of conceptual clarity, a more complete analysis of the relevant issues would have involved a recognition of the constitutional value of state accountability (and the common law rules that have been developed in light of this norm) even though such recognition did not have an effective impact on Country Cloud's appeal to the Constitutional Court.<sup>186</sup>

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<sup>181</sup> *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2013] ZASCA 161, 2014 (2) SA 214 (SCA) ('*Country Cloud SCA*').

<sup>182</sup> *Department of Health, Provincial Administration: Western Cape v Oppelt* [2014] ZASCA 135, 2014 JDR 2015 (SCA) ('*Oppelt SCA*').

<sup>183</sup> *Loureiro CC* (note 151 above).

<sup>184</sup> *H v Fetal Assessment Centre* [2014] ZACC 34, 2015 (2) SA 193 (CC), 2015 (2) BCLR 127 (CC) ('*Fetal Assessment Centre CC*' – the difference in spelling between 'foetal' and 'fetal' appear in citations to the High Court and Constitutional Court judgements respectively). See IM Rautenbach 'Overview of Constitutional Court Judgments on the Bill of Rights – 2014' (2015) *Journal of South African Law* 379, 381ff; C Chürr 'Wrongful Life Claims under South African Law: An Overview of the Legal Framework' (2015) 36 *Obiter* 745, 748ff; J Neethling & JM Potgieter 'Aksie weens Onregmatige Lyding Vanweë Gestremdheid (Wrongful Life)' (2015) 12 *LitNet Akademies* 364; CJ Boezaart 'n Kind met Gestremdheid en Onregmatige Lyding in die Suid-Afrikaanse Deliktereg' in JM Potgieter, J Knobel & RM Jansen (eds) *Essays In Honour of / Huldigingsbundel vir Johann Neethling* (2015) 93, 96ff; P Mahery 'A Child's Potential Claim for Negligent Misdiagnosis: The Case of H v. Fetal Assessment Centre' (2016) 106 *South African Medical Journal* 348; and M Rabie 'Die Eis om Onregmatige Lewe: Bestaanbaar in die Deliktereg of Word die Gemenereg Buite sy Perke Gestrek?' (2016) 13 *LitNet Akademies* 502.

<sup>185</sup> *Oppelt v Head: Department of Health Provincial Administration, Western Cape* [2015] ZACC 33, 2016 (1) SA 325 (CC), 2015 (12) BCLR 1471 (CC) ('*Oppelt CC*').

<sup>186</sup> *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2014] ZACC 28, 2015 (1) SA 1 (CC), 2014 (12) BCLR 1397 (CC) ('*Country Cloud CC*'). See J Neethling & JM Potgieter 'Breach of Contract and Delictual Liability to Third Parties' (2015) 78 *Journal of Contemporary Roman-Dutch Law* 711; J Neethling & JM Potgieter "'Vulnerability to Risk" as a Factor Determining Delictual Liability for Pure Economic Loss' (2015) 78 *Journal of Contemporary Roman-Dutch Law* 635, 640ff; and A Mukheibir 'Limitless Liability – Tokoloshe or Real Danger?' (2015) 132 *South African Law Journal* 22, 30ff.

### 3.3.2 *Constitutional Heedlessness in Loureiro SCA*

In *Loureiro SCA* the court had to determine whether a security company could be held contractually and/or delictually liable for the conduct of its security guard.<sup>187</sup> The conduct concerned involved opening the gate to the Loureiro household for a person who pretended to be a police officer, while in reality the person was a robber who then let his accomplices onto the property causing a great deal of financial and emotional harm to the Loureiro family and their employees.<sup>188</sup> For purposes of this discussion, I shall direct my attention to the delictual enquiry only. Mhlantla JA, writing for the majority, first addressed the issue of the guard's negligence followed by a discussion on the issue of the wrongfulness of his conduct.

With regard to the question of negligence, the court repeated the classical test articulated in *Kruger v Coetzee* that requires a court to determine whether 'a reasonable person in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and would take reasonable steps to guards against such occurrence; and the defendant failed to take such steps'.<sup>189</sup> Drawing from a variety of earlier cases, the court emphasised that the reasonable person is a normal, balanced individual<sup>190</sup> and that the enquiry into reasonable foreseeability is an abstract enquiry where at least the general manner of the occurrence of harm should be anticipatable.<sup>191</sup> Furthermore, the reasonable person is not a prophet and therefore the determination of negligence should not be conducted 'wise after the event' – one must have regard to the specific circumstances that the guard found himself in.<sup>192</sup> Applying this test to the facts presented to it, the court held that the guard 'could not be faulted' for his assumption that the robber was a policeman because the robber arrived in a car with a blue flashing light and was dressed like a genuine police officer. There was no reason for the guard to have suspected the disguised persons of being robbers.<sup>193</sup> In a nutshell, the reasonable person in the guard's position 'would not have foreseen that he was

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<sup>187</sup> *Loureiro SCA* (note 179 above) at para 7.

<sup>188</sup> *Ibid* at paras 4-6.

<sup>189</sup> *Kruger v Coetzee* 1966 (2) SA 428 (A) ('*Kruger v Coetzee*') 430E-G quoted in *Loureiro SCA* (note 179 above) at para 24.

<sup>190</sup> *Loureiro SCA* (note 179 above) at para 25.

<sup>191</sup> *Ibid* at para 26.

<sup>192</sup> *Ibid* at para 28.

<sup>193</sup> *Ibid* at paras 28-29.

opening the gate to robbers and that he would be overpowered' and consequently the guard was not legally 'blameworthy'.<sup>194</sup>

As to the wrongfulness of the guard's conduct, the court was of the view that it had to be determined whether the guard breached a legal duty owed towards the Loureiro family and that the considerations applicable to determining negligence are the same considerations that apply in determining wrongfulness.<sup>195</sup> The equating of wrongfulness with negligence is peculiar because the court then proceeded to indicate that even if conduct is negligent it does not necessarily mean that it is wrongful.<sup>196</sup> The court then indicated that even though the determination of wrongfulness may involve taking the foreseeability of harm into account, wrongfulness primarily involves an enquiry into whether the legal convictions of the community require that the plaintiff be compensated for his or her losses caused by the negligence of the defendant.<sup>197</sup> In this case the guard in question was under an obligation not to resist a policeman's entry to the property and, because he acted in good faith at all times believing that the robber was in fact a policeman, it cannot be said that the guard acted wrongfully.<sup>198</sup> As a result, the security company was not held delictually liable for the guard's conduct as he acted neither negligently nor wrongfully.<sup>199</sup>

On appeal, the Constitutional Court overturned the decision of the Supreme Court of Appeal partly because of the Supreme Court of Appeal's misunderstanding of the common law, partly because of a different reading of the facts and partly because of the Supreme Court of Appeal's failure to engage properly with the Constitution, or, as I would prefer to formulate it, because of the Supreme Court of Appeal's constitutional heedlessness. Van der Westhuizen J, writing for a unanimous court in *Loureiro CC*, framed the issue differently to the Supreme Court

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<sup>194</sup> Ibid at paras 29-30.

<sup>195</sup> Ibid at para 31.

<sup>196</sup> Ibid at para 32.

<sup>197</sup> Ibid at paras 32-33.

<sup>198</sup> Ibid at paras 33-34.

<sup>199</sup> Ibid at para 35. The minority judgment portrays the opposite conclusion. Cloete JA held that the guard was negligent as he should have taken further steps to ascertain whether the robber truly was a police officer because the guard was a trained security professional (at para 49). Furthermore, the minority favoured a clearer separation of the elements of negligence and wrongfulness and stressed that the wrongfulness enquiry involves an engagement with constitutional norms that inform the legal convictions of the community to determine whether liability should be imposed on the defendant. The state of mind of the defendant is not relevant to the determination of wrongfulness (at paras 52-53). Because the guard's conduct is a positive act that infringed on the rights of the plaintiffs, it is well-established in the law of delict that wrongfulness is presumed in cases such as these. Therefore, Cloete JA would have held the security company delictually liable (at para 53).

of Appeal. The judgment starts with a restatement that human dignity, the advancement of fundamental rights and the rule of law are the foundational values of the Constitution and that the rights to life, freedom and security of the person, privacy and property are to be protected.<sup>200</sup> Within this transformative framework, the Court then turned to determine the delictual liability of the security company. According to the Court, wrongfulness and negligence are two separate elements in the law of delict that should not be conflated. The Supreme Court of Appeal appeared to conflate the two elements and therefore its understanding of the common law was incorrect.<sup>201</sup> An investigation into wrongfulness concerns the conduct of the defendant and enquires whether the legal convictions of the community, which are necessarily informed and shaped by the Constitution, regard the conduct as acceptable. Drawing from earlier judgments of the Constitutional Court and the Supreme Court of Appeal, Van der Westhuizen J noted that an analysis of wrongfulness should always involve constitutional contemplation. Failure to pay due regard to the Constitution in determining wrongfulness could lead to a successful appeal on constitutional grounds.<sup>202</sup> It is clear that the Supreme Court of Appeal did not give proper consideration to constitutional imperatives in its decision on the wrongfulness of the guard's conduct. Furthermore, wrongfulness is based on three pillars: the duty to respect rights, not to cause harm and the reasonableness of imposing liability.<sup>203</sup> In the wrongfulness enquiry the defendant's state of mind is not the focal point – the subjective state of mind of the defendant is the concern of the negligence enquiry that centres around the question whether the reasonable person *in the same situation* would have done the same.<sup>204</sup>

Turning to the question of wrongfulness first, the Court held that the legal conviction of the community in this case was that security guards should not give criminals access to the properties that they are supposed to protect.<sup>205</sup> The test for wrongfulness is objective and thus the Court reasoned that liability should be imposed here because the constitutional rights to 'personal safety' and 'protection from theft or damage to property' deserve protection from security companies that are contracted to prevent the type of harm seen here.<sup>206</sup> The Court's

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<sup>200</sup> *Loureiro CC* (note 151 above) at para 1. Sections 12, 14 and 25 protect those respective rights.

<sup>201</sup> *Loureiro CC* (note 151 above) at para 53.

<sup>202</sup> *Ibid* at para 34.

<sup>203</sup> *Ibid* at para 53.

<sup>204</sup> *Ibid* at para 53 (my emphasis).

<sup>205</sup> *Ibid* at para 55.

<sup>206</sup> *Ibid* at para 56.

constitutionally enthusiastic approach to determining wrongfulness will be more thoroughly evaluated in the next section.

Moving on to the question of negligence, the Court repeated the test laid down in *Kruger v Coetzee* that the Supreme Court of Appeal also relied on.<sup>207</sup> However, a different conclusion was reached on appeal to the Constitutional Court. Even though it is indicated that the test of negligence is partly normative and partly factual, it seems that the Court found that the guard had been negligent here on a different reading of the facts in the sense that certain facts that had not been emphasised in the Supreme Court of Appeal were emphasised here. The facts that indicate negligence are that the robbers arrived in an unmarked car, that the robber posing as a policeman wore a blazer (which South African police officers do not wear while on duty), that the policeman never announced the purpose for his visit and that he flashed his 'identity card' so quickly that the guard could make no proper evaluation of it.<sup>208</sup> The guard should have foreseen the possibility that robbers would want to gain access to the property by posing to be someone that they are not.<sup>209</sup> Answering the question of whether the reasonable person would have taken reasonable steps to prevent harm, the Court indicated that the extent of risk and consequences of the conduct was huge and that it would not have been disproportionately burdensome to have expected the guard to have taken reasonable steps to confirm the identity of the alleged policeman, to check that the person had lawful grounds to enter the property and, to attempt to make contact with his employer to obtain permission to allow the person onto the property.<sup>210</sup> The Court also underscored the fact that guard in question was an A-grade security official. In cases where a person professes to have a certain level of skill, the 'greater the general level of expected care and skill will be'.<sup>211</sup> Evidently, the difference in the way that the facts are described by the Court is the main reason why the finding of negligence was made in the affirmative on appeal. Even though the Court was not clear on this it would further appear that the Supreme Court of Appeal's failure to have due regard to the common-law rule of *imperitia culpa adnumeratur* also contributed to its incorrect finding.<sup>212</sup> The failure to consider the *imperitia*-rule has normative implications in that this rule promotes the notion that persons who are supposed

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<sup>207</sup> Ibid at para 58.

<sup>208</sup> Ibid at para 59-60.

<sup>209</sup> Ibid at para 61.

<sup>210</sup> Ibid at para 63.

<sup>211</sup> Ibid at para 64.

<sup>212</sup> See the observation in this regard made in TJ Scott's case note 'Loureiro and Others v iMvula Quality Protection (Pty) Ltd 2014 3 SA (SCA)' (2014) 47 *De Jure* 374, 390.

to have better skills than others should be treated differently. This notion is consistent with the South African constitutional jurisprudence on the achievement of substantive equality that accentuates the need to treat different people with different characteristics differently to ensure that the playing field, even between private individuals inter se, is levelled.<sup>213</sup> For these factual, common-law-technical and constitutional differences, the decision of the Supreme Court of Appeal was overturned and the security company was held delictually liable on these facts. At least one of the reasons why the SCA decision was wrong was its constitutional heedlessness. Also important is the fact that in the Constitutional Court's judgment one can observe subtextual support for the single system of law principle detailed in the previous part of this piece.

### 3.3.3 *Constitutional Heedlessness in Foetal Assessment Centre HC*

In *Foetal Assessment Centre HC* a mother represented her child who had been born with Down's syndrome, claiming damages for harm suffered by the child due to the negligence of the Foetal Assessment Centre. The negligence was alleged to have been the failure of the Centre to have identified a high risk of abnormality in the foetus and to inform the mother of that risk which would have resulted in her terminating her pregnancy rather than letting the child be born.<sup>214</sup> The Centre took exception to the claim of the mother, alleging, among other reasons, that the claim is bad in law or contrary to public policy.<sup>215</sup> The question that confronted Baartman J was whether South African law could recognise a claim based on 'wrongful life'.<sup>216</sup>

A 'wrongful life' claim is brought by a child against a medical practitioner for the negligent misinformation communicated to the parents of the child about the risks of the pregnancy, resulting in the child being born (instead of being aborted) and suffering as a result of life with a disability. A claim of this nature should be distinguished from claims for 'wrongful pregnancy', that are brought by the parents of an unwanted but healthy child who would not have been born but for the medical practitioner's negligence (for example where a botched sterilisation is executed or where contraceptives are inadequately prescribed to parents who consult the medical practitioner with the aim of preventing pregnancy), as well as claims for 'wrongful birth' that are brought by the parents of a child born with certain congenital defects who would not have been born if the parents were properly informed of the risks involved with

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<sup>213</sup> Section 9 of the Constitution. See also Chapter 7 below.

<sup>214</sup> *Foetal Assessment Centre HC* (note 180 above) at para 1.

<sup>215</sup> *Ibid* at para 4.

<sup>216</sup> *Ibid* at para 5.

the pregnancy as they would have aborted the foetus. Claims for wrongful pregnancy and wrongful birth are recognised in South African law.<sup>217</sup>

However, in the present matter, the court relied on the decisions in *Friedman v Glicksman*<sup>218</sup> and *Stewart & Another v Botha & Another*<sup>219</sup> to conclude that claims for wrongful life are not and should not be recognised in South African law. The cardinal reason for this decision and its predecessors is the concern that children with disabilities should not be told that their lives are ‘wrongful’. This main concern can be expanded into four other closely related reasons. Firstly, it would be contrary to the legal convictions of the community for a court to hold that children with disabilities would have been better off if they had not been alive than to have ‘the unquantified blessing of life’.<sup>220</sup> Secondly, there can be no quantification of damage in comparing a position of existence and non-existence.<sup>221</sup> Thirdly, a number of foreign jurisdictions have done away with claims for wrongful life and South Africa should follow this trend.<sup>222</sup> Fourthly, the determination of wrongfulness in a case such as this questions whether it would have been better for the child not to have been born at all and that ‘goes so deeply to the heart of what it is to be human that it should not even be asked of the law’.<sup>223</sup> Even though counsel for the child in *Foetal Assessment Centre HC* contended that the constitutional rights of the child had not been considered in *Friedman* and *Stewart*, Baartman J concluded that there had not been a change in the legal convictions of the community since those decisions. This conclusion is finally backed up with the observation that many people with disabilities display great resilience and often overcome the odds of their condition, meaning that their lives cannot be ‘wrongful’ and therefore the exception was upheld.<sup>224</sup> It can be argued that the circumvention of the potential impact of the Constitution in the determination of wrongfulness in this case is reflective of constitutional heedlessness that I have been describing throughout this piece.

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<sup>217</sup> Ibid para 7.

<sup>218</sup> *Friedman v Glicksman* 1996 (1) SA 1134 (W) (‘*Friedman*’) 1142-1143 referred to in *Foetal Assessment Centre HC* (note 180 above) at para 9.

<sup>219</sup> *Stewart & Another v Botha & Another* [2008] ZASCA 84, 2008 (6) SA 301 (SCA), [2009] 4 All SA 487 (SCA) (‘*Stewart*’) para 28 referred to in *Foetal Assessment Centre HC* (note 180 above) at para 20.

<sup>220</sup> *Foetal Assessment Centre HC* (note 180 above) at para 9.

<sup>221</sup> Ibid.

<sup>222</sup> Ibid at para 19.

<sup>223</sup> Ibid at para 20.

<sup>224</sup> Ibid at para 29.



On appeal to the Constitutional Court, Froneman J, writing for a unanimous Court, held that there were two problematic parts to the High Court decision. The first part that is problematic is that the exception was readily granted. This is problematic because there could potentially be a claim for the child based on these facts and that the High Court was perhaps too quick to uphold the exception, as the reasonable possibility for the common law's development existed. The second problematic point relates to the High Court's failure to properly contemplate whether its decision pertaining to the wrongfulness of the Centre's conduct was truly reconcilable with constitutional rights and values including the best interests of the child standard that is guaranteed in section 28 of the Constitution.<sup>225</sup> Despite these problematic aspects in the High Court decision, the Constitutional Court only provided a new framework within which the High Court would have to reconsider the matter.<sup>226</sup>

With regard to the first problematic point in the High Court judgment, Froneman J indicated that in order for an exception to succeed, there should be no possible reading of the facts that could give rise to a cause of action.<sup>227</sup> If the possibility for the development of the common law arises, it may be best to refuse the granting of exceptions or orders for absolution from the instance. This is especially true where there are complex factual matrices with uncertain legal positions accompanying those facts, even though this is not a hard and fast rule.<sup>228</sup> In a case such as the present one where a common-law rule could be changed altogether, it would usually be wise to refuse the exception so that all of the evidence and arguments could be heard to enable an informed decision about whether or not the common law should be developed.<sup>229</sup>

Earlier in this chapter, it was indicated that one of the reasons why the Constitution should play a central role in all common-law matters is to promote the single system of law principle. The single system of law principle was an important consideration that was ignored in both problematic aspects of the High Court judgment. In the judgement of *Fetal Assessment Centre CC* the single system of law principle was highlighted with great enthusiasm where Froneman J reiterated that the development clauses in the Constitution have the aim of ensuring that constitutional values permeate the common law.<sup>230</sup> Thus, both in its failure to consider the

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<sup>225</sup> *Fetal Assessment Centre CC* (note 184 above) at para 81.

<sup>226</sup> *Ibid* at para 81.

<sup>227</sup> *Ibid* at para 10.

<sup>228</sup> *Ibid* at paras 11-12.

<sup>229</sup> *Ibid* at para 24.

<sup>230</sup> *Ibid* at para 14 referring to *K v Minister CC* (note 47 above) at paras 16-17.

possibility of development and constitutional compliance in general, the High Court fell short of its transformative mandate.

With regard to the second problematic aspect of the High Court judgment, the Constitutional Court showed that the term ‘wrongful life’ is an incorrect reflection of what a claim of that nature really involves. A claim for ‘wrongful life’ does not truly involve labelling the life of the child as wrongful. The claim involves determining whether ‘the law should allow a child to claim compensation for a life with a disability’. By framing the issue in that way, the enquiry focuses on the fact that the law cannot ignore the difficulties that a child born with a disability is faced with.<sup>231</sup> The dictum that has historically been repeated by our courts to the effect that the law should not determine an essential question that seeks to define what it means to be human cannot be accepted in a single system of law where the Constitution is supreme. This is so because by side-stepping this question, judges attempt to exempt themselves from making a difficult value choice – but they only attempt to circumvent the value choice, because deciding not to answer the question has practical implications that in themselves display a particular value choice that is disguised in a fictitious cloak of neutrality.<sup>232</sup> Moreover, there cannot be areas of life and law where the Constitution can be ignored. In other words, the question about whether a claim for so-called wrongful life should be recognised by our law must be answered in light of the Constitution. It is not an extra-legal issue.<sup>233</sup> The question then arises: What should the influence of the Constitution be on this part of the law?

Foreign law may be useful in reaching an answer.<sup>234</sup> Even though there are jurisdictions that do not recognise claims of this nature, there are other jurisdictions that do. Different jurisdictions often have different answers to the same legal question because of differing socio-political circumstances and contexts. The task that a court faces is therefore to decide which jurisdictions have similar normative frameworks and material contexts to our own. Phrased differently, the exercise of employing a comparativist method involves questioning whether our objective, constitutional, normative framework could draw substance from the foreign jurisdiction in question.<sup>235</sup> In this matter, foreign jurisdictions that emphasise the best interests of

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<sup>231</sup> *Fetal Assessment Centre CC* (note 184 above) at para 19.

<sup>232</sup> *Ibid* at para 22.

<sup>233</sup> *Ibid* at para 23.

<sup>234</sup> *Ibid* at para 28. Section 39(1)(c) of the Constitution provides that a court may consider foreign law when interpreting the Bill of Rights.

<sup>235</sup> *Fetal Assessment Centre CC* (note 184 above) at paras 32 & 42.

children and the autonomy of parents would probably be compatible jurisdictions. This is a transformative approach to legal comparativism that compliments the single system of law principle. The High Court's cursory reliance on foreign law is therefore an undesirable treatment of that source of law.

The Court identified that the constitutional rights that were relevant to the issue in this case included the rights to equality, dignity and the best interests of children.<sup>236</sup> Even though common law rules can often be easily interpreted to be harmonious with the Constitution, there are cases such as the present one where the rules do not, as they stand, optimally promote all of the relevant Constitutional provisions. The current common-law model does not give due regard to the need to assist persons with disabilities to realise their right to be substantively equal to other people – especially not for children who have the right to have their best interests considered paramount in every case relating to them.<sup>237</sup> This would especially be true in cases where parents do not pursue a claim for wrongful birth and the child is then left without a remedy.<sup>238</sup> Furthermore, the child's dignity is not optimised by denying his or her claim. Even though the common-law position may appear to create the impression that life with a disability is equally worth living than life without a disability, awarding the child the right to claim in these circumstances would be more sensitive to the child's condition that may require extra resources to live comfortably.<sup>239</sup> In conclusion, the Constitutional Court held that the High Court erred insofar as it upheld the exception without appropriately considering the issue of the common law's development and the 'factual, legal and policy issues' that should have been established to play a decisive role in the court's decision.<sup>240</sup> Even though Froneman J did not make the final decision on whether the common law had to be developed in this case, it is clear that the constitutional heedlessness of the High Court was overruled and is not to be repeated in similar matters in future.

### 3.3.4 *Constitutional Heedlessness in Oppelt SCA*

The seventeen-year-old Charles Oppelt suffered a serious spinal injury while playing a rugby game. He was immediately transported to a state-run hospital but was sent to two other state hospitals until he was eventually treated more than thirteen hours after the injury had been

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<sup>236</sup> Ibid at para 49. Sections 9, 10 and 28 of the Constitution guarantee those respective rights.

<sup>237</sup> *Fetal Assessment Centre CC* (note 184 above) at para 59.

<sup>238</sup> Ibid at paras 61-62.

<sup>239</sup> Ibid at para 72.

<sup>240</sup> Ibid at para 78.

sustained.<sup>241</sup> It was Mr Oppelt's contention that the attending doctors should have treated him more expeditiously and that he would not have become a quadriplegic if they had treated him within four hours of sustaining the injury. The High Court held that the Department was vicariously liable for the failure of its employee doctors to treat Mr Oppelt timeously.<sup>242</sup> The Supreme Court of Appeal's judgment primarily focused on the testimonies of two competing expert witnesses – the one testified that there had been medical evidence to show that the doctors should have treated Mr Oppelt within four hours of his injury while the other witness testified that the medical evidence was scientifically weak.<sup>243</sup> The Supreme Court of Appeal ultimately sided with the second witness and therefore held that Mr Oppelt had failed to prove that the doctors' failure to treat him within four hours of sustaining his injury factually caused his quadriplegia. The Supreme Court of Appeal noted that it was unnecessary to consider the issues of wrongfulness and negligence in light of the negative finding regarding factual causation, but it nevertheless proceeded to make brief comments on wrongfulness and negligence. As to wrongfulness the court held that because of the rejection of the first expert witness's testimony there had been no duty on the attending doctors to treat Mr Oppelt within four hours and thus their omission had not been wrongful.<sup>244</sup> As to negligence, the court held that the doctors could not reasonably have foreseen the possibility that their tardiness could have resulted in Mr Oppelt's quadriplegia.<sup>245</sup> The Supreme Court of Appeal not only failed to justify its findings with thorough references to precedent, but also failed to consider the Constitution with regard to the matter at hand in totality.

Mr Oppelt appealed to the Constitutional Court, requesting it to overturn the Supreme Court of Appeal's decision in respect of its findings on the expert witnesses' testimonies, causation, wrongfulness and negligence. The majority of the Court in *Oppelt CC* held that the Supreme Court of Appeal had misinterpreted (or, I would suggest, skewed) the expert witnesses' testimonies and that both experts had ultimately agreed that spinal-cord injuries should be treated as quickly as possible to obtain the best possible results and that there had been no evidence to refute this general medical principle.<sup>246</sup> For this reason the probable medical consequences for Mr Oppelt could have been radically different but for the omission of the

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<sup>241</sup> *Oppelt SCA* (note 182 above) at para 1 read with para 23.

<sup>242</sup> *Ibid* at para 3. The High Court judgment is unreported.

<sup>243</sup> *Ibid* at paras 5-20 canvasses the opinions of the two expert witnesses in detail.

<sup>244</sup> *Ibid* at para 24.

<sup>245</sup> *Ibid* at para 25.

<sup>246</sup> *Oppelt CC* (note 185 above) at paras 36-44.

attending doctors and therefore factual causation had been established.<sup>247</sup> Similarly, the attending doctors should have reasonably foreseen that their failure to treat Mr Oppelt timeously could result in serious consequences and the doctors did not provide any reasons why they did not take the necessary steps to treat him on time.<sup>248</sup> Significantly for purposes of the present discussion, the Court in *Oppelt CC* overturned the Supreme Court of Appeal's findings with regard to wrongfulness partly because it had failed to consider the relevance of the Constitution in establishing a legal duty on the attending doctors or their employer.

In its treatment of the wrongfulness enquiry the Court referred to section 27(3) of the Constitution that provides everyone with the right not to be 'refused emergency medical treatment'. The constitutional duty placed on all hospitals to provide any person with emergency medical treatment is specifically intensified and supported by section 25(2)(m) of the National Health Act<sup>249</sup> that requires the heads of provincial health departments to ensure the provision of, among other things, emergency medical treatment to those who may need it.<sup>250</sup> After a rigorous analysis of section 27(3) the Court held that the attending doctors' unreasonable delay in providing Mr Oppelt with the necessary treatment for his injury had amounted to a refusal, or at least an unreasonable failure to provide emergency medical treatment.<sup>251</sup> Therefore, primarily for constitutional reasons, the omission of the attending doctors was regarded as being wrongful. Because all three elements in dispute had been established, Mr Oppelt succeeded with his claim against the Department, contrary to what the Supreme Court of Appeal had decided.<sup>252</sup>

### 3.3.5 *Constitutional Heedlessness in Country Cloud SCA*

In *Loureiro CC*, *Fetal Assessment Centre CC* and *Oppelt CC* the approach of constitutional heedlessness employed by the lower courts was on appeal held to be unfitting and inappropriate. In those appeals to the Constitutional Court a transformative method was employed in terms of which the Constitution played a central role in the understanding of the common law, that resulted in the appeals being upheld. In other words, due to the lack of constitutional lustre in the Supreme Court of Appeal and High Court judgments, those decisions were substantively incorrect. On the other hand, in the matter of *Country Cloud* the constitutional heedlessness of

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<sup>247</sup> Ibid at paras 49-50.

<sup>248</sup> Ibid at paras 69-84.

<sup>249</sup> National Health Act 61 of 2003.

<sup>250</sup> *Oppelt CC* (note 185 above) at para 55.

<sup>251</sup> Ibid at paras 58-68.

<sup>252</sup> Ibid at para 86.

the Supreme Court of Appeal did not substantively have a practical effect on the outcome of the case, as the Supreme Court of Appeal's decision was confirmed on appeal to the Constitutional Court. However, a more complete and analytically rigorous approach by the Supreme Court of Appeal to the issue at hand would have required it to ponder constitutional considerations, as was done by the Constitutional Court on appeal.

In *Country Cloud SCA*, the Department of Infrastructure Development in Gauteng contracted with a construction company called Ilima Projects for the erection of a clinic in Soweto. The Department undertook to pay R480 million to Ilima for the completion of the work. Assisted by the Department, Ilima entered into a loan agreement with Country Cloud Trading for R12 million in order to embark on the project.<sup>253</sup> After the loan had been made available and paid to Ilima, the Department cancelled the building contract leading to Country Cloud suffering damage on account of Ilima being liquidated and the principal debt (plus interest) consequently not being repaid.<sup>254</sup> The SCA held that a valid contract had been entered into and that the cancellation of that contract had not been lawful.<sup>255</sup> The question that had to be answered in light of these facts was whether the Department wrongfully caused Country Cloud's pure economic loss on these facts.

After surveying the history of the common-law position on the causing of pure economic loss in the law of delict, Brand JA, writing for a unanimous court, explained that the element of wrongfulness in delict acts as a 'safety valve' to prevent limitless liability.<sup>256</sup> Wrongfulness is determined with reference to the legal convictions of the community and questions the reasonableness of imposing liability on the defendant in accordance with public policy.<sup>257</sup> There had been no case with similar facts that a court has had to decide in the past and thus the court had to resolve whether or not the common law had to be developed to allow Country Cloud's claim here.<sup>258</sup> Brand JA held that, even though a blameworthy state of mind and foreseeability of harm are relevant policy considerations to the determination of wrongfulness in cases of pure economic loss, if the question here turned on whether the Department had foreseen the possibility of harm and whether the Department had intentionally proceeded in its

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<sup>253</sup> *Country Cloud SCA* (note 181 above) at paras 1 & 5.

<sup>254</sup> *Ibid* at para 2.

<sup>255</sup> *Ibid* at paras 15-16.

<sup>256</sup> *Ibid* at paras 17-18.

<sup>257</sup> *Ibid* at paras 19-20.

<sup>258</sup> *Ibid* at para 26.

harm-causing conduct, then the result would be indeterminate liability. This is so because a long list of third parties (including Ilima's employees and other creditors) would then be able to claim for the pure economic loss caused by the Department's cancellation of the contract.<sup>259</sup> The court reasoned that that would be an undesirable state of affairs and that in determining who should bear the loss in cases such as these, the doctrine of 'vulnerability to risk' should be employed. That doctrine dictates that if a defendant could reasonably have protected him or her against the risk that materialised, then the defendant should bear the risk.<sup>260</sup> Applied to the facts of this case, Country Cloud could have either claimed repayment of the money that it lent to Ilima, or it could have taken cession of Ilima's claim against the Department. Because no substantial reasons could be provided as to why Country Cloud had failed to take these steps to protect itself against the risk that materialised, the Department could not be said to have acted wrongfully towards Country Cloud and so there was no delictual liability in that case.<sup>261</sup> Even though there is ample authority that shows that the determination of wrongfulness should involve constitutional considerations, the SCA opted to circumvent constitutional considerations here. Constitutional heedlessness won again.

On appeal to the Constitutional Court, the only issue that had to be addressed was whether the Department had acted wrongfully towards Country Cloud in cancelling the contract. Khampepe J, for a unanimous Court, reiterated the thorough overview on the law of wrongfulness that the Supreme Court of Appeal had provided with some variations and one key added ingredient: Relying on its earlier decision in *Loureiro CC*,<sup>262</sup> the Court emphasised the fact that the legal convictions of the community, that shape the element of wrongfulness, had to be constitutionally understood.<sup>263</sup> Considerations relating to the blameworthy state of mind of the alleged wrongdoer, the prevention of indeterminate liability and the vulnerability to risk doctrine

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<sup>259</sup> Ibid at para 28.

<sup>260</sup> Ibid at para 30.

<sup>261</sup> Ibid at paras 31-33.

<sup>262</sup> *Loureiro CC* (note 151 above) at para 53.

<sup>263</sup> *Country Cloud CC* (note 186 above) at para 21.

are indeed relevant policy considerations to determining wrongfulness.<sup>264</sup> In addition to these considerations the constitutional value of state accountability should be, at least, considered.<sup>265</sup>

The value of state accountability could, but will not always, be translated into a private-law duty that founds delictual liability.<sup>266</sup> In previous cases state accountability translated into a private-law duty only where the state functionaries concerned acted maliciously for personal gain either through corrupt, fraudulent or otherwise criminal conduct.<sup>267</sup> The state functionaries in this case did not act illicitly towards Country Cloud. The only wrong that the state committed here was against Ilima who could hold the state accountable by instituting a claim based on their contract.<sup>268</sup> Upholding a claim in favour of Ilima based on contract and a claim in favour of Country Cloud based on delict would undermine the functioning of the Department concerned and that is a relevant consideration in promoting state accountability – the state cannot be accountable to the public if courts undermine its functions.<sup>269</sup> For this and other reasons (that were slight variations on the same themes present in the Supreme Court of Appeal’s judgment) the appeal was dismissed.<sup>270</sup>

### 3.4 Anti-Constitutionalism

#### 3.4.1 *Introducing Anti-Constitutionalism*

In exceptional cases judges might explicitly acknowledge that the Constitution exists and that it could potentially have an effect on the common law’s development, but then nevertheless try to formulate an argument that the Constitution should not apply. With reference to the Supreme Court of Appeal decision in *RH v DE*<sup>271</sup> it will be shown that if the common law is to be

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<sup>264</sup> Ibid at paras 39-43 & 51-61.

<sup>265</sup> I take cognisance of the fact Country Cloud raised the argument based on state accountability in the Constitutional Court and that the Court did not raise this issue *mero motu*. For a sound overview of the different ways by which the value of state accountability can be realised see A Price ‘State Liability and Accountability’ (2015) *Acta Juridica* 313.

<sup>266</sup> *Country Cloud CC* (note 186 above) at para 45. The value of accountability forms part of the Constitution’s founding provisions. See eg T Roux ‘Chapter 10: Democracy’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Ed, OS, 2006) and Chapter 5 below.

<sup>267</sup> *Country Cloud CC* (note 186 above) at paras 46-47.

<sup>268</sup> Ibid at para 50.

<sup>269</sup> Ibid.

<sup>270</sup> Ibid at para 69.

<sup>271</sup> *RH v DE* (note 44 above).



developed, it will be very difficult for a lawyer to follow the anti-constitutional approach legitimately. This is made clear by the Constitutional Court's judgment in *DE v RH*.<sup>272</sup>

### 3.4.2 *An Introduction to RH v DE*

This case tells the story of an egotistical husband and the fading principle of the horizontal application of the Bill of Rights. The husband alleged that his wife had an affair with the managing director ('MD') of her firm.<sup>273</sup> He claimed damages for both loss of consortium and insult from the MD. After an eight-day trial, luridly exposing the private sex lives of the three people involved, Vorster AJ held that the MD was liable to compensate the husband for both heads of damage.<sup>274</sup> On appeal, Brand JA overturned that decision. There are two moments in the unanimous Supreme Court of Appeal judgment.

The first moment involved an exposition of the common-law position: The husband did not prove that the MD incited the wife to leave the common household and, therefore, could not succeed with his claim for loss of consortium. The wife left of her own accord before the adulterous relationship occurred.<sup>275</sup> In principle, according to the court, the husband, however, did prove that the adulterous affair took place while they were married, albeit after the wife had moved out and after divorce proceedings had been instituted. At first glance, therefore, it appeared that the husband could succeed with his claim based on insult.<sup>276</sup>

The second moment of the judgment explains that even though it appeared that the husband could succeed in claiming for insult, the court had to determine the foundational issue of whether the delictual claim for adultery still has a place in our law. In other words, should the common law be developed in such a way that the husband in this case should be left without a legal remedy for his bruised ego? The short answer, given by the Supreme Court of Appeal, is that the 'changing mores of our society' demand that our law no longer recognise claims of this nature.<sup>277</sup>

This short answer is commendable. However, the problem concerning this case is the approach of Brand JA to common-law development – an approach that can be described as

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<sup>272</sup> *DE v RH* (note 44 above).

<sup>273</sup> *Ibid* at para 3.

<sup>274</sup> *Ibid* at para 2.

<sup>275</sup> *Ibid* at paras 10 & 13.

<sup>276</sup> *Ibid* at para 15.

<sup>277</sup> *Ibid* at para 40.

conservatively anti-constitutional. Consequently, the analytical part of my discussion will be limited to this aspect of the judgment and my line of reasoning will be based on the transformative method developed by André van der Walt in the context of property law.<sup>278</sup>

### 3.4.3 *Rising to the Occasion of Common-Law Development*

After emphasising that courts are under a duty to develop the common law in an incremental way, Brand JA provided two occasions when the common law may be developed.<sup>279</sup> The first occasion is based on the decision in *Carmichele CC* that the common law must be developed if the section 39(2) objectives so require.<sup>280</sup> The second occasion is based on the guidance provided in *Du Plessis* that the ‘common law [can and should be adapted] to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared’.<sup>281</sup> Two interrelated issues arise from this suggestion. Does *Du Plessis* have binding force in light of the fact that it was decided in terms of the 1993 Constitution and not the 1996 Constitution? Are the two occasions that prompt common-law development listed by the Supreme Court of Appeal really two very different and unrelated occasions? There is a relatively simple combined answer to these issues.

The above quotation from *Du Plessis* that was transcribed from the Canadian judgment of *Salituro*<sup>282</sup> has value, but it must be read with the following cautionary note. As Ackermann and Goldstone JJ point out in *Carmichele CC*:<sup>283</sup>

Under our Constitution the duty cast upon Judges is different in degree to that which the Canadian Charter of Rights cast upon Canadian Judges. In South Africa, the [1993 Constitution] brought into operation, in one fell swoop, a completely new and different set of legal norms.

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<sup>278</sup> AJ van der Walt ‘Development of the Common Law of Servitude’ (2013) 130 *South African Law Journal* 722. For similar discussions on *RH v DE* see M Carnelley ‘Die Doodskoop vir of Slegs die Verwonding van die Eis teen die Derdeparty-Egbreker?’ (2015) 12 *LitNet Akademies* 333; J Neethling ‘Owerspel as Gedingsvatbare Aksiegrond’ (2015) 12 *LitNet Akademies* 397; and J Barnard-Naudé ‘The Pedigree of the Common Law and the “Unnecessary” Constitution: A Discussion of the Supreme Court of Appeal’s Decision in *RH v DE*’ (2016) 133 *South African Law Journal* 16.

<sup>279</sup> *RH v DE* (note 44 above) at para 17.

<sup>280</sup> *Carmichele CC* (note 27 above) at para 40.

<sup>281</sup> *Du Plessis* (note 27 above) at para 61.

<sup>282</sup> *Salituro* (note 117 above).

<sup>283</sup> *Carmichele CC* (note 27 above) at para 36.

This evaluation reminds one of Cornell's interpretation of former Justice Laurie Ackermann's work to the effect that the new constitutional order brought about a substantive revolution,<sup>284</sup> in line with the transformative metaphor of crossing a bridge from a politics of tyranny and violence to an ethical political environment, based on the justified use of power.<sup>285</sup>

The idea of a substantive revolution is especially important for the purposes of rethinking the role of the common law in a post-apartheid context.<sup>286</sup> The exercise of any power (including judicial power) should be justified in terms of the Constitution. To ensure that the judiciary complies with its justificatory mandate, Davis and Klare suggest that all common-law disputes must be constitutionally framed so that a transformative methodology is effectively utilised to bring about the social change that the Constitution requires.<sup>287</sup> Not only is a transformative methodology missing from the Supreme Court of Appeal's judgment, but there is a complete failure to engage with the applicable provisions in the Bill of Rights substantively.

The cautionary note described is further supported by section 39(2) of the Constitution that requires a court to promote the spirit, purport and objects of the Bill of Rights when it develops the common law. The section 39(2) instruction is not qualified to be applied 'now and then, if we feel like it', but is a clear and mandatory obligation of our courts to promote the spirit, purport and objects of the Bill of Rights whenever the common law is being developed. In *Carmichele CC* the practical effect of the interplay between the cautionary note and section 39(2) is explained as follows:<sup>288</sup>

Under s 39(2) of the Constitution concepts such as 'policy decisions and value judgments' reflecting 'the wishes . . . and the perceptions . . . of the people' and 'society's notions of what justice demands' might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution.

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<sup>284</sup> D Cornell 'Bridging the Span toward Justice: Laurie Ackermann and the Ongoing Architectonic of Dignity Jurisprudence' (2008) *Acta Juridica* 18, 19-22.

<sup>285</sup> See eg E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31, 31-32; and Klare (note 66 above) at 147.

<sup>286</sup> See eg AJ van der Walt 'Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law' (1995) 11 *South African Journal on Human Rights* 169; and K van Marle 'Reflections on Legacy, Complicity and Legal Education' (2014) 46 *Acta Academica* 196.

<sup>287</sup> Davis & Klare (note 13 above) at 412.

<sup>288</sup> *Carmichele CC* (note 27 above) at para 56.

The deduction to be made is that the position on common-law development in *Du Plessis* cannot be read in a vacuum and that the two cases cannot be regarded as delineating two separate grounds on which the common law can be developed: Because the ‘changing mores’ of a really diverse society can be found in the Constitution and is given effect to by section 39(2). As it has been noted above, in *Van Eeden* Vivier ADP explained that the Constitution cannot be regarded as the sole embodiment of the legal convictions of the community, but further accepted that all law, conduct and values must be consistent with the Constitution.<sup>289</sup> Furthermore, in *Van Duivenboden* Nugent JA also emphasised that even though the legal convictions of the community are not exclusively found in the Constitution, extra-constitutional legal convictions must however be consistent with the Constitution.<sup>290</sup> Thus, even if one accepts for a moment that the legal convictions of society can be found in logic extrinsic to the Constitution, morality must be consistent with the Constitution *and* must be so justified.

This is a crucially important point to make, because apart from the statement that section 39(2) exists and, in principle, could affect the wrongfulness enquiry, the Constitution’s role in this specific case is substantively ignored. In fact, Brand JA went so far as to say the following:<sup>291</sup>

I find it unnecessary to consider the further contention advanced by some of our academic authors... that the continued existence of the action is in conflict with our constitutional norms. Suffice it to say that there could well be merit in some of these arguments.

Therefore the Constitution could, but does not need to, have a substantive effect on the process of common-law development. This is an approach that is in conflict with an earlier article authored by Brand JA in which he gives an overview of the impact of the Constitution on the law of delict,<sup>292</sup> which has a laudatory undertone. Giving due regard to the above explanation of the interaction between *Carmichele CC*, *Du Plessis*, *Van Eeden* and *Van Duivenboden*, the anti-constitutional approach to the development of the common law should not be supported.

Because of an unfortunate oversight of the above interaction of cases, the Supreme Court of Appeal opted to develop the common law on the second ground, in other words, simply because societal norms have changed. From a holistic reading of the judgment it is clear that it is the view of the Supreme Court of Appeal that the Constitution has no direct and

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<sup>289</sup> *Van Eeden* (note 146 above) at para 12.

<sup>290</sup> *Van Duivenboden* (note 142 above) at para 17.

<sup>291</sup> *RH v DE* (note 44 above) at para 40.

<sup>292</sup> FDJ Brand ‘Influence of the Constitution on the Law of Delict’ (2014) *Advocate* 42.

substantive role to play in determining the legal convictions of the community, despite Brand JA quoting *Le Roux v Dey*: '[T]he judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms'.<sup>293</sup> The judgment gives no explanation as to why the development in question is in accordance with constitutional norms or, at least, it is not explicitly given. The recognition of the Constitution as the guideline for determining the legal convictions of the community could keep many conservative and progressive private lawyers satisfied: Conservatives might now regard the open-ended test as being 'more certain' because it can be determined from a more reliable source which respects and protects diversity and even minority groups,<sup>294</sup> whereas progressives will take solace in the potential of the Constitution to direct private law in a more egalitarian direction. It is regrettable that the role meant to be fulfilled by the Constitution was replaced by extra-constitutional legal argumentation largely based on fashionable morals that dominated Europe in the 1970s.

Even though some of the extra-constitutional substantive reasons provided by the court as to why the claim is out of place in modern society are laudable, at the very least Brand JA should have explained why the suggested development fits comfortably in the objective normative framework of the Constitution.<sup>295</sup> In this regard one should be mindful of the fact that section 173 of the Constitution entrusts our courts with the power to develop the common law having regard to the interests of justice. As explained above, such a use of power must be justified with reference to the Constitution to give effect to the transformative goals of the supreme law. Failure to do so, as in the case under discussion, could be indicative of a use of judicial power amounting to anti-constitutionalism.

I borrow the term 'anti-constitutionalism' from an earlier observation made by Roux.<sup>296</sup> In Roux's discussion of the case of *Brisley v Drotzky*<sup>297</sup> he notes that the Supreme Court of Appeal's approach in that case to the issue of the impact of the Constitution on the common law was not 'anti-constitutional' but rather 'anti-vagueness' in the sense that the court wished to

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<sup>293</sup> *Le Roux and Others v Dey* [2011] ZACC 4, 2011 (3) SA 274 (CC), 2011 (6) BCLR 577 (CC) para 122.

<sup>294</sup> See eg the pre-democracy case of *Van Erck v Holmer* 1992 (2) SA 636 (W) 649C where the morals of society were found, among other things, in the *Fair Lady* magazine and the *Sunday Times* newspaper.

<sup>295</sup> *Carmichele CC* (note 27 above) at para 54.

<sup>296</sup> T Roux 'Continuity and Change in a Transforming Legal Order: The Impact of Section 26(3) of the Constitution on South African Law' (2004) 121 *South African Law Journal* 466.

<sup>297</sup> *Brisley v Drotzky* [2002] ZASCA 35, 2002 (4) SA 1 (SCA), 2002 (12) BCLR 1229 (SCA) ('*Brisley*').

avoid the situation in which the ‘Constitution exerts an indeterminate influence on the common law’.<sup>298</sup> It is my argument that the same defence cannot be tweaked to be raised in favour of the Supreme Court of Appeal in the case of *RH v DE*. In this case the goal of the court was not to uphold legal determinacy by sidestepping the Constitution. Here the court radically disrupted the ‘predictable’ common-law scheme of rules pertaining to delictual claims based on adultery and, consequently, the judgment cannot be said to militate against the indeterminacy of law. The judgment, therefore, is not ‘anti-vagueness’ or ‘anti-uncertainty’. Additionally, the court sidestepped the Constitution while creating this ‘unpredictable’ result.

If a court creates uncertainty while avoiding the Constitution, it appears to be ‘anti-constitutional’ contrary to what Roux contends the court may have done in *Brisley*. It is not suggested that the court acted with ‘*dolus directus*’ to betray the supremacy of the Constitution. But, at least, an inference could be drawn from the Supreme Court of Appeal’s failure to engage with the Constitution at a substantive level (despite there being ample authority for the important role that the Constitution must play in the development of the common law) that it had the ‘*dolus eventualis*’ to act in an anti-constitutional manner. It is accepted by our courts that *dolus eventualis* is proven by means of inference, as enunciated in *S v Sigwabla*.<sup>299</sup> There are further good reasons for the rejection of the approach promoted in this case that become apparent upon a further exploration of the reasons for the decision provided in the following sub-sections of this discussion. It must be reiterated that it is not the outcome of this case that is problematic. It is the ideology reflected in the Supreme Court of Appeal’s reasoning that is troubling.

#### 3.4.4 *The Claim for Adultery in Historical Context*

The Supreme Court of Appeal noted that adultery has had a chequered history in South African law.<sup>300</sup> In 1904 the crime of adultery was abrogated by disuse in the matter of *Green v Fitzgerald*<sup>301</sup> and by 1944 the civil claim for adultery was put at the disposal of spouses of both sexes and no longer limited to its use by aggrieved husbands in *Rosenbaum v Margolis*.<sup>302</sup> By the time that the Divorce Act had been promulgated, adultery was no longer regarded as a specific ground for divorce distinct from the irretrievable breakdown of a marriage.<sup>303</sup> Despite the historical evidence

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<sup>298</sup> Roux (note 296 above) at 492.

<sup>299</sup> *S v Sigwabla* 1967 (4) SA 566 (A) 570D-E.

<sup>300</sup> *RH v DE* (note 44 above) at paras 20-21.

<sup>301</sup> *Green v Fitzgerald* 1914 AD 88.

<sup>302</sup> *Rosenbaum v Margolis* 1944 WLD 147.

<sup>303</sup> Divorce Act 70 of 1979.

to the effect that individuals, judges and Parliament have systematically regarded adultery as becoming less of a societal evil deserving legal condemnation, it was held in *Wiese v Moolman* that a civil claim based on adultery should still be recognised.<sup>304</sup> Brand JA seemed surprised at the decision in *Wiese* because of the overwhelming academic support for a contrary conclusion. The dominant view is that such a claim is ‘outdated and archaic’.<sup>305</sup> This is the first extra-constitutional argument as to why the claim should not be recognised today.

Left in the air, without proper constitutional justification, on what basis should one determine whether a common-law rule is outdated or archaic? Should it be decided on the historical track record of the legal rule, read with academic criticism? On this whim, one could argue that the institution of marriage should also fall away because it is an archaic and outdated institution with formalities that show similarity to the Roman *mancipatio* and *in iure cessio* methods for the transfer of ownership of a slave to a man. There is academic support for the view that the institution of marriage should be abolished on constitutional grounds due to the inherent incompatibility of marriage and the equality clause.<sup>306</sup> However, if one is sensitive to the impact of the Constitution on the common law, one realises that the jurisprudence of the constitutional right to dignity actually might respect the institution of marriage.

As articulated in *Dawood & Another v Minister of Home Affairs & Others* (a case that is referred to later in the judgment by Brand JA), marriage may provide individuals with a deep feeling of personal fulfilment, in the sense that our humanity is expressed through our relationships with one another.<sup>307</sup> To this view can be added that the potential problems of inequality within the marriage and inequality produced by the nature of marriage can be mitigated by the constitutional right to equality as formulated in section 9 of the Constitution. Since the dawning of the Constitution we have, for example, seen the legal recognition of the fact that a husband can rape his own wife in terms of section 56(1) of the Criminal Law (Sexual

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<sup>304</sup> *Wiese v Moolman* [2008] ZAGPHC 246, 2009 (3) SA 122 (T) (‘*Wiese*’).

<sup>305</sup> See the authority listed in *RH v DE* (note 44 above) at para 21.

<sup>306</sup> See eg D Meyerson ‘Rethinking Marriage and its Privileges’ (2013) *Acta Juridica* 385.

<sup>307</sup> *Dawood & Another v Minister of Home Affairs & Others* [2000] ZACC 8, 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) paras 30 & 36.

Offences and Related Matters) Amendment Act<sup>308</sup> and the legal recognition of unions beyond the conventional one-man-one-woman marriage.<sup>309</sup>

The key idea put forward is therefore that the test to determine whether legal rules are archaic and outdated cannot be based on asking whether the rule has had a problematic history and has been subjected to academic criticism, because even though a rule or an institution may have a problematic foundation, that rule or institution could be transformed into something with a new, constitutionally justifiable rationale and meaning in the South African context.

### 3.4.5 *The Colony of South Africa*

The next stage of the Supreme Court of Appeal's approach involved an evaluation of the stance of other jurisdictions on the question of a civil claim for adultery. It was explained by the court why some authors argued that a civil claim for adultery is based on English law and not on a Roman-Dutch model.<sup>310</sup> The Supreme Court of Appeal argued that if one accepts English law as the true foundation of the claim, it is worth noting that an action based on adultery had been abolished in England in 1970 by their Law Reform (Miscellaneous Provisions) Act.<sup>311</sup> It is conceded that the logical force in this argument is that if the basis for one of our rules falls away, our courts should ensure that our rule follows suit. It reminds one of the Latin maxim *cessante ratione legis cessat ipsa lex* that conventionally, at most, lays the foundation for a restrictive interpretation of a statute or the abolition of an old law.<sup>312</sup> There is a snag to this point of logic. Before the English legislature intervened, the Court of Appeal in *Pritchard v Pritchard and Sims* described the action as insensible and anachronistic because it was born in a patriarchal society in which men had a proprietary interest in their wives comparable to that in cattle.<sup>313</sup> Yet, that court deferred the matter to the legislature and opted not to abolish the action.<sup>314</sup> I shall return to the issue of judicial deference below.

Brand JA observed that shortly after the developments in England the previous colonies of New Zealand and Australia also abolished the action. Scotland, most of Canada and most of

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<sup>308</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

<sup>309</sup> For an overview see eg JA Robinson 'The Evolution of the Concept of Marriage in South Africa: The Influence of the Bill of Rights in 1994' (2005) 26 *Obiter* 488.

<sup>310</sup> *RH v DE* (note 44 above) at para 24.

<sup>311</sup> *Ibid* at para 26.

<sup>312</sup> *Nourse v Van Heerden NO and Others* 1999 (2) SACR 198 (W) 208F-H.

<sup>313</sup> *Pritchard v Pritchard and Sims* [1966] 3 All ER 601 (CA) 606-610.

<sup>314</sup> *RH v DE* (note 44 above) at para 26.



the United States of America were next in line.<sup>315</sup> However, it is not only the common-law jurisdictions that regard claims of this nature as being out of touch with reality. The French, Dutch, Austrian and German legal systems also do not recognise civil claims for adultery, even though adultery once constituted criminal offences in those legal systems.<sup>316</sup> Brand JA relied extensively on the reasoning of the Federal High Court of Germany<sup>317</sup> to bolster his arguments. The German reasoning is based on the following aspects: (a) When a spouse voluntarily embarks on an extra-marital affair, it is essentially a matter that must be resolved internally between the spouses and not by the law of torts or delict. (b) It is not acceptable to regard the liability of the unfaithful spouse as being regulated by matrimonial law and the liability of the third party by delict as if there are two very distinct acts committed by the two adulterers. (c) It is very tricky to decide which types of interference with the marriage should be punishable – should one pretend that only penetrative sexual intercourse with a third party would bruise a spouse’s pride? (d) The legislature has prudently refrained from dictating to spouses how they should behave in their marriage and thus it is the view of the German population that family law provides enough protection to spouses. (e) Finally, that the law should not interfere in a highly personal relationship such as marriage – a view that is in line with the German Constitution. Thus, the institution of marriage would not be given true protection by the recognition of a claim for adultery because, ultimately, marriages will fail if the spouses themselves are not committed to maintaining it.<sup>318</sup>

The dominance of foreign perspectives in the judgment deserves closer analysis. From the outset I wish to make it clear that I am not entirely against the use of the comparative method in this type of case. There is great value in comparative legal study in terms of the sharing of ideas and lessons learnt in jurisdictions with similar normative frameworks to ours.<sup>319</sup> However, one should be wary that the laws of other countries should not dictate South African legal morality (a point also made in *Van Duivenboden*).<sup>320</sup> One should be mindful of the fact that South Africa has a peculiar history which creates the context for our morality. Even though we may find guidance for our decisions from other jurisdictions, we should always contextualise those foreign positions in a South African materiality. It is not wise to follow fashionable

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<sup>315</sup> Ibid at para 27.

<sup>316</sup> Ibid at para 24.

<sup>317</sup> JZ 1973, 668.

<sup>318</sup> *RH v DE* (note 44 above) at para 25.

<sup>319</sup> See LWH Ackermann ‘Constitutional Comparativism in South Africa’ (2006) 123 *South African Law Journal* 497.

<sup>320</sup> *Van Duivenboden* (note 142 above) at para 16.

international legal trends under the guise that our morality must be congruent with ‘most other jurisdictions’. To some extent, Brand JA does realise this. For example, he stated that if there is a disparity between our morality and that of ten other non-African states, we should ask why this is the case.<sup>321</sup> Yet, this question does not appear to be asked in light of the Constitution, but it is asked against the backdrop of extra-constitutional reasoning.

I do not regard the reasoning of the German Federal High Court as being false and concede that those reasons could usefully be incorporated into South African law. However, if a court wishes to develop the common law (and in the process wishes to adopt the law of another state) section 39(2) requires that court to frame the incorporated principles in light of the South African Constitution – which did not occur here. The adoption of a foreign legal position, especially in the context of attempts at determining the legal convictions of the community, should be approached cautiously and with due regard to the history of colonialism in South Africa.

South Africa is no longer under colonial rule and our law should also not be dictated by the laws of Europe. The South African situation, in part, has been shaped by physical and ideological colonial violence and there may be cases where our Constitution demands a break with Eurocentric views on the law. One thinks of the law of ownership in this regard. The need in South Africa for expropriation has drastically (even though not radically) changed the traditional conception of ownership that South Africa inherited from the Roman law tradition. Even though reference might be made to Western European law of private ownership in a judgment, those perspectives can be incorporated only on condition that they are compatible with our constitutional view on property which aims, partially, to redress the effects of colonialism and, what can be called its theoretical progeny, ‘apartheid’. In this specific case our constitutionally-inspired morality might not differ greatly from the European perspectives quoted above, but the generalised implication in the Supreme Court of Appeal’s judgment that we should hesitate to differ from foreign jurisdictions should not be supported, especially if the incorporation of foreign legal principles is not properly justified in terms of our Constitution. A contrary view, prevalent in this case, would mean that foreign courts and foreign legislatures have a greater effect on South African law than to our supreme law. It may be argued that such a position is a perpetuated form of objective (ideological) colonial violence and hegemony that our Constitution does not intend.

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<sup>321</sup> *RH v DE* (note 44 above) at para 28.

Drawing on Žižek,<sup>322</sup> I argue that the judgment is objectively violent in the sense that it operates at an invisible ideological level. Žižek identifies capitalism as the source of objective violence while the source in our context would be a colonially submissive failure to recognise the importance of the Constitution that solidifies our democratic transition. Even though some may hold the opinion that the Constitution is not a complete break from colonialism, I argue that it can be regarded as a sincere attempt to do so. Therefore the invocation of the Constitution in common-law matters shows a willingness to move in the direction of a symbolic rejection of a particular form of colonialism.

A pertinent point of criticism that could be raised against my argument is that the Constitution itself is symptomatic of a colonial hegemony over South Africa and that its transformative possibility is thus inherently limited.<sup>323</sup> The concept of fundamental rights is not an African creation. My argument is that it is impossible to escape colonialism totally until the radical paradise comes: For the moment we need to make the best of what we have because despite the wide powers given to them, judges cannot abolish the Constitution.<sup>324</sup>

The foregrounding of human rights has its roots in Europe, but South African courts have made attempts to Africanise them: Specifically, one can refer to the permeation of the value of *ubuntu* in our discourse on human rights. As Ramose indicates,<sup>325</sup> our Bill of Rights is far from a perfect reflection of an African jurisprudence, but from my perspective it is a step closer in comparison with the legislation and court decisions of Europe. Williams has argued that even though fundamental rights may be criticised from various points of view, those rights have played a great symbolic role in the emancipation of oppressed groups. Williams specifically argues that before rejecting them we need to be sensitive to the black experience of rights: Those rights are tools that may be used to demand the attention and respect of oppressors.<sup>326</sup>

A further critique to be raised in this case against the incorporation of foreign law, without constitutional verification of imported principles, is that in England the courts deferred

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<sup>322</sup> S Žižek *Violence: Six Sideways Reflections* (2009).

<sup>323</sup> See eg Van Marle (note 286 above) at 198; and T Delpont 'An Ethical (Anti)Constitutionalism? Transformation for a Transfigured Public' (2014) 46 *Acta Academica* 104.

<sup>324</sup> This view resonates with the 'double-handed' approach suggested by H Botha 'Equality, Plurality and Structural Power' (2009) 25 *South African Journal on Human Rights* 1, 37.

<sup>325</sup> See eg MB Ramose 'An African Perspective on Justice and Race' (2001) *polylog* (available at <http://them.polylog.org/3/fm-en.htm>) 19, read with Chapter 8 below.

<sup>326</sup> P Williams *The Alchemy of Race and Rights* (1991) 154.

the abolition of the action for adultery to the legislature regardless of how outdated the moral grounds may have been.<sup>327</sup> In Germany the issue was whether a court should create a remedy based on adultery and the court refused to do so with the rationale that the German Parliament did not intend to create penal consequences for adultery committed by a third party and a court is in no position to interfere with that legislative decision.<sup>328</sup> If the Supreme Court of Appeal was concerned to heed the practices of their colleagues overseas, it is strange that it overlooked the fact that foreign courts have not regarded the abolition and creation of the civil claim for adultery as an ‘incremental change’ that would justify judicial law-making. It seems that the Supreme Court of Appeal was desirous of the best of both worlds: an acceptance of foreign law without constitutional confirmation of the imported principles, as well as the extensive constitutional power given to South African judges to develop the common law. Through its failure to incorporate the rights and values of the Constitution meaningfully and explicitly, the Supreme Court of Appeal opened itself up to this criticism. Directly below I shall explore how the foreign law and the aforementioned extra-constitutional reasoning could have been effectively constitutionally framed.

#### 3.4.6 *Constitutionally Justified Logic*

Even though proponents of the civil claim for adultery emphasise the importance of protecting marriage as an institution and the personality rights of the aggrieved spouse, the Supreme Court of Appeal provided a number of extra-constitutional factors that outweigh the arguments of those proponents. These logical factors are closely related to the German arguments detailed above. The Supreme Court of Appeal explained these factors as follows. It is strange that the betraying spouse is not held delictually liable while that spouse’s conduct is more unacceptable than the behaviour of the third party in that the third party is not breaching a solemn vow.<sup>329</sup> If the spouses are married in community of property and do not get divorced in spite of the adultery, the misbehaving spouse would benefit from the damages accruing to the aggrieved spouse.<sup>330</sup> Although the protection of marriage might be of great importance it is doubtful whether the possibility of a delictual claim for adultery will prevent its dissolution if the spouses have already given up on the marriage. The view that adultery can only occur through sexual intercourse is flawed because non-sexual extra-marital relationships can be a serious breach of

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<sup>327</sup> *RH v DE* (note 44 above) at para 26.

<sup>328</sup> *Ibid* at para 25.

<sup>329</sup> *Ibid* at paras 29-30.

<sup>330</sup> *Ibid* at para 30.

trust as well. Marriages do not break down simply because of adultery. The reality, for many people, is more complicated than that. Besides, people should have the freedom to do with their bodies as they please. If the purpose of this type of claim is prevention, then it is odd that the crime of adultery has already been abolished.<sup>331</sup> One cannot say that an objective observer will conclude that the aggrieved spouse has been insulted. In fact, it is the good name of the unfaithful spouse that suffers damage the moment that the adulterous behaviour comes to the fore.<sup>332</sup> Historically, the claim for adultery has undergone numerous modifications and it could be abolished now.<sup>333</sup> Young children have experienced serious trauma from the court cases, which is against their best interests; the cross examination of the spouses in this case delved deep into their most intimate spaces and the case caused massive costs to be incurred, all for the sake of the husband's desire for revenge.<sup>334</sup> If a court were to say that the conduct of the adulterers is 'not wrongful', that does not mean that their conduct is 'right'. It simply means that the conduct does not attract delictual liability.<sup>335</sup>

These arguments are powerful and deserve recognition. However, they were never properly supported with reference to our rich constitutional jurisprudence. As the Constitutional Court explained on a previous occasion, the wrongfulness enquiry in delict could involve a proportionality exercise and such a balancing should take place through the prism of the spirit, purport and objects of the Bill of Rights.<sup>336</sup> The summative points of logic that the Supreme Court of Appeal relied on involve such a balancing exercise, namely weighing up the interests of the aggrieved spouse against those of the community at large. In what follows it will be illustrated how the Constitution could have been used to bolster Brand JA's balancing exercise.

There are two issues that go to the heart of the constitutional right to equality (as enshrined in section 9 of the Constitution) of joint wrongdoers: The fact that the adulterous spouse is not held liable, as is the third party, and the fact that the adulterous spouse could benefit from the conduct whereas the third party will lose money. Hidden in the text is an argument based on unfair discrimination on the grounds of marital status.<sup>337</sup> The fact that

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<sup>331</sup> Ibid at para 34.

<sup>332</sup> Ibid at para 35.

<sup>333</sup> Ibid at para 38.

<sup>334</sup> Ibid at para 39.

<sup>335</sup> Ibid at para 32.

<sup>336</sup> *Carmichele CC* (note 27 above) at para 43.

<sup>337</sup> See eg section 9(3) of the Constitution read with Chapter 7 below.

spouses' right to determine the future of their marriage is given greater effect to than the institution of marriage itself, is rooted in the Constitutional Court's understanding of self-autonomy as a fundamental aspect of one's dignity.<sup>338</sup> This fact is linked to the right to physical integrity (enshrined in section 12 of the Constitution) that includes the freedom that individuals enjoy to make decisions regarding their own bodies, as opposed to the archaic situation in which women were regarded as slaves of their husbands (section 13 of the Constitution prohibits slavery and human servitude). The best interest of the child standard, as embodied in section 28 of the Constitution, has been interpreted to mean that children must be free from the type of emotional trauma that they were subjected to here.<sup>339</sup> The right to privacy found in section 14 of the Constitution is infringed the moment that the opponents wish to delve into each other's private behaviour in the courtroom: This type of cross-examination reminds one of earlier cases against homosexuals who had committed the crime of sodomy and who had their sexual histories laid bare.<sup>340</sup> The vengeful nature of the husband's claim is exactly what Mokgoro J warned against in *Dikoko v Mokhatla*, because revenge is inconsistent with reconciliation and *ubuntu* that informs our constitutional right to dignity.<sup>341</sup>

Notwithstanding the fact that all of the extra-constitutional logical reasons provided by the court are in fact consistent with the Constitution, would it have done any harm for the judge to have acknowledged this fact, with appropriate constitutional authority? It would not have cost the Supreme Court of Appeal a tremendous effort to effect a proper integration of the Constitution in its reasoning, especially when one considers the copious amount of non-constitutional authority referred to in the rest of the judgment. Nor would harm have been done to the integrity of the common law, as Van der Merwe once worried,<sup>342</sup> because after the case of *Pharmaceutical Manufacturers* there can be no doubt that there is one type of South African law and, that is law under the Constitution.<sup>343</sup> The classic purist debate has come to an end. Our common law has been shaped by a wide variety of sources and intellectual influences: The Constitution, as the supreme law, should be one of these, and that reality should be frankly acknowledged.

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<sup>338</sup> See eg section 10 of the Constitution read with *Barkhuizen* (note 150 above) at para 57 and Chapter 8 below.

<sup>339</sup> See eg *S v Mokoena* [2008] ZAGPHC 148, 2008 (5) SA 578 (T), 2008 (2) SACR 216 (T).

<sup>340</sup> See eg the observation made in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15, 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) para 28.

<sup>341</sup> *Dikoko v Mokhatla* [2006] ZACC 10, 2006 (6) SA 235 (CC), 2007 (1) BCLR 1 (CC) para 68.

<sup>342</sup> D van der Merwe 'Constitutional Colonisation of the Common Law: A Problem of Institutional Integrity' (2000) *Journal of South African Law* 12.

<sup>343</sup> *Pharmaceutical Manufacturers* (note 80 above) at para 44.

Giving tacit support to constitutional principles is good but explicitly shaping the common law to abide by the normative framework created by the Constitution is better. It is unfortunate that the Supreme Court of Appeal proclaimed that the Constitution would not play a role in its substantive reasoning but, contradictorily, constitutional themes are hidden in the judgment, as has been illustrated above.

### 3.4.7 *Concluding Thoughts on RH v DE and Anti-Constitutionalism*

The leading textbook of Neethling and Potgieter on the law of delict explains the ‘indirect horizontal application of the Constitution’ as the radiating effect that the Bill of Rights has on open-ended delictual principles, such as the *boni mores* test.<sup>344</sup> In this case it seems that the Supreme Court of Appeal understands it to mean that the Constitution must be felt but not heard. It is my view that the failure to refer to the Constitution substantively in a case such as this is a subtle but influential neglect of the justificatory obligation that courts have in light of the wide constitutional power conferred on them to develop the common law. The development of the common law without a serious engagement with the Constitution should not be supported.

I argue that it is our conservative legal culture that persists in championing a veneration of the common law that has led to South Africa falling behind the rest of the world with regard to delictual claims based on adultery. South African morality surely did not only change in 2014. In both *Wiese* and the trial court judgment of this case, the courts were preoccupied with toeing as closely as possible a line with the common law: The court in *Wiese* used the Constitution as a rubber stamp for the common-law *status quo* (while failing to balance competing interests of various persons), while the Supreme Court of Appeal in *RH v DE* sidestepped the substantive provisions of the Constitution completely. If the case under discussion reflected the transformative framing of all common-law disputes in constitutional terms, perhaps the judge would have been more open to the possibility of developing the common law with the proper justification that is required in our constitutional context. I concede that the mere constitutional framing of disputes will not automatically result in progressive outcomes, as we observe in *Wiese*. If the Supreme Court of Appeal applied a transformative framing coupled with a substantive appreciation of the Constitution and its transformative goals, it could have avoided the pertinent criticism that it had been so nostalgic over 1970s Europe that it had set a blueprint for an anti-constitutional approach to developing the common-law of delict.

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<sup>344</sup> Neethling & Potgieter (note 33 above) at 22.

The Constitutional Court *DE v RH* tacitly rejected the anti-constitutional approach of the Supreme Court of Appeal. It rejected the idea that the *boni mores* can be determined without reference being made to the Constitution.<sup>345</sup> Furthermore, when developing the common law one cannot ignore the Constitution.<sup>346</sup> Thus, it was the constitutional rights to freedom and security of the person, privacy and association of the adulterous spouse and the third party that required the common law's development.<sup>347</sup> The Constitutional Court's remedying of the anti-constitutional approach in *DE v RH* should be welcomed by any South African transformation-minded lawyer. However, as the next section shows, the Constitution should also not blindly be venerated instead of the common law, as that could result in the problematic phenomenon of constitutional over-excitement.

#### 4 CONSTITUTIONAL OVER-EXCITEMENT

In the previous section an attempt has been made to make out a case for the rejection of constitutional avoidance as an approach to common-law issues. It was shown that there is no insurmountable conceptual or jurisprudential barrier that insulates the common law from the influence of human rights. I demonstrated that it is desirable for the common law to be infused with constitutional norms for the purposes of ensuring the common law's legitimacy in light of Africanist notions of human rights, that the much needed transformation of private law could be guided by the Constitution's development clauses which aim to map and critique the common law and that the single system of law principle developed by the Constitutional Court requires that the Constitution be taken seriously even in seemingly uncontroversial issues. The approach that I promote can be broadly referred to as a transformative theory for the private common law. The vision for a transformed common law is presently supported neither in delict scholarship, nor in recent High Court and Supreme Court of Appeal judgments surveyed above. What is also clear is that the approach of constitutional heedlessness which the academics and certain courts appear to support is not accepted by the Constitutional Court as a legitimate private law method.

The question left to answer is to what extent the Constitution should take possession of the common law. On the one hand, one could argue that the Constitution should completely dispose of well-established common-law rules and that private law should be completely rewritten in every case. This approach I call constitutional over-excitement. On the other hand,

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<sup>345</sup> *DE v RH* (note 44 above) at para 17.

<sup>346</sup> *Ibid* at para 21.

<sup>347</sup> *Ibid* at paras 52-53.



one could follow a moderate yet transformative approach that tries to solve tensions between various sources that may potentially apply to any given case. In this section, I firstly show why it may be said that the wrongfulness enquiry in *Loureiro CC* may have bordered on constitutional over-excitement and why that is undesirable. I then turn to suggest tentatively how and why adjudicative subsidiarity can be used to find a midway between the two extremes.

To repeat, in *Loureiro CC* the Court held that conduct is wrongful if the legal convictions of the community, constitutionally understood, regards it as unacceptable. 'It is based on a duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability.'<sup>348</sup> Here the Court determined wrongfulness with special attention given to the duty to respect rights; but not any rights: the constitutional rights to personal safety and property that should be protected by security companies and their guards who are contracted for that purpose.<sup>349</sup> Except for the condensed definition of wrongfulness, the fact that it should not be conflated with negligence and that wrongfulness should be determined before negligence, very little doctrinal discussion about wrongfulness was endeavoured and previous similar cases were not visited to fit this case into the interesting and complex pattern of the wrongfulness theme. This is a point that Price takes issue with in his note on *Loureiro CC*.<sup>350</sup> Even though Price agrees with the outcome of the case, he disagrees with the reasoning of the Court.

Firstly, Price argues that the Court emphasised the open-ended policy considerations and underemphasised the importance of 'principled analogy from past or hypothetical cases where legal duties in delict have been or would be imposed or denied'.<sup>351</sup> This type of reasoning, Price contends, facilitates the 'orderly and incremental developments of the common law' that ensures a greater degree of 'coherence and predictability'. Price is clear on the fact that by this he does not mean that the previous decisions and their principles provide unconditional demands, as analogical reasoning is also complemented by policy considerations.<sup>352</sup> What he finds problematic, in a quasi-Dworkinian fashion, is that principles should not be replaced by policy considerations. It would appear that Price is in favour of finding a balance between and integration of the two.<sup>353</sup> Ultimately, for Price, the reasoning of the Court would have been more

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<sup>348</sup> *Loureiro CC* (note 151 above) at para 53.

<sup>349</sup> Sections 12 & 25 of the Constitution guarantee these rights.

<sup>350</sup> A Price 'The Contract/Delict Interface in the Constitutional Court' (2014) 25 *Stellenbosch Law Review* 501.

<sup>351</sup> *Ibid* at 503-504.

<sup>352</sup> *Ibid* at 504.

<sup>353</sup> *Ibid* at 505.

complete, more analytically rigorous and therefore more defensible if it referred more extensively to previous similar decisions. In Price's analysis, he shows that there has been a string of (conflicting) similar cases to *Loureiro CC*. Fundamentally, the Court should have analysed to what extent those earlier cases are correct and whether the present matter is analogous to or distinguishable from those cases.<sup>354</sup> By doing that, the Court would have contributed to establishing a more complete picture on the different scenarios that could play out where a security company commits (or does not commit) a delict.<sup>355</sup>

The basic tenure of Price's view should be favoured, not necessarily because legal certainty and coherence are possible goals for the law to fulfil, but because the implication of *Carmichele CC* is that courts do not only need a thorough knowledge of the Constitution in order for incremental developments to be effected to the common law; courts also need a thorough knowledge of the common law in order for its developmental exercise to be meaningful and rational.<sup>356</sup> Price's critique of the over-emphasis of constitutional principles is also valid because it guards against what Du Plessis would refer to as a purely monumental reading of the Constitution whereby the Constitution is celebrated and regarded as the pinnacle of an already transformed society,<sup>357</sup> without the critical recognition that the Constitution as a source of law is inherently limited in its transformative capacity.<sup>358</sup> Du Plessis argues for a simultaneous monumental and memorial reading of the Constitution that does not over-celebrate nor under-appreciate the significance of the supreme law. To put it in my terms, the approach called for should not be one of constitutional avoidance, nor constitutional over-excitement. This is best done, with specific reference to dealing with the common law, through the principle of what Du

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<sup>354</sup> See the analysis and suggestions of Price (note 350 above) at 505-509 in this regard.

<sup>355</sup> Ibid at 510.

<sup>356</sup> *Carmichele CC* (note 27 above) at para 40 implies that a thorough knowledge of the common law is necessary to determine whether the common law as it stands is consonant with the Constitution.

<sup>357</sup> L du Plessis 'The South African Constitution as monumental and memorial and the commemoration of the dead' in B Pieroth & R Christensen (eds) *Rechtstheorie in Rechtspraktischer Absicht* (2008) 189, 192-193.

<sup>358</sup> For a good overview on the South African literature regarding the inherent limitations of the Constitution's transformative aspirations see D Brand *Courts, Socio-Economic Rights and Transformative Politics* (2009) (unpublished LLD Thesis, Stellenbosch University) 3ff.

Plessis calls ‘adjudicative subsidiarity’ that guards against constitutional absolutism while simultaneously taking the supremacy of the Constitution seriously.<sup>359</sup>

Adjudicative subsidiarity refers to the ‘reading strategy’<sup>360</sup> that the Constitutional Court has employed in the past to ensure that the Constitution would not be ‘overused’.<sup>361</sup> It means that the direct invocation of the Constitution as the primary substantive or doctrinal source of law should be avoided if legislation or the common law can provide relief to the parties in the dispute.<sup>362</sup> This principle does not mean that the Constitution’s supremacy is relegated as the legislation, customary law or common law that is primarily relied on to establish the technical rules that govern the dispute should be applied in a way that promotes constitutional norms.<sup>363</sup> André van der Walt regards the idea of adjudicative subsidiarity as a useful algorithm through which to approach the jumble of sources that may appear to be competing in a specific, private-common law case.<sup>364</sup> This, Van der Walt argues, promotes and does not stifle the single system of law principle explained earlier in this piece.<sup>365</sup>

Practically, adjudicative subsidiarity provides guidance on which sources to use when. Van der Walt, making sense of a number of relevant property-law cases,<sup>366</sup> explains that if a constitutional right has been infringed, the first port of call would be to turn to legislation that has been promulgated to give effect to the right in question. The exception to this rule in favour of legislation that promotes a right is where the legislation in question is alleged to be unconstitutional or is deficient in promoting the right in question – in such a case, direct reliance on the Constitution would be desirable and necessary to review the questionable legislation. Additionally, if a constitutional right is infringed and legislation exists that promotes the right in

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<sup>359</sup> Du Plessis (note 357 above) at 197. See also his other works on adjudicative subsidiarity: L du Plessis ‘Subsidiarity: What’s in the Name for Constitutional Interpretation and Adjudication?’ (2006) 17 *Stellenbosch Law Review* 207 (‘Du Plessis on Subsidiarity’) that formed the basis for L du Plessis ‘Chapter 32: Interpretation’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Ed, OS, 2006) 150-158.

<sup>360</sup> Du Plessis on Subsidiarity (note 359 above) at 209.

<sup>361</sup> *Ibid* at 215.

<sup>362</sup> *Ibid* at 220.

<sup>363</sup> *Ibid* at 227.

<sup>364</sup> Van der Walt first developed his stance on subsidiarity in AJ van der Walt ‘Normative Pluralism and Anarchy: Reflections on the 2007 Term’ (2008) 1 *Constitutional Court Review* 77 that was more fully taken up in Chapter 2 of *Property and Constitution* (note 80 above).

<sup>365</sup> Cf K Klare ‘Legal Subsidiarity & Constitutional Rights: A Reply to AJ van der Walt’ (2008) 1 *Constitutional Court Review* 129.

<sup>366</sup> See the dense footnotes in Van der Walt (note 80 above) at 35-112.

question, that legislation should take preference over the common law. The exception to legislation trumping common law mostly arises where the facts of the specific case do not fall within the ambit of the legislation concerned or where no such legislation exists. If there is neither legislation nor common law that could apply to the dispute at hand, the Constitution may be directly relied on by the litigants.<sup>367</sup> Turning to other sources of law does not mean that the Constitution becomes completely irrelevant for those cases. In cases where legislation or common law will be the main source of rules for a specific dispute, that legislation will need to be interpreted or the common law will be developed in light of section 39(2) of the Constitution that requires a court to promote the spirit, purport and objects of the bill of rights in either of those exercises. In that way the Constitution still plays an important role in ensuring that the single system of law principle is realised, without abandoning common-law rules and legislative schemes that do not necessarily need major changes to be aligned to transformative goals.<sup>368</sup>

## 5 ADJUDICATIVE SUBSIDIARITY AS TRANSFORMATIVE METHOD FOR THE LAW OF DELICT

### 5.1 Re-Reading the South African Constitution's Application Provisions

In this final section it will be shown that the direct and indirect constitutional application models are not actually supported by a rigorous and technical reading of the Constitution.<sup>369</sup> Instead, it will be shown that adjudicative subsidiarity, as a reading strategy, may provide a more accurate portrayal of what the Constitution actually says. In this process it is hoped that the practical application of adjudicative subsidiarity as a transformative method for the South African law of delict will be illustrated. Even though in another context I would happily argue for a much freer and less technical reading of the Constitution, I am mindful of the fact that South African private-law scholars who might read this research will probably not show much fondness to such a hyper-postmodern reading. Instead, I hope to show that even on a more technical reading of the various constitutional provisions a critical result might be achieved in the sense that the Constitution will be placed at the heart of all legal disputes including common-law matters. Thus, to be candid, I am using the uncertainty in this area of the law coupled with *one* strategic reading

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<sup>367</sup> Ibid at 36 provides a similar summary of his take on subsidiarity.

<sup>368</sup> Ibid at 37.

<sup>369</sup> I specifically call the reading 'technical' and not 'formalist' partly because I do not support formalist politics and partly because, as Davis and Klare (note 13 above) at 407ff argue, the aim of legal certainty inherent to legal formalism is *in strictu sensu* impossible to achieve because words must be interpreted and given meaning to.

of the Constitution to show traditional common lawyers that the Constitution might in fact require constitutional consideration in all delictual disputes. I by no means intend to suggest that this is the *only* way of reading the Constitution which we know is filled with gaps and ambiguity and requires judges to find some type of balance between ‘freedom and constraint’.<sup>370</sup>

Various scholars have raised concerns about the artificial distinction between direct and indirect application of the Constitution.<sup>371</sup> Textually there is nothing in the text of the Constitution to suggest that a rigid distinction should be drawn between the use of ‘constitutional rights’ and ‘constitutional values’ or between ‘the striking down of an unconstitutional common-law rule’ and the ‘development of the common law in light of constitutional imperatives’. The two most current delict textbooks however still refer to direct and indirect constitutional application in their discussions on the interaction between constitutional law and delict.<sup>372</sup> Before considering a different reading of the Constitution, let us first turn to consider what the relevant constitutional provisions are and what they provide.

Section 2 of the Constitution provides that the Constitution ‘is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled’.<sup>373</sup> Section 7(1) makes it clear that the Bill of Rights is a ‘cornerstone of democracy in South Africa... and affirms the democratic values of human dignity, equality and freedom’. Section 7(2) obliges the state to respect, protect, promote and fulfil the rights in the Bill of Rights. Section 8, headed as ‘application’ reads as follows:

- (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

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<sup>370</sup> Klare (note 66 above) at 159.

<sup>371</sup> See eg Woolman (note 1 above); Cheadle (note 1 above); Bhana (note 4 above); Friedman (note 7 above); G Ferreira ‘The Direct and Indirect Application of the Bill of Rights: Constitutional Imperative or Questionable Academic Innovation?’ (2006) 20 *Speculum Juris* 241; and A Price ‘The Influence of Human Rights on Private Common Law’ (2012) 129 *South African Law Journal* 330.

<sup>372</sup> Loubser & Midgley (note 56 above) at 33ff; and Neethling & Potgieter (note 33 above) at 18ff.

<sup>373</sup> This must be read with *Pharmaceutical Manufacturers* (note 80 above) which provides that there is one system of law and that is law under the Constitution – thus the common law cannot be seen as being divorced from the Constitution.

- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –
  - (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
  - (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).
- (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

Furthermore, section 39(2) provides that ‘when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights’.<sup>374</sup> Section 172(1)(a) gives courts the authority in constitutional matters to, among others, declare any law or conduct inconsistent with the Constitution invalid. Section 173 bestows certain inherent powers on the High Court, Supreme Court of Appeal and Constitutional Court, namely, ‘to protect and regulate their own process, and to develop the common law, taking into account the interests of justice’. Section 211(3) states that ‘[t]he courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law. Schedule 6 item 2(1) provides that ‘[a]ll law that was in force when the new Constitution took effect continues in force, subject to (a) amendment or repeal; and (b) consistency with the new Constitution’. Section 39(3) compliments this position in that ‘[t]he Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill’.

Even though one should be cautious of creating the impression that the state always holds more power than private parties, for purposes of conceptual clarity it may be useful to distinguish between those cases where a non-state or ‘private’ party is the alleged wrongdoer and where the state is the wrongdoer to the extent that the Constitution creates such a distinction in its phraseology. The remainder of this discussion is consequently divided along these lines.<sup>375</sup> The

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<sup>374</sup> With regard to the interpretation of statutes, the case of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15, 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) paras 72, 80 and 90 provides that the starting point for statutory interpretation is the Constitution and not necessarily the technical rules of literal interpretation.

<sup>375</sup> F du Bois ‘State Liability in South Africa: A Constitutional Remix’ (2010) 25 *Tulane European and Civil Law Forum* 139 goes as far as to suggest that state liability should be treated as a completely separate body of law removed from the principles of delict. His view involves radical change to the law of state liability. Contrarily, in this thesis I am interested in making the best of the law that we have at our disposal.

remainder of this thesis, which aims to evaluate the method proposed in this chapter in more detail, is also divided along the lines of the distinction between the state and private wrongdoers – Part Two will deal with the former and Part Three will deal with the latter.

## 5.2 Private Wrongdoers

In light of the above exposition of constitutional provisions, it is my view that the following structured procedure should be followed in all delictual disputes where the alleged wrongdoer is a non-state actor. It is an approach that merges the direct and indirect models for constitutional application. The starting point is to consider section 2 read with section 39(3) and Schedule 6 item 2(1). These sections cumulatively provide the framework for constitutional application to other sources of law. From here, section 8(2) clearly enacts that one should ask whether there is a right or are rights in the Bill of Rights that bind/s the parties.

If answered in the affirmative section 8(3) requires that one should enquire whether legislation gives effect to the right/s. This is a proposition also supported by section 211(3) with regard to customary law. If there is such legislation, the legislation must be applied in accordance with section 39(2) to promote the spirit, purport and objects of the Bill of Rights. Alternatively, if the legislation is unconstitutional, section 172 makes it clear that the statute may be declared unconstitutional and thus invalid. Applicable legislation in the context of the law of delict could for example be the Road Accident Fund Act<sup>376</sup> or the Compensation for Occupational Injuries and Diseases Act.<sup>377</sup> Both of these statutes create delictual insurance regimes that bolster common-law delictual principles and also provide a number of additional requirements and procedures that must be followed in order to succeed with a claim.

If no legislation gives effect to the right/s, the common-law position applies (following section 8(3)), unless the parties can show that customary law should regulate the matter (following section 211(3)). Although provision should be made for the customary law in this context, there have been no reported cases on customary delicts in the last 50 years. The reason for this could be that customary disputes are often resolved extra-judicially or that the quantum of claims for customary-law damages is so small that the cases never reach the High Court.

When the common law applies, regard must be had to section 173, granting the higher courts the power to develop the common law. This power must be approached in a

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<sup>376</sup> Road Accident Fund Act 56 of 1996.

<sup>377</sup> Compensation for Occupational Injuries and Diseases Act 130 of 1993.

transformative context being sensitive to the culture of justification that the Constitution promotes. The power to develop the common law ultimately poses a choice to the judge. She can either choose to develop the common law, or to apply the common law without such development. Section 8(3) creates the impression that a difference exists between application and development of the common law. It is my argument that the choice that results from a joint reading of sections 8(3) and 173 demands thorough justification in each case. It is therefore untenable to accept, as supporters of the constitutional-avoidance paradigm do, that the common law needs no constitutional consideration except in some extraordinary cases. As section 173 states, the court must consider the interests of justice in making this decision. The question is whether justice (perhaps, in the South African context this could mean transformative justice) requires common-law development in a specific matter. Transformative justice would involve promoting the values that underlie the Constitution, such as the achievement of equality, human dignity and freedom. In order to have transformative justice flourishing in 'post'-apartheid South Africa, a deconstructive project will have to be undertaken with respect to each common-law rule that has to be decided by a judge. Although sections 8(3) and 173 make no mention of customary law, the power conferred on courts to develop the customary law in light of section 39(2) creates the impression that the same considerations relating to the choice between application and development of the common law could be analogously applied to the customary law. The omission of customary law in sections 8(3) and 173 is unfortunate. The accommodation of customary law should nevertheless feature in the transformative methodology developed here.

If the court decides merely to apply a rule of common or customary law, reasons must be provided why the current rule is just. This means that the law as it is will not be accepted simply because it is the law – a deeper moral investigation into the validity of law will be required. The enquiry would then end there. However, if the court decides to develop the law, section 39(2) would kick in and determine that the spirit, purport and objects of the Bill of Rights would have to be promoted by the development. From a strategic litigation perspective it is understandable that lawyers might want to weigh up the rules against the spirit, purport and objects of the Bill of Rights because those are inherently more flexible than specific rights in the Constitution. But for purposes of the present technical reading, I shall accept that Fagan's reading of section 39(2) is correct. Fagan argues that the word 'when' in section 39(2) implies that a decision should already have been made to develop the common law before the spirit, purport and objects should be



relied on.<sup>378</sup> The exact form of the development should take on the form that best promotes the spirit, purport and objects of the Bill of Rights. Section 172 does however hint that a development could take on the form of striking down or invalidating a specific common-law rule if necessary.

If the exceptional situation arises where no legislation or common law provisions can assist a person in vindicating his or her rights, it might be possible for a litigant to base his or her cause of action solely on the breach of a constitutional right. This is true because section 38 provides that a court may grant ‘appropriate relief’ for an infringement of constitutional rights. ‘Appropriate relief’ is expansive enough to encompass claims for constitutional damages. Furthermore, in these exceptional situations, it can be said that the law has ‘run out’, but section 2 makes it clear that ‘conduct’, in addition to ‘law’, is subject to constitutional scrutiny. This supports the argument in favour of having constitutional damages as a remedy of last resort. As the remainder of this thesis will show, the South African law of delict is usually flexible enough to avoid the situation where legislation or the common law leaves a claimant remediless.

Returning to the starting point of this structured procedure, if a right does not directly bind parties to a private dispute, it does not mean that a plaintiff’s hands are now tied. Section 8(2) is only a carving from the framework for constitutional application to other sources of law created by section 2, read with schedule 6 item 2(1) and section 39(3). After section 8(2) has been carved out, the framework ultimately provides that legislation, common law and customary law must even be consistent with constitutional provisions beyond the Bill of Rights. A holistic reading of the Constitution could thus lead to the conclusion that legislation may be invalidated, or the common and customary law may be developed, for broader constitutional reasons and not merely for the purposes of giving effect to a constitutional right.

If a constitutional provision other than a right in the Bill of Rights is potentially relevant to the matter, it should be noted that is an age-old principle of South African law that, if the legislation is clear on this, legislation can override the common and customary law.<sup>379</sup> It would thus be apt to enquire whether legislation could provide a remedy for the plaintiff and, if it does, to apply such legislation in accordance with section 39(2). The legislation may be invalidated if

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<sup>378</sup> Fagan (note 45 above).

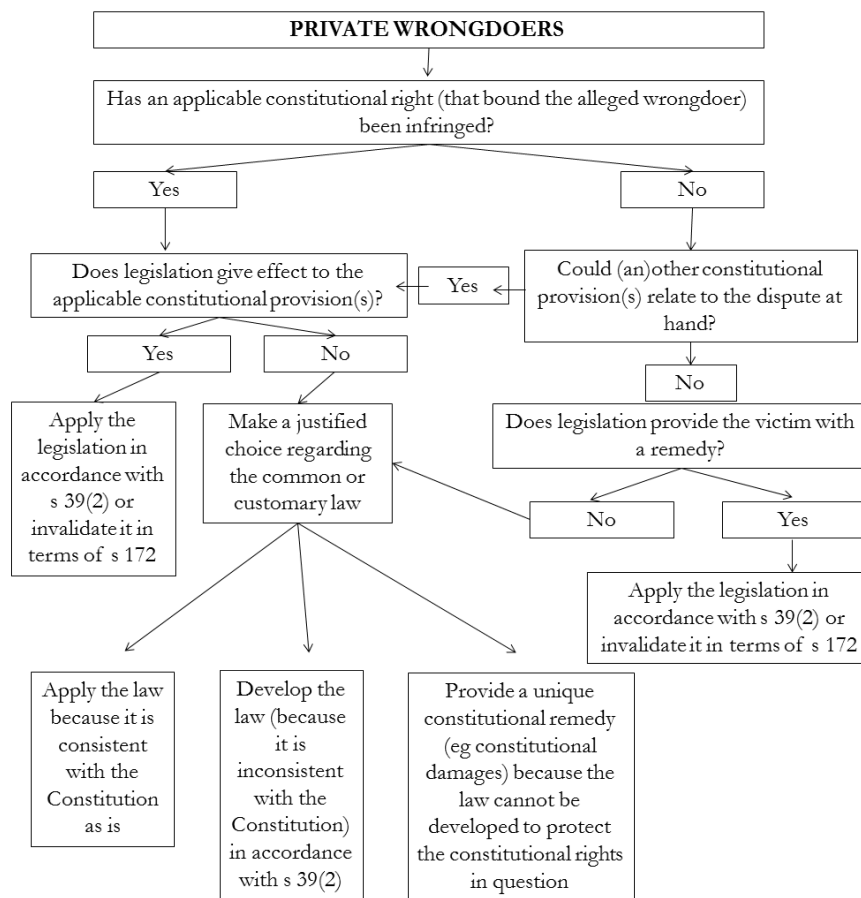
<sup>379</sup> See eg the more recent cases of *SANDU v Minister of Defence and Others* [2007] ZACC 10, 2007 (5) SA 400 (CC), 2007 (8) BCLR 863 (CC), [2007] 9 BLLR 785 (CC), (2007) 28 ILJ 1909 (CC) paras 51-52; and *Minister of Safety and Security v Sekhoto and Another* [2010] ZASCA 141, 2011 (5) SA 367 (SCA), 2011 (5) SA 367 (SCA), 2011 (1) SACR 315 (SCA), [2011] 2 All SA 157 (SCA) (*‘Sekhoto’*) para 22 that indirectly affirms this principle as still being valid law.

necessary. Alternatively, if there is no legislation governing the matter, the judge will once again be faced with the section-173 question of whether to develop the law in the interests of justice. The same comments regarding justification for the exercise of power once again apply here, but now the enquiry is not whether the common or customary law accords with a specific constitutional right but rather whether the law accords with any other constitutional provision. The judge will have to provide reasons why the current rule has constitutional muster, or whether it should be adapted accordingly. If the judge reasons that the rule could simply be applied, then it will apply. If the judge concludes that the rule should be developed, the court must promote the spirit, purport and objects of the Bill of Rights in doing so as required by section 39(2). Once again the notional possibility exists that, in the absence of legislative or common or customary law relief, litigants could rely on the breach of a constitutional right as their cause of action.

In the unlikely event that a dispute would arise in terms of which neither constitutional rights nor other constitutional provisions are relevant, a court should follow the time-honoured principle that legislation should be considered before the common or customary law. Legislation should be applied in accordance with section 39(2) or it should be struck down in terms of section 172. If no legislation applies, the dilemma about what to do with the common or customary law arises. In these cases it will probably be found that the common or customary law as it stands complies with the Constitution because no conflict could exist between the two. However, the Constitution would not be completely irrelevant for these types of disputes because the court would thoroughly have to justify why no constitutional rights or other provisions are applicable to the issue.

This method shows the importance of both rights and values in the development process without neglecting either. It also shows a deeper appreciation for the ideal of justice, which is not seen as a separate ground for developing the common law but is rather seen as integral to each step of common-law development. This structured process is illustrated in Diagram B that follows below.

**Diagram B**



### 5.3 The State as Wrongdoer

Regarding the vertical enforcement of constitutional rights, the Constitution does not provide a clear step-by-step method for determining state liability. Once again, section 2 read with section 39(3) and Schedule 6 creates the framework for constitutional application to other sources of law. The only practical hints that we have as to how to apply the Constitution vertically are sections 7(2) and 8(1). Section 7(2) makes it pertinently clear that our Constitution goes beyond the classical-liberal goal that the State should simply refrain from interfering with the rights of individuals. Instead, the State is required to ‘protect, promote and fulfil’ the fundamental rights of everyone within our borders. This immediately creates the impression that the State is under a duty to take positive steps to ensure that the rights in the Bill of Rights are not mere words on paper, but that they should be seen to be realised in society.

To eliminate any doubt as to whether the Bill of Rights binds the State, section 8(1) provides that the executive, legislative and judicial branches of government as well as organs of state are bound by the Bill of Rights. The next relevant provision appears to be section 38 which allows a list of persons to approach a competent court for appropriate relief for an actual or threatening infringement of a fundamental right. The reality, however, is that despite the Constitution a number of different sources of law are still applicable in South Africa. How should one deal with statutes and the common law in light of section 38 which allows for appropriate relief?

Following the well-established principle in our law, if legislation is specifically promulgated to give effect to the infringed right, relief should be sought in terms of such legislation. In the context of state liability one pertinent example is the Promotion of Administrative Justice Act<sup>380</sup> that lists ‘compensation’<sup>381</sup> as a possible form of relief for exceptional cases where section 33 of the Constitution has been infringed by the state.

If no legislation applies, one turns to the application or development of the common law as detailed in the discussion above on private disputes. Due to the fact that customary law is the law that applies between people belonging to a specific cultural community,<sup>382</sup> it is unlikely that the state could be a party to a customary delictual dispute. A third option could also be applicable in this instance. If the common law does not apply, or no provision at common law can be developed to protect the constitutional rights of the victim, then one can claim direct constitutional relief such as constitutional damages. The notional possibility for a claim for constitutional damages against the state is indirectly supported in *Fose v Minister of Safety and Security*.<sup>383</sup>

If no fundamental right is infringed by the state, there should be the possibility to hold the state to account for other, broader constitutional infringements caused by it. As pointed out above, the framework for constitutional application to other areas of law is not limited to protecting constitutional rights alone but also includes constitutional principles beyond the Bill of Rights. If another constitutional provision should be violated by the state, one should enquire whether a statute provides a remedy or relief where damage has been suffered. A hypothetical

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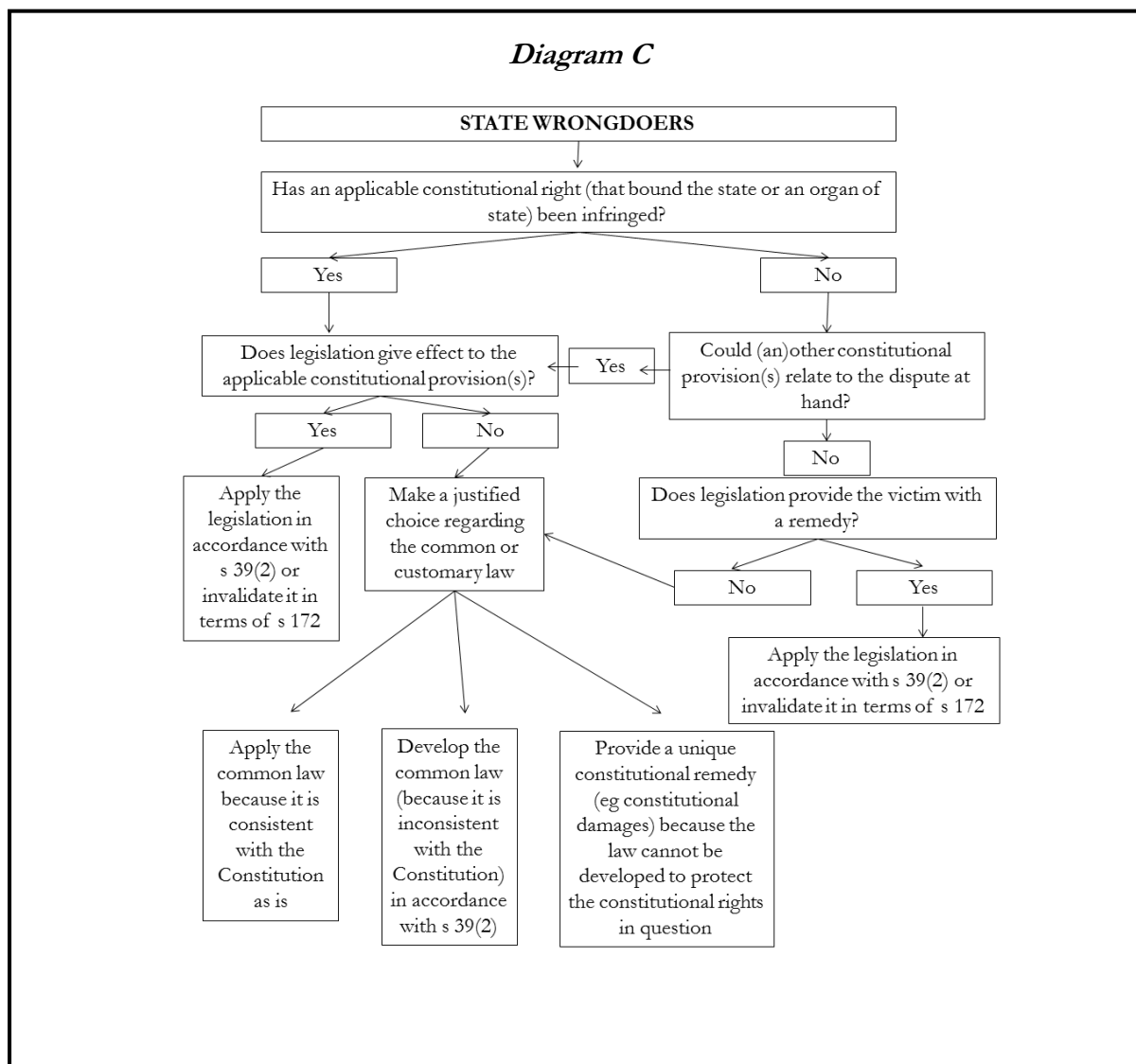
<sup>380</sup> Promotion of Administrative Justice Act 3 of 2000 (‘PAJA’).

<sup>381</sup> Section 8(1)(c)(ii)(aa) of PAJA.

<sup>382</sup> See Chapter 1 § 1 above.

<sup>383</sup> *Fose v Minister of Safety and Security* [1997] ZACC 6, 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) paras 19-54.

piece of legislation may provide that the organ of state governed by the legislation will pay a set or capped amount of compensation to a victim for any loss caused by it.<sup>384</sup> If no such legislation exists, it takes us back to the comments made above regarding the justified choice between applying or developing the common law, failing which a constitutional remedy may be provided. In the unlikely event that no constitutional provision of any kind relates to the dispute, the same comments made in this regard about private wrongdoers apply here with the necessary changes. The methodology for the vertical application of fundamental rights in delictual cases is illustrated in Diagram C that follows below.



<sup>384</sup> Non-constitutional legislation as discussed here does not mean legislation that simply lists the duties of the State without providing a remedy. It is common cause that legislation in such an instance is but one factor that can be considered to establish the element of wrongfulness under the common-law enquiry. See eg Loubser & Midgley (note 56 above) at 259ff; and Neethling & Potgieter (note 33 above) at 78ff.

## 5.4 A Perfect Methodology?

The recent High Court decision of *Nkala v Harmony Gold Mining Company*<sup>385</sup> shows that even if adjudicative subsidiarity is used as an approach to integrating sources, the substantive concerns of the Constitution will not necessarily be realised. In order for the substantive concerns of the Constitution to be properly realised lawyers must be particularly attentive as to how the Constitution is interpreted in the context of common-law disputes.

*Nkala* concerned an application for certification of a class-action brought by mineworkers and their dependants for the silicosis contracted by goldmine workers in South Africa.<sup>386</sup> Importantly for purposes of the present discussion, the court in *Nkala* had to determine whether a common-law rule that prohibits the passive transmissibility of non-patrimonial claims for pain and suffering before *litis contestatio*, could withstand constitutional scrutiny.<sup>387</sup> Practically the common-law rule means that if a victim instituted a claim for pain and suffering against an alleged wrongdoer but died before the closing of the pleadings-stage of the suit, the heirs of the victim would not be entitled to continue with the claim.<sup>388</sup> The court held that the common-law rule was inconsistent with the constitutional rights to bodily integrity (section 12), the best interests of the child (section 28) and created a situation of unfair discrimination (section 9) between the heirs of victims who managed to reach *litis contestatio* before their death and those who did not.<sup>389</sup> For these reasons the common-law rule was struck down and therefore whether the victim's claim reached *litis contestatio* or not, his or her heirs can continue with the claim.<sup>390</sup>

The references to the various constitutional rights in the *Nkala* judgment are not supported by precedent and provide very little substantive content to the rights concerned. For example, it seems that the heirs of the silicosis victims in this case suffered infringements to their own bodily integrity, vicariously through the victim. There is nothing in the South African constitutional jurisprudence to suggest that one's bodily integrity can be infringed when someone else experiences pain and suffering. This is indeed a radical

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<sup>385</sup> *Nkala and Others v Harmony Gold Mining Company Limited and Others* [2016] ZAGPJHC 97, 2016 JDR 0881 (GJ), [2016] 3 All SA 233 (GJ), 2016 (7) BCLR 881 (GJ) ('*Nkala*').

<sup>386</sup> *Ibid* at paras 1-4.

<sup>387</sup> *Ibid* at para 176.

<sup>388</sup> *Ibid* at paras 182-192.

<sup>389</sup> *Ibid* at paras 200-204.

<sup>390</sup> *Ibid* at paras 211-220.

development to our constitutional jurisprudence and one would have hoped that a better explanation had been given for this finding. The reference to the best interests of the child does not explain why the common-law rule should be abolished for the spouses of the mineworkers.

The equality argument is flawed because the court accepted, without any substantive reasons, that the distinction drawn between claims that are passively transmissible and those that are not amounts to ‘unfair discrimination’. In reality, the South African law of unfair discrimination involves a detailed and technical analysis.<sup>391</sup> In brief, ‘differentiating’ between different people will only amount to ‘discrimination’ if it occurs on the basis of one of the grounds prohibited in section 9(3),<sup>392</sup> or on an unlisted ground that similarly affronts the inherent human dignity of the claimant.<sup>393</sup> It is clear that the differentiation created by the common-law rule does not constitute one of the prohibited grounds. Furthermore, the persons experiencing differentiation in *Nkala* are not experiencing segregation on the basis of inherent characteristics that relate to their human dignity – the differentiation caused by the common-law rule occurs between heirs of victims who timeously instituted legal proceedings and the heirs of victims who did not. The dignity of the heirs concerned can surely not be impeded by this distinction in the same degree as the dignity impairments systemically suffered by people on the basis of, for example, their race, gender, sex or sexual orientation. It would therefore seem that even though the court followed the adjudicative subsidiarity methodology, when it came to interpreting and applying the relevant constitutional rights to this issue, the court failed to provide an outcome that accords with South African constitutional jurisprudence, broadly understood.

If we accept that *Nkala*’s reliance on the various constitutional rights is erroneous, perhaps the case shows us something about the limits of the method proposed in this thesis. In radical spirit, let us assume that mineworkers are in a situation of vulnerability to the mining companies that employ them. What should a human rights lawyer in South

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<sup>391</sup> See eg C Albertyn & B Goldblatt ‘Chapter 35: Equality’ in S Woolman & M Bishop *Constitutional Law of South Africa* (2<sup>nd</sup> Ed, OS, 2006) 42ff.

<sup>392</sup> The prohibited grounds listed in section 9(3), as incorporated in section 9(4), include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

<sup>393</sup> See the *locus classicus* in this regard *Harksen v Lane* NO 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) para 53.

Africa do from a strategic litigation perspective to assist the miners and their heirs? The best option is probably to avoid the subsidiarity method in the strict sense and to rely solely on section 39(2) of the Constitution read with *Carmichele CC* (a decision that is critiqued in Chapter 3 below). That could be useful because if the common law is weighed up against the constitutional values then one might legitimately argue that the value of equality could require the common law's development without getting into the nitty gritty details of the unfair-discrimination analysis. The second option, which is interesting from an academic and political perspective but will probably not bear a great deal of force in a courtroom, is to think about the pain and suffering of the miners as intrinsically linked to their heirs in African philosophical terms. As Ramose noted before, in more abstract terms, South African law and the Constitution fail to give effect to the triadic relationship in African philosophy between the dead, the living and the unborn who are all regarded as being part of the community.<sup>394</sup> In this sense then the pain and suffering of the miners are also the pain and suffering of the heirs. However, it has previously been held that abortion should be legal in South Africa despite African philosophy pointing in the other direction.<sup>395</sup>

One can summarise the two points of potential critique against this method illustrated by *Nkala* as follows: (a) From a strategic litigation point of view it may be more advantageous to rely on the spirit, purport and objects of the Bill of Rights instead of on a rigorous constitutional rights-based analysis in arguing common-law development. (b) South African constitutional jurisprudence perhaps has a Western bias and fails to give effect to concerns relating to decoloniality.

In conclusion, I would argue that approaches such as those championed by Price, Du Plessis and Van der Walt that aim to strike a balance between the two extremes of constitutional avoidance and constitutional over-excitement deserve support. Constitutional avoidance is undesirable as it stifles the development of private law which is needed in order for it to maintain its legitimacy in the transformative South African legal era. Constitutional over-excitement also stifles the potential of forming a critical framework for evaluating the common law, as it fails to realise that the Constitution should be approached unpretentiously regarding its limited transformative possibilities. Just as much as the Constitution is important, it is not a perfect tool to effect real and tangible transformation

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<sup>394</sup> See eg MB Ramose 'Ubuntu: Affirming a Right and Seeking Remedies in South Africa' in *Ubuntu: Curating the Archive* (2014).

<sup>395</sup> *Christian Lawyers Association of SA v Minister of Health* 1998 (4) SA 1113 (T).



in South African society. Such a humble recognition is crucial to monumentalise neither the common law nor the Constitution. Analogous to Paul Kruger's problematic metaphorical monument of legal reasoning, the emblematic monument of the Constitution might have a similar haunting effect on private-law reasoning. While these two monuments can be impressive and inspirational at first glance (and for a while after that), the modest recognition needs to be made that the required interplay between the common law and the Constitution was bargained and determined in a process of ideological negotiation and struggle where various parties to the discussion had to sacrifice certain beliefs regarding certain sources of law. Those sacrifices serve as a memorial to both the common law and the Constitution. Thus, a transformative method, inspired by the formation of the negotiated South African constitutional democracy, should be a sign of memorialising both sources of law. Perhaps adjudicative subsidiarity may also help us craft a unified memorial concurrently dedicated to the common law and the Constitution. However, the mere integration of the various sources of the South African legal system will not necessarily yield transformative results. What is additionally required is a strong appreciation for the transformative South African constitutional jurisprudence and what constitutional rights mean for South African law in general. The remainder of this thesis aims to evaluate the progress of our courts in realising this goal thus far in light of the suggestions made in this chapter. It will be seen that there have been many successes in the transformation of the law of delict to date, but that much is also left to be desired.

PART TWO

# THE STATE AS WRONGDOER

# The Constitutional Framework for Holding the State Delictually Liable: Reflections on *Carmichele v Minister of Safety and Security*<sup>1</sup>

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## 1 INTRODUCTION

The ground-breaking case of Alix Carmichele from the small town of Noetzie, close to Knysna, was the first common-law development matter to appear before the Constitutional Court under the 1996 Constitution.<sup>2</sup> The acclaimed unanimous judgment of Ackermann and Goldstone JJ has had a prolific impact on the way that common-law development is approached by our courts.<sup>3</sup> However, the judgment, which is rich in controversial constitutional theory, has not escaped

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<sup>1</sup> *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22, 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) (*Carmichele CC*). For a concise summary on the Constitutional Court judgment see J Knobel 'Liability of Organs of State for Omissions on Part of Police and Prosecutors' (2002) 43 *Codicillus* 96. The trial court judgment is unreported (*Carmichele HC P*) but the first Supreme Court of Appeal judgment is cited as *Carmichele v Minister of Safety and Security and Others* [2000] ZASCA 61, 2001 (1) SA 489 (SCA), [2000] 4 All SA 537 (A) (*Carmichele SCA P*). The Constitutional Court referred the matter back to the High Court to establish the facts of the case in more detail. The subsequent High Court judgment, decided in favour of Ms Carmichele, is reported as *Carmichele v Minister of Safety and Security and Another* 2003 (2) SA 656 (C), 2002 (10) BCLR 1100 (C) (*Carmichele HC IP*). The 2003 High Court decision was unsuccessfully appealed against by the Minister of Safety and Security and is reported as *Minister of Safety and Security v Carmichele* [2003] ZASCA 117, 2004 (3) SA 305 (SCA), 2003 (4) All SA 565 (SCA) (*Carmichele SCA IP*).

<sup>2</sup> N Botha 'The Role of International Law in the Development of South African Common Law' (2001) 26 *South African Yearbook of International Law* 253, 255.

<sup>3</sup> See eg G Carpenter 'The Carmichele Legacy – Enhanced Curial Protection of the Right to Physical Safety' (2003) 18 *SA Public Law* 252, 266 who states that '[i]t is therefore very gratifying that such a sound foundation has been laid for future development of this area of our law', and J Neethling & JM Potgieter 'Toepassing van die Grondwet op die Deliktereg' (2002) 65 *Journal of Contemporary Roman-Dutch Law* 265, 272-273 who adds that '[d]ie Konstitusionele Hof se gebalanseerde benadering in *Carmichele* tot die toepassing van die Handves van Regte op die deliktereg verdien instemming. Dit verskaf naamlik die grondslag vir 'n gesonde wisselwerking tussen *de lege lata* delikteregbeginsels en die *de lege ferenda* rol wat die gees, strekking en oogmerke van die Handves op hierdie regsgebied moet speel.'

criticism. The judgment, academic commentary thereof, and my own analysis of both the judgment and its commentary follow below.

In § 2 of this chapter I shall survey the facts and legal problem in *Carmichele CC*. Then in § 3, seven issues in the decision of the Court are evaluated. These seven issues relate to the constitutional framework for common law development; a critical rethinking of the meaning and scope of section 39(2) of the Constitution; the role of the separation of powers doctrine in the common law's development; the nature of the obligation imposed on courts to develop the common law; when that obligation arises, the two steps involved in the actual developmental process; the appropriate test to employ in deciding applications for absolution from the instance; and the troublesome practice of raising constitutional issues only at the Constitutional Court.

## 2 FACTS, BACKGROUND AND THE LEGAL ISSUE

Francois Coetzee had been sexually deviant from an early age.<sup>4</sup> In 1994 the twenty-year-old was convicted and sentenced to 18 months imprisonment on charges of housebreaking and indecent assault.<sup>5</sup> In early 1995 he was charged with attempted rape and murder. The police officer taking the statement from the victim of the latter case made a note in the investigation file that Coetzee had a previous conviction.<sup>6</sup> Despite this fact being known to the investigating officer, he

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<sup>4</sup> *Carmichele CC* (note 1 above) at para 6.

<sup>5</sup> *Ibid* at para 8.

<sup>6</sup> *Ibid* at para 12.

informed the prosecutor that there were no reasons to deny bail.<sup>7</sup> The magistrate consequently released Coetzee with a warning to appear at a later date. The prosecutor did not oppose this decision. Coetzee returned to his mother's home in Noetzie.<sup>8</sup>

The community of Noetzie appeared to be well-informed of Coetzee's previous conviction and the current case against him. Consequently the employer of Coetzee's mother, Ms Gosling, approached the police with the concern that Coetzee posed a danger to the community. She was referred to the senior prosecutor of the area, who claimed that her hands were metaphorically tied.<sup>9</sup> When the senior prosecutor interviewed Coetzee at a later stage, she referred him for psychiatric observation due to his sexually aggressive character. The psychiatric report showed that he was fully capacitated at the time of the incident and was ready to stand trial.<sup>10</sup> Coetzee again appeared before the magistrate where he pleaded not guilty and no mention was made of bail or opposition to release Coetzee by the prosecutor.<sup>11</sup> After being released again, Carmichele noticed Coetzee attempting to break into Gosling's house. Carmichele encouraged Gosling to approach the police again, but the complaints fell on deaf ears.<sup>12</sup> On 6 August 1995

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<sup>7</sup> The Court assumed that the reader of the judgment has sufficient knowledge of the basic principles of South African criminal procedure, and did not further address the relevance of previous convictions in bail hearings. For the sake of completeness, I shall briefly elaborate on the significance of previous convictions here. Section 60(1)(a) of the Criminal Procedure Act 51 of 1977 provides that an accused is entitled to be released on bail if the interests of justice so permit. Section 60(4)(a) states that the interests of justice do not support the release of the accused on bail where 'there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence'. Schedule 1 offences include housebreaking and what was known in the past as indecent assault, which Coetzee was previously convicted of. In the process of determining whether the requirements of section 60(4)(a) has been met, section 60(5)(d) allows a court to consider 'any disposition to violence on the part of the accused, as is evident from his or her past conduct', and section 60(5)(e) allows for the consideration of 'any disposition of the accused to commit offences referred to in Schedule 1, as is evident from his or her past conduct'. Applied to the facts of Coetzee's bail hearing, a court could have refused the granting of bail if it was aware of Coetzee's previous convictions, as he posed a threat to the public. See also *Carmichele CC* (note 1 above) at para 76 where the Court makes the *obiter* remark that the test applied to establish causation (between the failure of the prosecutor to raise the previous conviction and the decision to release the accused as well as the assault that ensued) is to ask how the reasonable magistrate would have applied the law. In *Carmichele SCA II* (note 1 above) at paras 71-72 it was held that causation was successfully proved in this regard.

<sup>8</sup> *Carmichele CC* (note 1 above) at para 13.

<sup>9</sup> *Ibid* at para 15.

<sup>10</sup> *Ibid* at para 19.

<sup>11</sup> *Ibid* at para 21.

<sup>12</sup> *Ibid* at para 22.

Carmichele entered Gosling's home with the intention of a visit. Unfortunately Gosling was out and Coetzee was hiding inside the house, waiting upon his victim. He assaulted her with a pick handle (causing serious injury to her head and arm) and later stabbed her with a knife.<sup>13</sup> Coetzee was subsequently found guilty of attempted murder and housebreaking.<sup>14</sup>

The key issue in dispute was whether the state, acting through the instrumentality of the police and/or the prosecutors, owed Alix Carmichele a legal duty to act. More specifically, as similar facts had not been presented to a court before, the question was whether the common law of delict had to be developed to impose such a duty.<sup>15</sup> At the close of the plaintiff's case, the trial court granted absolution from the instance (and this was confirmed by the first Supreme Court of Appeal judgment)<sup>16</sup> on the basis that there was no *prima facie* duty to protect Ms Carmichele and that no special relationship had been established between her and the Minister of Safety and Security.<sup>17</sup>

### 3 THE REASONING OF THE CONSTITUTIONAL COURT

#### 3.1 The Constitutional Framework for Common-Law Development

The substantive reasoning of the Constitutional Court started with an examination of all the relevant constitutional provisions applicable to common-law development. The systematic layout of these rules flows from section 2,<sup>18</sup> followed by schedule 6 item 2,<sup>19</sup> and finally sections 173,<sup>20</sup> 7,<sup>21</sup> 8(1)<sup>22</sup> and 39(2).<sup>23</sup>

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<sup>13</sup> Ibid at para 23.

<sup>14</sup> Ibid at para 24.

<sup>15</sup> Ibid at para 4.

<sup>16</sup> An application for absolution from the instance can be brought by the defendant at the close of the plaintiff's case, on the basis that there is either no evidence to support the plaintiff's case or that there is 'insufficient evidence upon which a reasonable court could find for the plaintiff'. See eg C Theophilopoulos, CM van Heerden & A Borraine *Fundamental Principles of Civil Procedure* (2<sup>nd</sup> Ed, 2012) 314-315. For a personal account of why the High Court judge granted absolution from the instance, see D Chetty 'The Perspective of a High Court Judge' (2004) 121 *South African Law Journal* 493.

<sup>17</sup> *Carmichele CC* (note 1 above) at para 25. The Minister of Safety and Security is hereafter referred to as 'the Minister'.

<sup>18</sup> 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

It is disappointing that the Court failed to proceed to a thorough analysis of the interplay between the different sections. One sentence is provided as a ‘catch-all phrase’ to summarise all of the quoted sections because it appears that, to the Court, all the sections mean the same thing: ‘It follows implicitly that where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation’.<sup>24</sup> Two paragraphs later the Court continues: ‘Where a court develops the common law, the provisions of s 39(2) of the Constitution oblige it to have regard to the spirit, purport and objects of the Bill of Rights.’<sup>25</sup> Do these two summaries provided by the Court have the same meaning? I argue that the statements have different implications and are not merely paraphrases of each other. The true meaning and functioning of section 39(2) will now be explored.

## 3.2 What Does Section 39(2) Really Mean?

### 3.2.1 Preliminary Observations

Both of the summaries borrow from the wording of section 39(2). I therefore refer to them as the two ‘section 39(2)-axioms’. The first axiom regards the ‘spirit, purport and objects’ as the standard against which the common law is to be measured to determine whether the common law (as it stands) can withstand constitutional scrutiny. In other words, it addresses the issue of *whether* the common law should be developed. The second axiom relates to the situation where the court has already determined that the common law is inconsistent with the Constitution and that it should be developed. It proceeds to answer the question of *how* the common law should be developed. That is, while engaging in the development process, the court must have regard to the ‘spirit, purport and objects of the Bill of Rights’. Thus, the two summaries provided by the Court do not have a shared meaning. It is my view that there are two arguments that show that

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<sup>19</sup> It suggested that the Court erroneously referred to item 2, whereas the first item of schedule 6 was actually quoted: ‘All law that was in force when the new Constitution took effect, continues in force, subject to – (a) any amendment or repeal; and (b) consistency with the new Constitution’. Item 2 deals with ‘old order legislation’ which was not applicable to the present matter.

<sup>20</sup> ‘The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.’

<sup>21</sup> ‘The state must respect, protect, promote and fulfil the rights in the Bill of Rights’.

<sup>22</sup> ‘The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.’

<sup>23</sup> ‘When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’

<sup>24</sup> *Carmichele CC* (note 1 above) at para 33.

<sup>25</sup> *Ibid* at para 35.

both of these summaries are misrepresentations of what section 39(2) really means. In the first instance I shall argue that section 39(2) is not a ground for developing the common law and, secondly, I shall argue that a plain-language reading of section 39(2) imposes a greater burden on a court than simply requiring it to ‘have regard to’ the spirit, purport and objects of the Bill of Rights.

### 3.2.2 Critique of the First Axiom

Following Leinius and Midgley, as well as Fagan, the first axiom can be critiqued because an ordinary reading of section 39(2) does not give rise to the conclusion that inconsistency with the ‘spirit, purport and objects’ should be regarded as a ground for developing the common law *per se*.<sup>26</sup> Section 39(2) relates to *when* the court is embarking on a developmental exercise, and cannot be used as a standard to test *whether* the court should start embarking on the developmental exercise.<sup>27</sup> Following the methodology that I have developed and proposed in Chapter 2 above, section 8(1) provides a specific ground for developing the common law where the state is the alleged wrongdoer in order to give effect to a *right*, whereas schedule 6 item 1 read with section 2 gives rise to a more general ground for developing the common law where there is *any inconsistency* between the common-law rule and the Constitution (not necessarily involving a specific right). The broader ground for common-law development based on any inconsistency with the Constitution will be applicable if a common-law rule is inconsistent with a provision in the Constitution that falls outside of the Bill of Rights. Then the common law should also be

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<sup>26</sup> B Leinius & JR Midgley ‘The Impact of the Constitution on the Law of Delict: Carmichele v Minister of Safety and Security’ (2002) 119 *South African Law Journal* 17, 19; A Fagan ‘The Secondary Role of the Spirit, Purport and Objects of the Bill of Rights in the Common Law’s Development’ (2010) 127 *South African Law Journal* 661, 621.

<sup>27</sup> I once again acknowledge the opposite view that is held by D Davis & K Klare ‘Transformative Constitutionalism and the Common and Customary Law’ (2010) 26 *South African Journal on Human Rights* 403, 423. Those authors and other critical scholars argue that the word *when* does not refer to the specific moment of developing the common law but rather refers to the more general process of engaging with the common law through application and/or development. I have already expressed my dissent from the reading of Davis and Klare in Chapter 2 above, with reasons, and it will not be repeated here.



developed. There could very well be common law rules that do not live up to the constitutional promises of the two hundred and ten other sections in the Constitution.<sup>28</sup>

As detailed in Chapter 2 above, a specific line of thought on the issue of constitutional application unnecessarily distinguishes between direct application (the infiltration of *rights* into common-law disputes) and indirect application (the infiltration of *values* into common-law disputes).<sup>29</sup> One might be tempted to assume that the broader ground for common-law development (based on Schedule 6 item 2 read with section 2) coincides with the values-based understanding of indirect horizontal application. However, the proposed methodology in this work does not draw the conventional distinction between direct and indirect horizontality. If one does not frame the private dispute in terms of *rights*, it does not follow that one must frame the dispute in terms of *values*. For example, in *Carmichele CC*, the Court also referred to relevant sections pertaining to the obligations of the South African Police Service as ancillary reasons for holding the Minister liable.<sup>30</sup> Those sections are not phrased as rights or values. They are phrased as *obligations* and also constitute valid reasons for the need to develop the common law. As will be seen in Chapter 5 below, it is of course possible for the founding constitutional values of non-racialism and non-sexism, rule of law, democratic government, accountability, responsiveness and openness to form part of broader constitutional promises that could lead to the development of the common law. However, these values are not the only broader ground on which the development may be based.

The fact that the broader ground for common-law development is not only restricted to inconsistency with constitutional *values* is stressed here because the first axiom of *Carmichele CC*

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<sup>28</sup> For example, it could be possible that a common-law rule conflicts with the principles of cooperative government detailed in Chapter 3 of the Constitution, or that the common law conflicts in some way with the roles of parliament (Chapter 4), the executive (Chapter 5), provincial government (Chapter 6), municipalities (Chapter 7), the courts (Chapter 8) and/or the colloquially-termed 'Chapter 9 Institutions'. Our public administration system (Chapter 10), security services (such as the military and police regulated by Chapter 11), traditional leaders (Chapter 12) and ministry of finance (Chapter 13) could be bound by rules of common law which may require constitutional review.

<sup>29</sup> See eg D Bhana 'The Horizontal Application of the Bill of Rights: A Reconciliation of Section 8 and 39 of the Constitution' (2013) 29 *South African Journal on Human Rights* 351, 359 where she points out that indirect horizontal application is often said to involve a value-based analysis and is often referred to as the section 39(2)-construction. It must be noted that Bhana does not support this vocabulary, as she also sides with a more complex understanding of section 39(2) which takes effect in each case where the common law is being developed.

<sup>30</sup> *Carmichele CC* (note 1 above) at para 61. Section 215 of the 1993 Constitution, that lists the constitutional functions of the South African Police Service, was referred to in this regard.

(paraphrasing section 39(2)) is often cited as authority for the conventional approach to value-centred indirect constitutional application. Such reasoning is illogical at another level because that approach equates ‘the spirit, purport and objects of the Bill of Rights’ with the word ‘values’. Each of the three words of section 39(2) has distinct yet related meanings – none of which can be reduced to the word ‘values’.<sup>31</sup>

Notwithstanding the preceding discussion, it must be emphasised that the values of the Constitution will necessarily always be incorporated into a discussion of constitutional rights. Section 39(1)(a) of the Constitution enjoins a court to ‘promote the values that underlie an open and democratic society based on human dignity, equality and freedom’ in the interpretation of the Bill of Rights. This section has been understood by our courts to mean that the Constitution demands a purposive interpretation of constitutional rights.<sup>32</sup> Therefore, the Constitutional values are implicitly always involved in the process of interpreting the Constitution and so also in the process of developing the common law. In conclusion, the wording of section 39(2) itself shows that the section should not be used as a ground to develop the common law and the belief that ‘spirit, purport and objects’ mean ‘values’ is a shallow reading of section 39(2) that should not be supported.<sup>33</sup>

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<sup>31</sup> See the discussion on the critique of the second axiom directly below for the definitions of ‘spirit’, ‘purport’ and ‘objects’ of the Bill of Rights.

<sup>32</sup> For an overview of the purposive method of interpretation see L du Plessis ‘Chapter 32: Interpretation’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Ed, OS, 2006). The essay by D Cornell and N Friedman ‘In Defence of the Constitutional Court: Human Rights and the South African Common Law’ (2011) 5 *Malawi Law Journal* 1, 5-14 contains an insightful discussion of purposive constitutional interpretation as it relates to common-law development. The first post-apartheid Constitutional Court case on the topic of purposive interpretation is *S v Zuma and Others* [1995] ZACC 1, 1995 (2) SA 642 (CC), 1995 (4) 401 BCLR (CC), 1995 (1) SACR 568 (CC), 1996 (2) CHRLD 244 (CC) paras 13-18. Kentridge AJ explains that purposive interpretation involves an engagement with the actual legal text but does not lose sight of the need for a jurisprudence of generosity which seeks to address the mischief of the old constitutional dispensation of our country. See also the following cases for practical applications of the purposive interpretation rule where rights were interpreted in a generous manner: *S v Mhlungu and Others* [1995] ZACC 4, 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) paras 8 & 125; *City Council of Pretoria v Walker* [1998] ZACC 1, 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) para 43; and *Khosa and Others v Minister of Social Development and Others; Mablanle and Another v Minister Of Social Development and Others* [2004] ZACC 11, 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) para 47.

<sup>33</sup> For a deeper critique of the continuing theoretical shallowness of the courts see I Currie ‘Judicious Avoidance’ (1999) 15 *South African Journal on Human Rights* 138, 147.

### 3.2.3 Critique of the Second Axiom

Only a limited critique is raised against the second axiom. I agree with the Court that section 39(2) does take effect once it has been established that the common-law rule is inconsistent with the Bill of Rights. However, the section is clear that the spirit, purport and objects of the Bill of Rights must be *promoted*, as opposed to mere *regard being had* to it. *Promotion* involves encouragement and support for the growth and development of the spirit, purport and objects, or to further it by helping to arrange or introduce it.<sup>34</sup> *Having regard to* something involves looking at it or having an opinion as to the quality of worth of it.<sup>35</sup> Courts are not required by section 39(2) simply to look at or have an opinion about the spirit, purport and objects of the Bill of Rights. Courts are required to push for constitutional infiltration of the common law when it is being developed. Section 39(2) provides judges with a new value system as a goal when developing the common law. The goal of common-law development is no longer to keep up with the times and to ensure economic expediency,<sup>36</sup> but to ensure that constitutional provisions do not fall into a position where they are ‘bumper-sticker phrases’ with little or no practical value.<sup>37</sup>

Moreover, if one considers that *promotion* involves the development and encouraging of ideas, it is unfortunate that the Court did not define exactly what it is that should be promoted in more detail. The question was left open as to what the spirit, purport and objects entail. For the sake of completeness, I shall suggest possible meanings of these three words, which I have already argued cannot be reduced to the compact term *values*: The *spirit* of the Bill of Rights means its typical character, quality or mood. It relates to the real meaning of the Constitution as opposed to a strict interpretation thereof. It requires one to have regard for substance over form.<sup>38</sup> The *purport* of the Bill of Rights refers to what it appears to be or do, and what it means to do.<sup>39</sup> In this regard it is argued that the Constitution is a transformative one, and that the transformative goals of the Constitution must be borne in mind. The *objects* of the Bill of Rights

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<sup>34</sup> C Soanes (ed) *South African Pocket Oxford Dictionary* (3<sup>rd</sup> Ed, 2003) sv ‘promotion’.

<sup>35</sup> *Ibid* sv ‘regard’.

<sup>36</sup> This argument is fully developed in E Zitzke ‘Realist Evolutionary Functionalism and Extra-Constitutional Grounds for Developing the Common Law of Delict: A Critical Analysis of Heroldt v Wills 2013 (2) SA 530 (GSJ)’ (2016) 79 *Journal of Contemporary Roman-Dutch Law* 103 taken up in Chapter 2 above.

<sup>37</sup> This phraseology is used by CJ Botha *Statutory Interpretation: An Introduction for Students* (5<sup>th</sup> Ed, 2012) 143-145.

<sup>38</sup> Soanes (note 34 above) sv ‘spirit’.

<sup>39</sup> *Ibid* sv ‘purport’.

questions what the purpose of the Bill of Rights is.<sup>40</sup> Section 7 provides the answer as the Bill is said to be the cornerstone of our democracy and enshrines both the rights of all the people in the country and the values of human dignity, freedom and equality. These three respective definitions are simply not identical to the term *values* and all of these complex aspects should be addressed in a judgment where common-law development is at issue.

Finally, it has been shown that the functioning of section 39(2) commences after it has been decided that the common law should be developed, that the obligation to promote the spirit, purport and objects of the Bill of Rights is much more burdensome than requiring a court to have mere regard thereto and, ultimately, that the effect of section 39(2) is not merely to window-dress a legal problem with the language of constitutional values but that a much more intellectually rigorous analysis is required.

### 3.3 The Separation of Powers and Judicial Deference

After summarising the constitutional provisions on common-law development as discussed above, the Court progressed to warn judges faced with developmental problems to be mindful of the separation of powers doctrine and the role of the judiciary in the structure of our constitutional dispensation.<sup>41</sup> The primary branch of the state entrusted with the duty to effect law reform is the legislature and not the courts.<sup>42</sup> The duty of the courts only stretches so far as to effect incremental changes to ensure that the law remains in touch with the evolving society. In the South African context, the substantive revolution brought about by the Constitution is the primary indicator of the needs of the ‘evolving society’ according to which the common law must be developed.<sup>43</sup>

In the method proposed in this thesis for common-law development, the *trias politica* doctrine is at play in the enquiry as to whether the judge should apply or develop the common law. If the common law is consistent with the Constitution, there is no constitutional mandate to develop it.<sup>44</sup> However, a court that rises to the occasion of the ‘culture of justification’<sup>45</sup> (that the

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<sup>40</sup> Ibid sv ‘object’.

<sup>41</sup> *Carmichele CC* (note 1 above) at para 36. For a précis of the South African take on the separation of powers doctrine, see S Seedorf & S Sibanda ‘Chapter 12: Separation of Powers’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Ed, OS, 2006).

<sup>42</sup> *Carmichele CC* (note 1 above) at para 36.

<sup>43</sup> Ibid.

<sup>44</sup> In Chapter 2 above it has been shown that section 8(3)(a) draws a distinction between ‘applying’ and ‘developing’ the common law.

new democratic order brought about) would explain why the current common-law rule enjoys constitutional support. If the common law is inconsistent with the Constitution in any way, a court is obliged to develop the common law accordingly. This is ultimately a highly restricted law-making competency that is bestowed on the courts. However, this is not a unique trait of South Africa as most representative democratic states accept that courts do have some law-making power.<sup>46</sup> As Michelman has explained, constitutions that contain provisions granting courts explicit (but limited) law-making competency are not in conflict with the separation of powers doctrine – if one accepts that the Constitution (which contains the development clauses) was drafted by a validly constituted legislative body – then the small sacrifice by the legislature to defer the detailed interpretation of a broadly-phrased document to the courts is a wise strategic move that ensures that the Constitution stays relevant and in touch with the present contingencies of a transforming society.<sup>47</sup>

Even though Davis and Klare are anxious about courts constantly deferring issues to the legislature instead of rising to the occasion when common-law development is necessary,<sup>48</sup> it is my view that the incorporation of the *trias politica* principle in *Carmichele CC* serves as a crucial guideline for judges in a constitutionally democratic state and consequently this part of the judgment is fully supported. If judges have not fully realised their developmental duty as Davis and Klare suggest, I argue that this could be due to judicial anxiety related to the haphazard and unpredictable methodology pertaining to constitutional application to the common law that is observed in the law reports and not necessarily due to an inborn fearful deference that courts show towards the legislature. Perhaps a more consistent methodology for the development of the common law is what is needed to ensure that a delicate balance is achieved between the separation of powers doctrine on the one hand and the necessity to develop the common law on the other.

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<sup>45</sup> K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146-188. Klare relies on E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31, who describes the Constitution as a bridge from a culture of authoritarianism to a culture of justification.

<sup>46</sup> Davis & Klare (note 27 above) at 403.

<sup>47</sup> F Michelman 'Constitutional Authorship, "Solomonic Solutions", and the Unoriginalist Mode of Constitutional Interpretation' (1998) *Acta Juridica* 208.

<sup>48</sup> Davis & Klare (note 27 above) at 414.

### 3.4 The Generality of the Obligation to Develop the Common Law

Notwithstanding the importance of the separation of powers doctrine, courts have a ‘general obligation’ to develop the common law.<sup>49</sup> The Court explained that the obligation is general in nature because judges are not required in every single common-law dispute to contemplate the Constitution’s possible impact on developing the common law, even though a judge may raise the issue of development *mero motu*.<sup>50</sup> It will be argued here that the imposition of a general (as opposed to a specific) obligation has created a barrier to the realisation of the transformative potential of the Constitution for the common law.

In Chapter 2 above I showed that section 173 of the Constitution grants the higher courts the inherent power to develop the common law considering the interests of justice. Relying on the work of Mureinik<sup>51</sup> and Klare,<sup>52</sup> I illustrated why the new constitutional dispensation demands a culture of justification where all uses of power have to be justified to prevent abuse. The competence to develop the common law, read with the instruction in section 8 to give effect to rights in the Bill of Rights through either application or development, means that judges are given the power to choose between developing and applying the common law. Due to the constitutional culture which is (in principle, not necessarily in practice) based on justified exercises of power, higher courts should be compelled to defend their choices of either applying or developing the common law in each case. This justification of the judicial choice can only be done if common-law problems are constitutionally framed in accordance with a ‘transformative methodology’ originally coined by Davis and Klare,<sup>53</sup> and taken further in this thesis. Thus, the current common-law rule must be shown to be consistent with the Constitution, or the development must be shown to be consistent with the Constitution. The main claim is that the Constitution must play a pivotal role in evaluating the common law in each dispute that a court is faced with, and that one cannot presume that the *status quo* of the common law must be preserved at all costs.<sup>54</sup> It is possible that the Court in *Carmichele CC* was particularly optimistic about judges in post-apartheid South Africa having a ‘basic intellectual reflex’<sup>55</sup> to

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<sup>49</sup> *Carmichele CC* (note 1 above) at para 39.

<sup>50</sup> *Ibid* at para 39.

<sup>51</sup> Mureinik (note 45 above).

<sup>52</sup> Klare (note 45 above).

<sup>53</sup> Davis & Klare (note 27 above) at 412.

<sup>54</sup> *Ibid* at 422.

<sup>55</sup> *Ibid* at 463.

question the possible application of the Constitution in common-law disputes. However, the way that common-law problems are approached in practice paints a different picture and the time has perhaps come for the employment of a more structured and coherent transformative methodology.

Davis and Klare correctly propose that a conscious contemplation of the impact of the Constitution in each common-law matter will not be a timeous and inexpedient exercise. It should not take more than a few minutes to frame the common-law dispute constitutionally.<sup>56</sup> Seeing that judges may require counsel to address constitutional provisions during argument, it surely will not be too onerous on judges to engage with this new methodology. The opposite view would imply that our Constitution is too burdensome on judges because they need to be constantly self-conscious in utilising it. Such a view should not be accepted if the Constitution's supremacy is to be taken seriously.

A further argument in favour of the proposed transformative methodology is to prevent the abuse of the Constitution as a fall-back mechanism. In the present case, Alix Carmichele's advocates waited until the last minute to raise the constitutional issue of development and relied on the Constitution as their last resort. Luckily for Ms Carmichele, the Court was willing to hear her arguments. In contrast to *Carmichele CC*, eleven years later in *Everfresh Market Virginia v Shoprite Checkers* the Court did not entertain the possible application of the Constitution to a contractual dispute, due to the delayed invocation of the Constitution.<sup>57</sup> This was a clear and stern warning to litigants to refrain from turning to the Constitution only when they have reached the end of their ropes. Since *Everfresh CC*, section 167(3) of the Constitution has been amended to expand the jurisdiction of the Constitutional Court. The Court may now hear any matter where an 'arguable point of law of general public importance' is raised. In the context of private disputes, one could easily argue that the impact of the Constitution to that dispute constitutes 'general public importance'. Thus, if litigants were to approach common-law disputes wisely, keeping the possibility open to appeal to the Constitutional Court if need be, they should frame all issues constitutionally. This is not only a wise strategy for a specific client but it is also a prudent approach that can ensure constitutional legitimacy and a potentially transformed private law.

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<sup>56</sup> Ibid at 464.

<sup>57</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30, 2012 (1) SA 256 (CC), 2012 (3) BCLR 219 (CC) (*Everfresh CC*) para 74.

It is my view that the Court in *Carmichele CC* expected future higher courts and litigants to be constitutionally conscious and to have a sense of duty towards the Constitution's transformative goals. It did not foresee the unfortunate reality that the courts below it would avoid using their inherent authority to raise the issue of development of their own volition, nor did it predict that litigants would strategically use common-law development as a weapon of last resort to surprise opponents after the Supreme Court of Appeal had declared them victorious. Following the methodology proposed in this thesis coupled with the above reasoning for a compulsory constitutional framing of all common-law problems, the supremacy of the Constitution could be given effect to, at least at a symbolic and imaginary level. The actual engagement with the Constitution and creating a space for constitutional interplay with the common law could lead to the Constitution having a real influence on the lives of ordinary people. Perhaps the constitutional framing is exactly what is needed to lead to the real and far-reaching impact of the Constitution being felt at ground level. For all of the abovementioned reasons the Constitutional Court should be encouraged to reconsider the famous paragraph 39 of *Carmichele CC*.

### **3.5 When Does the General Obligation to Develop the Common Law Arise?**

According to the Court, the obligation to develop the common-law arises where 'the common law as it stands is deficient in promoting the s 39(2) objectives'.<sup>58</sup> Taking a step back, one must bear the Court's earlier comment in mind: 'It follows implicitly that where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation.'<sup>59</sup> Is a deficiency in promoting the section 39(2) objectives an alternative ground for development, separate from a deviation from the spirit, purport and objects of the Bill of Rights? In other words, the question is whether the section 39(2) objectives are the spirit, purport and objects of the Bill of Rights. I argue that the section 39(2) objectives are not equivalent to the spirit, purport and objects of the Bill of Rights. However, it is my argument that inconsistency with the objectives of section 39(2), properly understood, is a more accurate (albeit not perfect) reflection of what the grounds for developing the common law are.

Fagan has argued that the 'objectives of section 39(2)' are equivalent to the 'spirit, purport and objects of the Bill of Rights'.<sup>60</sup> I disagree with Fagan on this point. Above, I have

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<sup>58</sup> *Carmichele CC* (note 1 above) at para 39.

<sup>59</sup> *Ibid* at para 33.

<sup>60</sup> Fagan (note 26 above) at 618.



given the ordinary dictionary meanings of *spirit*, *purport* and *objects* respectively. The ordinary meanings of these words do not tell us what the objectives of section 39(2) are. They simply tell us how to read the constitutional provisions when engaging in the developmental process. The ‘objectives of section 39(2)’ refer to the rationale and purpose behind incorporating section 39(2) in the Constitution. This counter-argument to Fagan was first introduced by Roederer who has demonstrated that the objectives of section 39(2) include the achievement of social justice and rule of law through a uniform constitutional legal order.<sup>61</sup> One can also draw from the work of Davis and Klare who indirectly argue that the objectives of section 39(2) are the constitutional auditing of the common law, the constitutional framing of all common-law problems and a rethinking of public and private power relationships.<sup>62</sup> Therefore, if one substitutes the phrase ‘section 39(2) objectives’ with the argument presented by Roederer, Davis and Klare, the obligation to develop the common law arises if the common law as it stands is deficient in promoting ‘a uniform legal order that strives to achieve social justice through the auditing of the common law, the constitutional framing of common-law problems and the rethinking of private power’. This does not make sense. The actual rules of delict do not in themselves prevent the audit of the common law or the achievement of a uniform legal order. Perhaps our conventions of presenting arguments and what arguments we view as being persuasive are inconsistent with promoting an audit of the common law (in other words, a belief in the veneration of the common law) but no rule in delict *per se* is deficient in promoting the audit of the common law. There are many rules that could be audited but that does not mean that the rules in themselves act as an obstacle to creating a uniform constitutional legal order.

What is needed is a complete rewording of what was said in *Carmichele CC* for the arguments of Roederer, Davis and Klare to be brought to fruition. For their arguments to make sense, the test should be worded as follows: ‘The section 39(2) objectives demand a continuous audit of the common law to achieve a uniform legal order that could achieve social justice. There is a specific obligation on the courts to embark on this audit in each common-law case.’ In other words, the question should be: ‘Does the aim of a constitutional audit of the common law to ensure a uniform legal order result in the conclusion that the common law should be developed

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<sup>61</sup> C Roederer ‘Remnants of Apartheid Common Law Justice: The Primacy of the Spirit, Purport and Objects of the Bills of Rights for Developing the Common Law and Bringing Horizontal Rights to Fruition’ (2013) 29 *South African Journal on Human Rights* 219, 223-224.

<sup>62</sup> Davis & Klare (note 27 above) at 426.

in this specific case?’ If this is the principle enunciated in *Carmichele CC* and that is what Roederer, Klare and Davis intended, I am in agreement with them.

However, as indicated in Chapter 1 above, my aim is not to preach the necessity of transformative methodology to the critical legal scholars who would be happy to look past the form to see the substance of a specific *dictum*. My aim here is to present an argument to analytical delict lawyers to accept that even a systematic reading of the Constitution makes it clear that there is a demand for a transformative approach to common-law development. From the perspective of critical legal scholarship it would make sense to look at the substantive purpose of section 39(2) to conflate all the sections pertaining to common-law development and to conclude that there is a demand for a transformative methodology because the common law should be audited. However, recognising that our private-law scholarship has its roots firmly laid in the analytical tradition, I propose a complete rewording of many of the phrases in *Carmichele CC* to ensure that what was probably meant in the judgment can be more clearly appreciated. By this I do not wish to create the impression that I regard my re-worked phrases as so definite and perfectly clear that they are not open to interpretation. Language and the law are indeterminate to some extent and are therefore more often than not open to contestation – the same holds true for my re-worked phrases.

In another context, writing for critical legal scholars, I would readily repeat the arguments in support of Roederer, Davis and Klare. With that said, even in an optimistic argument in support of the above critical authors, the Court clearly contradicted this optimistic interpretation of *Carmichele CC*. The Court gave a problematic classification of the obligation to develop the common law as a ‘general’ one which means that the Constitution does not need to be the starting point for solving common-law problems. It is virtually impossible to reconcile the radical purposive understanding of ‘the section 39(2) objectives’ that Roederer proposes with the limited generality of the obligation to develop the common law. The tension between the radical view of Roederer and the more conservative view of the Court could easily lead to much confusion and the haphazard use of judicial power in deciding whether the Constitution should apply to a given common-law dispute or not. For this reason I emphasise the importance of the need to rework and reword certain crucial phrases in the *Carmichele CC* judgment to bring more clarity to a part of the law that is in a moderate state of disarray. The simplified summary of the Court’s approach thus far in *Carmichele CC* is the following: ‘The general idea of section 39(2) is to re-think the common law, but only sometimes, whenever we feel like it, probably in obvious cases.’ It need not be reiterated that this gut-feel approach is unacceptable and that a justified use

of judicial power demands a drastic change in the current developmental methodology provided by the Court.

### 3.6 Dancing the Two-Step of Common-Law Development

#### 3.6.1 *Introductory Choreography*

The Court provided two steps or stages for determining whether the common law requires development.<sup>63</sup>

The first stage is to consider whether the existing common law, having regard to the s 39(2) objectives, requires development in accordance with these objectives. The inquiry requires a reconsideration of the common law in the light of s 39(2). If this inquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the s 39(2) objectives.

The more practical part to the *Carmichele CC* methodology is found in the above quoted paragraph. The discussion that follows illustrates how the two stages were applied in *Carmichele CC*.

#### 3.6.2 *Step 1: Comparing the Common Law and the Constitution*

The problematic wording of the first stage of the enquiry has already been criticised above where the question arose as to when the obligation to develop the common law arises. The implications of the application of this stage are, however, of great practical importance. The Court firstly turned to the common-law position on determining the wrongfulness of omissions. Secondly, the Court interpreted the applicable constitutional rights in light of international law. The Court then turned to the role of constitutional values in this process and concluded with philosophical reflections on the concept of wrongfulness. Each of these aspects will now be discussed in turn.

(a) *Wrongfulness and the Constitution*: After surveying the relevant case law, it was clear to the Court that the test for determining whether a legal duty to act exists at law is based on reasonableness (grounded in the perceptions of the community) and must be determined casuistically. It is a value judgment but, nonetheless, it remains a legal question based on policy and not on pure morality.<sup>64</sup> This value judgment involves a proportionality exercise, weighing up different interests at stake between the victim, the wrongdoer and the community at large. In this proportionality exercise, the ‘spirit, purport and objects of the Bill of Rights’ are applied, which

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<sup>63</sup> *Carmichele CC* (note 1 above) at para 40.

<sup>64</sup> *Ibid* at para 42.

leads to the infiltration of the Constitution into the common law.<sup>65</sup> In this regard, the Court referred to the rights to life, dignity and freedom and security of the person that are guaranteed in both the 1993 and the 1996 Constitutions. These sections must be read with section 8(1) of the Constitution which binds the state and all law to the Bill of Rights.<sup>66</sup> Combrinck celebrates these constitutional provisions as the progressive ‘normative framework’ that serves to protect women from the unfortunate reality of gender-based violence in South Africa.<sup>67</sup> Contrarily, Fagan has argued that the Court incorrectly understood the common law and in the process created an unconstitutional outcome.<sup>68</sup>

The first component of Fagan’s argument is that the Court in *Carmichele CC* conflated the respective tests for wrongfulness and negligence.<sup>69</sup> According to him, the test for wrongfulness evaluates the reasonableness of the imposition of liability on a defendant, whereas negligence evaluates the reasonableness of the conduct of the defendant and, thus, that the Court’s discussion of reasonableness actually pertains to negligence and not to wrongfulness as the Court proposes.<sup>70</sup> Fagan is mistaken. Even though some uncertainty exists with regard to the appropriate test for wrongfulness, the test that Fagan phrases has mostly been used by our courts in cases dealing with pure economic loss and not necessarily in cases dealing with omissions (as we find in *Carmichele CC*), nor in cases dealing with positive conduct that infringes subjective rights.<sup>71</sup> Different factual constructions require differently nuanced versions of the broad *boni mores* test to be applied: Firstly, in cases relating to the causing of pure economic loss, courts have followed Fagan’s phraseology in defining wrongfulness as the ‘reasonableness of imposing liability’. However, *Carmichele CC* did not relate to a case of pure economic loss. Secondly, if a subjective right is infringed by positive conduct, the conduct is presumed to be wrongful. The presumed wrongdoer can then rely on a ground of justification to rebut this presumption. This construction did not feature here and the Court also did not create that impression. Lastly, the

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<sup>65</sup> Ibid at para 43.

<sup>66</sup> Ibid at para 44.

<sup>67</sup> H Combrinck ‘The Dark Side of the Rainbow: Violence Against Women in South Africa After Ten Years of Democracy’ (2005) 21 *Acta Juridica* 17, 173-174. See also her case discussion of *Carmichele CC* at 176-179. Contrary to Combrinck’s celebratory discussion of the Court’s analysis, M Pieterse ‘The Right to be Free from Public or Private Violence after Carmichele’ (2002) 119 *South African Law Journal* 27 argues that the Court could have delved deeper into the substantive meaning of, specifically, the right to freedom and security of the person.

<sup>68</sup> A Fagan ‘Reconsidering Carmichele’ (2008) 125 *South African Law Journal* 659

<sup>69</sup> Ibid.

<sup>70</sup> Ibid at 660.

<sup>71</sup> J Neethling & JM Potgieter *Neethling-Potgieter-Visser Law of Delict* (7<sup>th</sup> Ed, 2015) 80ff;

overwhelming majority of cases pertaining to wrongful omissions (at the time of the *Carmichele CC* judgment and today) ask the question whether the defendant had a 'legal duty to prevent harm' in light of the legal convictions of the community.<sup>72</sup> There are many crystallised factors that courts consider in evaluating the reasonableness of an omission and whether a duty to act existed.<sup>73</sup> Deleting these crystallised factors in favour of Fagan's misdirected test would dispose of a valuably developed and advanced jurisprudence pertaining to wrongful omissions. I concede that the Court did not define wrongfulness in the context of omissions in the exact manner that Neethling and Potgieter do. However, the Court's application of the legal principles makes it abundantly clear that it was dealing with the conventional wrongfulness test for omissions. At no point did the Court suggest that it was dealing with the reasonable person test required for negligence where foreseeability and preventability enter the equation.<sup>74</sup> The inquiry into the reasonableness of the conduct that the Court employed in *Carmichele CC* coincides with the conventional test for wrongful omissions where conflicting interests are balanced, which the Court referred to as 'proportionality' as explained above. There is no authority for Fagan's allegation that negligence evaluates the reasonableness of the defendant's deed, in the air. If the Court made reference to the blameworthiness of the defendant, weighed up against the standard of the reasonable person, then Fagan's criticism would have been correct.<sup>75</sup> Unfortunately though, Fagan's insinuation that it is more important to understand private law than the Constitution can be used against him in this case.<sup>76</sup> The issue of the definition of wrongfulness is not taken further in this study because it is my view that the correct test was used in the correct manner on the facts of *Carmichele CC*.

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<sup>72</sup> Ibid at 55; and M Loubser & JR Midgley (eds) *The Law of Delict in South Africa* (2<sup>nd</sup> Ed, 2012) 147ff.

<sup>73</sup> Neethling & Potgieter (note 71 above) at 60ff provide a detailed discussion on the open list of factors including: the old Roman prior conduct rule, control of dangerous situations, rules of law, the presence of a special relationship, the holding of a particular office, contractual undertaking for the safety of third parties, and the creation of the impression of the protection of an interest of a third party.

<sup>74</sup> The *locus classicus* on negligence in the South African law of delict is *Kruger v Coetzee* 1966 (2) SA 428 (A) where Holmes JA at 430 provides the age-old test as follows: 'For the purposes of liability *culpa* arises if (a) a *diligens paterfamilias* in the position of the defendant – (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and (ii) would take reasonable steps to guard against such occurrence; and (b) the defendant failed to take such steps.' This classical test for negligence is applied in explicit terms in *Carmichele SCA II* (note 1 above) at para 45.

<sup>75</sup> Loubser & Midgley (note 72 above) at 156ff; and Neethling & Potgieter (note 71 above) at 163-167.

<sup>76</sup> Fagan (note 68 above) at 659.

The second component of Fagan's argument is that invoking the Constitution in the wrongfulness and/or negligence enquiries in *Carmichele CC* leads to an unconstitutional outcome. This is so, Fagan argues, because *Carmichele CC* creates the impression that where the state commits a delict through the instrumentality of its functionaries, the Constitution will automatically cause the state to be liable, while this will not necessarily be the case where a private employer's functionary commits the same delict. This would be unconstitutional because 'it fails to treat the state employee with dignity' and creates an inequality between state and private wrongdoers.<sup>77</sup> This part of Fagan's reasoning is also mistaken. The Court at no point created the impression that wrongfulness is solely determined with reference to the Constitution. What the Court said is that a court faced with a question of wrongfulness should determine the content of the *boni mores* with reference to the Constitution. It was and is South African law that indicators of wrongfulness in cases of harm-causing omissions include the breach of a statutory duty and the existence of a special relationship between the sufferer of harm and the alleged wrongdoer. The Constitution creates the broader framework for the statutory duties of various state functionaries and their relationship with the public. It is a difficult exercise trying to imagine the current legal framework for the functioning of the police and related public services without the influence of the Constitution that introduced the new democratic dispensation. It should be remembered that the Constitution changed the Police *Force* into the Police *Service*. For these reasons it makes practical and systematic sense to refer to the Constitution in a case such as *Carmichele CC* in the way that the Court did. It should not be inferred from this that the state or its employees will be unfairly treated in delictual cases because of the obligations imposed on them by the Constitution. The reality is that the Constitution imposes far-reaching obligations on the state towards the entire community that private persons do not necessarily bear. The state, being in a position of power over the entire community, should bear an equal amount of responsibility. The state simply cannot be equal to its citizens because of this reality and so the guarantee of equality that the Constitution provides is afforded to all people, but not the state. In fact, this state of affairs acts as a mechanism to ensure the protection of the dignity of all people from the encroaching abuse of power of the state. This construction is therefore constitutionally compliant, contrary to what Fagan argues.

Before the digression into the wrongfulness issue, it was stated that the Court regarded the state bound in terms of the various constitutional rights of Ms Carmichele that had been infringed by the police and the prosecutors. The conclusion drawn from the relevant

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<sup>77</sup> Ibid at 668-671.

constitutional rights (read with section 8) is that the South African state is not only under a constitutional duty to refrain from interfering with the rights of the people within our borders, but also to go a step further and to take positive steps to protect them.<sup>78</sup> This is where the legal position in South Africa is quite different from that of other jurisdictions such as the United States of America because classically liberal constitutions only require the state to observe passive respect for rights as opposed to active obligations to protect those rights.<sup>79</sup> In light of the differences between different jurisdictions on this matter, the Court turned to international law to determine the South African legal position on the state's duty to actively protect the rights of its inhabitants.

*(b) International Law and the Interpretation of Rights:* The Court then turned to the provisions of the European Convention on Human Rights (1950) as interpreted by the European Court of Human Rights (European Court) for guidance on how to approach the responsibility of the state to protect the rights of those within its borders.<sup>80</sup> The Court was not explicit in this regard but Botha emphasises that section 39(1) of the Constitution enjoined the Court to consider international law in interpreting the Bill of Rights.<sup>81</sup> Section 39(1) of the Constitution reads: 'When interpreting the Bill of Rights, a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.'

Although counsel for the Minister made submissions to the effect that the English House of Lords has been applying a principle of state immunity and that South African courts should follow suit,<sup>82</sup> the European Court found against the application of that principle by the House of Lords as it would open up the possibility of the abuse of state power.<sup>83</sup> The House of Lords has subsequently adopted a more accommodating approach to delictual (tortious) cases against the state.<sup>84</sup> Our Constitutional Court sensibly decided to follow the judgment of the

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<sup>78</sup> *Carmichele CC* (note 1 above) at para 44.

<sup>79</sup> *Ibid* at para 45.

<sup>80</sup> *Carmichele CC* (note 1 above) at paras 45-46.

<sup>81</sup> Botha (note 2 above) at 255.

<sup>82</sup> The Minister's counsel relied on the English cases of: *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53 (HL); *X and Others (Minors) v Bedfordshire County Council*; *A Minor and Another v Newham London Borough Council and Others*; *A Minor v Dorset County Council and Other Appeals* [1995] 2 AC 633 (HL), [1995] 3 All ER 353 (HL).

<sup>83</sup> See the cases of *Osman v United Kingdom* (23452/94) [1998] ECHR 101; and *Z and Others v United Kingdom* (29392/95) [2001] ECHR 329.

<sup>84</sup> *Barrett v Enfield London Borough Council* [1999] 3 All ER 193 (HL).

European Court.<sup>85</sup> The Minister also raised concerns about an anti-immunity approach opening the floodgates to litigation in future. The Court found that proportionality, foreseeability and causation were factors that sufficiently protected the state against the floodgates being opened too widely.<sup>86</sup> Thus, in some cases the state would not be liable for its omissions. However, that would be due to the facts of the specific case and not because of a generalised state immunity.

The Court was not vocal on its reasoning for this conclusion but the decision is consistent with sub-sections 39(1)(b) and (c) of the Constitution which holds international law, like a judgment of the European Court (which it *must* consider), to be more important and binding compared to foreign law such as an old judgment by the House of Lords (which it *may* consider). The thorough reference of the Court to the international-law principles in the context of constitutional sections 8, 10, 11 and 12 is, in principle, commendable.

Even though the incorporation of international-law principles is laudable in that it gives legitimacy to section 39(1) and shows our state's commitment to asserting itself as a dominant force in the international human rights community, a point of criticism that can be raised against the specific type of international law that was referred to here is that South Africa is not a party to the European Convention. The European Court would not be able to override a decision of the South African Constitutional Court, as it did to the decisions of the English House of Lords, because it has no jurisdiction over non-signatory parties. From an international comparative perspective the provisions imposing positive obligations on parties to the European Convention are dogmatically similar to the principles regulating South Africa's responsibility to promote fundamental rights actively.<sup>87</sup> However, it is disappointing that an instrument such as the African Charter on Human and Peoples' Rights (Banjul Charter) (1981) was not referred to at all despite

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<sup>85</sup> *Carmichele CC* (note 1 above) at para 46.

<sup>86</sup> *Ibid* at para 49. In this context, proportionality probably refers to 'wrongfulness', preventability to 'fault' and causation to both factual and legal causation.

<sup>87</sup> Article 1 of the European Convention reads: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.' Section 7(2) of our Constitution provides that: 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.' The phrases 'secure' and 'respect, protect, promote and fulfil' can be argued to have similar meanings.



it having a similar active-promotion provision.<sup>88</sup> As De Wet remarks, in order to ensure legitimacy of African human rights instruments and treaties (as opposed to ‘othering’ them in favour of Eurocentric models) and to allow South African human rights jurisprudence to grow in light of its prominent position in its own continent, courts should first turn to human rights instruments closer to home before embarking on ‘foreign international law’ expeditions.<sup>89</sup> This point of criticism requires two cautionary notes.

Firstly, the African Court on Human and Peoples’ Rights has to date not heard a single case dealing with the immunity of governments in delictual cases. Consequently, in cases such as these, it could be justified to turn to non-binding international law from Europe. Section 39(1) refers broadly to international law and does not demand the consideration of *binding* international law. The probable and more practical reason why the European Convention was referred to in this context is that the Minister invoked state immunity in the context of claims for damages from citizens, relying on a decision of the House of Lords. This argument of the Minister was however rejected by the Court on the basis that the specific House of Lords decision had been overturned by the European Court. Thus, the real reason why the European Convention and the accompanying judgment were referred to was to show that the authority that the Minister relied on was invalid. At most, the reference to the European Convention and the accompanying case law was not based on binding law but rather on persuasive international law authority which is comparable to the provisions of the South African Constitution.

The second cautionary note on the criticism against the Court’s use of European international law is that, since *Carmichele CC*, the Constitutional Court has taken De Wet’s criticism seriously and has made a concerted effort to refer to African human rights instruments as well as the position in comparable African jurisdictions in its judgments.<sup>90</sup> In addition to this, I argue that the specific provisions in the European Convention that deal with positive state

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<sup>88</sup> It is noteworthy that Article 1 of the African Charter on Human and Peoples’ Rights (Banjul Charter) (1981) provides that: ‘The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.’ Therefore, it can be argued that there is no substantial difference between the phraseology that imposes positive obligations on member states under the European Convention, the African Charter and our Constitution.

<sup>89</sup> E De Wet ‘The “Friendly but Cautious” Reception of International Law in the Jurisprudence of the South African Constitutional Court: Some Critical Remarks’ (2004-5) 28 *Fordham International Law Journal* 1529, 1534.

<sup>90</sup> For a recent example see *DE v RH* [2015] ZACC 18, 2015 (5) SA 83 (CC), 2015 (9) BCLR 1003 (CC) paras 33-36 & 45-50.

obligations as applied in *Carmichele CC* could constitute ‘international custom’ in South Africa today. Article 38(1)(b) of the Statute of the International Court of Justice (1946) recognises ‘international custom’ as a source of international law. As Dugard explains, custom is established when a specific state, such as South Africa, generally practices (the *usus* requirement) and accepts (the *opinio juris* requirement) a custom as binding.<sup>91</sup> Regarding the *usus* requirement, section 7 read with section 8(1) of the Constitution has been applied and accepted by South African courts, such as in the case of *Carmichele CC* and many others that followed it.<sup>92</sup> In the international law realm, this is said to be indicative of settled state practice.<sup>93</sup> Regarding the *opinio juris* requirement, it must be proved that the state in question must consider itself legally bound to the rule. This is a very difficult requirement to prove. Dugard explains that something more needs to be shown than mere settled practice and that the rule must be carried out in such a way that the state accepts the rule as legally obligatory. After *Carmichele CC*, in the famous vicarious liability cases of *K v Minister of Safety and Security* and *F v Minister of Safety and Security*,<sup>94</sup> the state was quick to concede wrongfulness on their part. In other words, there was an acceptance of a legal duty to protect the dignity and freedom and security of person of all people within our borders. It is my argument that concessions such as these could show that the South African state accepts the principle of positive state duties as binding on it.

Thus, in future cases, meaningful reference could be made to the provisions of the European Convention and the European Court judgments in cases dealing with the enforcement of positive state duties in the context of certain civil and political rights due to the fact that these sources of international law may be customarily binding on South Africa. It is, however, emphasised that the correct methodology to follow when considering fundamental rights in the international context is to start with human rights instruments closest to home, such as the African Charter that South Africa is a party to and has ratified. If that Charter does not adequately address the problem at hand, other instruments that have been signed and ratified should be evaluated. Only as a matter of last resort would it make sense to fall back onto non-

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<sup>91</sup> J Dugard *International Law: A South African Perspective* (4<sup>th</sup> Ed, 2011) 26-30.

<sup>92</sup> For examples of other cases where positive state duties were enforced in the context of delict see Carpenter (note 3 above).

<sup>93</sup> Dugard (note 91 above) at 26.

<sup>94</sup> *K v Minister of Safety and Security* [2005] ZACC 8, 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC); and *F v Minister of Safety and Security and Another* [2011] ZACC 37, 2012 (1) SA 536 (CC), 2012 (3) BCLR 244 (CC), 2012 (3) ILJ 93 (CC), 2013 (2) SACR 20 (CC). See also Chapter 4 below.

binding, non-African international law principles that are only customarily applicable to South Africa.

(c) *Another (Mis)understanding of the Role of Values:* After discussing the relevant rights in the Bill of Rights and how they should be interpreted in the context of international law, the Court compared the South African Constitution to the German Constitution in that both embody ‘an objective, normative value system’.<sup>95</sup> This means that there are not only rights embodied in the Constitution but also values that must guide the three branches of government. According to the Court, these constitutional values are supposed to leave an impression on the common law by virtue of section 39(2). It is against this backdrop that the common law must be developed.<sup>96</sup> As it has been explained earlier in this discussion of *Carmichele CC*, the Court here equates ‘values’ with ‘spirit, purport and objects’. Again it is stressed that it cannot be accepted that these last three words share the same meaning and that they all simply mean ‘the values of the Constitution’. With that being said, it can however not be disputed that the Constitution contains values that must be given effect to. Section 39(1)(a) provides that a court, tribunal or forum ‘must promote the values that underlie an open and democratic society based on human dignity, equality and freedom’ when interpreting the Bill of Rights. This means that values are always relevant when interpreting the Bill of Rights. In the process of weighing up the common law against the Constitution, not only the fundamental rights are of relevance. Values are also implicitly part of the evaluation due to the instruction found in section 39(1)(a). It is my contention that it is unwise to equate section 39(1)(a) with section 39(2), even though they are closely related. Following the methodology proposed in this thesis, section 39(2) only kicks in once the decision has been taken that the common law needs to be developed. As section 39(2) forms part of the Bill of Rights, the instruction to promote the constitutional values in section 39(1)(a) must also inform the section 39(2) enquiry. Therefore, the values of the Constitution influence our understanding of fundamental rights, how to go about effecting change to the common law and other sections in the Bill of Rights. The theory is that the constitutional values are so influential that they do not merely take effect sometimes but all the time.<sup>97</sup> With that being said, the Court’s view on the importance of the constitutional values cannot be faulted. The only part of the Court’s discussion on values that I take issue with is the authority for claiming that

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<sup>95</sup> *Carmichele CC* (note 1 above) at para 54.

<sup>96</sup> *Ibid.*

<sup>97</sup> Cornell & Friedman (note 32 above) at 5-14.

values are highly influential. That authority is actually found in section 39(1)(a) as opposed to section 39(2).

(d) *Crystallised Manifestations of the Boni Mores in the Wrongfulness Enquiry*: Under the discussion of absolution from the instance<sup>98</sup> the Court turned to section 215 of the 1993 Constitution<sup>99</sup> and section 5 of the Police Act<sup>100</sup> to show that the police have positive duties to prevent crime, especially in the context of women who face serious forms of subordination due to gender-based violence in our country.<sup>101</sup> According to the Convention on the Elimination of All Forms of Discrimination against Women (1979), which South Africa is a party to and has ratified,<sup>102</sup> South Africa is under a positive duty to take reasonable steps to prevent the violation of the fundamental rights of women. The South African Police Service is the main state representative responsible to discharge this duty.<sup>103</sup> The reference to the Constitution and supporting legislation confirms the principle that a rule of law can place an obligation on a person to act positively – in other words that a legal duty can be created by law.<sup>104</sup> It further shows that the fact that a person holds a particular office may result in a legal duty to prevent harm.<sup>105</sup>

According to the Court, on the evidence, the investigating officer did not merely omit to inform the prosecutor of the previous convictions of Francois Coetzee. The investigating officer

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<sup>98</sup> Even though the Court situated the principles that follow under the discussion of absolution from the instance, these principles really strike at the heart of the wrongfulness issue and consequently they are discussed in this thesis with the focus on their impact on wrongfulness.

<sup>99</sup> The section reads as follows: ‘The powers and functions of the Service shall be - (1) the prevention of crime; (2) the investigation of any offence or alleged offence; (3) the maintenance of law and order; and (4) the preservation of the internal security of the Republic.’ Section 205(3) of the 1996 Constitution contains similar objectives but include the protection of inhabitants and their property, as well as upholding and enforcing the law.

<sup>100</sup> Police Act 7 of 1958. ‘The functions of the South African Police shall be, *inter alia* - (1) the preservation of the internal security of the Republic; (2) the maintenance of law and order; (3) the investigation of any offence or alleged offence; and (4) the prevention of crime.’ The South African Police Service Act 68 of 1995 has now replaced the Police Act and reflects the objectives of the Service as found in the 1996 Constitution.

<sup>101</sup> *Carmichele CC* (note 1 above) at para 62.

<sup>102</sup> *Ibid* at para 62. Footnote 67 indicates that ‘[t]he Convention was signed by South Africa on 29 January 1993 and ratified on 15 December 1995’.

<sup>103</sup> *Ibid* at para 62.

<sup>104</sup> See Loubser & Midgley (note 72 above) at 153ff; and Neethling & Potgieter (note 71 above) at 66-69 and the extensive authority listed in the footnotes.

<sup>105</sup> Neethling & Potgieter (note 71 above) at 70.

made a positive statement that Coetzee should be released on warning, while knowing that there was a previous conviction of rape.<sup>106</sup> He knew that Coetzee was a threat to the community, yet nevertheless made the recommendation that Coetzee should be released.<sup>107</sup> The Court was not clear on this, but it could be argued that the wrongfulness of the investigating officer's positive act was actually based on the unreasonable infringement of the subjective (personality) rights of Ms Carmichele, which created a presumption of wrongfulness.<sup>108</sup>

Regarding the prosecutors, the senior prosecutor who sent Coetzee for observation had been aware that he was sexually deviant and had a criminal record. The senior prosecutor knew that the women of Noetzie feared for their safety with Coetzee at large on the streets.<sup>109</sup> The other prosecutor who dealt with his case after his psychiatric observation did not oppose his release. Even though the 1993 Constitution provided scant details on the role of prosecutors, their duty has always been (and is supported by the United Nations Guidelines on the Role of Prosecutors)<sup>110</sup> to act without fear, favour or prejudice and to act in the public interest.<sup>111</sup> A court must not be blind to the immense workload that prosecutors face yet, on the facts of this case, the prosecutors had reliable knowledge of Coetzee's violent nature and had no reason not to oppose his release. This position confirms the principle that the existence of a special

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<sup>106</sup> *Carmichele CC* (note 1 above) at para 65.

<sup>107</sup> *Ibid* at para 66.

<sup>108</sup> I base this argument on the thorough outline of legal principles that regulate the determination of the wrongfulness of positive conduct provided by Loubser & Midgley (note 72 above) at 146ff; and Neethling & Potgieter (note 71 above) at 51ff.

<sup>109</sup> *Carmichele CC* (note 1 above) at para 68.

<sup>110</sup> *Ibid* at para 73, footnote 74 cites the Guidelines as follows: 'Adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Havana, Cuba, from 17 August - 7 September 1990.'

<sup>111</sup> *Ibid* at para 72.

relationship between the parties could indicate the existence of a legal duty.<sup>112</sup> Therefore, their omissions should be actionable.

(e) *Concluding the First Step:* The first step of the *Carmichele CC* common-law developmental enquiry can be abridged as follows: The starting point is to detail the common-law position on the specific issue, for example wrongfulness. A thorough knowledge of the common law is imperative for this exercise to be executed effectively. After this, one turns to the relevant rights in the Constitution that are applicable to the dispute, such as the rights to dignity, life and freedom and security of the person. These rights are interpreted in light of international law. However, the focus is not only on the fundamental rights. Due to the fact that our Constitution has an ‘objective, normative value system’ incorporated into it, these values provide the background against which the common law must be evaluated and, if necessary, be developed. In the context of determining wrongfulness specific constitutional and legislative duties imposed on the state or an organ of state may be relevant in assessing the existence of a legal duty to prevent harm.

### 3.6.3 *Step 2: If the Common Law Must Be Developed, How Should It Be Developed?*

Once it has been established that the common law as it stands is inconsistent with the Constitution, the next step that a court must embark on is to consider how (in what way) the common law should be developed. In its description of the second step, the Court provided what I will refer to as the ‘paradigm-instruction’:

Not only must the common law be developed in a way which meets the s 39(2) objectives, but it must be done in a way most appropriate for the development of the common law within its own paradigm... There are notionally different ways to develop the common law under s 39(2) of the Constitution, all of which

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<sup>112</sup> See generally Neethling & Potgieter (note 71 above) at 69ff who point out that the mere existence of a special relationship is often insufficient by itself to establish a legal duty. Also see Leinius & Midgley (note 26 above) at 21-26 where the authors criticise the imposition of a broad duty on the police to protect women as a vulnerable group. At 25 they argue that a plaintiff would have to fall within a ‘narrow and distinct group of potential victims’ before it can be said that the police have a duty to prevent harm to them. J van der Walt ‘A Special Relationship with Women’ (2002) *Journal of South African Law* 148, 155 explains that even though the existence of a special relationship is not an essential requirement to prove wrongfulness of an omission, the facts of *Carmichele CC* show that the group of potential victims was in fact identified with enough precision for a special relationship that creates a legal duty to act positively to arise.

might be consistent with its provisions. Not all would necessarily be equally beneficial for the common law.<sup>113</sup>

Davis and Klare point out that in a constitutionally supreme state the common law cannot be developed in a way most appropriate to a non-constitutional paradigm.<sup>114</sup> Their argument is that the common-law paradigm should not necessarily be assumed to be consistent with the Constitution. Barnard-Naudé contends that the rules of the common law of contract (and I argue by analogy, to some extent, the common law of delict as well) are perhaps slanted in favour of an individualistic political commitment at the expense of a more altruistic political vision for life and the law.<sup>115</sup> Following Kennedy, Barnard-Naudé claims that this is due to the common law's focus on rules instead of standards.<sup>116</sup> The rules-centred approach fits comfortably within the realm of political liberalism, or even libertarianism.<sup>117</sup> Barnard-Naudé suggests that constitutional interpretation, on the other hand, securely converges with standards (perhaps in the South African context, the appropriate term is 'values') and thus facilitates a more altruistic approach to legal problems. The altruistic approach compliments the post-liberal nature of our Constitution.<sup>118</sup>

To illustrate the problem of the contradiction between the individualism of the common-law paradigm and the altruism of the Constitution, reference can be made to the case of *Minister of Safety and Security v Van Duivenboden*.<sup>119</sup> Nugent JA made the following *obiter* comment in the context of imposing a duty on a private person to act: "The reluctance to impose liability for omissions is often informed by a laissez faire concept of liberty that recognises that individuals are entitled to "mind their own business" even when they might reasonably be expected to avert

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<sup>113</sup> *Carmichele CC* (note 1 above) at para 55-56.

<sup>114</sup> Davis & Klare (note 27 above) at 465.

<sup>115</sup> J Barnard-Naudé 'Of Dorothy's Dog, "Poststructural" Fairy Tales... And the Real: Power, Poverty and the General Principles of the South African Law of Contract' (2013) 29 *South African Journal on Human Rights* 467, 473.

<sup>116</sup> D Kennedy 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685.

<sup>117</sup> For a concise overview on liberalism and libertarianism see eg W Stacey 'The Theory and Ideas of Libertarianism' (2015) 3 *Journal of Peace, Prosperity and Freedom* 103.

<sup>118</sup> See for example D Moseneke 'The Fourth Bram Fischer Memorial Lecture' (2002) 18 *South African Journal on Human Rights* 309, 318 where former Deputy Chief Justice states that '[l]iberal legalism balks at the idea of transformative adjudication. The primary objection is that such jurisprudence invites judges to accomplish political objectives'.

<sup>119</sup> *Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79, 2002 (6) SA 431(SCA), 2002 (3) All SA 741 (SCA) ('*Van Duivenboden*').

harm...<sup>120</sup> The Supreme Court of Appeal in *Van Duivenboden* used the constitutional rights to privacy, freedom and equality as support for the laissez faire approach to determining whether a duty to act existed. The political ideology of laissez faire liberalism is referred to with approval by the Court in that case. Arguably, the libertarian notion of freedom fits comfortably in the paradigm of the common law but not in the paradigm of our transformative Constitution because the Constitution promotes an ethics of care, not an attitude of turning a blind eye to our fellow human beings.<sup>121</sup> From this perspective the claims made by Davis and Klare, as supported by Barnard-Naudé and my argument above, are valid. The question then remains: What should be done with paradigm-instruction? It is my suggestion that this instruction can be read restrictively to avoid the above criticism.

If one defines the word ‘paradigm’ as ‘conceptual framework’ or as a ‘particular model’<sup>122</sup> and one understands that to mean the interplay of ‘doctrine’ of the specific subject field, then the argument can be made that the paradigm-instruction given in *Carmichele CC* could simply mean that a court is not tasked to revolutionise the common law. Having regard to the separation of powers doctrine referred to earlier in this discussion of *Carmichele CC*, courts are not meant to invent a new common law from scratch. What the development clauses require is that courts should meaningfully engage with the constitutionality of the common-law doctrine currently in force and grant it constitutional legitimacy, either by affirming consistency with the Constitution or by developing it accordingly. Thus, a court is not at liberty to create the sixth and seventh elements of a delict despite the existing five elements being sufficient to address the problem that the court is faced with. Courts are enjoined to work with the current doctrinal framework of delict and evaluate the constitutionality thereof.

If this is what the Court meant by its paradigm-instruction, then it can be supported in the sense that this is exactly what this study aims to provide a method for – working to make the current law better suited to the needs of a society undergoing the ongoing process of transformation. However, if the paradigm-instruction is interpreted in a wider sense to maintain the political basis of the common law, which is laissez faire, then this instruction could well be unconstitutional if one accepts the argument that our Constitution is a post-liberal one.

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<sup>120</sup> Ibid at para 19.

<sup>121</sup> See the discussion of *ubuntu* and the law of delict in Chapter 8 below.

<sup>122</sup> Soanes (note 34 above) sv ‘paradigm’.



It is my view that the Court meant that the paradigm-instruction should be read restrictively. After the Court had given the paradigm-instruction it was immediately stated that the ‘policy decisions and value judgments’ implicit in common-law principles, such as the *boni mores* test in the wrongfulness enquiry, might now be ‘replaced, supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution’.<sup>123</sup> This explanation should be viewed as a restrictive qualification to the paradigm-instruction.

The Court then turned to the more practical side of the second stage of the *Carmichele* CC-enquiry. The responsibility of the state to respect the fundamental rights of the people within our borders actively and passively may broaden the scope of wrongfulness. The scope of wrongfulness may be broadened by an accentuation of the objective nature of wrongfulness (in other words to make the objectiveness of the wrongfulness test more noticeable); by defining wrongfulness in broader terms (thus, not losing sight of the fact that the ultimate test for wrongfulness is the flexible *boni mores* test, and not only the specific examples of wrongful conduct that have crystallised over the years); and to turn to fault and causation to ensure that liability is not unlimited (therefore preventing a conflation of the wrongfulness test and the enquiry employed in the determination of negligence).<sup>124</sup> The Court was mindful of the fact that there are other ways in which the wrongfulness enquiry may be developed due to the concept’s rich doctrinal history and the academic debates about it.<sup>125</sup>

As I have repeatedly emphasised in this discussion, it is here in the second stage of the *Carmichele*-enquiry that section 39(2) takes effect. This means that if a court were to decide to broaden the scope of wrongfulness, it must promote the spirit, purport and objects of the Bill of Rights in the process. It has been stated above that this is an active exercise that places the Constitution at the forefront of the endeavour of developing the common law. This is in conflict with the Court’s suggestion that the development best suiting the common law must be made. In light of section 2 that declares the Constitution to be the supreme law of the Republic, it is peculiar that the constitutional exercise of common-law development should be in abeyance with the common law rather than the Constitution.

It has already been stated that the courts in *Carmichele HC I* and *Carmichele SCA I* granted absolution from the instance in favour of the Minister. Due to the granting of that order, neither

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<sup>123</sup> *Carmichele CC* (note 1 above) at para 56.

<sup>124</sup> *Ibid* at para 57.

<sup>125</sup> *Ibid* at para 58.

of the courts engaged meaningfully with the common-law position regarding wrongfulness as weighed up against the Constitution and therefore the Constitutional Court did not have the advantage of reading the opinion of the common-law experts (as the High Court and Supreme Court of Appeal are known) as to what type of development of the common law would be best suited to its own paradigm. In light of the above discussion on the paradigm-instruction, the Court was desirous of a thorough survey of the common-law position on wrongfulness, especially in light of the uncertainty pertaining to it. On this basis, the Court referred the matter back to the High Court with the above guidelines and recommendations. As Davis and Klare note, this is an ‘odd vote of confidence [in the High Court and Supreme Court of Appeal] given that both courts below missed the boat in *Carmichele*’.<sup>126</sup> There are two aspects of the order of the Constitutional Court that require further analysis, namely how applications for absolution from the instance should be approached taking the development clauses into account, and the requisite interaction between the High Court, Supreme Court of Appeal and Constitutional Court in matters such as these. Both issues are discussed in more detail below.

### **3.7 A New Test for Absolution from the Instance in Common-Law Development Cases**

Taking the discussion of the Court’s judgment thus far into consideration, it may come as no surprise that the order of the Constitutional Court was that the appeal be upheld with costs. Thus, the application for absolution from the instance was dismissed and the matter was referred back to the High Court for the trial to continue.<sup>127</sup> The crux of the reason for dismissing the application for absolution will now be expounded upon.

After reiterating the obligations of the police and the prosecutors, the Court explained that absolution from the instance is granted at the close of the plaintiff’s case if the evidence led by the plaintiff leads a reasonable court to the conclusion that it ‘could not or might not find for the plaintiff’.<sup>128</sup> This is in line with the explanation given by Theophilopoulos, Van Heerden and Boraine that an application for absolution will succeed if there is either no evidence to support the plaintiff’s case or that there is ‘insufficient evidence upon which a reasonable court could find for the plaintiff’.<sup>129</sup> Ackermann and Goldstone JJ likened the application for absolution to

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<sup>126</sup> Davis & Klare (note 46 above) at 466. My own addition.

<sup>127</sup> *Carmichele CC* (note 1 above) at para 84.

<sup>128</sup> *Ibid* at para 79.

<sup>129</sup> Theophilopoulos, Van Heerden & Boraine (note 16 above) at 314-315.

the raising of exceptions against pleadings. An exception is raised against an entire pleading (such as particulars of claim, pleas, counterclaims and replications) that fails to show a valid cause of action or defence.<sup>130</sup> The Court explained that in order for an exception to be successfully raised, the facts pleaded by the plaintiff in the particulars of claim must at first glance not support the proposed legal duty.<sup>131</sup> According to the Court this principle can be applied to applications for absolution as well.

The judges proceeded to express support for the view that there are certain clear-cut cases where there is no merit in a suggestion for common-law development and in those cases the application for absolution should be granted. However, if the factual matrix is complicated and the law is uncertain, then absolution should be refused.<sup>132</sup> This appears to be a much more flexible re-imagining of the test for absolution. Although it can be conceded that there is some overlap between these concepts, sight must not be lost of the important difference between these two. Applications for absolution focus on the plaintiff's *evidence*, whereas exceptions deal with the *facts pleaded* by the plaintiff before evidence is presented. It is unfortunate that the Court did not clearly sketch the link between the respective principles pertaining to exceptions and applications for absolution. It is even more regrettable that the Court did not explain how a trial court should go about identifying the clear-cut cases where common-law development will not be applicable. Nevertheless, the conclusion is that the case of *Carmichele CC* was factually and legally complex enough for the order for absolution to be reversed and the trial to continue.<sup>133</sup> This issue of absolution from the instance in the context of common-law development deserves closer attention. What should the approach be to the granting of orders for absolution from the instance in light of the importance of the development of the common law?<sup>134</sup> The work of Johan van der Walt is particularly insightful in this regard.<sup>135</sup>

Van der Walt's main claim is that the law of delict is not the monster that the Constitution came to slay. As he explains, the law of delict could have helped Ms Carmichele to

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<sup>130</sup> Ibid at 217-224.

<sup>131</sup> *Carmichele CC* (note 1 above) at para 80.

<sup>132</sup> Ibid at para 80.

<sup>133</sup> Ibid at para 81.

<sup>134</sup> Both procedures are closely related and the decision of a practitioner to rely on the one rather than the other is a consideration that could at most affect costs. See eg J Van der Walt 'Horizontal Application of Fundamental Rights and the Threshold of the Law in View of the Carmichele Saga' (2003) 19 *South African Journal on Human Rights* 517, 523 at footnote 14.

<sup>135</sup> Ibid.

vindicate her rights. However, it was either (a) the incorrect application of the common law or (b) the antiquated principles of civil procedure relating to applications for absolution that stopped her in her tracks. The courts in *Carmichele HC I* and *Carmichele SCA I* held that the plaintiff had not established a *prima facie* case in support of a legal duty to act and that she had further failed to prove a special relationship between herself and the Minister.<sup>136</sup> Van der Walt contends that both grounds were incorrectly applied by the aforementioned courts. It had already been held in 1975 in the case of *Minister van Polisie v Ewels*<sup>137</sup> that the existence of a legal duty to act is subject to the flexible *boni mores* criterion and that public policy dictates that the police have a duty to protect the public. At first glance, even on a pure application of the common law, the police did have a duty to protect the plaintiff. Furthermore, in an earlier piece, Van der Walt explained that a ‘special relationship’ is not a dispositive requirement for the establishment of a duty to act but even if it was an essential requirement, the police’s specific knowledge of the perpetrator and the identity of his potential victims established such a relationship.<sup>138</sup> Therefore, the incorrect application of the common law is actually what let Ms Carmichele down. It is nevertheless my argument that the Constitution should play a pivotal role in determining what the *boni mores* are so that at least symbolic recognition is afforded to the Constitution. However, I must concede that Van der Walt is correct in stating that it was not the common law *per se* that fell short of the transformative goals of the Constitution here.

Van der Walt’s alternative observation is that the test for granting absolution from the instance was too formalistic (and outdated) and that it needed amendment. In fact his research shows that the strict test that South African courts applied during the time of *Carmichele CC* to grant absolution had been abolished by 1875 in England – the very country we inherited it from during the period of British colonial rule in South Africa.<sup>139</sup> A chasm therefore existed between the development clauses of the Constitution and our outdated rules of civil procedure: The rules of civil procedure required a plaintiff to establish a *prima facie* case, which would have been very difficult to establish if there was no concrete case law to support the claim. The fact that there was no concrete case law is exactly why the plaintiff would argue to develop the common law. The Constitution was therefore not really at odds with the common law of delict but required us to rethink our formalistic law of civil procedure that often sacrifices substance over form.<sup>140</sup> Van

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<sup>136</sup> Ibid at 527.

<sup>137</sup> *Minister van Polisie v Ewels* [1975] ZASCA 2, 1975 (3) SA 590 (A).

<sup>138</sup> Van der Walt (note 112 above) at 155.

<sup>139</sup> Van der Walt (note 134 above) at 533.

<sup>140</sup> Ibid at 537.

der Walt contends that the test should simply be whether the matter ‘is serious enough to warrant the attention of a court of law’.<sup>141</sup> I argue that his broader test is in line with the Court’s proposition that complicated facts and law should properly be heard by a court. Even though his test is open-ended, it is slightly more concrete and more certain than the idea that there are certain cases where a court’s intuition will push it to grant an order for absolution because it is a ‘clear case’ where absolution is appropriate. If a constitutional right has been infringed, that factor in itself deserves a court’s attention.

Before the new constitutional era dawned in South Africa, the purpose of having applications for absolution from the instance was possibly (and at least partly) rooted in the belief that there are certain extra-legal disputes which would forever remain untouched by the law. However, after the horizontal application of fundamental rights was introduced to South Africa, it can be accepted that there is virtually no extra-legal sphere and that the supreme law of the Republic could interfere in the most intimate of private spheres.<sup>142</sup> Therefore Van der Walt is surely correct in his argument that it was actually the old and starched test for applications for absolution that should have been developed in light of the Constitution before the law of delict was developed.

Since *Carmichele CC* and the concerns raised by Van der Walt, the Constitutional Court has made it abundantly clear in *H v Fetal Assessment Centre* that when dealing with either exceptions or applications for absolution in cases where common-law development is pleaded the same principle, taken from *Carmichele CC*, applies: If the facts are complicated and the law unclear, it is best not to grant the exception or absolution.<sup>143</sup> There could certainly be cases where the facts and law could appear to be uncomplicated and uncontroversial due to the fact that a particular rule may have been in existence for a number of years. Yet, that rule may now come under constitutional scrutiny when one of the parties or the court raises the issue of common-law development. In determining whether the facts are complex and whether the law is uncertain, the Court in *Fetal Assessment Centre CC* made two observations. Firstly, if a court is faced with a situation where novel and distinctive facts that have not been reported before are presented to it, it may be possible to deal with the case on exception or by means of absolution but, for more radical changes to the current scheme of the common law, the general rule is that

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<sup>141</sup> Ibid at 538.

<sup>142</sup> Ibid at 539.

<sup>143</sup> *H v Fetal Assessment Centre* [2014] ZACC 34, 2015 (2) SA 193 (CC), 2015 (2) BCLR 127 (CC) (*Fetal Assessment Centre CC*) paras 11-12.

all the evidence should be heard by the court concerned so that all relevant factors can be considered.<sup>144</sup> Secondly, courts should be alert to the reality that many common-law rules, although seemingly apolitical, are deeply rooted in a particular value choice. Such a value choice has to be evaluated by the judges concerned and either constitutionally justified or constitutionally altered. This must be done so that the normative influence of the Constitution is felt throughout the common law.<sup>145</sup> Therefore, in summary, if there is a notional possibility that the common law and the Constitution are not in optimal harmony, either at the stage of raising an exception or at the time that an application for absolution is brought, a court would do best to continue to hear all the evidence concerned.

In conclusion, I maintain that the constitutional framing of delictual disputes is important and that the common law needs to be constitutionally legitimised (either by application or development) regardless of its content. It appears that the call of Van der Walt for a new test for absolution from the instance now, in principle, prevents courts from making hasty decisions that are based on gut-feeling without proper constitutional justification. When a constitutional right is infringed, a court should be reluctant to grant an order for absolution as the matter should be regarded as being important enough to deserve a court's attention. The only issue for discussion that remains is the complex interaction between the High Court, Supreme Court of Appeal and Constitutional Court in matters such as *Carmichele CC*. More specifically, the issue of raising developmental arguments at a late stage will be addressed in the following section.

### **3.8 Raising Common-Law Development at a Late Stage**

It has been mentioned above that the Constitutional Court referred the matter back to the High Court so that the trial could continue.<sup>146</sup> The decision to refer the matter back to the High Court was largely based on the fact that the Constitutional Court could not properly decide on the full merits of the case because it only had the evidence of the plaintiff at its disposal. Hearing the defendant's case could, in principle, have change the picture entirely.<sup>147</sup> Another problem that the Constitutional Court referred to is that the High Court and Supreme Court of Appeal had not given their esteemed opinion on how the common law should have been developed to best suit

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<sup>144</sup> Ibid at para 14.

<sup>145</sup> Ibid at paras 15-24.

<sup>146</sup> *Carmichele CC* (note 1 above) at para 84.

<sup>147</sup> Ibid at para 81.

its own paradigm.<sup>148</sup> Broadly speaking, the paradigm under consideration would be the generalising approach to the South African law delict. Narrowly construed, this would be an evaluation of the different tests for wrongfulness that apply in different circumstances.<sup>149</sup>

The Court further maintained that litigants could also suffer detriment because they could not carefully consider the High Court and Supreme Court of Appeal judgments on how the common law should be developed in order for their own arguments to be carefully analysed and improved before approaching the Constitutional Court.<sup>150</sup> Ms Carmichele could largely be blamed for failing to raise the issue of constitutional common-law development in the High Court and in the Supreme Court of Appeal and as a consequence neither of those courts considered the impact of the Constitution on the current matter.<sup>151</sup> It appears that Carmichele relied on the Constitution in the same way that death row prisoners once relied on presidential pardons when the Supreme Court of Appeal had condemned them to the gallows. The attitude that our supreme Constitution should be the secret weapon that is only pulled out when all the other resources have been depleted is not sustainable and is actually a gamble that litigants take due to the fact that the Constitutional Court can refuse to hear such arguments that have not been raised in the lower courts.<sup>152</sup>

All of the above could be prevented in future by framing each delictual case constitutionally in line with the methodology proposed in this work. If this is done, the Constitution would be given due legitimacy because of the way in which the common law is applied or developed and litigants would also be protected as they have shown constitutional interest from an early stage and will probably not be barred from relying on the Constitution beyond the trial court. The implication of my argument, and the stance of the Constitutional Court, is that the High Court and Supreme Court of Appeal must be watchful regarding its duty and power to develop the common law and should not hesitate to require counsel to present arguments on the possible impact of the Constitution to the case at hand.

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<sup>148</sup> Ibid at para 60. It is stressed once again that the ‘common law paradigm’ should be understood to mean the conceptual framework of the specific field.

<sup>149</sup> See Loubser & Midgley (note 72 above) at 144ff; and Neethling & Potgieter (note 71 above) at 33ff.

<sup>150</sup> *Carmichele CC* (note 1 above) at para 59.

<sup>151</sup> Ibid at paras 31-32.

<sup>152</sup> This is the implication of the judgment in *Everfresh CC* (note 57 above) at para 74.

#### 4 CONCLUDING REMARKS ON *CARMICHELE CC*

Despite the important guidance provided by this case, it has been shown that the judgment of Ackermann and Goldstone JJ is not flawless in every respect and various aspects of it require a careful rethinking to ensure the constitutional legitimacy of the common law. I have criticised the Court's shallow understanding of the interplay between the different sections relevant to common-law development. For example, the invocation of section 39(2) as both a ground for developing the common law and as the method for such development has been shown to be theoretically and practically unsound. It has been demonstrated that constitutional rights could actually be regarded as the *raison d'être* of the judgment and not pure constitutional values as many commentators have suggested. The generality of the obligation to develop the common law has been criticised from the angle that it is inconsistent with our constitutional culture of justification. The Court's failure to engage with binding international law that situates South Africa within the African international community has been shown to be unfeasible. The danger of requiring the common law to be developed to best suit a non-constitutional paradigm has been indicated. Lastly, the need for a new and more flexible test for absolution from the instance in light of our flexible substantive rules of common law (as bolstered by the Constitution) has been highlighted. However, as the saying goes, every cloud has a silver lining.

In 2003 the trial proceeded in the High Court and the case was decided in favour of Ms Carmichele, relying heavily on the Constitutional Court's judgment.<sup>153</sup> The appeal of this second High Court case was decided in 2004, and the Supreme Court of Appeal did not fault this finding. Alix Carmichele was finally successful in vindicating her rights.<sup>154</sup> The impact of what has been aptly referred to as the 'Carmichele-saga' has had a profound effect on the way that the development of the common law is approached. As Neethling commented in 2005, 'a healthy basis has been laid for the future deployment of the accountability of the state for its failure to protect nationals against violence from third parties'.<sup>155</sup> These prophetic words have indeed been realised as will be shown in the following case discussions pertaining to delictual liability of the state. On the other hand, it is regrettable that the realities of violence (from both public and private sources) experienced by the vulnerable members of our society have not been eliminated

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<sup>153</sup> *Carmichele HC II* (note 1 above).

<sup>154</sup> *Carmichele SCA II* (note 1 above).

<sup>155</sup> My own translation of J Neethling 'Die Carmichele-Sage Kom tot 'n Gelukkige Einde' (2005) *Journal of South African Law* 402, 409.



by the mere existence of our progressive Constitution.<sup>156</sup> Serious intervention by political entities and social movements will be necessary to reconcile the idealistic transformative goals of our Constitution and the real world.

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<sup>156</sup> Combrinck (note 67 above) at 172.

# Vicarious Liability as Mechanism for Holding the State Liable in *K v Minister of Safety and Security*<sup>1</sup>

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## 1 INTRODUCTION

In the previous chapter the constitutional framework that underpins the delictual liability of the state has been analysed in light of the Constitutional Court judgment in *Carmichele v Minister of Safety and Security*.<sup>2</sup> The issue in that case related to whether various state functionaries had acted wrongfully in releasing a dangerous criminal on bail providing him with an opportunity to assault Ms Carmichele. The wrongfulness of their conduct turned on whether they owed the victim a legal duty not to cause her harm. However, the state functionaries were not sued for their wrongful conduct. Instead their employer, the Minister of Safety and Security, was the defendant against Ms Carmichele's claim. The mechanism through which the Minister was held liable for the conduct of his employees was not disputed by the parties in *Carmichele CC* and is known in South African law (and various other legal systems under English influence) as 'vicarious liability' and is the topic of discussion in the present chapter.

The general principle regarding loss in South African law is *res perit domino* – the risk lies where it falls.<sup>3</sup> In functional terms this means that the owner and/or another legal interest holder should bear the loss. One step away from the general principle is the notion of 'direct' or 'personal' liability imposed on a wrongdoer for their wrongful, culpable conduct that causes harm to another. The rationale is that a culpable wrongdoer should be held to account for his or her causing harm to another because *alterum non laedere* (do others no harm) is one of the foundational precepts of Roman law and thus also of many legal systems that have, in some way,

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<sup>1</sup> *K v Minister of Safety and Security* [2005] ZACC 8, 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC) ('*K v Minister CC*'). For analytical summaries of the case see A Lombard 'Vicarious Liability of Employer – Rape Committed by Employees of SAPD – NK v Minister of Safety and Security Case CCT 52/04' (2005) 46(2) *Codicillus* 93; TJ Scott 'K v Minister of Safety and Security 2005 6 SA 419 (CC)' (2006) 39 *De Jure* 471.

<sup>2</sup> *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22, 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) ('*Carmichele CC*').

<sup>3</sup> See M Loubser & JR Midgley (eds) *The Law of Delict in South Africa* (2<sup>nd</sup> Ed, 2012) 6-7; and J Neethling & JM Potgieter *Neethling-Visser-Potgieter Law of Delict* (7<sup>th</sup> Ed, 2015) 3 and the authority cited in that discussion.

adopted the civilian legal tradition as is the case in South Africa.<sup>4</sup> However, there are instances where delictual liability arises even without the fault requirement being met and these are referred to as instances of 'strict liability'.<sup>5</sup> One example of strict liability is vicarious liability.

In simple terms vicarious liability is a category of strict liability recognised in South African law whereby one legal subject or the state is held delictually liable for the civil wrong committed by another person.<sup>6</sup> The most common example of vicarious liability features where an employer is held liable for its employee's delict. In this regard three requirements need to be met:<sup>7</sup> Firstly, an employer-employee relationship must be established. Secondly, the employee must commit a delict (which was the issue in dispute in *Carmichele CC*). Thirdly, the delict of the employee must be committed within the scope of his or her employment. As this chapter will show, these three 'simple' requirements (especially the third) can lead to much confusion in their application.

The questions arise as to why vicarious liability is so important for purposes of determining the delictual liability of the state and why the state is not held directly liable for its civil wrongs. Even though many states around the world have historically been immune to civil claims, under the influences of liberalism and its abhorrence of the abuse of state power, this

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<sup>4</sup> See D 1 1 10 1: 'Juris praecepta sunt haec: Honestè vivere, alterum non laedere, suum cuique tribuere'. The precepts, as they are relevant to South African law, are discussed in more detail by DG Kleyn & G van Niekerk 'Ulpian's Praecepta Iuris and Their Role in South African Law Part 1: Historical Context' (2014) 20 *Fundamina* 437; and DG Kleyn & G van Niekerk 'Ulpian's Praecepta Iuris and Their Role in South African Law Part 2: Modern-Day South African Practice' (2014) 20 *Fundamina* 446.

<sup>5</sup> Loubser & Midgley (note 3 above) at 375-396; Neethling & Potgieter (note 3 above) at 379-402.

<sup>6</sup> Loubser & Midgley (note 3 above) at 383; and Neethling & Potgieter (note 3 above) at 389. For an historical overview of the South African law of vicarious liability in its early stages see TB Barlow *The South African Law of Vicarious Liability in Delict and a Comparison of the Principles of Other Legal Systems* (1939).

<sup>7</sup> After the case of *K v Minister CC* there has been consensus among various academic writers that these are the three requirements that establish vicarious liability. These three requirements are deduced from a number of cases that the authors cite in their respective works. For the recent textbooks that support these three requirements see: Loubser & Midgley (note 3 above) at 383-384; and Neethling & Potgieter (note 3 above) at 390-397. For journal articles that reflect on the case of *K v Minister CC* and support the three requirements see: K Calitz 'The Close Connection Test for Vicarious Liability' (2007) 18 *Stellenbosch Law Review* 451; M Botha & D Millard 'The Past, Present and Future of Vicarious Liability in South Africa' (2012) 45 *De Jure* 225, 229; and J Neethling & JM Potgieter 'Deliktuele Staatsaanspreeklikheid weens Polisieverkrating' (2012) 9 *LitNet Akademies* 73, 77-78.

position has largely changed.<sup>8</sup> In South Africa the State Liability Act ensures that the state is held accountable for its interactions with legal subjects that have traditionally been labelled as ‘private legal relations’, namely, entering into contracts and the commission of delicts.<sup>9</sup> Section 1 of the Act provides as follows:

Any claim against the State which would, if that claim had arisen against a person, be the ground of an action in any competent court, shall be cognizable by such court, whether the claim arises out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant.

This section is important because it emphasises three aspects of the state’s liability for civil wrongs. (i) It shows that the state is not immune to claims for civil damages and that the rules of the common law of delict is to be used to determine the state’s liability towards a person who has suffered harm from the state. (ii) It recognises that the state is an abstract entity and as such requires individuals to act as its functionaries and representatives. (iii) Nevertheless, a state functionary can only cause the state (in its abstract sense, represented by the Minister concerned) to be held delictually liable if that functionary is in fact acting in the capacity as a servant of the state and within the scope of his or her authority as a servant.

Our courts and most of our delict scholars have held and still hold the view that these three aspects of state liability under the Act indicate that the appropriate legal mechanism for founding the delictual liability of the state is the doctrine of vicarious liability.<sup>10</sup> This is necessary because, as it will be shown in the fourth section below, the state in its abstract sense cannot act by itself. It needs the hands and minds of its functionaries to do its work. Therefore, it is practically impossible to hold the state directly liable in the conventional sense of the word and the only way to determine whether a state functionary has committed a delict on behalf of the state is by invoking the rules of vicarious liability. Alternatively, one may argue that the relevant cabinet Minister could be held directly liable as the ultimate representative of the state. However, as will be shown in the fourth section below, the Minister is a representative of the state who might or might not be acting on behalf of the state at a given point in time. Therefore, even to determine whether a specific cabinet Minister should be held delictually liable for delicts

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<sup>8</sup> L. Boonzaier ‘State Liability in South Africa: A More Direct Approach’ (2013) 130 *South African Law Journal* 330, 331-337.

<sup>9</sup> State Liability Act 20 of 1957.

<sup>10</sup> See eg WE Scott *Middelike Aanspreeklikheid in die Suid-Afrikaanse Reg* (1983) 201; and Neethling & Potgieter (note 7 above) at 77.

committed in representative capacity of the state, the rules of vicarious liability will be useful in deciding whether the Minister acted in a private or ministerial capacity. It will thus be my argument that the state can never be held ‘directly’ liable in the true sense of the word because of its abstract nature.

In what follows, I critically engage with the judgment of the Court in *K v Minister CC*. In § 2 the facts, background and legal problem of the case are discussed. In § 3 the reasoning of the Court is analysed and critiqued. In the latter section I consider the approach of the Court to the technicalities of common-law development in light of the preceding discussion of *Carmichele CC* and the method for effecting transformation in the South African law of delict proposed in this thesis. I also evaluate the common-law rules of vicarious liability as they were provided by the Court as well as the developments to those rules that were brought about in the judgment. The impact of the judgment in *K v Minister CC* on subsequent cases is also highlighted. In § 4 the recent call of various academics to replace vicarious liability with a direct model where the state is the alleged wrongdoer will be contemplated. Finally § 5 provides some suggestions for future determinations relating to the vicarious liability of the state.

## 2 FACTS, BACKGROUND AND THE LEGAL ISSUE

Ms K was in need of transport to her home after a night out and an altercation with her partner.<sup>11</sup> She was approached by an on-duty police officer in full uniform who offered to give her a lift to her home – an offer that she accepted. There were two other on-duty and uniformed police officers in the police vehicle that was to take her home.<sup>12</sup> At some stage of their journey the policemen took, literally and figuratively, a ‘turn in the wrong direction’. The police officers then smothered her with a jacket and proceeded to gang-rape her.<sup>13</sup> A year later the policemen were convicted of rape and kidnapping and were sentenced to 10 years imprisonment.<sup>14</sup>

Ms K claimed damages from the Minister of Safety and Security for the rape committed by the police officers in the Minister’s employ. The issues of liability and quantum were separated and the Johannesburg High Court dismissed her claim on the basis that the Minister was not vicariously liable for the damage suffered by Ms K.<sup>15</sup> The majority of the Supreme Court

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<sup>11</sup> *K v Minister CC* (note 1 above) at para 2.

<sup>12</sup> *Ibid* at para 3.

<sup>13</sup> *Ibid* at paras 4-5.

<sup>14</sup> *Ibid* at para 6.

<sup>15</sup> *Ibid* at para 8. The High Court judgment is unreported.

of Appeal, per Scott JA, held that the High Court had been correct in its decision to dismiss the claim.<sup>16</sup>

Scott JA confirmed that an employer can be held liable for a delict committed by its employee in the course and scope of employment but noted the difficulty that arises in ‘deviation cases’ such as the present one. Where an employee is said to deviate from the course and scope of his or her employment the so-called ‘standard test’ applies. The standard test establishes whether ‘the deviation was of such a degree that it can be said that in doing what he or she did the employee was still exercising the functions to which he or she was appointed or was still carrying out some instruction of his or her employer’. If the employee was still exercising his or her functions or was carrying out an instruction of the employer despite the deviation, the employer will be liable ‘no matter how badly or dishonestly or negligently those functions or instructions were being exercised by the employee’.<sup>17</sup>

Applied to the facts of the case at hand, the Supreme Court of Appeal held that the rape committed by the police officers had deviated so far from the functions of the police officers’ employment that it could not be said that they had been acting in the course and scope of their employment. Scott JA explained that if the rape had been committed as a means to force evidence from a victim then it might have been said that the police officers had acted within the course and scope of their employment. However, the hypothetical facts are distinguishable from those in the case at hand.<sup>18</sup> Even though it was argued that the common law should be developed in a way that would grant Ms K the requisite relief, Scott JA relied on the Constitutional Court’s pronouncement in *Phoebus Apollo Aviation CC v Minister of Safety and*

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<sup>16</sup> *K v Minister of Safety and Security* [2004] ZASCA 99, 2005 (3) All SA 529 (SCA) (*K v Minister SCA*). For a critical evaluation of the Supreme Court of Appeal judgment see J Neethling & JM Potgieter ‘Middelike Aanspreeklikheid van die Staat vir Verkragting deur Polisiebeamptes’ (2005) *Journal of South African Law* 595. That case note contains many useful references to case law and scholarly writings relating to vicarious liability prior to the decision in *K v Minister SCA*. It should also be noted that Neethling & Potgieter’s concerns and suggestions regarding Scott JA’s judgment are virtually all considered with approval by the Constitutional Court on appeal to it. See also A Kok ‘An Appalling Lack of Judgment by the Supreme Court of Appeal’ (2005) 68 *Journal of Contemporary Roman Dutch Law* 506.

<sup>17</sup> *K v Minister SCA* (note 16 above) at para 4. This segment of the SCA judgment is quoted in *K v Minister CC* (note 1 above) at para 9.

<sup>18</sup> *K v Minister SCA* (note 16 above) at para 5.

*Security*<sup>19</sup> to conclude that the common-law rules of vicarious liability were consistent with the Constitution and did not require development.<sup>20</sup>

The salient issue on appeal before the Constitutional Court was whether the common law had to be developed in order for the Minister to be held vicariously liable for the rapes of the police officers in his employ. The Court approached this issue by firstly reiterating and adding to the constitutional theory on common-law development established in *Carmichele CC*. It then proceeded to detail what it understood the common-law position to be and finally how it had to be developed in order to best promote constitutional norms. The next section is similarly structured around these three aspects addressed by the Court.

### 3 THE REASONING OF THE CONSTITUTIONAL COURT

#### 3.1 An Expanded Constitutional Framework for Common-Law Development

Due to the fact that at this point in time the Constitutional Court only had jurisdiction over constitutional matters, as a preliminary point O'Regan J, writing for a unanimous court, had to consider whether the issues in *K v Minister CC* raised a constitutional issue.<sup>21</sup> This was a contentious issue because the court in *K v Minister SCA* held that the common law could not be developed in light of the Constitution, on the basis of the finding in *Phoebus Apollo CC* (also a case that pertained to the vicarious liability of the Minister of Safety and Security for delicts committed by state employees) where the Court held that a constitutional issue did not arise. Scott JA seemed to understand the finding in *Phoebus Apollo CC* to mean that the rules of vicarious liability would never be subject to change or constitutional scrutiny.

However, as the Court in *K v Minister CC* indicated, a proper appreciation of the reasons given for the decision in *Phoebus Apollo CC* shows that Scott JA had misinterpreted that judgment. The Court in *Phoebus Apollo CC* reached its decision because no suggestions had been made by counsel to the effect that the common-law rules of vicarious liability were inconsistent with the Constitution or that the common law required developing in light of the spirit, purport

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<sup>19</sup> *Phoebus Apollo Aviation CC v Minister of Safety and Security* [2002] ZACC 26, 2003 (2) SA 34 (CC), 2003 (1) BCLR 14 (CC) (*Phoebus Apollo CC*).

<sup>20</sup> *K v Minister SCA* (note 16 above) at paras 8-10.

<sup>21</sup> *K v Minister CC* (note 1 above) at para 12. When this matter was heard, section 167(3)(b) provided that the Court could decide 'only constitutional matters, and issues connected with decisions on constitutional matters'.

and objects of the Constitution. Furthermore, in *Phoebus Apollo CC* counsel for the applicant conceded that the rules of vicarious liability were in line with the Constitution.<sup>22</sup>

The absence of constitutional arguments and the incurable concession made by the advocate regarding the constitutionality of the rules of vicarious liability led to the finding by the Court that, based on the way in which it had been pleaded, no constitutional issue had been raised in that specific case. Scott JA was therefore incorrect in his interpretation of *Phoebus Apollo CC* as that case did not place an absolute prohibition on developing the common law of vicarious liability.<sup>23</sup> The present case can be distinguished because Ms K had in fact pleaded that the common law as it stood needed developing in light of the Constitution and therefore *Phoebus Apollo CC* posed no obstacle to her case being heard by the Constitutional Court. Therefore, it was certainly possible that the case at hand could have involved a constitutional issue.

The Court superficially relied on the observations made in *Carmichele CC* to the effect that section 39(2) (requiring a court to promote the spirit, purport and objects of the Bill of Rights) read with section 8(1) (that binds the judiciary to the Bill of Rights) affirms that our Constitution creates an ‘objective normative value system’ to which the common law has to conform.<sup>24</sup> However, since *Carmichele CC* was decided the Court had a further opportunity to add content to its jurisprudence on common-law development in *S v Thebus and Another*.<sup>25</sup> In that case the appellants were convicted of murder and attempted murder through the application of the doctrine of ‘common purpose’.<sup>26</sup> The appellants questioned the constitutionality of the doctrine. The Court peculiarly noted that section 39(2) applies ‘when’ the common law is being developed and that the section does not clearly indicate what circumstances could give rise to the need to develop the common law. It is a peculiar observation because the Court proceeded to identify ‘at least two’ instances where the common law would require development in light of section 39(2), the second instance drawing heavily from the wording of that section.<sup>27</sup>

The first instance is where a common-law rule is clearly inconsistent with a specific constitutional provision, as was observed in the cases of *Shabalala and Others v AG Transvaal and Another* (where a common-law rule placing an absolute prohibition on an accused’s access to

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<sup>22</sup> *Phoebus Apollo CC* (note 19 above) at para 9, quoted in *K v Minister CC* (note 1 above) at para 13.

<sup>23</sup> *K v Minister CC* (note 1 above) at para 14.

<sup>24</sup> *K v Minister CC* (note 1 above) at para 15 relying on *Carmichele CC* (note 2 above) at para 54.

<sup>25</sup> *S v Thebus and Another* [2003] ZACC 12, 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC) (*Thebus CC*).

<sup>26</sup> The doctrine of common purpose is explained and discussed in *Thebus CC* (note 25 above) at paras 18-22.

<sup>27</sup> *K v Minister CC* (note 1 above) at para 16 relying on *Thebus CC* (note 25 above) at para 28.



police dockets was held to be inconsistent with the constitutional right to a fair trial enshrined in section 25(3) of the 1993 Constitution and was consequently struck down)<sup>28</sup> and also in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (where provisions in immigration legislation were held to be inconsistent with the right to equality as the same rights and privileges were not afforded to heterosexual and homosexual partners and was consequently struck down).<sup>29</sup> The second instance where common-law development can be triggered, according to the Court, is when the common law falls short of the spirit, purport and objects of the Bill of Rights even though the common law is not inconsistent with a specific constitutional provision. This is the construction in *Carmichele CC* that has been detailed in the previous chapter. These remarks require further expansion and comment for the sake of clarity.

The first instance that triggers common-law development explained above relates to situations where a given common-law rule is inherently unconstitutional and the only way to remedy the unconstitutionality is to lay the rule to rest. It is interesting to note that the Court therefore equated the striking down of a common-law rule to an inconsistency with the specific constitutional right. The second instance refers to situations where a given common-law rule is not necessarily unconstitutional but may better promote constitutional values if it were adapted in some way. In the latter cases the rules can simply be altered without being struck down completely, even though the alteration could notionally involve certain deletions. It would appear that specific constitutional rights do not feature in the latter enquiries but that the spirit, purport and objects of the Bill of Rights do. Before these two instances that trigger common-law development can be properly analysed, regard must be had to O'Regan J's comments on 'the difficult question of what constitutes "development" of the common law for the purposes of s 39(2)'.<sup>30</sup>

In defining 'development' the court sensibly distinguished between the *application* and the *development* of common-law rules. *Application* of a rule involves a rule being used to decide a set of facts that clearly falls within the ambit of existing authority. Thus, if the facts of one case are

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<sup>28</sup> *Shabalala and Others v Attorney-General of the Transvaal and Another* [1995] ZACC 12, 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC).

<sup>29</sup> *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17, 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC). The use of this case seems misplaced as the test for determining the objective unconstitutionality of legislation is based on section 172 whereas here it is stated that the process of common-law development is based on section 39(2).

<sup>30</sup> *K v Minister CC* (note 1 above) at para 16.

identical to the facts of a case that is binding precedent, then the rule is simply being applied. *Development* of a rule can take on one of two forms: (i) drastic developments that involve either a complete change of a rule or a new rule being introduced into the scheme of existing rules; or (ii) minor developments that occur when an existing common-law rule is tweaked to suit ‘a new set of facts’. The minor developments can involve either an expansion of the ambit of a given rule (where the rule is held to apply to the new set of facts), or a restriction of the rule (where it is held that the new facts do not fall within the scope of the rule). The minor developments therefore involve incremental developments through the expanding body of precedent on a specific topic.<sup>31</sup> According to O’Regan J, both the drastic and minor developments fall in the ambit of section 39(2) because the purpose of that section is ‘to ensure that our common law is infused with the values of the Constitution’.<sup>32</sup>

Applied to the case at hand, the Court held that the rights to security of the person (section 12), dignity (section 10), privacy (section 14) and substantive equality (section 9) as well as the constitutional obligations imposed on the South African Police Service (sections 205-208) would be relevant considerations in determining the direction of the incremental development that would ultimately occur in the case at hand. This is so because at this point of South African legal history, courts had not yet been faced with the situation where the Minister was alleged to be vicariously liable for rape committed by its employees. Furthermore, it was held that incremental developments to the common law of delict are not to be restricted to the determination of wrongfulness only – there are no good reasons why the doctrine of vicarious liability should be shielded from the Constitution’s normative influence.<sup>33</sup>

Even though the Court is not clear in this regard, the triggers for common-law development and the forms of common-law development are intrinsically linked. The more drastic form of development comfortably coincides with the fact that a flagrant constitutional inconsistency incites development. The minor or incremental form of development fits in the realm of cases where a rule falls short of the spirit, purport and objects of the Bill of Rights. Therefore, the scenarios that trigger development and the definition of development provided by the Court should be read as complimentary observations rather than two distinct theoretical frameworks for the interaction between the Constitution and the common law. With this

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<sup>31</sup> Ibid.

<sup>32</sup> Ibid at para 17.

<sup>33</sup> Ibid at para 19.

overview of the Court's stance on common-law development in *K v Minister CC* in mind, I now turn to conduct an appraisal of the issues thus far raised.

There are a number of points of critique that can be raised against the Court's approach to the common law's development. The first point of criticism is the fact that the Court once again evaded the complexity of a number of different constitutional provisions that relate to common-law development. In the Court's view the starting point for an inquiry into the common law's constitutionality is section 39(2) read with section 8(1). It will be recalled that in *Carmichele CC* the Court reasoned that the starting point should be a joint reading of sections 2, 7, 8(1), 39(2) and 173 together with Schedule 2 that collectively entails that where the common law deviates from the spirit, purport and objects of the Bill of Rights, that deviation must be remedied by a court through the process of development.<sup>34</sup> In both *Carmichele CC* and in *K v Minister CC* the Court appears to have oversimplified the interaction between various sections that cannot all be said to mean exactly the same thing. On a shallow reading of *K v Minister CC* it appears that sections 2, 7 and 173 are not as important as they seemed to be in *Carmichele CC* as these sections did not feature in *K v Minister CC* at all. Even though it is a highly technical point, it would have been better for the Court to either repeat the same sections that were invoked in *Carmichele CC* or to remind the reader that section 39(2) supposedly means the same as a number of other constitutional provisions that would, for the sake of brevity, not be repeated. However, following the method proposed in this dissertation, the Court would have done even better to provide clearer methodological guidance on how courts should reason all common-law issues in a uniform manner that places the Constitution at the heart of all enquiries.

The second point of criticism against the approach to common-law development laid out in *K v Minister CC* is the remark adopted from *Thebus CC* to the effect that a common-law rule will be struck down if there is an inconsistency between the rule and a 'specific constitutional provision' (that can be paraphrased as a 'specific constitutional right') while a rule will be incrementally adapted if it falls short of the 'spirit, purport and objects of the Bill of Rights'. What can be objected to here is the problematic distinction drawn between specific constitutional rights and the undefined notion of the 'spirit, purport and objects' of the Bill of Rights. Focusing on the decision in *K v Minister CC* it becomes clear that the spirit, purport and

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<sup>34</sup> *Carmichele CC* (note 2 above) at para 33. Similar methodological concerns in the context of *K v Minister CC*, informed by a respect for the separation of powers doctrine, are raised by T Maseko 'The Impact of the Principle of Separation of Powers on the Development of Common Law and the Protection of Rape Victim's Rights' (2008) 29 *Obiter* 53.

objects ultimately mean specific constitutional rights. It was noted by the Court that Ms K's rights to equality, dignity, freedom and security of the person and privacy had been at stake in the present case and that those rights ultimately required the common law to be developed in that case. One may then ask whether it is in any way practically useful to draw a distinction between constitutional rights and the spirit, purport and objects of the Bill of Rights. One may come to the Court's defence and argue that it was not only the infringement of Ms K's constitutional rights that prompted the need for development here because the constitutional duties imposed on the South African Police Service were also relevant considerations in deciding that the common law had to be developed.

My counter-argument to the above contention is that the duties of the police officers are simply indicative of a corollary of Ms K's rights because a Bill of Rights is of no use if the rights contained therein are not respected and protected by the state. The mere mention of the constitutional duties imposed on police officers does not change the fact that the central reason for developing the common law here is the fact that Ms K's constitutional rights would not be sufficiently protected by the state but for such development. Certainly this could be rephrased to read that the common law as it stood fell short of the spirit, purport and objects of the Bill of Right. However, that would then show that there is no practical distinction here between whether a constitutional right or the spirit, purport and objects of the Bill of Rights are used to justify the common law's development. It would be more understandable and candid to demolish the distinction between common-law rules that are struck down and common-law rules that need incremental adaptations and simply say that 'where a rule of common law is inconsistent with a right enshrined in the Bill of Rights or the Constitution more generally, that rule must be developed'. It would be best to avoid the phraseology of the spirit, purport and objects of the Bill of Rights in the inquiry as to whether the common law should be developed because the spirit, purport and objects should only feature during the second step of the developmental process where it has to be decided exactly how the common law rule in question must be developed. These suggestions correlate with the methodology proposed in Chapter 2 above.

The Court's reasoning can be criticised on a third point. In *Thebus CC* the Court acknowledged that section 39(2) only takes effect 'when' the common law is being developed. To quote, the Court said that the 'section does not specify what triggers the need to develop the

common law or in which circumstances the development of the common law is justified'.<sup>35</sup> In providing scenarios that prompt common-law development, the Court questionably proceeded to list a deficiency in promoting the spirit, purport and objects of the Bill of Rights as one of the grounds justifying common-law development – the wording being twisted from section 39(2). As Fagan observes, the Court ultimately inverted section 39(2) in this process.<sup>36</sup> To use a similar example as Fagan does, if a law professor posts an announcement on the university intranet for his law of delict class instructing them 'when writing the supplementary examination, students must complete the written component of the examination in blue ink', a student cannot claim that he or she has gained entry into the supplementary examination simply because he or she has a blue pen. There are separate rules governing the admission of students into supplementary examinations. For example, at the University of Pretoria a student must have written the main examination and achieved a final mark of at least 40% to be afforded a second chance at passing the module by writing the supplementary examination. The professor's announcement cannot be understood to mean that the possession of a blue pen admits a student into the supplementary examination – the supposition is that the student has gained entry into the supplementary examination according to some other rules but when the student is actually writing the supplementary examination, the announcement provides guidance as to how the examination should be answered. It is unfortunate that the Court contradicted itself in saying that section 39(2) does not provide a ground to develop the common law but then immediately proceeded to use the wording of section 39(2) as a ground for such development.

Following the methodology proposed in Chapter 2 above it would have been less confusing if the Court opted to start the enquiry with the recognition that section 7(2) charges the state with the responsibility to respect, protect, promote and fulfil the rights in the Bill of Rights and that the state failed to do that in this case. Because of the state's failure to fulfil this obligation, which is supported by the relevant constitutional provisions relating to the South African Police Service and the common law's failure to hold the state accountable in this regard, the common law should be developed here as it would be in the interests of justice to do so (per section 173) and because the common law is always subject to constitutional scrutiny (per Schedule 2). This concludes my critique of the Court's elaboration on the constitutional framework for common-law development. Fagan, on the other hand, decries the constitutional aspects of the decision in *K v Minister CC* for two further reasons that are addressed here. Firstly,

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<sup>35</sup> *Thebus CC* (note 25 above) at para 27.

<sup>36</sup> A Fagan 'The Confusions of K' (2009) 126 *South African Law Journal* 156, 181-184.

Fagan disapproves of the Court's invocation of the constitutional duties of the police in the context of determining vicarious liability and, secondly, takes issue with the notion that the rules of vicarious liability are subject to development as he argues that the determination of vicarious liability involves a purely factual enquiry.

Fagan argues that even if one accepts that the Court utilised section 39(2) only in determining how the common law should be developed, it erred in considering the constitutional duties of the South African Police Service in that process.<sup>37</sup> In his opinion the Court erred because section 39(2) requires a court to consider the spirit, purport and objects of *the Bill of Rights* and, technically, the duties imposed on the police fall outside of the scope of *the Bill of Rights*. In other words, according to Fagan, *the Bill of Rights* should be restrictively understood to mean *only* Chapter 2 of the Constitution comprising of sections 7 through to 39. He concludes that sections 205 to 208 of Chapter 11 of the Constitution relating to security services can never be understood to form part of the Bill of Rights. Fagan uses the following analogy to illustrate his point.<sup>38</sup>

Imagine that a medical professor, in the course of an examination, asks the student being examined to explain the function of the heart. Imagine further that the student commences his answer by saying: 'I have been asked to explain the function of the body. Let me therefore start with the liver.' The professor probably would tell the student to answer the question posed, rather than the question which he had just invented. If the student nonetheless persisted with his initial answer, he would in all likelihood fail the examination. In the *K* case, the Constitutional Court made a mistake similar to that of the medical student in this example.

Fagan's line of reasoning is incorrect because of his lack of appreciation for the purposive nature of constitutional interpretation in South Africa and because of his failure to see that his own analogy of the medical student can be used against him.

In Cornell and Friedman's response to Fagan's distinction between 'non-Bill-of-Rights' constitutional values and the specific values of the Bill of Rights, the authors call for a purposive interpretation of the Constitution that collapses that distinction.<sup>39</sup> Cornell and Friedman contend that there is wide academic consensus on what they identify as four principles of constitutional

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<sup>37</sup> Fagan (note 36 above) at 178.

<sup>38</sup> Fagan (note 36 above) at 179.

<sup>39</sup> D Cornell & N Friedman 'In Defence of the Constitutional Court: Human Rights and the South African Common Law' (2011) 5 *Malawi Law Journal* 1.

interpretation.<sup>40</sup> Firstly, because texts are not self-revealing, words must be interpreted so that meaning is given to them.<sup>41</sup> Secondly, interpretation or meaning-giving is a normative exercise.<sup>42</sup> Thirdly, it is normative because the quality of an interpretation is determined by three moral considerations: An interpretation of a constitution can be described as a ‘good’ one if (i) it renders ‘the component parts of a constitution consistent (so far as possible)’; (ii) it relates different parts of the same constitution to each other; and (iii) it involves taking the values and purpose underlying the constitution seriously.<sup>43</sup> Fourthly, constitutional interpretation must be context-sensitive to the circumstances of the specific state in which the constitution is to be applied.<sup>44</sup> Cornell and Friedman maintain that these four principles accord with South African constitutional jurisprudence on purposive interpretation.<sup>45</sup>

With these four principles (that are of academic and practical importance) in mind, it is clear that Fagan’s ideas do not conform to the purposive version of constitutional interpretation that our law requires. Fagan specifically fails to appreciate the third principle which relates to a complex reading of constitutional provisions. Fundamentally what Fagan loses sight of is the fact that the Constitution is not practically detachable into smaller, completely independent parts.<sup>46</sup> For example, the founding provisions of the Constitution enshrined in Chapter 1 thereof surely cannot be regarded as being irrelevant for the rest of the Constitution. The fact that section 2 in Chapter 1 provides that the Constitution is the supreme law of the Republic and that any law or conduct inconsistent with it is invalid, has serious implications for the conduct of state functionaries even though more detailed duties of those functionaries are detailed elsewhere in the Constitution. Similarly the Bill of Rights is not completely unrelated to the duties imposed on the state and various state organs in other parts of the Constitution.

If section 7, which forms part of the Bill of Rights, provides that the state must ‘respect, protect, promote and fulfil the rights in the Bill of Rights’ it surely cannot be said that that section is irrelevant for purposes of giving meaning to, for example, section 205(3) that provides that the police service has the objectives of, among others, protecting and securing the

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<sup>40</sup> Ibid at 5.

<sup>41</sup> Ibid at 6.

<sup>42</sup> Ibid at 7.

<sup>43</sup> Ibid at 9.

<sup>44</sup> Ibid at 10.

<sup>45</sup> Ibid at 10-14 and the authority listed therein.

<sup>46</sup> Ibid at 25-26.

inhabitants of the Republic. Therefore, when attempting to give meaning to the spirit, purport and objects of the Bill of Rights it must surely be appropriate to consider how the impacted rights in a particular case involving state delicts relate to the more specific duties of the state functionaries involved. Cornell and Friedman correctly point out that that the questions ‘what are the values of the Bill of Rights?’ and ‘what are the values of the Constitution?’ do not necessarily mean the same thing, just as the question ‘what is the function of the body?’ does not equate to ‘what is the function of the heart?’. However, they further state that ‘one cannot give a meaningful answer to the question “what is the function of the heart?” without a relatively extensive understanding of the question: “what is the function of the body?”’

To add to the refutation presented by Cornell and Friedman, one may argue that posing these questions in the abstract obscures the real issue. The issue of common-law development in *K v Minister CC* is not an abstract, but a practical one. So certainly, from an abstract theoretical perspective one may argue that the definitions of ‘Bill of Rights’ and ‘Constitution’ (or ‘heart’ and ‘body’) are not the same. However, in reality one concept may be relevant to identifying and solving a problem that *prima facie* relates to another. I shall draw from Fagan’s analogy of the medical student to do this: If one accepts that renal stenosis (constriction of ducts in the kidneys, not caused in any way by the heart) leads to increased blood pressure and thus has a negative impact on the heart, it would be correct to conclude that a discussion of the kidneys may well be relevant when analysing a problem pertaining to the heart.<sup>47</sup> What Fagan overlooks is that the Constitution, similar to the human body, is a unitary system that has many interrelated parts that affect one another.

Furthermore, the underlying rationale of section 12 that protects the right to freedom and security of the person is to protect individuals from the South African state’s historical penchant for perpetrating severe forms of brutality and violence through the instrumentality of what was previously known as the police ‘force’.<sup>48</sup> Therefore the Constitutional Court was correct to incorporate constitutional provisions relating to the police service that do not, strictly speaking, fall within the Bill of Rights in its interpretation of the spirit, purport and objects of the

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<sup>47</sup> See eg DU Silverthorn et al *Human Physiology: An Integrated Approach* (4<sup>th</sup> Ed, 2007) 486 for an explanation of ‘stenosis’ generally. I am indebted to Dr JC Terblanche from the Faculty of Health Sciences at the University of Pretoria for providing me with this useful example and reference.

<sup>48</sup> Cornell & Friedman (note 39 above) at 29.



Bill of Rights. This leaves us with Fagan's final point of criticism against the constitutional jurisprudence laid down in *K v Minister CC*.<sup>49</sup>

Fagan slates the Court's assertion that when a court has to decide 'whether a new set of facts falls within or beyond the scope of an existing rule' that court clarifies the exact ambit of the rule either by extending the limits of the rule or by restricting its boundaries.<sup>50</sup> Fagan argues that South African law draws a clear distinction between rules that are developed by their application to new facts and rules that are not so developed.<sup>51</sup> He further contends that many rules in the South African law of delict are those that are not developed through their application to new sets of facts. This is so because the findings in many delictual cases are highly contingent on the specific facts of particular cases.<sup>52</sup> Using negligence as an example, Fagan quotes the finding in *Kruger v Coetzee* to the effect that negligence is determined with reference to the reasonable foreseeability and preventability of harm but most pertinently that in this enquiry, '[n]o hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases.'<sup>53</sup> This quote, he contends, shows that findings of negligence do not create precedent.

Judges sometimes invoke phrases such as 'decisions of this nature will ultimately depend on the particular facts and circumstances of the case' to justify haphazard ad hoc judgments in some uncertain parts of the law (such as the rules relating to negligence and vicarious liability under discussion here). Phrases to this effect are tacitly premised on the belief that the rules in question are clear, normatively neutral and do not require interpretation of any kind. All that a judge would be required to do is to enter the peculiar facts of a case into a legal equation that produces outcomes that are always different due to the inestimable number of differing circumstances in every case. Thus, in this line of reasoning, a judge simply applies the clear legal position in a mechanical fashion to the facts at hand. Those who follow this model, like Fagan, believe that no precedent is created in this process. Conversely I argue that this model is fundamentally flawed because the assumptions that the rules in question are normatively neutral and do not require interpretation are incorrect.

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<sup>49</sup> Fagan (note 36 above) meticulously expands his argument at 173-178 read with 184-192.

<sup>50</sup> *K v Minister CC* (note 1 above) at para 16.

<sup>51</sup> Fagan (note 36 above) at 187.

<sup>52</sup> Fagan (note 36 above) at 187.

<sup>53</sup> *Kruger v Coetzee* 1966 (2) SA 428 (A) ('*Kruger v Coetzee*') at 430E-F.

There are very few rules in South African law that do not have some type of normative foundation. Responding to Fagan's example of the test for negligence, it should be noted that the test does not simply contain a purely factual assessment. One part of the enquiry clearly involves establishing the expected standard of care that the reasonable person would have displayed. That part of the enquiry is normative because it suggests that there is a legal construction of the reasonable person who, although abstract and non-anthropomorphic, has certain objective characteristics. On the other hand, the enquiry certainly also emphasises the importance of considering the facts and circumstances of the particular case at hand because the reasonable person must be placed in the shoes of the alleged wrongdoer. The phrase in *Kruger v Coetzee* is 'the *diligens paterfamilias* in the position of the defendant'. Therefore, the test for negligence is not purely factual, nor is it purely normative. It involves a delicate balance between facts and legal norms. The recognition that the test for negligence is at least partially normative is important because it suggests that the test requires interpretation and not blind application.

If one accepts that the test for negligence involves the normative exercise of imagining the abstract reasonable person and placing him or her in the position of the alleged wrongdoer, courts cannot simply state that 'because of facts x, y and z the defendant is obviously negligent'. What a court must do is to explain what the reasonable person, with his or her legally constructed characteristics, would have done in light of facts x, y and z. In the process of identifying the characteristics of the reasonable person in a court's reasoning, albeit highly context-sensitive, certain principles develop through the cases. For example Neethling and Potgieter have shown that even though the 'reasonable person' cannot be given any physical qualities, certain theoretical characteristics regarding the fictitious person's carefulness have come to the fore. The reasonable person is, for example, not an exceptionally gifted superhero nor is he or she a timid and thoughtless individual.<sup>54</sup> What is more, despite the fact that the circumstances of each case are important, a number of principles have developed from the cases relating to the determination of the preventability-leg of the negligence enquiry. For instance the nature and the extent of the risk of the alleged wrongdoer's conduct; the seriousness of the potential damage; the importance of the wrongdoer's conduct; and the cost and difficulty of taking precautions are all relevant considerations in determining whether the reasonable person would have reasonably prevented the harm in question.<sup>55</sup>

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<sup>54</sup> Neethling & Potgieter (note 3 above) at 141.

<sup>55</sup> Ibid at 151-154.

These are not concrete rules that can be mechanically applied but they are useful themes that can be used by academics, practitioners and judges alike to ensure that there is some conceptual coherence in the jurisprudence on the reasonable person. An alternative conclusion, such as the one that Fagan draws, would mean that the abstract reasonable person suffers from a serious personality disorder. But the reasonable person is an objective legal standard and therefore requires some type of consistency in principle. Of course, just as people of sane mind develop over time, so the reasonable person may need to develop. However, the reasonable person cannot be extremely superstitious, scared and violently reactionary in the one case while being in control, rational, caring, fearless and level-headed in the next. A contrary conclusion would fly in the face of the rule of law and the notion that similar cases should be treated similarly which is a practical manifestation of the constitutional right to equality.

There are other examples in the law of negligence that indicate that certain subsidiary rules or principles (that give content to the basic test enunciated in *Kruger*) have developed over time. For example, although emphasising that different facts may call for different outcomes, Neethling and Potgieter further explain that certain factors should be taken into account in analysing the facts of a particular case. For example, inherently dangerous activities or work relating to inherently dangerous things or people require greater care; in cases of sudden emergency, a reasonable person would act quickly without necessarily taking the same amount of care as a person who had more time to consider the course of his or her conduct carefully; and reasonable people are allowed to expect others to act reasonably too.<sup>56</sup>

What these examples of the principles relating to negligence show is that even though the detailed facts of one motor vehicle collision on a slippery road in Johannesburg might be different to another collision on a similar road of the same quality in the same area, the rules and principles of negligence can in fact develop through the application of an old test to new facts. In addition to this it is questionable whether the criteria of the ‘particular facts and circumstances of the case’ are in any way useful to cases that pertain to uncertain areas of law. In reality there is no case that a court will hear, regardless of the legal rules or principles concerned, which is not highly contingent on the particular facts and circumstances. The same argument that I have developed here in the context of negligence can be transposed to the determination of vicarious liability.

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<sup>56</sup> Ibid at 154-158.

In *K v Minister CC* the Minister contended that the Court did not have jurisdiction over the matter as the determination of vicarious liability is a question of fact and not a question of law.<sup>57</sup> Consequently the argument was that the rules of vicarious liability could not be developed and therefore the present matter could not raise a constitutional issue, similar to what Fagan has subsequently argued. The Court remarked:<sup>58</sup>

If one looks at the principle of vicarious liability through the prism of s 39(2) of the Constitution, one realises that characterising the application of common-law principles of vicarious liability as a matter of fact untrammelled by any considerations of law or normative principle cannot be correct. Such an approach appears to be seeking to sterilise the common-law test for vicarious liability and purge it of any normative or social or economic considerations. Given the clear policy basis of the rule as well as the fact that it is a rule developed and applied by the courts themselves, such an approach cannot be sustained under our new constitutional order... [T]he principles of vicarious liability are principles which are imbued with social policy and normative content.

These remarks on the nature of the test for vicarious liability are similar to the observations that have been made above regarding the test for negligence. What this comment of the Court makes clear is that even though vicarious liability has historically been described as a purely factual issue, that position is incorrect. The rules of vicarious liability have normative implications. When rules have normative implications those rules require interpretation and, as it has been explained above in the discussion on constitutional interpretation, interpretation is a meaning-giving exercise. If vicarious liability is truly a purely factual issue and no precedents are ever created, that would mean that no coherent body of vicarious-liability jurisprudence could ever be established and that would incorrectly strip the rules of vicarious liability of their normative content. The implication of this observation made by the Court is that through the cases certain guiding principles relating to the determination of vicarious liability may come to the fore, similar to the guiding principles that have emerged in the context of the negligence enquiry. These guiding principles are unavoidably informed by the social and economic policy considerations underlying the rules of vicarious liability. Those include the rationale that those who have suffered harm should be afforded the most efficacious remedies possible and that employers should be encouraged to take steps to prevent their employees from causing harm, while simultaneously recognising that in some cases it will be fair not to impose the burden of strict liability on an employer.<sup>59</sup>

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<sup>57</sup> *K v Minister CC* (note 1 above) at para 20.

<sup>58</sup> *Ibid* at para 22.

<sup>59</sup> *Ibid* at para 21.

The Court further observed that a failure to recognise the normative implications (and by extension, the guiding principles that emerge from case law through interpretation) of the fact-contingent rules of vicarious liability would create a reliance on ‘inarticulate premises that in a democracy committed to openness, responsiveness and accountability should be articulated’.<sup>60</sup> Therefore, in summary, it would be appropriate for a court to acknowledge that in marrying the rules of vicarious liability to a specific set of facts, it is embarking on a normative exercise that involves interpretation of the rules and not simply the mechanical application of them. In the process of giving meaning to the uncertain rules of vicarious liability, a court should always be sensitive to the underlying rationale for the rules and the rationale itself should be viewed through the prism of the Constitution. In my view, this stance of the Court is appropriate as it shows the requisite insight into the normative nature of law that is supported by a transformative conception of legal methodology.

In the present discussion the Court’s elaboration on the expanded constitutional framework for the common law’s development has been detailed and critiqued – the critique has primarily focused on the meaning and use of section 39(2) as the impetus for common-law development. It has been indicated that reducing the entire enterprise of common-law development to section 39(2) read with section 8 is an oversimplification of an intricate web of constitutional provisions. Furthermore, the way in which section 39(2) was employed in *K v Minister CC* is an inversion of what section 39(2) says: That section is not the reason why a court should develop the common law. Rather, it is the instruction as to how a court should go about developing the common law when it has already been decided that the common-law needs developing. It has also been shown that the way in which the phrase ‘spirit, purport and objects of the Bill of Rights’ was applied in the present case, appears to have no meaning distinct from ‘constitutional rights’ because the constitutional rights of Ms K to dignity, equality, privacy and freedom and security of the person are cited as the primary defining factors of the spirit, purport and objects of the Bill of Rights relevant to the common law’s development in this case. Subsequently Fagan’s commentary on *K v Minister CC* has been critiqued. Fagan’s view to the effect that constitutional provisions falling outside of the Bill of Rights should not be considered in the process of common-law development has been opposed in light of the recognised principles of purposive constitutional interpretation that hold that different components of a constitution are not divorced from one another and do not exist in vacuums. Finally, I have contended that Fagan’s view, that the interpretation of the rules of negligence and vicarious

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<sup>60</sup> Ibid at para 23.

liability are purely factual issues that do not create precedent, is erroneous as it fails to appreciate that legal principles may emerge from cases that relate to issues that are context-sensitive and highly contingent on the facts of a particular case. In the next section the detailed rules of vicarious liability as they had developed prior to the decision in *K v Minister CC* will be evaluated.

## 3.2 The Common-Law Rules of Vicarious Liability

### 3.2.1 *The Overview of Rules Given by the Constitutional Court*

The Court in *K v Minister CC* proceeded to detail the common-law principles of vicarious liability in South Africa. The Court explained that if an employee commits a delict within the course and scope of his or her employment, the employer will be held liable for that delict.<sup>61</sup> For purposes of the present discussion, this will be called the ‘course-and-scope requirement’.<sup>62</sup> Even though many cases are uncomplicated and uncontroversial, the course-and-scope requirement becomes difficult to interpret in so-called ‘deviation cases’ where an employee strays from the ‘normal performance of an employee’s duties’.<sup>63</sup> The Court noted<sup>64</sup> that the test for vicarious liability in deviation cases was laid down in the seminal case of *Feldman v Mall* by Watermeyer CJ as follows:<sup>65</sup>

If an unfaithful servant, instead of devoting his time to his master’s service, follows a pursuit of his own, a variety of situations may arise having different legal consequences. (a) If he abandons his master’s work entirely in order to devote his time to his own affairs then his master may or may not, according to the circumstances, be liable for harm which he causes to third parties. If the servant’s abandonment of his master’s work amounts to mismanagement of it or negligence in its performance and is, in itself, the cause of harm to third parties, then the master will naturally be legally responsible for that harm; there are several English cases which illustrate this situation and I shall presently refer to some of them. If, on the other hand, the harm to a third party is not caused by the servant’s abandonment of his master’s work but by his activities in his own affairs, unconnected with those of his master, then the master will not be responsible. (b) If he does not abandon his master’s work entirely but continues partially to do it and at the same time to devote his attention to his own affairs, then the master is legally responsible for harm caused to a third party which may fairly, in a substantial degree, be attributed to an improper execution by the servant of his master’s work, and not entirely to an improper management by the servant of his own affairs.

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<sup>61</sup> Ibid at para 24.

<sup>62</sup> Following Fagan (note 36 above) at 156.

<sup>63</sup> *K v Minister CC* (note 1 above) at para 25.

<sup>64</sup> Ibid at para 27.

<sup>65</sup> *Feldman v Mall* 1945 AD 733(‘*Feldman*’) at 742.

Paragraph (a) of the quoted extract will be referred to as the ‘abandonment-mismanagement rule’<sup>66</sup> for purposes of the present discussion while paragraph (b) will be referred to as the ‘divided-interests rule’.

The Court emphasised that the above extract from *Feldman* shows that even though an employee may be on a ‘frolic of his own’ he or she could simultaneously be doing the employer’s work and that the frolic may ‘itself constitute a neglect to perform his master’s work properly, and may be the cause of the damage’.<sup>67</sup> The reason for the rule formulated by Watermeyer CJ in *Feldman* is the ‘risk theory’.<sup>68</sup> The risk theory provides that because an employer creates a ‘risk of harm to others’ (in that an employee may act negligently or prove to be untrustworthy) and the employer creates this risk solely for his or her own benefit, the employer is entrusted with the duty to ensure that no harm is brought about by the employee while doing the employer’s work.<sup>69</sup> In a similar vein, Tindall JA in *Feldman* held that the test is ‘whether the circumstances of the particular case show that the servant’s digression is so great in respect of space and time that it cannot reasonably be held that he is still exercising the functions to which he was appointed; if this is the case the master is not liable’.<sup>70</sup>

Turning to *Minister of Police v Rabie*,<sup>71</sup> the Court noted that Jansen JA formulated the test for vicarious liability as follows:

It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant’s intention (cf *Estate Van der Byl v Swanepoel* 1927 AD 141 at 150). The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant’s acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test.

In its analysis of *Rabie*, the Court in *K v Minister CC* explained that the first question to be asked is therefore whether the employee acted for his or her own purposes alone and turns on an evaluation of the facts of the case. But even if the employee acted for his or her own purposes

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<sup>66</sup> Following S Wagener ‘The Abandonment-Mismanagement Rule: Vicarious Liability for an Employee’s Simultaneous Commission and Omission’ (2015) 132 *South African Law Journal* 270.

<sup>67</sup> *K v Minister CC* (note 1 above) at para 27.

<sup>68</sup> *Feldman* (note 65 above) at 741.

<sup>69</sup> *K v Minister CC* (note 1 above) at para 28.

<sup>70</sup> *Feldman* (note 65 above) at 756-757 quoted in *K v Minister CC* (note 1 above) at para 29.

<sup>71</sup> *Minister of Police v Rabie* [1985] ZASCA 105, 1986 (1) SA 117 (A) (‘*Rabie*’) at 134 C-E.

alone, the second question can still cause the employer to be liable: Is there nevertheless a sufficiently close link between the employee's acts and the purposes and the business of the employer? The second question is a matter of fact and law and it is in that enquiry where the spirit, purport and objects of the Bill of Rights should feature.<sup>72</sup> Collectively these two questions will be called the 'subjective-objective test' for purposes of this discussion.

The Court concluded its discussion of the common-law *status quo* of vicarious liability by indicating that even though the test in *Rabie* had been 'frequently applied' it was not always followed. The result was that a plethora of tests for vicarious liability have been established by our courts, that the uncertainty created by that legal position is undesirable and that this judgment would make clear what rule should govern vicarious liability. Later in the judgment it becomes clear that the subjective-objective test in *Rabie* (read through a constitutional lens) is the blueprint for future vicarious liability cases.<sup>73</sup> However, before the 'new' test for vicarious liability laid down by the Court will be explored, the common-law position discussed thus far will now be analysed.

The most profound critique against the common-law rules and principles invoked in the judgment of *K v Minister CC* is raised by Fagan. Fagan's argument can be abridged by saying that the subjective-objective test in *Rabie* has never constituted law. Fagan reasons that this is so because it never actually existed before *Rabie*, it was not the *ratio decidendi* of *Rabie*, and it has never formed precedent after *Rabie* until *K v Minister CC*.<sup>74</sup> To the extent that his argument strikes to the core of what the rules of vicarious liability are and should be, it will now be evaluated in some detail.

### 3.2.2 *The Pre-Rabie Position*

As to the legal position before *Rabie*, Fagan draws from eight Appellate Division judgments to show that the subjective-objective test never formed part of South African law. On Fagan's interpretation, the decisions in *Mkizze v Martens*,<sup>75</sup> *Estate Van der Byl v Swanepoel*,<sup>76</sup> *Union Government*

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<sup>72</sup> *K v Minister CC* (note 1 above) at para 32.

<sup>73</sup> *K v Minister CC* (note 1 above) at para 44.

<sup>74</sup> Fagan (note 36 above) at 160. For a more chequered and selective history of vicarious liability in South African law see Botha & Millard (note 7 above).

<sup>75</sup> *Mkizze v Martens* 1914 AD 382 ('*Mkizze*').

<sup>76</sup> *Estate Van der Byl v Swanepoel* 1926 AD 141 ('*Estate Van der Byl*').



*v Hawkins*,<sup>77</sup> *Feldman*,<sup>78</sup> *South African Railways and Harbours v Marais*,<sup>79</sup> *Carter & Co (Pty) Ltd v McDonald*,<sup>80</sup> *African Guarantee & Indemnity Co Ltd v Minister of Justice*<sup>81</sup> and *Ngubetole v Administrator, Cape and Another*<sup>82</sup> all show that the actual test employed by the Appellate Division to determine whether an employee's delict had been committed in the course and scope of employment is the 'discharge-of-duty rule'. The discharge-of-duty rule states that 'an employee's delict was committed in the course and scope of his employment if and only if he committed it while discharging a duty imposed upon him by his employer and defining his employment rather than the manner wherein it is to be carried out'.<sup>83</sup>

Fagan regards the discharge-of-duty rule as the express *ratio* for the decisions in *Mkize*, *Estate Van der Byl*, *Hawkins*, *Feldman*, *African Guarantee* and *Ngubetole*, while the decisions in *Carter* and *Marais* do not create precedent (regardless of the rules that may have been referred to) as in these last two cases the courts held that the 'conduct in question was outside the course and scope of employment' and therefore any statement made regarding the test to be used to determine the course and scope of employment in those cases would have been *obiter*.<sup>84</sup> My commentary on Fagan's view regarding the cases prior to *Rabie* is based on three points of contention: Firstly, Fagan is, to some extent, mistaken about what the six 'precedent-creating' cases mean for the vicarious liability test. Secondly, Fagan's view on precedent-creating judgments is too restrictive and impractical. Thirdly, it will be shown that Fagan failed to mention two important cases in his overview of pre-*Rabie* cases that will ultimately disrupt his argument about the pre-*Rabie* position.

The first point of contention raised against Fagan's outline of pre-*Rabie* cases is that it is an overbroad generalisation. Each of the six early cases on vicarious liability created sub-rules governing the course-and-scope requirement and I argue that those sub-rules should be read to apply to very specific factual constructions instead of creating one broadly phrased general principle. Therefore, it is not disputed that the discharge-of-duty rule does form part of South

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<sup>77</sup> *Union Government v Hawkins* 1944 AD 556 ('*Hawkins*').

<sup>78</sup> *Feldman* (note 65 above).

<sup>79</sup> *South African Railways and Harbours v Marais* 1950 (4) SA 610 (A) ('*Marais*').

<sup>80</sup> *Carter & Co (Pty) Ltd v McDonald* 1955 (1) SA 202 (A) ('*McDonald*').

<sup>81</sup> *African Guarantee & Indemnity Co Ltd v Minister of Justice* 1959 (2) SA 437(A) ('*African Guarantee*').

<sup>82</sup> *Ngubetole v Administrator, Cape and Another* 1975 (3) SA 1 (A) ('*Ngubetole*').

<sup>83</sup> Fagan (note 36 above) at 160.

<sup>84</sup> *Ibid* at 166.

African law. What is however disputed is that the discharge-of-duty rule takes on one specific form as a general test for all cases.

In *Mkize* two employees made a fire to prepare food for themselves while their employer left them in charge of a wagon and mules. Through their carelessness the fire spread to a nearby farm causing damage to the trees of the owner of that farm. The court came to the conclusion that the making of the fire to prepare food was ‘necessary’ for the two employees to ‘properly perform their work’ (per Solomon JA, Maasdorp AJA concurring)<sup>85</sup> or ‘to enable them to discharge their functions efficiently’ (per De Villiers AJA).<sup>86</sup> The court in *Mkize* therefore determined the course-and-scope requirement by asking whether the conduct of the employees had been *necessary* for purposes of doing the employer’s work and not, as Fagan alleges, whether the employee had been discharging a duty owed to the employer when the delict was committed. However, Fagan is surely correct when he argues that the discharge-of-duty rule featured in some way in *Estate Van der Byl*, *Hawkins*, *Feldman*, *African Guarantee* and *Ngubetole*.

In *Estate Van der Byl* a taxi driver was given specific instructions by his employer to avoid driving in a specific area. The taxi driver breached the instruction by driving in the prohibited municipality and there he negligently caused a motor vehicle accident. In holding the employer vicariously liable, the majority of the court (per Kotzé JA, Innes CJ and Stratford AJA concurring) held that the course-and-scope requirement was to be established by determining the nature of the employment of the employee concerned. In this case the nature of employment related to the plying ‘for hire with his master’s car’ for the benefit of the employer. The private instructions given to the driver pertaining to the restriction on routes are not part of the main duty of the taxi driver – those private instructions relate to the manner in which the work was to be carried out but did not relate to the more fundamental question of the primary nature of the employee’s employment.<sup>87</sup> In separate judgments, Wessels JA and De Villiers JA both held that the focus had to fall on the ‘general instruction’ that was given to the taxi driver (in other words, driving the taxi for the employer’s benefit).<sup>88</sup>

*Hawkins* related to a military driver charged with the duty of transporting military personnel. The driver deviated from a route that was prescribed by the employer because a

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<sup>85</sup> *Mkize* (note 75 above) at 397.

<sup>86</sup> *Ibid* at 401.

<sup>87</sup> *Estate Van der Byl* (note 76 above) at 154.

<sup>88</sup> *Ibid*, Wessels JA at 150 and De Villiers JA at 152.

military passenger so requested it. *Centrilivres JA* for a unanimous court held that an employee could be doing his or her employer's work even when disobeying instructions.<sup>89</sup> The court further held that the 'general function' of the driver was to be a troop carrier and that the deviation from the prescribed route in this case was not a complete relinquishing or abandonment of the employer's business.<sup>90</sup> Paraphrased in a way that is more consistent with *Estate Van der Byl*, the employee was discharging his main duty here which was carrying military personnel, even though he disobeyed instructions relating to the manner of executing the main duty.

In *Feldman* a driver was instructed by his employer to deliver a package and return the vehicle to the employer. After delivering the package, the driver stopped for a drink, became intoxicated and then proceeded to drive back to the employer's centre of operations but, before reaching the employer, negligently caused a motor vehicle accident. The majority of court (per Watermeyer CJ, Davis AJA concurring in the relevant parts and Fischer AJA concurring in the full judgment of Davis AJA) held that the course-and-scope requirement must be established by asking whether the employee was pursuing the ends of the employer even if the employee was disobeying instructions relating to the manner of performance.<sup>91</sup> The abandonment-mismanagement rule and the divided-interests rule, as quoted in *K v Minister CC* detailed above, were laid down by the court and it was held that the facts in *Feldman* related to the divided-interests rule in the sense that the employee acted partly in his own interests and partly in the interests of his employer when the delict was committed. The court further held that the employee was partly negligent in performing his work as a servant and therefore the employer was vicariously liable.<sup>92</sup> Davis AJA added that the functions for which the employee was employed included the 'care and control of that van at all times when it was in his possession, and they included also the duty to return it to the garage...' and thus that the employee was acting in the course and scope of his employment.<sup>93</sup> The decision in *Feldman* thus accords, in broad terms, with the discharge-of-duty rule even though the focus is not only directed at the duty of the employee but also at the pursuance of the interests of the employer.

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<sup>89</sup> *Hawkins* (note 77 above) at 562.

<sup>90</sup> *Ibid* at 563.

<sup>91</sup> *Feldman* (note 65 above) at 736.

<sup>92</sup> *Ibid* at 742-743.

<sup>93</sup> *Ibid* at 783.

In *African Guarantee* two policemen participated in a road race with another car while they were supposed to be on duty in a specific area. While racing, the policemen collided with another vehicle. A unanimous court per Ramsbottom JA held that the Minister of Justice was vicariously liable for the collision caused by the policemen on the basis that the deviation of the policemen had not been so great in space and time that they had not been exercising the functions for which they were employed as they had been on patrol when the race started. Thus, in terms of the divided-interests rule in *Feldman*, they were exercising their employment functions while busying themselves with their own affairs and their collision constituted an improper execution of the employer's work thus leading to the conclusion that the employer was vicariously liable.<sup>94</sup> The discharge-of-duty rule was therefore applied in *African Guarantee*.

In *Ngubetole* an authorised driver was instructed to fetch a certain passenger. When collecting the passenger, the passenger took over the driving from the authorised driver and subsequently negligently caused a collision. Corbett JA writing for a unanimous court held that by allowing the passenger to drive the vehicle of the employer, the authorised driver had still been doing the assignment of the employer – in other words, collecting the passenger and taking him to the required location – even though the manner of executing the task had been improper.<sup>95</sup> Once again, the discharge-of-duty rule was affirmed.

To summarise the first point of my rebuttal against Fagan thus far, although it can be deduced from these cases that the discharge-of-duty rule has historically featured in South African law, *Mkizze* is no authority for that fact. Furthermore, in *Feldman* the focus actually fell on the fact that the employee had been pursuing the interests of his employer when he drove the vehicle back to the headquarters. Furthermore, the phraseology of the 'discharge of a duty' did not prominently feature in *Feldman*, even though the finding could be interpreted in a manner consistent with it. However, the evaluation of the primacy of the discharge-of-duty rule does not end here as the cases already discussed need to be understood in a broader context of other cases that Fagan rejects or omits in his discussion.

The second objection that can be raised against Fagan's view on the pre-*Rabie* cases is his restrictive and reductionist understanding of judicial precedent. To recapitulate, according to Fagan, when a court holds that the course-and-scope requirement is not met in a particular case, it creates no precedent. To rebut Fagan's view I shall call to attention the difference between a

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<sup>94</sup> *African Guarantee* (note 81 above) at 447.

<sup>95</sup> *Ngubetole* (note 82 above) at 12H-13A & 14C.

*ratio decidendi* and an *obiter dictum*. As early as 1968 Hahlo and Kahn indicated, with regard to the *ratio decidendi* of a judgment:<sup>96</sup>

The binding quality of a judicial precedent, it has been seen, resides in the *ratio decidendi* and not in any *obiter dictum*. It has been seen that *ratio decidendi* ‘literally means “the reason of or for the decision” and the “decision” means the order of court’. But this is too widely put, and a better translation of the expression is ‘principle of the decision’.

Furthermore, as to *obiter dicta* they express themselves as follows: ‘An *obiter dictum* has been described by South African judges as a “statement not necessary for the decision of the case”, “an excrescence on the reasoning”’.<sup>97</sup> To the difference between *rationes decidendi* and *obiter dicta* they refer as follows: ‘The orthodox meaning given to *ratio decidendi* is the rule of law that the court considered was required for the decision of the case, the balance constituting *obiter dicta*.’<sup>98</sup>

The above three quotations of Hahlo and Kahn make it clear that Fagan’s view on what types of decision create precedent cannot be accepted as far as South African law is concerned. If a court decides that the course-and-scope requirement for vicarious liability has not been met and in the process reasons that the requirement is absent because the subjective-objective test yields a negative result, the subjective-objective test has in fact been applied and constitutes the *ratio decidendi* of the case. Arguing, like Fagan does, that there is no *ratio decidendi* in such a decision would effectively mean that no order of court is made if that court decides that a requirement of law is not present in a specific case. That in turn means that the pronouncement of the court has no binding effect on the parties to the dispute. Ultimately, Fagan’s line of reasoning suggests that the *reasoning* of a court to the effect that a specific requirement is not met is *obiter* – a statement which contradicts the very nature of an *obiter dictum*. Indeed it can be seen that a judicial statement to the effect that the subjective-objective test yields a negative conclusion on the question of vicarious liability is necessary and dispositive and thus constitutes the *ratio* of the case. I therefore now turn to discuss the *rationes decidendi* of *Marais* and *McDonald* even though those cases dealt with situations where it was found that the employees concerned had not acted within the course and scope of their employment.

In *Marais* a man was allowed into the driver’s compartment in a train by the train driver. The train derailed, for reasons beyond the control of the train driver, while the man was in the

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<sup>96</sup> HR Hahlo & E Kahn *The South African Legal System and Its Background* (1968) 260. Footnotes omitted.

<sup>97</sup> *Ibid* at 270. Footnotes omitted.

<sup>98</sup> *Ibid* at 261. Footnotes omitted.

driver's compartment. If the man had not been allowed into the compartment, he would not have died and his spouse would not have lost her breadwinner. Schreiner JA for a unanimous court held that the work of the train driver was to drive the train<sup>99</sup> and that letting a person into the driver's compartment had nothing to do with the act of driving the train.<sup>100</sup> Consequently the core task of the driver, his driving, could not be said to have caused the injury and therefore the employer of the train driver was not vicariously liable in this case. *Marais* affirms the discharge-of-duty rule.

Contrarily in *McDonald* the discharge-of-duty rule did not feature in isolation. In *McDonald* an employee was allowed to use his employer's bicycle in order to run a personal errand during which he collided with a pedestrian. Even though the court held that the employee had clearly been released of his duties so that he could engage in his personal affairs, the court added that another relevant consideration was that the employee had not been acting even for the slightest benefit of the employer.<sup>101</sup> Therefore the focus was not only on the main duty of the employee but also on whether the employer would stand to benefit in some way from the conduct of the employee. This is a variation of the traditional discharge-of-duty rule that Fagan proposes. Furthermore, the court proceeded to reason that there was 'no reason whatsoever to suppose that Solomon [the employee] regarded himself as undertaking the journey even partly in the interests of the appellant [the employer]'.<sup>102</sup> It can be argued that *McDonald* therefore considered as relevant the subjective intention of the employee coupled with the objective enquiry into whether the employee was either discharging a duty or acting in the interests of the employer – perhaps laying the foundation for the subjective-objective test, even though not expressly so stated in *Rabie*.

If Fagan therefore ventured to consider the reasoning in *McDonald*, that I argue constitutes precedent, he would have been able to see the connection between that case and the subjective-objective test supported in *Rabie*. However, the matter does not end there. Fagan also failed to consider two cases prior to *Rabie* that completely avoided the discharge-of-duty rule and this constitutes the third point of critique that is raised against Fagan's commentary on the pre-*Rabie* cases.

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<sup>99</sup> *Marais* (note 79 above) at 619C-D.

<sup>100</sup> *Ibid* at 619D-F.

<sup>101</sup> *McDonald* (note 80 above) at 209D-E.

<sup>102</sup> *Ibid* at 211C-D.

The cases that Fagan omitted to mention are *Mblongo and Another v Minister of Police*<sup>103</sup> and *Minister van Polisie en 'n Ander v Gamble en 'n Ander*.<sup>104</sup> In both cases the courts followed the same line of reasoning. In *Mblongo* a policeman shot a man while trying to arrest another who was a car thief, while in *Gamble* a policeman effected an unlawful arrest and unlawfully detained an innocent man. In both cases the courts reasoned that the key issue in determining whether an employee's delict was committed in the course and scope of his or her employment was to ask whether the employer exercised control over the employee's conduct that caused the harm. For purposes of the present discussion, this will be called the 'control rule'. It was held that the method of effecting arrests is an issue over which the Minister of Police exercised control in terms of orders and standing regulations. For that reason the Minister was held vicariously liable in both cases.<sup>105</sup> *Mblongo* and *Gamble* illustrate clear breaks in the pattern of the discharge-of-duty rule that had featured, with some variations, up to this juncture. These cases are important because they show that the discharge-of-duty rule is not the sole and inviolable test for giving content to the course-and-scope requirement in vicarious liability cases. Fagan's oversight is unfortunate because his analysis does not account for the contradictions between the control and the discharge-of-duty rules.

### 3.2.3 *The Rabie Case*

In *Rabie* an off-duty police mechanic identified himself as a policeman to his innocent victim, hit the victim with a spanner, then arrested and detained him – all for the egotistical gain of the mechanic. Jansen JA for the majority of the Appellate Division reasoned that the key question to be asked is whether the mechanic had been doing police work when he committed the wrong. In other words, a connection had to be established between the scope of the mechanic's employment and the acts of the mechanic that caused harm to the innocent victim.<sup>106</sup> It was emphasised that members of the police force (as it was then known) could at any time exercise police-functions, for example, the carrying out of arrests.<sup>107</sup>

Jansen JA noted that in deviation cases the subjective-objective test would have to be applied. In other words, one first establishes the subjective intention of the employee (whether he or she intended to act within the course and scope of employment) but even if the employee

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<sup>103</sup> *Mblongo and Another v Minister of Police* 1978 (2) SA 551 (A) ('*Mblongo*').

<sup>104</sup> *Minister van Polisie en 'n Ander v Gamble en 'n Ander* 1979 (4) SA 759 (A) ('*Gamble*').

<sup>105</sup> *Mblongo* (note 103 above) at 569D-E, followed in *Gamble* (note 104 above).

<sup>106</sup> *Rabie* (note 71 above) at 132F-G.

<sup>107</sup> *Ibid* at 133A-D.

intended to act purely selfishly, the employer would nonetheless be liable if, objectively, the conduct of the employee is sufficiently closely connected to the ‘purposes and business’ of the employer.<sup>108</sup> However, the employee in *Rabie* did not ‘deviate’ from his employment in the conventional sense of the word as he had never been engaging with his employer’s work before the assault occurred. Therefore the subjective-objective test could not be applied in this case.<sup>109</sup>

The court held that in a case such as *Rabie* the test for vicarious liability should be approached from the perspective of the risk created by the employer.<sup>110</sup> Thus, cases such as *Rabie* required a break from the subjective-objective test and the question simply is whether the conduct of the employee falls within the ambit of the risk created by the employer. It was held that the employee’s assault, arrest and detention fell within the ambit of the risk created by the employer as the employer gave all police force members the capacity to do police work of this nature even when they are off duty.<sup>111</sup>

The importance of the finding in *Rabie* is firstly that it indicates that different factual constructions require different approaches to the rules. On my interpretation, from the overview of cases provided thus far, there are two broad moulds into which facts could fall. On the one hand there are cases where employees are on duty according to the terms of their employment during which a delict is committed. These are either cases where the on-duty employee is solely engaged in the employer’s work, or doing what is reasonably necessary to do the employer’s work even though the manner of executing the work is contrary to instructions (as was the case in *Mkize*, *Estate Van der Byl*, *Hawkins* and *Ngubetole*) or these are cases where the on-duty employee deviates from the normal tasks or specific instructions of employment in some way while still executing the main duty of function for which the employee was appointed or doing something that the employer had control over (as seen in *Feldman*, *African Guarantee*, *Mblongo* and *Gamble*, and the corollaries in *Marais* and *McDonald*). On the other hand there are cases where employees are off duty according to the terms of their employment but place themselves on duty, as they are entitled to do, and then harm eventuates because of a risk created by the employer (according to *Rabie*).

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<sup>108</sup> Ibid at 134C-E.

<sup>109</sup> Ibid at 134F-G.

<sup>110</sup> Ibid at 134H.

<sup>111</sup> Ibid at 134I.



Furthermore, *Rabie* is important because it is the first case in which the subjective-objective test was expressly recognised. The rule does not actually radically disrupt the scheme of rules that have been laid out above. All that the subjective-objective test illustrates is that the subjective intention of the employee is not the predominant consideration because regardless of what the employee's intention may be it can be overridden by the objective consideration of whether the employee's conduct is sufficiently closely connected to the business of the employer. This reasoning of the primacy of objective considerations indirectly featured in *Estate Van der Byl*<sup>112</sup> and in *McDonald* as alluded to above.<sup>113</sup> Following Fagan's commentary, the 'sufficiently close connection' phraseology was never used in South African courts before *Rabie*.<sup>114</sup> Even though Fagan's literalist observation is correct, the court may not have been completely misguided in adopting this phraseology. As it has been argued above, the discharge-of-duty rule is but one of the relevant considerations in deviation cases. The control rule also features and perhaps the question of whether the employee was promoting the interests of the employer is also relevant. Imaginably the court in *Rabie*, even though inarticulate on this point, could have meant that the 'sufficiently-close-connection' criterion is the general standard to be used to determine the course-and-scope requirement and that this general standard is given content to with reference to the discharge-of-duty rule, the control rule, or the forwarding-of-employer-interests principle. Reading *Rabie* in this way is an attempt at reconciling the various seemingly contradictory rules that have emerged from the case law. Therefore, unlike Fagan, I reason that the sufficiently-close-connection standard and the discharge-of-duty rule are not necessarily irreconcilable and mutually exclusive. Thus, the sufficiently-close-connection standard mentioned (and the risk principle actually applied) in *Rabie* form a constructive part of the vicarious liability narrative that had developed up to that point in time, namely that the borders of the employer-liability playing field was expanding more rapidly than the Appellate Division in *Mkize* might have originally envisioned.

A final comment regarding the *Rabie*-judgment relates to the binding effect of the subjective-objective test and its related criteria. Fagan argues that even though the subjective-objective rule was supported by Jansen JA in *Rabie*, it did not form the reason for the decision and thus it had no law-making effect. In other words, only the risk rule created precedent.<sup>115</sup>

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<sup>112</sup> *Estate Van der Byl* (note 76 above) at 150.

<sup>113</sup> *McDonald* (note 80 above) at 211C-D.

<sup>114</sup> Fagan (note 36 above) at 161.

<sup>115</sup> *Ibid* at 161.

However, it can be argued that the *ratio* of this case is, for two reasons, conceptually more challenging to determine than Fagan suggests. Firstly, part of the court's reasoning is that the *Rabie*-construction does not fit the typical deviation-case model and that the deviation rules should therefore not apply where a policeman places himself on duty. Thus, in its reasoning, the court distinguished *Rabie* from deviation cases and distinguished the rules that should apply in each type of case. The drawing of this distinction itself forms part of the *ratio decidendi* because, but for this distinction, the outcome in *Rabie* may have been read to mean that the risk rule should apply generally, therefore also in deviation cases. Notionally there is at least some merit in the argument that the subjective-objective test did form part of the *ratio* of *Rabie*. The second reason why the *ratio/obiter* distinction in *Rabie* is puzzling is that even if one accepts Fagan's argument that the subjective-objective rule was only mentioned in passing, the next section shows that the rule has been applied in subsequent cases, thereby turning it into part of the *ratio* of *Rabie*. As Hahlo and Kahn note: 'It is not so much what the court itself thought what rule was being established by a decision but what courts thereafter understood it to be...'<sup>116</sup>

### 3.2.4 Cases Decided between *Rabie* and *K v Minister CC*

Fagan argues that in 13 appeal court decisions after *Rabie* the discharge-of-duty rule was never abandoned. Regarding eight of those decisions Fagan reasons as follows:

[T]he court decided that the course-and-scope requirement had *not* been satisfied. If a court decides that a particulate requirement is not satisfied, then, though it might have made a statement as to the sufficient conditions for the satisfaction of that requirement, it could not possibly have relied on that statement in coming to its decision. If a court makes a statement, but does not rely upon it in reaching its decision, the statement is *obiter*.

If Fagan is correct that the court did not rely on a specific rule to come to the conclusion that a requirement has not been met, it begs the question: What exactly did the court rely on to reach its decision? If it is not the legal rule referred to, what did the court rely on to form its decision? The answer to these questions is the puncture in Fagan's argument. When a court relies on a rule to show why a requirement, for example the course-and-scope requirement, is not met, the court is invoking rules in its reasoning and therefore those rules form part of the *ratio decidendi* of the case. If this was not so, a finding by a court that the course-and-scope requirement is not met in a particular case would not constitute the order of the court and it would be open for the unsuccessful party to take the case to another court. Fagan argues that the finding in that case is

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<sup>116</sup> Hahlo & Kahn (note 96 above) at 261.

simply *obiter*. Fagan's view is impractical and jeopardises the authority of courts that decide that certain requirements are not met in certain cases.

The eight cases that Fagan regard as judicial nullities are: *Minister van Wet en Orde v Wilson en 'n Ander*,<sup>117</sup> *Minister of Law and Order v Ngobo*,<sup>118</sup> *Macala v Maokeng Town Council*,<sup>119</sup> *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd*,<sup>120</sup> *Ess Kay Electronics Pte Ltd v First National Bank of Southern Africa Ltd*,<sup>121</sup> *Minister van Veiligheid en Sekuriteit v Phoebus Apollo Aviation Bk*,<sup>122</sup> *Bezuïdenhout NO v Eskom*<sup>123</sup> and *Costa Da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy*.<sup>124</sup> However, these cases are not judicial nullities simply because the course-and-scope requirement was not met in each case. In reality all of these cases are important because none of them applied the discharge-of-duty rule, showing that there are a multitude of tests that can be used to determine the course-and-scope requirement and not, as Fagan avers, the discharge-of-duty rule alone.

In *Macala*, the separate judgment of Zulman JA in *ABSA*, *Phoebus Apollo SCA* and *Bezuïdenhout* the subjective-objective test was either applied or endorsed by the courts to conclude that the course-and-scope requirement had not been met. In *Macala* the court went so far as to merge the subjective-objective rule and the risk rule from *Rabie* by reasoning that in that case, where a municipal policeman shot an innocent victim, the policeman subjectively did not intend to act as a policeman and even though he was objectively in uniform and using a service firearm he did not act in the employer's interest when the delict was committed and thus the delict did not fall within the risk of harm that the employer created by employing the employee.<sup>125</sup> The judgment of Zulman JA in *ABSA* determined the liability of an employer for a thieving employee by holding that the employee in question acted subjectively for his own

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<sup>117</sup> *Minister van Wet en Orde v Wilson en 'n Ander* [1992] ZASCA 81, 1992 (3) SA 920 (A), [1992] 2 All SA 238 (A) ('*Wilson*').

<sup>118</sup> *Minister of Law and Order v Ngobo* [1992] ZASCA 172, 1992 (4) SA 822 (A), [1992] 2 All SA 492 (A) ('*Ngobo*').

<sup>119</sup> *Macala v Maokeng Town Council* [1992] ZASCA 76, 1993 (1) SA 434 (A), [1993] 1 All SA 112 (A) ('*Macala*').

<sup>120</sup> *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* [2000] ZASCA 59, 2001 (1) SA 372 (SCA) ('*ABSA*').

<sup>121</sup> *Ess Kay Electronics Pte Ltd v First National Bank of Southern Africa Ltd* [2000] ZASCA 67, 2001 (1) SA 1214 (SCA), [2001] 1 All SA 315 (SCA) ('*Ess Kay*').

<sup>122</sup> *Minister van Veiligheid en Sekuriteit v Phoebus Apollo Aviation Bk* [2002] ZASCA 60, 2002 (5) SA 475 (SCA) ('*Phoebus Apollo SCA*').

<sup>123</sup> *Bezuïdenhout NO v Eskom* [2002] ZASCA 152, 2003 (3) SA 83 (SCA), [2003] 1 All SA 411 (SCA) ('*Bezuïdenhout*').

<sup>124</sup> *Costa Da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy* [2003] ZASCA 7, 2003 (4) SA 34 (SCA) ('*Costa Da Oura*').

<sup>125</sup> *Macala* (note 119 above) at 441B-H.

purposes and that objectively there was no connection between his theft and what he was authorised to do.<sup>126</sup> The court in *Phoebus Apollo SCA* concluded that thieving employees had not caused their employer to be vicariously liable as the employees had subjectively acted for their own gain and had objectively they not performed their duties at all so that it could not even be said that they had exercised their duties improperly.<sup>127</sup> In *Bezuidenhout* an employee of Eskom gave a child a lift in a company vehicle and then collided with another vehicle. The court held that the employee driver had no subjective intention to further his employer's work and, objectively, the giving of a lift had nothing to do with administering the interests of the employer – therefore the employer was not vicariously liable.<sup>128</sup>

In the remaining cases that Fagan regards as judicial nullities, the subjective-objective rule was never expressly rejected, nor was the discharge-of-duty rule expressly endorsed. In *Wilson* a policeman assaulted an innocent person for personal reasons while never announcing that he was a policeman. The court held, following the risk rule in *Rabie*, that the conduct of the policeman had been too far removed from the risk that had been created by the employer in this instance as the facts were distinguishable from *Rabie* where the policemen identified himself as such and made an arrest, and not merely committed an assault.<sup>129</sup> The risk rule of *Rabie* was however rejected in *Ngobo* where an off-duty policeman fired shots with a service revolver killing the victim and leaving the deceased's dependants without a breadwinner. The court in *Ngobo* simplified the test by simply asking whether the policeman purported to engage in police activity. The question was answered in the negative.<sup>130</sup> The risk rule was similarly rejected in *Ess Kay* where a bank employee defrauded customers causing them to suffer loss. In that case the court held that the employee had no authority to defraud the customers and thus the focus of the judgment revolved around the authority bestowed on the employee – not the employee's duties, nor the close connection between the delict and the employment.<sup>131</sup> It is important to note that even though *Ngobo* and *Ess Kay* rejected the risk rule in *Rabie*, those cases never questioned the subjective-objective test also laid down in *Rabie*. The majority in *ABSA* similarly framed the issue in terms of what the thieving employee was authorised to do, while in *Costa Da Oura*, a case relating to a barman who abandoned his work to engage in a personal altercation outside, the

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<sup>126</sup> *ABSA* (note 120 above) at para 9.

<sup>127</sup> *Phoebus Apollo SCA* (note 122 above) at paras 16-17.

<sup>128</sup> *Bezuidenhout* (note 123 above) at para 24.

<sup>129</sup> *Wilson* (note 117 above) at 928A-B.

<sup>130</sup> *Ngobo* (note 118 above) at 830C-832D.

<sup>131</sup> *Ess Kay* (note 121 above) at paras 9 & 16.

court held that the barman had not acted in the employer's interest, neither had he been acting under the authority of his employer and consequently the employer would not be held liable for the harm flowing from the personal vindictiveness of the barman.<sup>132</sup>

After reading the divergent tests applied in these cases that Fagan regards as judicial nullities, one may be tempted to follow Fagan simply because of the great deal of uncertainty that these cases have created. But unlike Fagan, I cannot ignore the discrepancies in vicarious-liability rules by suggesting that the discharge-of-duty rule is the only rule that has ever featured in South African law. Therefore, the Constitutional Court can hardly be blamed for selecting the subjective-objective test from the plethora of rules and principles of vicarious liability as the uniform test that should apply in all future cases.

However, according to Fagan there are only five cases decided between *Rabie* and *K v Minister CC* where the course-and-scope requirement was met and only these five cases are legally relevant: *Tshabalala v Lekoa City Council*,<sup>133</sup> *Viljoen v Smith*,<sup>134</sup> *Venter v Bophuthatswana Transport Holdings (Edms) Bpk*,<sup>135</sup> *Minister of Safety and Security v Jordaan t/a André Jordaan Transport*<sup>136</sup> and *Minister van Veiligheid en Sekuriteit v Japmoco BK h/a Status Motors*.<sup>137</sup> Fagan's interpretation of these cases leads him to argue that the discharge-of-duty rule is the only rule for determining the course-and-scope requirement in vicarious liability cases. Again Fagan is mistaken. Even though the discharge-of-duty rule was applied in *Venter*, *Jordaan* and partially applied in *Tshabalala*, it can be argued that in *Viljoen* and *Japmoco* the subjective-objective test provided in *Rabie* was clearly and unequivocally applied. It will be shown that at least one reading of *Tshabalala* also supports the subjective-objective rule. In addition, it will be shown that two cases that Fagan omits to mention (namely *Van Der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others*<sup>138</sup> and *MEC for Public*

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<sup>132</sup> *Costa Da Oura* (note 124 above) at para 7.

<sup>133</sup> *Tshabalala v Lekoa City Council* [1992] ZASCA 54, 1992 (3) SA 21 (A), [1992] 2 All SA 105 (A) ('*Tshabalala*').

<sup>134</sup> *Viljoen v Smith* [1996] ZASCA 105, 1997 (1) SA 309 (A) ('*Viljoen*').

<sup>135</sup> *Venter v Bophuthatswana Transport Holdings (Edms) Bpk* [1997] ZASCA 16, 1997 (3) SA 374 (SCA), [1997] 2 All SA 257 (A) ('*Venter*').

<sup>136</sup> *Minister of Safety and Security v Jordaan t/a André Jordaan Transport* [2000] ZASCA 176, 2000 (4) SA 21 (SCA) ('*Jordaan*').

<sup>137</sup> *Minister van Veiligheid en Sekuriteit v Japmoco BK h/a Status Motors* [2001] ZASCA 96, 2002 (5) SA 649 (SCA) ('*Japmoco*').

<sup>138</sup> *Van Der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others* [2000] ZASCA 73, 2001 (2) SA 242 (SCA), [2001] 1 All SA 425 (SCA) ('*Van der Berg*').

*Works, Eastern Cape v Faltein*)<sup>139</sup> illustrate that the discharge-of-duty rule is not as dominant as Fagan would believe.

In *Venter* it appeared on the evidence that when a truck driven by the employees of Venter had collided with the bus of Bophuthatswana Transport Holdings those employees had been driving the truck back to the headquarters of their employer after the truck had broken down causing them to drive the truck beyond their normal hours of work. Although not expressly stated, it seems that the court regarded the driving of the vehicle as the main duty of the employees concerned. In *Jordaan* a policeman who was on standby duty dropped his friends off at a specific location but, on his way back to his post, negligently collided with another vehicle. The court held the employer vicariously liable on the basis that the employee was generally employed to drive the vehicle in question and he was on his way to do the work of the employer.<sup>140</sup> Thus, the discharge-of-duty rule was applied. In *Tshabalala* the discharge-of-duty rule was likewise endorsed when the court held that an off-duty policeman who had negligently shot an innocent victim with a service pistol had been entitled to perform his duty at any time to restore order in public and if necessary utilise his firearm.<sup>141</sup> However, the discharge-of-duty rule is not the only rule that featured in this case.

The court in *Tshabalala* made reference to the subjective intention of the policemen on at least three occasions, even though *Rabie* and the subjective-objective rule is not mentioned once in the judgment. According to the court ‘in his mind he had been acting against a dangerous axe-wielding robber’<sup>142</sup> and he was ‘in his own mind following proper police procedures’<sup>143</sup> and the policeman had no ulterior motives in shooting the innocent victim.<sup>144</sup> It could be argued that the reference to the employee’s subjective state of mind coupled with the objective question of whether the employee was entitled to exercise his duties at any time constitutes tacit endorsement of the subjective-objective test from *Rabie*.

The subjective-objective test also featured in *Viljoen* where a farm worker ventured onto a neighbouring farm during working hours to relieve himself. In that process the worker lit a

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<sup>139</sup> *MEC for Public Works, Eastern Cape v Faltein* [2004] ZASCA 50, 2006 (5) SA 532 (SCA), [2004] 3 All SA 660 (SCA) (*Faltein*).

<sup>140</sup> *Jordaan* (note 136 above) at para 5.

<sup>141</sup> *Tshabalala* (note 133 above) at 28B.

<sup>142</sup> *Ibid* at 31B.

<sup>143</sup> *Ibid* at 31E.

<sup>144</sup> *Ibid* at 31H.

cigarette that fell and caused a veldfire on the neighbouring farm. In determining whether the worker's employer would be vicariously liable the court relied on *Rabie* and held that the employee subjectively had had no ulterior motive to cause harm to the neighbouring farmer,<sup>145</sup> and that objectively he had only deviated 400 meters from where he was supposed to work – a deviation that did not completely dissociate him from his employment.<sup>146</sup> Similarly in *Japmoco* the court held that policemen of the vehicle theft unit of the police service had been acting in the course and scope of their employment when they issued false clearance certificates for stolen vehicles to a syndicate, on the basis that even though the policemen had subjectively acted in their own interest, they had objectively been doing the exact task for which they had been appointed and authorised to do, namely to issue clearance certificates.<sup>147</sup> The court in *Japmoco* emphasised that in *Ngobo* and *Ess Kay* the risk rule may have been overruled but that the subjective-objective rule was authoritative and constituted the 'standard test' for determining the course-and-scope requirement.<sup>148</sup>

That leaves the two cases not mentioned by Fagan. The court in *Van der Berg* held that where employees of a company specialising in the administration of estates completed affidavits in which they defamed a senior counsel, the employer could be held liable for the defamation on the basis that the employer exercised control over the employees even though they had to exercise their discretion in some instances.<sup>149</sup> Here the control rule of *Mblongo* and *Gamble* was revived while the discharge-of-duty rule appeared to have straggled along in the rear. From the judgment in *Faltein* it appears that where an employee is not specifically instructed to do a specific task but nevertheless performs it, the employer will be held vicariously liable if the employer would not have objected to the employee performing the task in question.<sup>150</sup> Even though the court in *Faltein* referred to virtually no precedent, it once again illustrates that the discharge-of-duty rule is not the only rule that can be used to determine the course-and-scope requirement.

What this section of this chapter has revealed is that even though the discharge-of-duty rule is frequently applied in vicarious liability cases, it is not the only applicable one. The test may

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<sup>145</sup> *Viljoen* (note 134 above) at 318I.

<sup>146</sup> *Ibid* at 319A.

<sup>147</sup> *Japmoco* (note 137 above) at paras 12 & 14.

<sup>148</sup> *Ibid* at para 11.

<sup>149</sup> *Van der Berg* (note 138 above) at paras 40-42.

<sup>150</sup> *Faltein* (note 139 above) at paras 13-15.

also be phrased as an issue of employer-employee control, the furtherance of the employer's interests, the employee's designated authority, or even simply whether the employer would not have objected to an unauthorised task performed by the employee. Furthermore it has been proven that the subjective-objective test developed in *Rabie* has been applied with positive and negative answers on the question as to whether an employee was acting within the course and scope of employment, in a number of cases. Thus, even though the subjective-objective test in *Rabie* might not have been the dominant *ratio decidendi* of the Appellate Division in 1986, it certainly has become law since then. The essential argument has thus far been that Fagan's argument for the preservation of the discharge-of-duty rule at all costs holds no water.

### **3.3 The New, Constitutionally-Inspired Interpretation of the Common-Law Rules of Vicarious Liability**

#### *3.3.1 The Statement of Law in K v Minister CC*

After surveying the common-law rules and principles underlying vicarious liability, the Court in *K v Minister CC* conducted a comparative study of the rules of vicarious liability in England, Canada and the United States of America. Despite the fact that the South African law of delict is founded on the civilian legal tradition that is conceptually different from the common-law jurisdictions that the Court considered, the Court emphasised that section 39(1) of the Constitution provides that when interpreting the Bill of Rights a court may consider foreign law. Therefore the Court reasoned that, on condition that the comparison is not a shallow one, South African law could benefit from 'valuable and persuasive' jurisprudence from other jurisdictions.<sup>151</sup>

The Court turned to the English case of *Lister and Others v Hesley Hall Ltd* where the House of Lords held the employer of a school hostel warden liable for the warden's sexual abuse of boys in his care.<sup>152</sup> The Court emphasised that vicarious liability had been established because the test was whether the conduct of the employee was 'so closely connected with [the warden's] employment that it would be fair and just to hold the employers vicariously liable'.<sup>153</sup> The Court then proceeded to similar cases relating to the sexual abuse of children entrusted in the care of employees in the Canadian context.

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<sup>151</sup> *K v Minister CC* (note 1 above) at paras 34-35.

<sup>152</sup> *Lister and Others v Hesley Hall Ltd* [2001] UKHL 22, [2001] 2 All ER 769 ('*Lister*').

<sup>153</sup> *Ibid* at para 28 as quoted in *K v Minister CC* (note 1 above) at para 36.



In *Bazley v Curry* the Canadian Supreme Court held that courts should not attempt to determine vicarious liability with reference to semantic discussions about the various rules and catch-phrases used by courts in the past.<sup>154</sup> Rather, the question should revolve around whether the conduct of the employee was ‘sufficiently related to conduct authorised by the employer’ and this inquiry aims to discover whether a link exists between the ‘creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer’s desires’.<sup>155</sup> To determine the relationship between the risk created by the employer and the wrongs of the employee, factors for consideration include the following open list: the opportunity for abuse of power created by the employee’s scope of service, whether or not the employer’s aims were furthered in the commission of the wrong, whether the delict was closely related to inherent intimacy in the scope of service, the extent of power that the employee had over the victim and the vulnerability of the victim in relation to the employee’s power.<sup>156</sup> In *Bazley* the employer was held vicariously liable for the sexual abuse committed by its employee as the ‘opportunity for intimate control’ and ‘parental... power’ opened the door for sexual abuse of vulnerable children and that this was part of the risk established by the employer.<sup>157</sup> The rule in *Bazley* was applied by the Canadian Supreme Court in *Jacobi v Griffiths*,<sup>158</sup> even though on the facts of *Jacobi* vicarious liability had not been established.

Finally turning to the legal position in the United States of America, the Court relied on the case of *Primeaux v United States* that dealt with a rape committed by a police officer.<sup>159</sup> The majority in *Primeaux* held the employer not liable on the basis that the policeman was off duty and not in uniform.<sup>160</sup> However, the minority, short one vote from constituting the majority opinion, would have held the employer vicariously liable on the basis that the policeman thought it part of his duties to assist a stranded motorist such as the victim and because he had the red police lights flashing from the police vehicle when he approached the victim.<sup>161</sup> On the basis of

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<sup>154</sup> *Bazley v Curry* [1999] 2 SCR 534(‘*Bazley*’).

<sup>155</sup> *Ibid* at para 41 as cited in *K v Minister CC* (note 1 above) at para 38.

<sup>156</sup> *Bazley* (note 154 above) at para 41 as cited in *K v Minister CC* (note 1 above) at para 38.

<sup>157</sup> *Bazley* (note 154 above) at para 58 as cited in *K v Minister CC* (note 1 above) at para 39.

<sup>158</sup> *Jacobi v Griffiths* [1999] 2 SCR 570 as cited in *K v Minister CC* (note 1 above) at para 40.

<sup>159</sup> *Primeaux v United States* 181 F 3d 876 (8<sup>th</sup> Cir 1999)(‘*Primeaux*’).

<sup>160</sup> *Ibid* at 882 as cited in *K v Minister CC* (note 1 above) at para 41.

<sup>161</sup> *Primeaux* (note 159 above) at 887 as cited in *K v Minister CC* (note 1 above) at para 42.

the fine split between the majority and the minority, the Court held that *Primeaux* would not be dispositive of Ms K's case.<sup>162</sup>

The Court in *K v Minister CC* concluded that the above-cited foreign law indicated that the subjective-objective test formulated in *Rabie* (with specific reference to the 'sufficiently close connection' phraseology of the objective leg of the test) was implicitly supported around the globe and therefore it would be applied to the facts at hand.<sup>163</sup> It is in the objective stage of the subjective-objective test that the spirit, purport and objects of the Bill of Rights would have to feature in the sense that the application of the objective enquiry 'should not offend the Bill of Rights or be at odds with our constitutional order'.<sup>164</sup> Applying the subjective-objective test to the facts of *K v Minister CC*, the Court firstly held that the policemen were subjectively acting in their own interests alone.<sup>165</sup> Secondly, according to the objective part of the enquiry, it had to be established whether the rapes committed by the policemen were nevertheless sufficiently closely connected to the employer's business. The objective enquiry was informed by three considerations. (1) The policemen bore statutory and constitutional duties to protect the public and militate against crime. (2) The victim placed her trust in the policemen when they offered to assist her – they were in uniform and the purpose behind police officers wearing uniforms is to make them identifiable to the public as a type of advertisement for help.<sup>166</sup> (3) The policemen's collective conduct constituted both an act and an omission in the sense that the commission was the rape while the omission was the failure to protect the victim from harm – a statement which fits comfortably in the bounds of the abandonment-mismanagement rule first stated in *Feldman*.<sup>167</sup> As Scott indicates, the statement by the Court to the effect that the policemen committed both omissions and commissions simultaneously must be read restrictively to apply only to the determination of vicarious liability and not to the determination of wrongfulness or the general description of conduct.<sup>168</sup>

Synoptically the Court concluded that 'the opportunity to commit the crime would not have arisen but for the trust the applicant placed in them because they were policemen, a trust

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<sup>162</sup> *K v Minister CC* (note 1 above) at para 42.

<sup>163</sup> *Ibid* at para 43.

<sup>164</sup> *Ibid* at para 44.

<sup>165</sup> *Ibid* at para 50.

<sup>166</sup> *Ibid* at para 51.

<sup>167</sup> *Ibid* at para 47, 48 & 53.

<sup>168</sup> Scott (note 1 above) at 478.

which harmonises with the constitutional mandate of the police and the need to ensure that mandate is successfully fulfilled' and on that basis there was an 'intimate connection' between the policemen's conduct and the purpose of their employer, thus resulting in Minister's vicariously liability for the delicts committed by the policemen against Ms K.<sup>169</sup>

The 'new' test for vicarious liability as developed in *K v Minister CC* deserves further comment. The Court ultimately affirmed two main points that have been advanced earlier in this chapter under the previous section relating to the common-law rules of vicarious liability. Firstly, different factual constructions may give rise to vicarious liability – for example the abandonment-mismanagement construction versus the clearer cases where an employee is solely promoting the employer's interests and business. Secondly, the phraseology of 'sufficiently close connection' used in the objective part of the subjective-objective rule is a broad standard that can accommodate many different rules, or, as the Court described them, policy considerations. Therefore the sufficiently-close-connection phrase does not erase the various rules or policy considerations that have been relied on by courts in the past. Instead, that phrase is in fact informed by them. Therefore, depending on the facts, the discharge-of-duty rule could be a relevant policy consideration in giving meaning to the sufficiently-close-connection standard. But the discharge-of-duty rule and all the other rules canvassed in the previous section on the common-law rules of vicarious liability are not rules that exist parallel to or above the sufficiently-close-connection standard. The last-mentioned standard is the overarching standard that is given content to by various rules that will apply, depending on the factual construction that arises.<sup>170</sup>

The reasoning of the Court in *K v Minister CC* with regard to the detailed rules of vicarious liability is welcomed in the sense that, on the one hand, it heeded the international trend of relaxing the semantic formalism of applying the rules of vicarious liability in such a rigid manner that virtually no consideration was afforded to the values and policy considerations underlying the rules, while simultaneously, on the other hand, the Court respected the integrity of the scheme of previous South African decisions heard by the Appellate Division and Supreme Court of Appeal.<sup>171</sup>

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<sup>169</sup> *K v Minister CC* (note 1 above) at para 57.

<sup>170</sup> JA Linscott 'A Critical Analysis of the Majority Judgment in *F v Minister of Safety and Security* 2012 1 SA 536 (CC)' (2014) 17 *Potchefstroom Electronic Law Journal* 2915, 2932 makes a similar argument.

<sup>171</sup> See eg *Calitz* (note 7 above) at 468; Cf *Wagener* (note 66 above) at 282.

Less optimistic about the three main policy considerations in *K v Minister CC* is Fagan. As to the consideration given to the breach of the policemen's duties, Fagan argues that it is a nonsensical consideration because what it comes down to is that the greater the employee's breach of employment duty, the greater the connection to the employee's work.<sup>172</sup> In short, Fagan failed to understand the decision in *K v Minister CC* as a manifestation of a specific factual construction, namely the abandonment-mismanagement construction. The real issue in abandonment-mismanagement cases is that the employee is actually improperly doing his or her work by abandoning the task entrusted to him or her in light of the nature of the work.<sup>173</sup> Therefore, if the nature of the work entrusted to the employee is to positively prevent harm and the employee fails to do so, the employer is vicariously liable for the employee's improper conduct. That principle only applies in such cases. Therefore, if an employee who is charged with the duty to drive a van from location X to Y and in the process parks the car contrary to the employer's instructions and then shoots an innocent victim, the abandonment-mismanagement rule will not apply because the driver's abandonment of the vehicle in itself did not cause the harm and so Fagan's concern should fall away.

As to the consideration given to the exploitation of Ms K's trust and the risk created by the employer, Fagan argues that even though the Minister created a risk in appointing police officers who might rape innocent victims, the Minister did better in appointing them than he would have done if he appointed no police officers at all.<sup>174</sup> Fagan's utilitarian view on this matter fails to recognise that the Minister bears the further duty to implement systems in terms of which employees are properly trained and informed of their duties and that employees need to be regularly evaluated regarding their skills and competencies and that the Minister's accountability for those officials that he or she does appoint is what is truly promoted in *K v Minister CC*.

It is abundantly clear that Fagan and I hold diametrically opposite views regarding what the rules of vicarious liability are and should be. My reasoning up to this point has remained faithful to the stance of the Constitutional Court, while Fagan's position is similar to the one taken by the Supreme Court of Appeal in *K v Minister*. The divergence between Fagan's and my opinion on the matter stems from the divergent theories that underlie our work. As Roederer comments, in the context of the difference between the reasoning of the Supreme Court of

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<sup>172</sup> Fagan (note 36 above) at 195-199.

<sup>173</sup> This is what I understand to be the implication of the argument presented by Wagener (note 66 above) at 281.

<sup>174</sup> Fagan (note 36 above) at 199-204.

Appeal and Constitutional Court in *K v Minister*, there are two main ways of approaching the rules of vicarious liability. One could argue for a narrow and conservative reading of the applicable rules that results in support for the principle that the state should bear no positive duties towards its citizens and neither should private individuals owe each other any positive duties. Alternatively one could argue for a more expansive reading of the rules that recognises the importance of imposing certain duties on the state and private individuals to promote community cooperation.<sup>175</sup> Thus, the divergence in opinions about *K v Minister CC* and similar cases exists because of a disagreement about what values should take preference in cases where the state commits legal blunders.

The overwhelming academic opinion on *K v Minister CC* in the South African context has been in support of the Court's reasoning. For example, Roederer concludes his discussion on the case by commenting that the 'process of the decision, the substantive values that support it, and the conclusion, are all in keeping with a post-apartheid, post-liberal constitutional mind-set'.<sup>176</sup> Scott further applauds the judgment 'for having demonstrated the method in which our common law must be developed when one of its rules is not inconsistent with a specific constitutional provision – like the rule embodying the standard test for vicarious liability – but may still fall short of the spirit, purport and objects of the Bill of Rights'.<sup>177</sup> To conclude, as Mullins SC wrote, the new direction taken by the Court in *K v Minister CC*:<sup>178</sup>

accords with the need for the common law to respond to societal needs and developments. I doubt that the man on the Pretoria/Soweto train would find anything wrong with the proposition that the connection between the wrongful conduct of the policemen and their employment in *K* was sufficient to render the Minister vicariously responsible.

The question now arises as to what the implication of *K v Minister CC* and its constitutionally-inspired approach to vicarious liability has been for subsequent cases. The impact of *K v Minister CC* for cases heard by the Supreme Court of Appeal and Constitutional Court where the vicarious liability of the state was in dispute is discussed directly below.

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<sup>175</sup> C Roederer 'The Constitutionally Inspired Approach to Vicarious Liability in Cases of Intentional Wrongful Acts by the Police: One Small Step in Restoring the Public's Trust in the South African Police Service' (2005) 21 *South African Journal on Human Rights* 575, 579-581.

<sup>176</sup> Roederer (note 175 above) at 606.

<sup>177</sup> Scott (note 1 above) at 478.

<sup>178</sup> Correspondence to the editors by J Mullins 'Article by Professor Anton Fagan 'The Confusions of K' (2009) 126 SALJ 156' (2009) 126 *South African Law Journal* 861. See also the reply in A Fagan 'Letter by John Mullins SC in (2009) 126 SALJ 861' (2010) 127 *South African Law Journal* 363.

### 3.3.2 *The affirmation in Minister of Safety and Security v Luiters*<sup>179</sup> and *Minister of Finance and Others v Gore NO*<sup>180</sup>

In *Luiters* an off-duty policeman negligently shot Mr Luiters, mistaking him for a robber, leaving him paralysed.<sup>181</sup> The High Court held that the policeman concerned ‘subjectively placed himself on duty at the time of the shooting, although he was off duty’ and that he was objectively doing police-work at the time of the incident. Therefore, the Minister was held vicariously liable for Mr Luiters’ injuries.<sup>182</sup> The Supreme Court of Appeal applied the subjective-objective test as formulated in *K v Minister CC* through a constitutional lens and confirmed the High Court’s findings.<sup>183</sup> The Constitutional Court held that it was not in the interests of justice to grant leave to appeal to it because the Minister may not be allowed to circumvent his or her accountability to train policemen properly and that the decision in *K v Minister CC* applied to all deviation cases including those where a policeman is not on duty – the subjective-objective rule detailed in *K v Minister CC* had been derived from *Rabie* where the Minister of Police was held vicariously liable for the conduct of an off-duty policeman.<sup>184</sup> Even though the Court erroneously supposed that the subjective-objective rule was actually applied to the facts of *Rabie* (while in reality the risk rule was applied in that case), the Court’s argument that the Supreme Court of Appeal was correct in applying the decision in *K v Minister CC* in a generalised fashion deserves support. This accords with my argument above that the sufficiently-close-connection standard is a general one to which content is given in different cases with different factual constructions.

The same test was applied in *Gore* which concerned fraud committed by a government employee that caused a tender not to be awarded to the deserving tenderer. Subjectively, the conduct of the government employee was not entirely self-directed<sup>185</sup> and, objectively, following

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<sup>179</sup> *Minister of Safety and Security v Luiters* [2006] ZACC 21, 2007 (2) SA 106 (CC) [2007] 3 BCLR 287 (CC) (‘*Luiters*’).

<sup>180</sup> *Minister of Finance and Others v Gore NO* [2006] ZASCA 98, 2007 (1) SA 111 (SCA), 1 All SA 309 (SCA) (‘*Gore*’). See TJ Scott ‘Middelike Aanspreeklikheid van die Staat weens Manipulasie van ‘n Tenderproses’ (2007) *Journal of South African Law* 569; and J Neethling ‘Middelike Aanspreeklikheid vir ‘n Opsetlike Delik’ (2007) *Journal of South African Law* 616.

<sup>181</sup> *Luiters* (note 179 above) at paras 1-8.

<sup>182</sup> *Ibid* at para 9. The High Court judgment is unreported.

<sup>183</sup> *Ibid* at paras 10-12 citing *Minister of Safety and Security v Luiters* [2006] ZASCA 11, 2006 (4) SA 160 (SCA) (‘*Luiters SCA*’).

<sup>184</sup> *Luiters* (note 179 above) at paras 34-37.

<sup>185</sup> *Gore* (note 180 above) at paras 28-29.

the reasoning in *Japmoco*, the conduct of the employee was aligned to his functions.<sup>186</sup> Therefore, the Minister of Finance was held vicariously liable in that case. Scott concludes in his analysis of *Gore*:<sup>187</sup>

Hierdie uitspraak se grootste meriete, vir sowel teoretikus as praktisyn, is ongetwyfeld geleë in die feit dat die hof nie skroom om 'n werkgewer middellik aanspreeklik te hou vir die bedrieglike (in teenstelling met nalatige) optrede van sy werknemer nie – selfs waar sogenaamde beleidsoorwegings wat met tender-prosedures verband hou, die teendeel sou kon bewerkstellig. Hierdie benadering moet van harte verwelkom word.

### 3.3.3 *On Emphasising the Vulnerability of the Victim: F v Minister of Safety and Security*<sup>188</sup>

A few years later in *F v Minister CC* a girl of 13 years was raped by a police officer who offered her a lift home after being stranded at a club while the officer was on 'standby duty'.<sup>189</sup> That policeman was on standby duty in the sense that he could be required to do police work at any given time and he had been given an unmarked police vehicle for that purpose.<sup>190</sup> When Ms F got into the vehicle she noticed a few dockets lying in the car with the policeman's name and rank written on it, after which the policeman explained that he was a policeman.<sup>191</sup> During the trial Ms F explained that she trusted the policeman because he was a detective.<sup>192</sup> Eventually the policeman digressed from the road away from Ms F's home and proceeded to brutally rape her.<sup>193</sup> Even though the High Court found the Minister vicariously liable for the acts of the policeman on the basis of the test in *K v Minister CC*,<sup>194</sup> the Supreme Court of Appeal

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<sup>186</sup> Ibid at para 30.

<sup>187</sup> Scott (note 180 above) at 580.

<sup>188</sup> *F v Minister of Safety and Security and Another* [2011] ZACC 37, 2012 (1) SA 536 (CC), 2012 (3) BCLR 244 (CC), (2012) 33 ILJ 93 (CC), 2013 (2) SACR 20 (CC) (*F v Minister CC*). See TJ Scott 'Staatsaanspreeklikheid vir Opsetsdelikte van die Polisie – die Hoogste Hof van Appèl kry Nogmaals Bloedneus' (2012) *Journal of South African Law* 541; and Linscott (note 170 above).

<sup>189</sup> *F v Minister CC* (note 188 above) at paras 1 & 8.

<sup>190</sup> Ibid at para 9.

<sup>191</sup> Ibid at para 10.

<sup>192</sup> Ibid at para 13.

<sup>193</sup> Ibid at para 14.

<sup>194</sup> *F v Minister of Safety and Security and Another* [2009] ZAWCHC 101, 2010 (1) SA 606 (WCC), 2009 SACR (2) 639 (WCC) (*F v Minister HC*). For a positive commentary on the High Court decision see TJ Scott 'Middelike Aanspreeklikheid van die Staat vir Misdadige Polisie-Optrede: Die Heilsame Ontwikkeling Duur Voort' (2011) *Journal of South African Law* 135; J Neethling 'Vicarious Liability of the State for Rape by a Police Official' (2011) *Journal of South African Law* 186.

distinguished the current matter from *K v Minister CC* in that the policeman here had not been on duty and therefore bore no duty to protect Ms F from harm.<sup>195</sup>

The Constitutional Court rejected the Supreme Court of Appeal's reasoning and held that the High Court was correct in positively applying *K v Minister CC* to the facts at hand. After revisiting the rules and their underlying reasons as expounded upon in *K v Minister CC*,<sup>196</sup> the Court held that even though the policeman subjectively acted in pure self-interest, the objective policy considerations mentioned in *K v Minister CC* were equally applicable here, namely the constitutional duty borne by the policeman, the abuse of trust and the simultaneous omission and commission of the policeman.<sup>197</sup> As far as the Court was concerned the issue of the policeman's abuse of the trust that Ms F placed in him allowed the court to circumvent the on duty/off duty distinction.<sup>198</sup> Furthermore, the Court here emphasised the abuse of Ms F's vulnerability by the policeman as a further relevant policy consideration that did not feature equally strongly in *K v Minister CC*.<sup>199</sup> Effectively the Court held that even though the policeman had not been on duty in the strict sense of the phrase and even though he had not been in uniform or in a marked police vehicle, he had the capacity to place himself on duty at any given time if the need arose and on the facts of this case he had been identifiable as a policeman and had the opportunity to commit the rape only because of his employment.<sup>200</sup> This finding of the Constitutional Court fits more comfortably in the new, transformative vicarious liability paradigm that was established by *K v Minister CC*.

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<sup>195</sup> *Minister of Safety and Security v F* [2011] ZASCA 3, 2011 (3) SA 487 (SCA), [2011] 3 All SA 149 (SCA), 11 ILJ 32 1856 (SCA). For a critique on the artificial distinction made by the Supreme Court of Appeal, see J Neethling 'Liability of the State for Rape by a Policeman: The Saga Takes a New Direction' (2011) 32 *Obiter* 428; TJ Scott 'Die Hoogste Hof van Appèl Smoor Heilsame Regsontwikkeling' (2011) *Journal of South African Law* 773.

<sup>196</sup> *F v Minister CC* (note 188 above) at paras 40-50. See however the critique raised by Linscott (note 170 above) 2931- 2933 against the difference in wording employed by the Court in *K v Minister CC* and *F v Minister CC*.

<sup>197</sup> *F v Minister CC* (note 188 above) at paras 51-52.

<sup>198</sup> *Ibid* at para 65.

<sup>199</sup> *Ibid* at para 78. Cf the unfounded critique raised by Linscott (note 170 above) at 2938-2942 to the effect that the Court underemphasised police considerations and overemphasised the facts of the case.

<sup>200</sup> *F v Minister CC* (note 188 above) at paras 80-81.



### 3.3.4 Extending the Ambit of *K v Minister CC* in *Minister of Defence v Von Benecke*<sup>201</sup>

It has already been indicated that the finding in *K v Minister CC* has been extended to apply positively to situations where state officials are on standby duty or off duty, as well as to fraud committed by state employees. *K v Minister CC* again found new application in the case of *Von Benecke* where an on-duty military employee who was in charge of weaponry handed over parts of weapons and ammunition to criminals who committed a robbery in which Von Benecke was shot and his partner killed. The court in *Von Benecke* reasoned that before *K v Minister CC*, the Minister of Defence in the present matter would not have been vicariously liable on the reasoning employed in *ABSA* because the military employee had not been authorised to hand over the weapons to non-military personnel.<sup>202</sup> However, even though the military employee subjectively pursued his own interests alone by handing the weapons to a criminal, objectively a close enough connection between his conduct and the business of the employer existed: The main policy consideration underlying cases of vicarious liability concerning the state is that of state accountability.<sup>203</sup>

In this case, similar to the findings in *K v Minister CC* and *F v Minister CC*, there are various constitutional and statutory provisions that indicate the duties borne by the South African Defence Force which ultimately all show that the military has a duty to uphold national security.<sup>204</sup> The employee concerned was under a duty to preserve the weaponry under his control to ensure that it did not end up in the wrong hands and his failure to do that exact task constituted a simultaneous commission and omission thus affirming the abandonment-mismanagement rule as an important consideration in determining the sufficiently-close-connection standard.<sup>205</sup> The opportunity for the employee's mismanagement arose from his employment duties and his access to and knowledge of the weaponry concerned was instrumental to the commission of the delict.<sup>206</sup> As the employer created the risk of harm that

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<sup>201</sup> *Minister of Defence v Von Benecke* [2012] ZASCA 158, 2013 (2) 361 (SCA), (2013) 34 ILJ 275 (SCA) ('*Von Benecke*'). See TJ Scott 'Vicarious Liability for Intentional Delicts – The Constitutional Factor Clinches Liability' (2013) *Journal of South African Law* 348.

<sup>202</sup> *Von Benecke* (note 201 above) at para 13.

<sup>203</sup> *Ibid* at para 15.

<sup>204</sup> *Ibid* at para 17-23. For a concise summary of the various constitutional and statutory provisions, see Scott (note 201 above) at 358.

<sup>205</sup> *Von Benecke* (note 201 above) at para 24-25. See also Scott (note 201 above) at 359.

<sup>206</sup> *Von Benecke* (note 201 above) at para 25.

materialised in this case, the employer should bear the responsibility for that harm.<sup>207</sup> Consequently, the state was held vicariously liable for the conduct of its employee. As Scott notes:<sup>208</sup>

[T]his development may represent the last resort for offering legal protection to a citizenry under the growing threat of a failing civil service. For that reason alone such a development is to be heartily welcomed.

It is clear from the preceding discussion of cases subsequent to *K v Minister CC* that the state cannot avoid taking responsibility for the misconduct of its employees and that the scope of state liability has undergone rigorous expansion in the last decade. As it has been shown throughout this chapter, various commentators have commended this development towards the promotion of the constitutional value of state accountability. However, commentators have become aware of the possibility of an alternative mechanism, instead of vicarious liability, for founding state liability, namely direct liability. Even though the flexible test laid down in *K v Minister CC* for establishing state vicarious liability is capable of covering a number of different scenarios where state employees commit delicts – a test of great practical importance – some theoreticians argue that vicarious liability cannot truly and comprehensively account for the liability imposed on the state in many cases but that direct liability can remedy the theoretical shortcomings of the former.

#### 4 DIRECT LIABILITY AS AN ALTERNATIVE MECHANISM OF STATE LIABILITY

Neethling and Potgieter indicate that the call for replacing the vicarious-liability model for state delicts with a more direct approach is not a novel trend, as the issue had been raised since the 1970s.<sup>209</sup> Interesting for present purposes is that subsequent to *K v Minister CC*, the first voice to raise concerns regarding the theoretical soundness of utilising vicarious liability as the mechanism to impose delictual liability on the state was that of Wagener.<sup>210</sup> According to Wagener, the Court in *K v Minister CC* blurred the distinction between direct and vicarious

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<sup>207</sup> Ibid at para 26.

<sup>208</sup> Scott (note 201 above) at 361.

<sup>209</sup> Neethling & Potgieter (note 7 above) at 78 and the authority cited in fn 29. See also Scott (note 10 above) at 199ff.

<sup>210</sup> S Wagener 'K v Minister of Safety and Security and the Increasingly Blurred Line between Personal and Vicarious Liability' (2008) 125 *South African Law Journal* 673.

liability primarily because it referred to the state's (the employer's) constitutional obligations instead of the employee's employment duties in holding that the state was vicariously liable for the deeds of its employees.<sup>211</sup> Wagener argues that employees do not necessarily bear the same duties as their employers.<sup>212</sup> He further contends that persons in the employ of the state do not owe legal duties to the public as the only holder of constitutional and statutory duties is the state.<sup>213</sup> For these reasons Wagener argues that the Court imposed a type of strict, direct liability on the state and that vicarious liability could not possibly have been the actual mechanism utilised by the Court in coming to its decision.<sup>214</sup>

Soon after Wagener's concerns were raised, the separate concurring judgment in *F v Minister CC* followed in which Froneman J argued that the state's liability should not be 'unduly constrained by the language of vicarious liability' as the state is incapable of acting in any way other than through its employees.<sup>215</sup> Froneman J criticised the breach-of-duty consideration that the Court in *K v Minister CC* slotted under the objective leg of the subjective-objective test for vicarious liability because the breach of a legal duty actually fits more comfortably in the realm of the determination of wrongfulness, which should be established when answering the preliminary question whether the employee himself/herself committed a delict.<sup>216</sup> For Froneman J the way forward would be to recognise that when a police officer breaches a public duty the state should be held directly liable as the state effectively acted through the instrumentality of the policeman. Alternatively, if the police officer breached a private duty then the question should be whether such officer acted in the course and scope of his or her employment.<sup>217</sup>

Applied to the facts of *F v Minister CC*, Froneman J would have held the Minister directly liable in the sense that the policemen owed a public duty to prevent harm to Ms F (in that she placed her trust in the policeman acting in that capacity) and that duty was breached establishing the wrongfulness of the state's conduct.<sup>218</sup> Furthermore, the breach of the duty owed to Ms F was negligent in that the state had knowledge that the policeman concerned had previous

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<sup>211</sup> Ibid at 674.

<sup>212</sup> Ibid at 675.

<sup>213</sup> Ibid at 676.

<sup>214</sup> Ibid at 679-680.

<sup>215</sup> *F v Minister CC* (note 188 above) at para 89.

<sup>216</sup> Ibid at para 104.

<sup>217</sup> Ibid at para 115.

<sup>218</sup> Ibid at para 146.

convictions relating to similar misconduct but that the state took no steps to prevent the reasonably foreseeable harm that materialised for Ms F.<sup>219</sup>

Commenting on the possibility of direct state liability, Neethling and Potgieter argue that *replacing* vicarious liability with direct liability in cases pertaining to state employees would be a radical and unwarranted break with a large body of pre- and post-constitutional precedent.<sup>220</sup> However, the authors argue, following a similar line of reasoning to the separate concurring judgment of Froneman J in *F v Minister CC*, that direct state liability could be an *alternative* mechanism for holding the state liable for the delicts of its employees.<sup>221</sup> Support for the view that direct- and vicarious liability should exist as alternative mechanisms for state liability is also given by Botha and Millard,<sup>222</sup> but is most vociferously favoured and technically expounded upon by Boonzaier.<sup>223</sup>

Boonzaier's view is that courts must demonstrate theoretical clarity on when it is appropriate to rely on either of the two mechanisms for state liability. On the one hand, Boonzaier criticises Froneman J's reliance on direct liability mechanism in *F v Minister CC* because in that case the conduct complained of related to an identifiable wrongdoer who bore a private duty towards the victim not to rape her. It is a private duty in the sense that it is expected of all people to refrain from raping each other, regardless of their employment duties. The only question therefore was whether the state employee's conduct was sufficiently related to his employment duties.<sup>224</sup>

On the other hand, there are cases where direct liability would be more theoretically sound. Those are cases where the state employee bears no private duty towards the victim. A typical example is the issue in *Minister of Safety and Security v Van Duivenboden*.<sup>225</sup> In that case a number of police officers had knowledge of a certain gun possessor's habitual drunkenness and threatening behaviour, yet they failed to confiscate his weapons as required by law. The court held that the failure to confiscate the weapons from the dangerous individual constituted a

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<sup>219</sup> Ibid at para 148.

<sup>220</sup> Neethling & Potgieter (note 209 above) at 80.

<sup>221</sup> Ibid at 89.

<sup>222</sup> Botha & Millard (note 7 above) at 249-252.

<sup>223</sup> Boonzaier (note 8 above).

<sup>224</sup> Ibid at 368.

<sup>225</sup> *Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79, 2002 (6) SA 431 (SCA), [2002] 3 All SA 741 (SCA) ('*Van Duivenboden*').

breach of a legal duty and thus held that the omission of the police was wrongful. Boonzaier argues that the police officers in *Van Duivenboden* would not have borne the duty to confiscate the weapons if they were not members of the police service. In that sense, they bore a public duty as opposed to a private one. In such a case it would be more appropriate to consider the employees as acting as the hands of the state and therefore that state liability should be directly, instead of vicariously, established.<sup>226</sup> The reason why the liability has to be direct, according to Boonzaier, is that the course-and-scope requirement is not the only requirement to found vicarious liability. In the introduction to this chapter it was indicated that two other requirements must also be met, namely an employee-employer relationship must be established and that the employee must have committed a delict in own right. The employees in *Van Duivenboden* would not have committed delicts in their own right but for their employment relationship and by neglecting to enquire whether the employees committed delicts in their own right, the court failed to rationally establish vicarious liability in the true sense of the concept. By holding that the state was vicariously liable for the wrongs of its employees, Boonzaier suggests that the court misrepresents the reality that the state was being held directly liable.<sup>227</sup>

Boonzaier proposes several solutions to the problems that he identifies. Firstly he suggests that the vicarious liability paradigm could continue to dominate the state's delictual liability but only on condition that courts acknowledge that the requirement that the employee concerned must have committed a delict in own right does not need to be met where the state is the employer.<sup>228</sup> Secondly, courts could simply admit that they have been tacitly applying the direct liability model. If courts decide to follow the second option, Boonzaier suggests that they will do well to spell out in more precise terms what conduct of which actors should be regarded as conduct of the state.<sup>229</sup> The third possibility is for the legislature to intervene and to amend the State Liability Act in such a way that a 'separate liability regime' is established whereby a distinct set of rules will govern the state's delictual liability – rules that exist and develop independently of the common-law rules of delict.<sup>230</sup>

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<sup>226</sup> Boonzaier (note 8 above) at 341.

<sup>227</sup> Ibid at 342.

<sup>228</sup> Ibid at 354.

<sup>229</sup> Ibid at 357.

<sup>230</sup> Ibid at 361. The notion of a separate liability scheme for the state is also supported by F du Bois 'State Liability in South Africa: A Constitutional Remix' (2010) 25 *Tulane European and Civil Law Forum* 139.

Boonzaier's view on this matter is the most convincing as he more pertinently stresses the special nature of the state and how its obligations are to be fulfilled. However, following the earlier work of WE Scott<sup>231</sup> and the later work of TJ Scott,<sup>232</sup> my view on this matter is that even the direct model of state liability does not adequately explain when a state employee is in fact acting as the hands of the state. In other words, the question that the direct liability model fails to answer is at what point the state employee is using his or her hands for personal purposes and when the employee is operating on behalf of the state. Even under the direct liability model (and even if a new statutory liability regime were to be introduced) it has to be established whether the conduct of the state employee concerned was sufficiently closely related to the functions of the state so that the state may be held directly liable for that conduct. I shall illustrate the dilemma with an example.

Suppose that there is a policeman, called Cornelius, who is known as such to members of his community. At the same time, he is an elder of the local church. A woman who attends his church and who is resident in the area of his jurisdiction calls him one night alleging that her husband, who escaped from prison, is about to murder her and she requests the policeman's help. The policeman laughs it off. Suppose further that on the evidence Cornelius's failure to intervene factually leads to the woman's murder by her husband and the consequent loss of support that her children suffer once the husband is again arrested. Following the principles in *Van Duivenboden* as detailed by Boonzaier, the police service would have a duty to prevent harm to the victim in the fictitious example. If one accepts for a moment that Boonzaier is correct, then the state could *potentially* be held liable for Cornelius's omission as he is an instrument of the state. It is said that the state would only be *potentially* liable because a thorny conundrum would first have to be answered: Was Cornelius acting as an instrument of the state at the time of his omission or was he simply acting as a private church elder? If he was acting as an instrument of the state, his omission could attract state liability. If he was acting as a church elder neither the church nor Cornelius in his personal capacity would have been held delictually liable.<sup>233</sup> To answer the above question it has to be established whether some link between the policeman's conduct and the functions of the state existed when the delict was committed. That enquiry will ultimately draw from the rules of vicarious liability or some rules so similar to those of the

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<sup>231</sup> Scott (note 10 above) at 201ff.

<sup>232</sup> Scott (note 188 above) at 553ff.

<sup>233</sup> See eg *Van Duivenboden* (note 225 above) at para 19 on the reluctance to impose legal duties to prevent harm on private citizens.

constitutional approach to vicarious liability that the difference between direct and vicarious liability becomes blurred to the extent that the two terms dissipate into the ether of abstract and obscure academic concepts.

Thus, as interesting as the direct/vicarious liability debate may be, the two models inescapably overlap in cases where the state is the alleged wrongdoer. State employees inevitably bear the duties imposed on the state because the state cannot act without those employees (in that sense the delictual liability that they may attract for the state could be described as being direct), while those employees do not always act on behalf of the state as those employees also have private matters to attend to (and to determine in what capacity they act at a given time, considerations relevant to the determination of vicarious liability may become useful). Perhaps then the most accurate description of the mechanism for state liability could be ‘creolised liability’ because it involves a pragmatic piecing together of relevant parts of the direct and vicarious models that, jointly, results in the most accurate recognition of the abstract nature of the state and its unique duties that are carried out by its employees. Obsessing about whether the mechanism is to be called direct or vicarious liability is therefore not in any way useful for practice or for theoretical clarity and tries to oversimplify the complex nature of the state and its liability.

## 5 CONCLUDING THOUGHTS ON STATE LIABILITY IN THE WAKE OF *K v MINISTER CC*

From the discussion in this chapter it is clear that the Court in *K v Minister CC* has laid the foundation for a transformative approach to the doctrine of vicarious liability specifically as it applies to the state. Furthermore, even though the approach is transformative, the Court has established some degree of legal certainty amidst the unfortunately haphazard approach historically employed by the Appellate Division and Supreme Court of Appeal in cases relating to vicarious liability. Moreover, it has been made clear in this chapter that in order to acknowledge the complex nature of the state, its duties and its relationships to its employees, a creolised legal mechanism involving aspects of both direct and vicarious liability is necessary. To summarise and integrate the deductions that have been laid out in this chapter, the following summative points are provided on the creolised legal mechanism that recognises that the state cannot act without the hands of its employees while those employees may act in the capacity of the state or in the capacity of the individual himself/herself:

- (1) The first technical question that must be raised where state employees commit delicts is whether the employee concerned was on duty in terms of his or her employment contract at the time that the delict was committed. According to *Rabie* and *Luiters* it is possible for an off-duty police officer to place himself/herself on duty by conducting police work after hours. In *Rabie* (and in *Wilson* that followed *Rabie*) the court held that the state created a risk by granting police officers the power to place themselves on duty at any given time. In *Ngobo* and *Tshabalala* the courts similarly questioned whether the police officers concerned purported to do police work at the time of the delicts. In *Luiters* the Court held that the policeman who had been on standby duty had subjectively and objectively been engaged in police work at the time the delict was committed. In *Luiters* the subjective-objective test was applied because the Court regarded the facts as fitting into the deviation-case mould. In *F v Minister CC* the Court also held that the matter pertained to a deviation and that it was possible to circumvent the on-duty/off-duty distinction by emphasising how the police officer concerned had abused the victim's trust. Linscott correctly criticises the forcing of these cases into the deviation mould.<sup>234</sup> Plainly understood, the police officers in *Rabie*, *Luiters* and *F v Minister CC* never 'deviated' from their duty as they were never on duty to begin with. These cases factually deal with a different construction altogether that can be called the 'off-duty construction'. However, following the reasoning of *Luiters* and *F v Minister CC*, the test for facts that fit the off-duty construction also involve subjective and objective enquiries as is the case in deviation matters. The small difference between the deviation cases and the off-duty cases is that in conducting the subjective and objective enquiries in off-duty cases, the question is slanted towards determining whether the employee objectively placed himself or herself on duty. In that enquiry, there will necessarily be an overlap between the principles and considerations that are relevant in deviation cases and those that feature in off-duty cases because both situations revolve around the establishment of a sufficiently close link between the employee's conduct and the functions of the state.
- (2) Following *Feldman* as quoted in *K v Minister CC*, if the state employee concerned was on duty according to the terms of his or her service contract it may be useful to question whether the employee completely abandoned the employer's work. This aims to establish whether the facts fit into the deviation-case mould.

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<sup>234</sup> Linscott (note 170 above) at 2933.

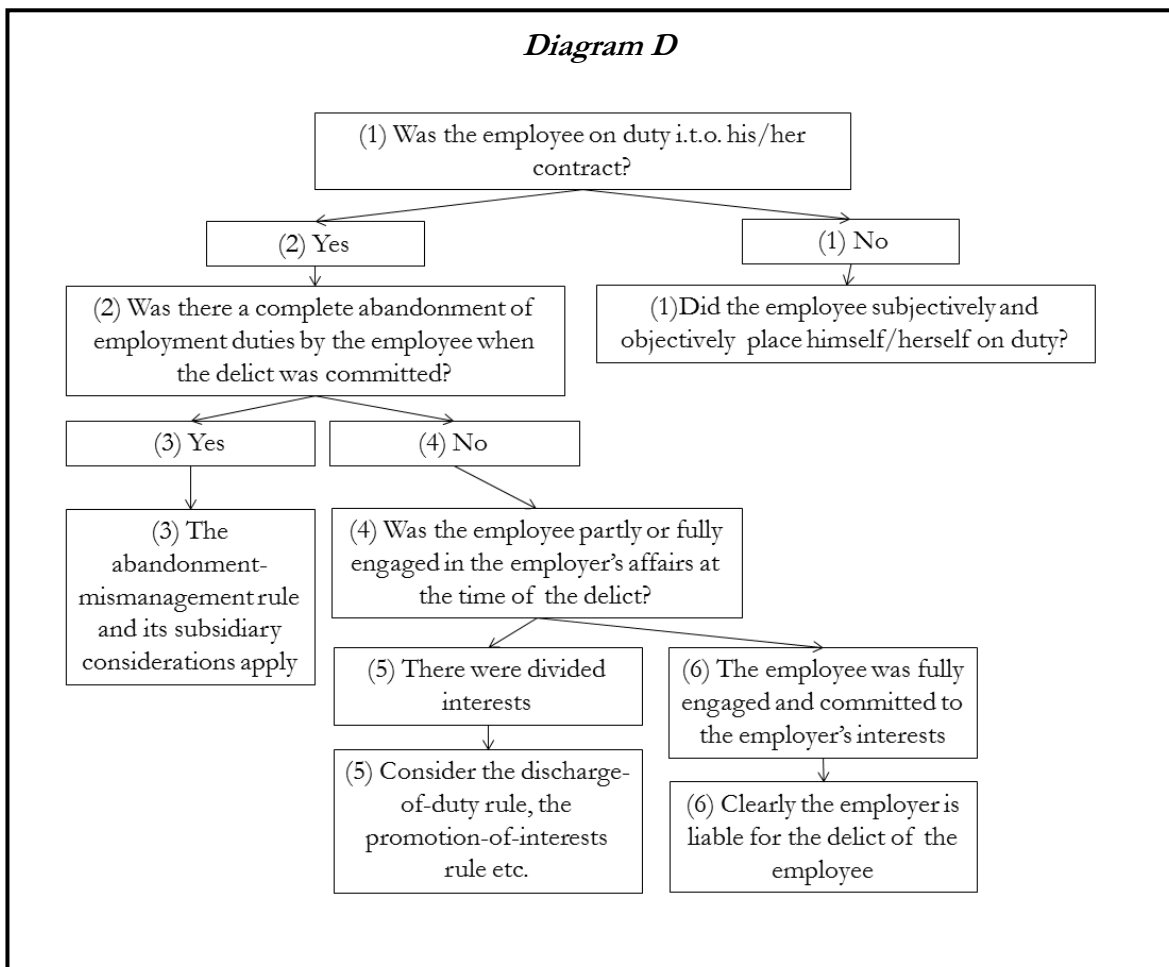


- (3) If there was a complete abandonment of the employer's work, the abandonment-mismanagement rule and its subsidiary rules apply. 'Complete abandonment' means that the employee has subjectively acted in the sole pursuit of his or her own interests. If the employee has subjectively acted completely selfishly, the employer may still be held liable for the employee's conduct if the employee's abandonment constitutes a mismanagement of the work entrusted to him/her. The abandonment will only constitute a mismanagement where the employee has been entrusted with a positive duty to prevent harm and that duty is subsequently breached. The new textbook examples of this are the constructions in *K v Minister CC* and *Von Benecke*. Subsidiary considerations in determining whether the employee mismanaged his or her work by abandonment include, but are not limited to, the trust that the victim may have placed in the employee because of his or her employment, the constitutional and statutory obligations imposed on the employee who acts as the hands of the state and the prevalence of a simultaneous commission and omission if those obligations are breached. Thus, *K v Minister CC* should be interpreted to add considerable substance to the abandonment-mismanagement rule. Alternatively, if it is found that the abandonment of the employee's work in itself did not cause harm to another, no vicarious liability for the employer would follow, as per *McDonald* and *Costa da Oura*.
- (4) If a complete abandonment of the employee's work did not occur, one of two situations may arise by asking the question whether the employee was at least partly engaged in the business of the employer at the time of the delict. In answering this question, consideration will be given to whether the activity that the employee was engaging in was reasonably necessary for properly performing his or her main function (following *Mkize*, cf *Viljoen*) and whether the delict was committed solely for the interests of the employer (as was ultimately done in *Estate Van der Byl* and *Hawkins*).
- (5) If the employee was engaged partly in his or her own affairs and partly in the affairs of the employer (in other words the divided-interests-rule construction), the facts of such a matter would fit into the deviation-case mould. Implicit in the judgment in *K v Minister CC*, the subjective-objective rule will then apply. Objectively, establishing whether there was a close enough connection between the conduct of the employee and the affairs of the employer, a court would consider whether the employee was improperly doing the employer's work (following *Feldman*, quoted with approval in *K v Minister CC*). The discharge-of-duty rule, the promotion-of-employer-interests rule, the authority rule and

the control rule will feature most prominently in cases that fit into this specific mould as was apparent in *Feldman, Marais, Mblongo, Gamble, Macala, Bezuidenbout, Van den Berg, Japmoco* and *Gore* (cf *Ess Kay* and *Phoebus Apollo SCA* that will have to be revisited post-*K v Minister CC*).

- (6) If the employee was engaged solely in the affairs of the employer (on account of the employee’s conduct being reasonably necessary for doing his or her work or because the employer’s interests alone were being promoted) when the delict was committed, this is a straightforward case where the employee was acting in the course and scope of employment and the employer should then be vicariously liable, as was held in *Mkize, Estate Van der Byl, Hawkins, Ngubetole* and as is the implication of *Jordaan*.

For ease of reference the above synopsis of my argument can be illustrated in Diagram D that follows below. In the next chapter the role that constitutional values should play in the determination of state liability will be scrutinised.



# The Role of Constitutional Values in the Determination of State Liability

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## 1 INTRODUCTION

In Chapter 3, under the discussion of *Carmichele v Minister of Safety and Security*,<sup>1</sup> it has been indicated that constitutional rights and the concomitant obligations imposed on the state to protect those rights play important roles in considering whether the common law must be developed. It was further stressed that, according to section 39(1) of the Constitution, the constitutional rights that feature in the process of common-law development must be interpreted in light of constitutional values. In Chapter 4, under the discussion of *K v Minister of Safety and Security*,<sup>2</sup> following *Carmichele CC*, it has been emphasised that most instances of common-law development occur as incremental developments brought about by the application of established rules to ‘new’ sets of facts. Those incremental developments are to be inspired by constitutional imperatives. It was also shown in that chapter that vicarious liability, in a constitutionally modified form, is the most appropriate mechanism for holding the state delictually liable. In light of the aforementioned discussions the present chapter explores in more detail the role that constitutional values play and should play in the establishment of the delictual liability of the state, especially in those cases where incremental developments are brought about to the rules of delict.

The role of the constitutional values of ‘historical self-consciousness’ and ‘state accountability’ (the latter, as complimented by the ‘rule of law’ or ‘legality’) in the common law’s development in cases where the state is the alleged wrongdoer will specifically be considered. Historical self-consciousness is a value that features most prominently in the preamble of the Constitution but it could easily be related to the call in section 1 of that Constitution for the values of non-racialism, non-sexism and the general advancement of human rights and freedoms. State accountability is a specific value mentioned in section 1 of the Constitution that is

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<sup>1</sup> *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22, 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) (‘*Carmichele CC*’).

<sup>2</sup> *K v Minister of Safety and Security* [2005] ZACC 8, 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC) (‘*K v Minister CC*’).

interrelated to the values of constitutional supremacy, the rule of law, responsiveness and openness – which are all founding values of the Republic of South Africa. Mogoeng CJ recently framed the dispute in *EFF v Speaker of the National Assembly*, relating to President Zuma’s failure to pay back the state money spent on improvements made to his private dwelling as follows:<sup>3</sup>

One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck.

The *EFF* judgment is the springboard for the rest of this chapter. In § 2 of the present chapter the preambular call for historical self-consciousness will be unpacked in light of the decision of Davis J in *Geldenhuys v Minister of Safety and Security and Another*<sup>4</sup> and its relation to the philosophical concept of ‘memory’ as an interpretative tool in the determination of the wrongfulness of state conduct. In § 3 the history of the constitutional value of state accountability and its impact on the wrongfulness enquiry into state conduct will be traced. § 4 finally concludes with a critical reflection on the role that constitutional values played in past decisions and what these decisions promise for the future of state liability as well as what the relationship of constitutional values is to the broader constitutional framework provided in Chapter 3 and what these values mean for the utilisation of vicarious liability as a mechanism for holding the state liable as explored in Chapter 4.

## 2 THE PREAMBULAR CALL FOR HISTORICAL SELF-CONSCIOUSNESS AND THE LEGAL TURN TO ‘MEMORY’

### 2.1 Introducing *Geldenhuys HC*

Even though the Court in *Carmichele CC* provided extensive comments on the substantive constitutional provisions and their potential impact on the common law’s development, a key question that the Court did not address in explicit terms is what role South African history should play in the adjudication of common-law development matters. For example, should the

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<sup>3</sup> *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11, 2016 (3) SA 580 (CC), 2016 (5) BCLR 618 (CC)(‘*EFF*’) para 1.

<sup>4</sup> *Geldenhuys v Minister of Safety and Security and Another* [2002] ZAWCHC 2, 2002 (4) SA 719 (C), [2002] 3 All SA 82 (C)(‘*Geldenhuys HC*’).

history of police brutality during apartheid play any role in the determination of wrongfulness of police conduct today? In the judgment of *Geldenhuys HC Davis J* provided a crisp exposition of how a court could show sensitivity to our past.<sup>5</sup> This is the same Judge Davis that co-authored the article on transformative constitutionalism in the context of the development of the common law with Klare that has continuously been referred to in this dissertation,<sup>6</sup> and it is therefore not surprising that a transformative methodology was utilised in this case. It is suggested here that Davis J compellingly employed historical self-consciousness, or as it is referred to in philosophical circles, ‘memory’, in the substantive appraisal of the role that the Constitution should play in evaluating the delictual criterion of wrongfulness in the case at hand. In 2004 the High Court judgment was overturned on appeal,<sup>7</sup> most pertinently on the finding of negligence (and not wrongfulness).<sup>8</sup> Therefore, the constitutional principles pertaining to wrongfulness (and by implication also the court’s invocation of memory) provided in the High Court decision have

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<sup>5</sup> For a broad discussion on this case and related others see J Neethling ‘Delictual Protection of the Right to Bodily Integrity and Security of the Person against Omissions by the State’ (2005) 122 *South African Law Journal* 572.

<sup>6</sup> D Davis & K Klare ‘Transformative Constitutionalism and the Common and Customary Law’ (2010) 26 *South African Journal on Human Rights* 403. Davis J serves as a High Court judge in the Western Cape High Court and in addition he currently fulfils the roles of Judge President of the South African Competition Appeal Court, judge of the Labour Appeal Court and honorary professor at the University of Cape Town – hence the joint role as academic and judge.

<sup>7</sup> *Minister van Veiligheid en Sekuriteit en ‘n Ander v Geldenhuys* [2003] ZASCA 90, 2004 (1) SA 515 (SCA), [2003] 4 All SA 330 (SCA) (*Geldenhuys SCA*). Reasons will later be provided as to why the success of the appeal was unfortunate. For commentary on this case see J Neethling & JM Potgieter ‘Deliksvereistes vir Polisie-Aanspreeklikheid weens Versuim om die Fisiese-Psigiese Integriteit te Beskerm’ (2004) 67 *Journal of Contemporary Roman-Dutch Law* 501; PJ Visser ‘Deliktuele Aanspreeklikheid van Polisie’ (2005) 38 *De Jure* 183; and more recently J Neethling ‘Persoonlikheidsregtelike Beskerming van Staatsgevangenes’ (2014) *Journal of South African Law* 26 at 36.

<sup>8</sup> The Supreme Court of Appeal was not particularly clear on whether the element of wrongfulness had been established on the facts of this case. See the exposition of the element of wrongfulness in *Geldenhuys SCA* (note 7 above) at paras 24-26. At para 26 the court stated that ‘[i]n die onderhawige geval was daar ongetwyfeld 'n regsplig op die polisie om mediese hulp vir Geldenhuys in te roep *indien* enigeen van hulle besef het of redelikerwys moes besef het dat hy sodanige hulp benodig het’ (my own emphasis). The imposition of the legal duty on the police is subject to the condition that one of the police officers reasonably ought to have known that Geldenhuys needed medical assistance. It is not clearly indicated in this part of the judgment whether the police officers reasonably ought to have known this fact. In paras 27-32 the issue of negligence was analysed at length. After the discussion of negligence, at para 33, Brand JA remarked that ‘[d]ie bevinding dat een van die essensiële elemente vir deliktuele aanspreeklikheid ontbreek, bring reeds mee dat Geldenhuys se eis ook nie op hierdie alternatiewe basis kon slaag nie’. On this basis the impression was created that the conduct was wrongful (or that is was not contested by the parties and was therefore accepted as being present) and the case was primarily decided on the basis that negligence had not been proven.

not been expressly discarded by the Supreme Court of Appeal, compared to many other aspects of the judgment that Brand JA was at pains to reject explicitly.<sup>9</sup>

The call for historical self-consciousness stems from the Preamble of the Constitution which reads:

We, the people of South Africa, Recognising the injustices of our past; Honour those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country; and Believe that South Africa belongs to all who live in it, united in our diversity.

Furthermore, the Preamble provides that the Constitution is adopted to:

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; Improve the quality of life of all citizens and free the potential of each person; and Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

Fowkes regards the Preamble as an ‘interpretative aid’ even though its provisions do not give rise to justiciable rights or duties.<sup>10</sup> Drawing from a large body of case law, Fowkes argues that the Preamble’s usefulness has largely been in accentuating the purpose of the Constitution.<sup>11</sup> The

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<sup>9</sup> See eg *Geldenhuys SCA* (note 7 above) at para 44 where the court made the following remark in the context of quantification of damages (which was unnecessary to discuss due to the fact that negligence had not been proven): ‘Ek vind dit nodig ten einde enige moontlike indruk, dat hierdie Hof die Verhoorhof se benadering onderskryf, uit die weg te ruim’. At para 25 the court took the stance that Davis J exaggerated the change in police behaviour since democratisation. However, that sentiment should not by itself be understood to mean that the legal principles pertaining to wrongfulness enunciated by Davis J should be discarded.

<sup>10</sup> J Fowkes ‘Chapter 13: Founding Provisions’ in S Woolman & M Bishop *Constitutional Law of South Africa* (2<sup>nd</sup> Ed, OS, 2006) 3.

<sup>11</sup> Fowkes (note 10 above) at 5-8. Fowkes’ assertions are based on: *Shabalala and Others v Attorney-General of the Transvaal and Another* [1995] ZACC 12, 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC) paras 25-26; *S v Mhlungu and Others* [1995] ZACC 4, 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) (‘*Mhlungu*’) para 112; *Islamic Unity Convention v Independent Broadcasting Authority* [2002] ZACC 3, 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC) para 43; *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* [2002] ZACC 5, 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) para 52; *Kaunda & Others v President of the Republic of South Africa*, [2004] ZACC 5, 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC) paras 218-220; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15, 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) paras 72-73; *Van Vuuren v Minister of Correctional Services* [2010] ZACC 17, 2012 (1) SACR 103 (CC), 2010 (12) BCLR 1233 (CC) para 47; and *The Citizen 1978 (Pty) Ltd v McBride* [2011] ZACC 11, 2011 (4) SA 191 (CC), 2011 (8) BCLR 816 (CC) para 74.

purpose of the Constitution, under the transformative-constitutionalism paradigm, is that it is a manifestation of a decisive break from the authoritarian past towards a new culture of justification where all exercises of power are to be validated in terms of law.<sup>12</sup> Therefore, the Constitution requires its interpreters to be historically self-conscious when giving meaning to the Constitution.<sup>13</sup>

The argument that I develop in the present discussion on *Geldenhuys HC* is that the Preamble will feature in giving content to substantive constitutional provisions that are cited in the process of developing the common law. Due to the fact that the state played the most prominent legal role in the establishment and perpetuation of apartheid and that it should play the most important legal role in the undoing of apartheid, it is posited that the Preamble will feature most glaringly in cases where the state is the alleged wrongdoer in a delictual dispute where the common law is subject to development.

## **2.2 Facts, Background and Legal Problem in *Geldenhuys HC***

John Geldenhuys was a 65-year-old man who was arrested late on Boxing Day evening in 1998 for public drunkenness in Gordon's Bay.<sup>14</sup> He was arrested on account of one Mr Du Toit laying a complaint after Geldenhuys swore at Du Toit's wife. Mr Du Toit retaliated and pushed Geldenhuys to the ground.<sup>15</sup> Even though the testimonies of the police officers were largely contradictory, the following are the undisputed facts. Upon arrival at the police holding cells, Sergeant Stover noted in the file that Geldenhuys was free of any visible injuries. Despite Mr Du Toit's affidavit detailing his retaliation on Geldenhuys, Inspector De Bruyn (who was on duty at the police service centre later that evening) failed to examine whether Geldenhuys had suffered any form of injury.<sup>16</sup>

By the following morning, Inspector Cronje took over from De Bruyn. During his hourly cell inspections he attempted to wake the plaintiff (whose breath no longer smelt of alcohol) to no avail.<sup>17</sup> A paramedic was called to the police station that afternoon by Cronje

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<sup>12</sup> K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 147.

<sup>13</sup> *Ibid* at 150.

<sup>14</sup> *Geldenhuys HC* (note 4 above) at 721G.

<sup>15</sup> *Ibid* at 723H.

<sup>16</sup> *Ibid* at 724F.

<sup>17</sup> *Ibid* at 724G.

where he found an incontinent Geldenhuys with a black eye and a protuberance on his forehead.<sup>18</sup> Geldenhuys was taken to hospital for observation and was operated on by a neurosurgeon to alleviate severe intracranial bleeding.<sup>19</sup> Geldenhuys suffered serious brain damage and essentially sued the Minister of Safety and Security on two alternative grounds, the first being assault by the police officers who were in the employ of the Minister and the second being the negligent failure on the part of the police officers to take notice of Geldenhuys' injuries and to provide him with basic medical care.<sup>20</sup> As insufficient evidence had been presented to the court to prove on a balance of probabilities that the police assaulted Geldenhuys,<sup>21</sup> the second claim was accepted by the trial court.

The fundamental question in this case, relating specifically to the second claim, was whether the omission in question negligently caused the serious brain damage to Geldenhuys. Even though wrongfulness had not been disputed by the Minister, Davis J thought it prudent to consider the element of wrongfulness in order to provide a stern warning to the police to alter their conduct in future matters.<sup>22</sup> The issue of wrongfulness will be discussed in detail here because it is under the court's discussion of that element that the issue of common-law development is pertinent.

## **2.3 Reasoning of the Court in *Geldenhuys HC***

### *2.3.1 Introduction to Aquilian Liability*

It is interesting that Davis J started by defining Aquilian liability in terms of six (and not the conventional five) elements. Voluntary conduct, wrongfulness, capacity of the wrongdoer, fault, causation and loss are listed as these elements.<sup>23</sup> Two of the elements of this definition require closer scrutiny. Firstly, the legal definition of delictual 'conduct' necessarily involves voluntariness and a human wrongdoer.<sup>24</sup> Therefore describing the conduct as being 'voluntary' is either redundant or it is an incomplete descriptor failing to indicate that the conduct must be human. Secondly, 'capacity' is not a separate element of a delict. The Latin adjectival phrase

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<sup>18</sup> Ibid at 722G.

<sup>19</sup> Ibid at 722B-D, I and 723A.

<sup>20</sup> Ibid at 721D-E.

<sup>21</sup> Ibid at 725E.

<sup>22</sup> Ibid at 727E-F

<sup>23</sup> *Geldenhuys High Court* at 727C.

<sup>24</sup> See M Loubser & JR Midgley (eds) *The Law of Delict in South Africa* (2<sup>nd</sup> Ed, 2012) 64; and J Neethling & JM Potgieter *Neethling-Potgieter-Visser Law of Delict* (7<sup>th</sup> Ed, 2015).



commonly used by our courts to describe a person's delictual capacity is *culpa capax*. That literally questions whether the wrongdoer is legally capable of acting negligently. Therefore it is not capacity 'in the air' but rather the capacity to act with fault. The test for capacity is whether the wrongdoer has the 'necessary mental ability to distinguish between right and wrong and if he can also act in accordance with such appreciation'.<sup>25</sup> This test is regarded by our courts as so closely linked to the question of fault that it can be regarded as a *conditio sine qua non* of the fault enquiry.<sup>26</sup> Therefore, in the leading academic works on delict in South Africa, the concept of 'accountability' (capacity) is discussed under the chapter dealing with fault.<sup>27</sup> These are small technical issues of the judgment but they are important to discuss in order to ensure conceptual clarity and consistency. It is worth reiterating that the implication of *Carmichele CC*'s first step in common-law development (weighing the common law against the Constitution) requires a thorough understanding and appreciation of the common law and its paradigm, and therefore conceptual clarity is imperative.

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<sup>25</sup> Loubser & Midgley (note 24 above) at 104-105; and Neethling & Potgieter (note 24 above) at 131.

<sup>26</sup> In *Jones, NO v Santam Bpk* 1965 (2) SA 542 (A) at 552B-C the court made it clear that capacity and fault are inextricably linked: 'It seems to me that once it is established that a child over the age of seven but under the age of 14 has conducted itself in such a manner that its conduct would ordinarily amount to *culpa* or negligence, then there arises the necessity of determining whether that child is *culpa capax*. This question involves an enquiry in relation to the capacity for *culpa* of the particular child. In all the cases quoted the Courts were in reality engaged upon such an enquiry. As in this case, conduct ordinarily negligent was established. Could the particular child be held accountable for such negligence?' In *Neubaus, NO v Bastion Insurance Co Ltd* 1968 (1) SA 398 (A) at 406F-G Potgieter JA stated that he would 'assume for the purpose of this judgment that the *onus* of showing that the boy was *culpa capax* rested on respondent on whom the *onus* rests to show that the boy was negligent', which shows again the close link between fault and capacity. In *Roxa v Mtsbanyi* 1975 (3) SA 761 (A) at 765-766, *Haffejee v South African Rail Ways and Harbours* 1981 (3) SA 1062 (W) at 1065F-H, *Damba v AA Mutual Insurance Association Ltd* 1981 (3) SA 740 (E) at 742G-743C and *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A) at 387F-H the above position was summarised and applied. Authority for the fact that capacity is to be established immediately before negligence is found in *Eskom Holdings Ltd v Hendricks* [2005] ZASCA 46, 2005 (5) SA 503 (SCA), [2005] 3 All SA 415 (SCA) at para 15: '[T]he first inquiry, ie as to capacity, was subjective, while the second, ie as to fault, was objective. In other words, once a child was found to have the necessary capacity, its negligence or otherwise, was to be determined in accordance with the standard of the ordinary (adult) reasonable person.'

<sup>27</sup> Loubser & Midgley (note 24 above) at 104-109; and Neethling & Potgieter (note 24 above) at 131-132;. For purposes of clarity, I shall refer to the constitutional value of state accountability as 'accountability' and the common-law descriptor of *culpa capax* as 'capacity' even though the authors cited in this footnote regard 'accountability' and 'capacity' as interchangeable phrases.

### 2.3.2 *Wrongfulness at 'Common Law'*

After identifying the conduct in question as an omission, the court relied on the 'orthodox approach'<sup>28</sup> for determining the wrongfulness thereof.<sup>29</sup> This orthodox approach is the test laid down in *Ewels*,<sup>30</sup> namely that an omission will be regarded as wrongful if the 'legal convictions of the community require that the omission should be regarded as wrongful and that the loss suffered should be compensated by the person who failed to act'.<sup>31</sup> Davis J then relied on the work of Du Bois to give content to the above test.

According to the judge, Du Bois notes four themes that a court should take into account when assessing wrongfulness: (i) A court will not easily interfere with a contractual allocation of rights and duties. (ii) Conduct is not regarded as wrongful if the application of fault by itself does not properly reflect the defendant's obligations because the law should not interfere with the defendant's decision-making autonomy in the specific case. (iii) Wrongfulness will not be present where the market provides a mechanism that can resolve the dispute, as an alternative to adjudication. (iv) Wrongfulness will not be present if such a finding would open the floodgates of litigation because individuals would have to run around looking after the affairs of others instead of their own.<sup>32</sup>

Applying these elements to the facts of the case at hand, the court noted that no alternative remedy had been available to Geldenhuys and that even though the police require a certain amount of autonomy to function properly, this autonomy is always limited by the constitutional framework. According to Davis J the only potential issue arose with regard to the 'floodgates argument' (a contention that I shall critique below).<sup>33</sup> However, the court pointed out that a duty on police officers to examine their detainees would not cause chaos by opening the floodgates of litigation – those detainees deserve utmost respect for their rights. Those rights can be given effect to by proper hourly cell inspections that are stipulated by the internal rules of the police service. Such an inspection should only take a few seconds per detainee. Therefore, the imposition of a duty on the police to inspect the well-being of their detainees would not cause

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<sup>28</sup> This phraseology is borrowed from F du Bois 'Getting Wrongfulness Right: A Ciceronian Attempt' (2000) *Acta Juridica* 1, 7.

<sup>29</sup> *Geldenhuys HC* (note 4 above) at 727C-E.

<sup>30</sup> *Minister van Polisie v Ewels* [1975] ZASCA 2, 1975 (3) SA 590 (A) ('*Ewels*').

<sup>31</sup> *Ibid* at 597A-B. My own translation.

<sup>32</sup> *Geldenhuys HC* (note 4 above) at 727F-728B.

<sup>33</sup> *Ibid* at 728B-D.

the police to become frantic in busying themselves with the affairs of others.<sup>34</sup> The use of Du Bois's work in this judgment is erroneous at two levels.

At the outset, Du Bois rejects the orthodox objective test for determining wrongfulness that Davis J relied on and therefore the use of the four themes of wrongfulness discussed above is incompatible with the broad legal principle that the judge invoked. On the other hand, if one accepts that Du Bois's four themes constitute a legitimate approach to the determination of wrongfulness (a view which I do not support) then it is my contention that the court failed to apply a more relevant theme to these facts, partly due to a misrepresentation by Davis J of Du Bois's work. These two aspects will now be further explored.

In his thought-provoking article, Du Bois seriously criticises the orthodox approach to determining wrongfulness in the law of delict.<sup>35</sup> This objective approach, based on the legal convictions of the community, is predominantly regarded as a substantive evaluation of the deed of the wrongdoer (as opposed to the test for negligence which judges the wrongdoer rather than her deed).<sup>36</sup> Du Bois rejects this approach on two main grounds. Firstly, he is concerned that the test is too fanciful to provide judges with any legitimate guidance. In other words, the test is based on a gut-feel approach cloaked in a false sense of objectivity.<sup>37</sup> Secondly, he indicates that there can be no true consensus in society about what our shared good morals are, due to the presence of value pluralism – we live in a country with diverse cultures, races, religions and economic standings, each with their own conception of what is right and wrong.<sup>38</sup> Due to these reasons, Du Bois regards the *boni mores* test as arbitrary in that it lends itself to judicial abuse where judges have too much scope to let their personal views influence their judgment.<sup>39</sup> As an alternative to the orthodox approach, Du Bois believes he provides a 'more concrete' approach that does not rely on ad hocery as the *boni mores* test apparently does.<sup>40</sup>

Du Bois proposes a 'reflexive test' to determining wrongfulness. It is reflexive in the sense that the primary question is whether the law 'ought to concern itself with a particular question, or should leave its resolution to other fora which apply different decision-making

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<sup>34</sup> Ibid at 729B-C.

<sup>35</sup> Du Bois (note 28 above) at 5.

<sup>36</sup> Ibid at 7.

<sup>37</sup> Ibid at 8.

<sup>38</sup> Ibid at 11.

<sup>39</sup> Ibid at 13.

<sup>40</sup> Ibid at 14.

criteria'.<sup>41</sup> Wrongfulness will only be found to be present if adjudication can enforce an obligation more effectively compared to another mechanism such as alternative dispute resolution.<sup>42</sup> According to Du Bois's understanding of the law of wrongfulness, court decisions already show implicit silent support for this reflexive approach, and manifests in the law reports as four themes.<sup>43</sup> These four themes are (apparently) hostile to the idea of the *boni mores*.

In light of the above, it is most peculiar that the judge in *Geldenbuys HC* gave content to the *boni mores* criterion with reference to the four themes offered by Du Bois, as these constitute two very different approaches to wrongfulness. Furthermore, it is doubtful whether Du Bois' work can be accepted after *Carmichele CC*. Du Bois's article was published in 2000, before the judgment in *Carmichele CC* in 2001. In *Carmichele CC* the Court gave its full support to the *boni mores* test for determining wrongfulness,<sup>44</sup> which is commendable as it shows respect to consistency of principle and is not as strict and rule-bound as Du Bois's suggested reflexive approach. Following Du Bois's method would be in conflict with the approach accepted by the Constitutional Court and narrows the possible impact of the Constitution in delictual cases.<sup>45</sup>

Even if one accepts Du Bois's approach for determining wrongfulness (which I again emphasise is not my view), the judge in *Geldenbuys HC* incorrectly paraphrased and misinterpreted one of the four themes and therefore relied on the wrong theme, namely the 'floodgates issue'. The first theme (that the judge explains as a court's reticence to interfere with contractual rights and duties) is actually referred to by Du Bois as the reluctance of courts to interfere with 'liabilities [that] have been allocated extra-judicially'.<sup>46</sup> This includes the fact that courts are shy to find delictual wrongfulness purely on the basis of breach of contract,<sup>47</sup> but it

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<sup>41</sup> Ibid at 20.

<sup>42</sup> Ibid at 29.

<sup>43</sup> Ibid at 33.

<sup>44</sup> *Carmichele CC* (note 1 above) at para 42.

<sup>45</sup> In *Loureiro and Others v iMvula Quality Protection (Pty) Ltd* [2014] ZACC 4, 2014 (3) SA 394 (CC), 2014 (5) BCLR 511 (CC) (*Loureiro CC*) at paras 34, 53 & 56 the *boni mores* criterion was regarded by the Constitutional Court as being central to the wrongfulness enquiry. That aspect of *Loureiro CC* has since been (directly and sometimes indirectly) cited with approval by the same Court in *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2014] ZACC 28, 2015 (1) SA 1 (CC), 2014 (12) BCLR 1397 (CC) (*Country Cloud CC*) para 21, *H v Fetal Assessment Centre* [2014] ZACC 34, 2015 (2) SA 193 (CC), 2015 (2) BCLR 127 (CC) para 53, *DE v RH* [2015] ZACC 18, 2015 (5) SA 83 (CC), 2015 (9) BCLR 1003 (CC) para 18; and *Oppelt v Head: Department of Health Provincial Administration, Western Cape* [2015] ZACC 33, 2016 (1) SA 325 (CC), 2015 (12) BCLR 1471 (CC) para 51.

<sup>46</sup> Du Bois (note 28 above) at 33. My own addition.

<sup>47</sup> Ibid at 34.

goes further than the hegemony of contract over delict. Rights and duties are also assigned to parties in legislation and the Constitution. That is why breach of a statutory duty could constitute a wrongful omission, or statutory authority could be invoked as a ground of justification excluding wrongfulness.<sup>48</sup> If one considers the fact that Davis J placed a great deal of emphasis in his judgment on the standing orders that require police officers to inspect their detainees regularly, then this first theme is actually the most prominent one in issue. The remaining three themes were correctly summarised by the court and therefore will not be repeated here.

As a concluding reflection on Du Bois's work, it is worth noting that his four themes are at most a re-grouping of what is known as the crystallised manifestations of the *boni mores* criterion that Neethling and Potgieter allude to in their textbook on the law of delict,<sup>49</sup> and therefore does not contribute anything completely novel to the wrongfulness debate. His belief that 'themes' that act as guidelines to courts will bring more certainty than the 'crystallised manifestations of the *boni mores* criterion' is unfounded and unreasonable. It seems unlikely that the literary resonance of 'themes' will bring more certainty than crystallised rules.<sup>50</sup> At a broader level, his belief that his test for wrongfulness will circumvent any possibility of a judge's 'inarticulate premises' influencing her decisions lacks the legal realist insight that psychological and sociological factors are *always* at play in the process of judgment.<sup>51</sup>

### 2.3.3 *Wrongfulness and Memory*

In light of the fact that the wrongfulness test is an objective one, based on the legal convictions of the community, the question that is answered in this section is what role the history of South Africa should play in this enquiry. Davis J bolstered his wrongfulness argument referred to above by quoting *Carmichele CC*<sup>52</sup> where the Court held that the common law must be developed in light of the 'objective normative value system' of the Constitution.<sup>53</sup> The values of human

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<sup>48</sup> Ibid at 33.

<sup>49</sup> Neethling & Potgieter (note 24 above) at 36-50. Cf Loubser & Midgley (note 24 above) at 144-161.

<sup>50</sup> See eg D Kennedy 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685. Kennedy's argument is that value-judgments (perhaps, thematic arguments) produce more socially equitable, altruistic results due to their pliability to adapt to different sets of facts, whereas rules tend towards a situation of certainty at the cost of socially equitable results.

<sup>51</sup> See eg J Dugard 'The Judicial Process, Positivism and Civil Liberty' (1971) 88 *South African Law Journal* 181, 187-188.

<sup>52</sup> *Carmichele CC* (note 1 above) at para 54.

<sup>53</sup> *Geldenbuys HC* (note 4 above) at 728D-F.

dignity, equality and freedom read with the demand for an accountable and transparent government are of importance here.<sup>54</sup> The court in *Geldenbuys HC* was of the view that the evaluation of constitutional values is not completely abstract and philosophical but is informed by an understanding that the Constitution requires police conduct to break from the past and move towards a constitutional ‘operational vision’.<sup>55</sup>

During apartheid the reality was that human dignity was not a concern of the police and captives were often left to die in police holding cells.<sup>56</sup> The security specialist Cawthra notes that during apartheid, physical abuse (i.e. torture) in holding cells was common, together with neglect of detainees. If detainees died, the responses from police officials typically involved a denial of police involvement and a suggestion that the detainees committed suicide or starved themselves.<sup>57</sup> Davis J abridged the role of memory in common-law development as follows:

The transformation of our legal concepts must, at least in part, be shaped by memory of that which lay at the very heart of our apartheid past. When considering police action, the past is of great importance in assisting to shape legal concepts which are congruent with our constitutional future.<sup>58</sup>

The above constitutional principles confirm the common-law position reflected in *Ewels* that the police owe a legal duty towards detainees to prevent harm being inflicted upon them while in custody. *Ewels* concerned the legal duty imposed on police officers to step in when an off-duty colleague assaults a member of the public.<sup>59</sup> As the facts of *Geldenbuys HC* were different from those in *Ewels*, the common law was accordingly incrementally developed to provide a remedy for the detainee whose physical state was not properly examined by the police while held in their custody.

It is clear that this case followed the type of constitutional framing required by transformative methodology. It is regrettable that the court relied on the concept of ‘values’, at the expense of ‘rights’ which section 8 of the Constitution demands. Following the methodology proposed in this dissertation, this case could have been more powerfully framed in light of the rights to dignity (section 10), physical integrity (section 12) and the rights of detained persons (section 35). Instead, the court fell back on the values of equality, dignity and freedom,

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<sup>54</sup> Ibid at 728G-H.

<sup>55</sup> Ibid at 728H-I.

<sup>56</sup> Ibid at 728I-J.

<sup>57</sup> G Cawthra *Policing South Africa* (1993) at 116.

<sup>58</sup> *Geldenbuys HC* (note 4 above) at 729A-B.

<sup>59</sup> *Ewels* (note 30 above) at 594B-H & 595F.

accountability and transparency which should at most influence the interpretation of the rights suggested above. Despite these shortcomings in methodology, the important observations pertaining to the historical interpretation of the Constitution will now be discussed.

Historical context is a crucial, defining feature of transformative constitutionalism and any legal method inspired by it.<sup>60</sup> The philosophy of transformative constitutionalism is grounded on the metaphor of the Constitution as a bridge from an authoritarian past to a new constitutional culture of justification,<sup>61</sup> or as some have observed, ‘a bridge to new memories’.<sup>62</sup> Specifically in the policing context, this means that the police must ‘transform under fire’.<sup>63</sup> This metaphor was borrowed from Mureinik who robustly observed that the zenith of apartheid was achieved by an ‘ethic of obedience’ where a chain of command filtered down from the ruling party, to parliament, to the bureaucracy (including the police) who commanded South African citizens at ground level, and that this had to change in the post-apartheid context.<sup>64</sup> However, transformation is not simply about crossing this bridge as quickly as possible to leave the past behind us, forgetting about it and pretending as if we have reached the world of Ideal Forms as Plato intended.<sup>65</sup> The usefulness of this bridge lies in our going ‘to and fro’<sup>66</sup> on it – recognising that the past substantively influences the present and can help us to shape a reimagined future. It is clear that the police ‘force’ (as it was then known) had a key role to play in the endurance and promotion of apartheid policies,<sup>67</sup> and if the South African legal community were to rise to the

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<sup>60</sup> Klare (note 12 above) at 150.

<sup>61</sup> Ibid at 147.

<sup>62</sup> K van Marle, I de Villiers & E Beukes ‘Memory, Space and Gender: Re-Imagining the Law’ (2012) 27 *SA Public Law* 559, 572.

<sup>63</sup> M Shaw *Crime and Policing in Post-Apartheid South Africa: Transforming Under Fire* (2002) xi.

<sup>64</sup> E Mureinik ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 *South African Journal on Human Rights* 31, 32. Mureinik emphasised this phraseology found in the postamble to the 1993 Constitution. See also A Singh (2008) *Policing and Crime Control in Post-Apartheid South Africa* 2 who identifies a changed police politics in post-apartheid South Africa, that is, a shift away from a culture of obedience towards a ‘new politics of control coupled with a politics of ethicalization’.

<sup>65</sup> AJ van der Walt ‘Dancing with Codes – Protecting, Developing and Deconstructing Property Rights in a Constitutional State’ (2001) 118 *South African Law Journal* 258, 296.

<sup>66</sup> Van Marle, De Villiers & Beukes (note 62 above) at 572.

<sup>67</sup> Cawthra (note 57 above) at 2 notes that the police were always at the frontline of the enforcement of apartheid. They ensured that, among other things, segregation was maintained, forced removals took place and opposition organisations were targeted and potentially crushed. Their role was essentially a militaristic one that demanded obedience to white minority rule in South Africa (and in our neighbouring countries).

challenge of being ‘historically self-conscious’<sup>68</sup> as Klare proposes, then we as lawyers should realise that our Constitution was not created in a vacuum – it is our duty to work towards remedying the injustices of the past through constitutional interpretation and application because that is what the Constitution was created to do. Two further questions sprout from the recognition of the duty to consider historical context in constitutional interpretation: Firstly, *how* the past should be remembered and, secondly, *which/whose* past should be considered in this endeavour?

The philosopher Snyman explores two possible ways of using ‘memory’ as a coping mechanism to deal with ‘profound social trauma’.<sup>69</sup> Those traumas can either be remembered monumentally or memorially. Monuments celebrate achievements and heroes (that we ultimately see in ourselves), whereas memorials commemorate the dead and victims.<sup>70</sup> What both of these strategies have in common is that it warns observers never to allow the atrocities to be committed, neither against them, nor by them.<sup>71</sup> In short, monuments and memorials caution onlookers to resist forgetting.<sup>72</sup> Where a positivist (who believes in the separation of law and morals)<sup>73</sup> would support the contention that the law should concern itself with forgetting, a purposive interpretive strategy is slanted towards remembering, exactly because it realises the potential role that the law could play in coping with the profound social traumas that Snyman articulates. In light of the fact that the Constitutional Court has endorsed a purposive, contextual

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<sup>68</sup> Klare (note 12 above) at 155.

<sup>69</sup> J Snyman ‘Interpretation and the Politics of Memory’ (1998) *Acta Juridica* 312.

<sup>70</sup> *Ibid* at 317.

<sup>71</sup> *Ibid* at 318.

<sup>72</sup> *Ibid* at 312.

<sup>73</sup> See eg Dugard (note 51 above) at 183.



model of constitutional interpretation,<sup>74</sup> it is useful to explore how our Constitution aims to remember.

Du Plessis indicates that the promises of the Constitution can only be realised if one regards the Constitution as both a monument and a memorial, even though these approaches can be understood as total opposites.<sup>75</sup> He reasons as follows: ‘A nation that only celebrates tends to become oblivious of how meticulous it should guard against the mischiefs of the past. A nation that only commemorates tends to underplay its memorable achievements; thereby denying itself the inspiration it needs to come to terms with an undecided future.’<sup>76</sup> The monumentalism of the Constitution is captured in the miracle of the ‘peaceful transition to a non-racial democracy’ that involved the promulgation of the Constitution.<sup>77</sup> The value-laden section 1 (entrenching human dignity, freedom and equality as the foundations of our state) and section 7 (declaring the Bill of Rights as the cornerstone of our democracy) have ‘monumental flair’ and are supported by ground-breaking judgments that quote these sections.<sup>78</sup> Yet, the Constitution also has a memorial dimension in the sense that we as South Africans ‘[r]ecognise the injustices of our past’.<sup>79</sup> The victims who were silenced in the past must be given voices through the interpretation of the Constitution. Van Marle, De Villiers and Beukes specifically

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<sup>74</sup> For an overview of the purposive method of interpretation see L du Plessis ‘Chapter 32: Interpretation’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Ed, OS, 2006). The essay by D Cornell and N Friedman ‘In Defence of the Constitutional Court: Human Rights and the South African Common Law’ (2011) 5 *Malawi Law Journal* 1, 5-14 contains an insightful discussion of purposive constitutional interpretation as it relates to common-law development. The first post-apartheid Constitutional Court case on the topic of purposive interpretation is *S v Zuma and Others* [1995] ZACC 1, 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC), 1995 (1) SACR 568 (CC), 1996 (2) CHRLD 244 (CC) paras 13-18. Kentridge AJ explained that purposive interpretation involves an engagement with the actual legal text but does not lose sight of the need for a jurisprudence of generosity which seeks to address the mischief of the old constitutional dispensation of our country. See also the following cases for practical applications of the purposive interpretation rule where rights were interpreted in a generous manner: *Mblungu* (note 11 above) at paras 8 and 125; *Pretoria City Council v Walker* [1998] ZACC 1, 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) para 43; and *Khosa and Others v Minister of Social Development and Others*; and *Mablaule and Another v Minister Of Social Development and Others* [2004] ZACC 11, 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) para 47.

<sup>75</sup> L du Plessis ‘The South African Constitution as Memory and Promise’ (2000) 11 *Stellenbosch Law Review* 385, 385-386.

<sup>76</sup> *Ibid* at 393.

<sup>77</sup> *Ibid* at 386.

<sup>78</sup> *Ibid* at 387 and the authority cited in that discussion.

<sup>79</sup> Preamble to the 1996 Constitution.

point out, for example, that women have historically been silenced in South Africa through physical and psychic violence and that a new memory of equality (that the Constitution calls for) is crucially necessary to ensure that the transformative goals of the Constitution are met.<sup>80</sup> This leads to the next question: Which or whose past should be considered in this interpretive challenge that courts face?

De Vos observes that the Constitutional Court has a very specific version of the history that should be used to give context to constitutional provisions.<sup>81</sup> He notes that a ‘grand narrative’<sup>82</sup> (a single, coherent version of history) has been sketched by the Constitutional Court, which involves on the one hand the injustices of apartheid and on the other the manner in which South Africa has transitioned to a constitutionally supreme state.<sup>83</sup> The basis for using this grand narrative is said to be the constitutional metaphor of the bridge that requires a constitutional interpreter to be conscious of the injustices of South Africa’s past.<sup>84</sup> However, De Vos suggests that the true reason why the Constitutional Court opted to sketch a single vision of South African history is to introduce the illusion of some degree of objectivity in its constitutional interpretive practice so that even highly contested political issues (such as the fate of capital punishment) have the deceptive appearance of being easily resolved by the law.<sup>85</sup>

The grand narrative is therefore used in order to avoid the uncomfortable reality that personal political, philosophical, psychological and sociological factors inevitably always find their way into a judgment, while hiding behind the veil of a (supposedly) uncontested, objective history.<sup>86</sup> The fallacy of the objectivity said to be produced by the use of the grand narrative is illustrated by the fact that different outcomes can be achieved on the same facts by using the same narrative of our ‘objective’ history through differing applications of that history.<sup>87</sup> It is nonetheless important to scrutinise the picture of our history sketched by the Constitutional Court more closely to discover why it can nevertheless be said that historical interpretation can

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<sup>80</sup> Van Marle, De Villiers & Beukes (note 62 above) at 570.

<sup>81</sup> P de Vos ‘A Bridge Too Far? History as Context in the Interpretation of the South African Constitution’ (2001) 17 *South African Journal on Human Rights* 1.

<sup>82</sup> *Ibid* at 8.

<sup>83</sup> *Ibid* at 11.

<sup>84</sup> *Ibid* at 10.

<sup>85</sup> *Ibid* at 7.

<sup>86</sup> *Ibid* at 4.

<sup>87</sup> *Ibid* at 28-30 and the case discussion conducted there.

be of great use in the broader transformative project. The grand narrative, as provided by the Constitutional Court, displays signs of both monumentalism and memorialism.

The picture of the injustices of the past is outlined with phrases such as division, conflict, suffering, injustice, violations of human rights, hatred, fear, guilt, revenge, racism and assaults on dignity.<sup>88</sup> The transition negotiated by the white minority government and the black majority evokes images of peace, reconciliation and national unity.<sup>89</sup> Even though this version of South Africa's history is fairly widely accepted by a number of historians, the reality is that history is not quite as determinate and uncontroversial as the courts have suggested. Differing versions of our history could place the focus either on colonialism, capitalism or reverse-apartheid instead of the aspects emphasised in the above description.<sup>90</sup> As De Vos laments, there are simply too many voices, too many events and too many views on what our country's history is for anyone to claim to have the perfect version of it.<sup>91</sup> A further point of criticism against a unitary vision of history is that the conceptual tools of historians change over time – new concepts are constructed that provide a new vocabulary to describe certain events. De Vos refers to the fact that the concept of 'racism' did not exist in 1652 when the Dutch settlers arrived in the Cape and therefore such a concept would not feature in the recorded history of the time.<sup>92</sup> Thus, our interpretation of history must be able to adapt to changing circumstances. As Snyman explains, memorials and monuments (in other words, history) do not necessarily change in form, but can often change in meaning.<sup>93</sup>

The First World War memorial situated in Luxembourg City, *Gëlle Fra*, is such an example. *Gëlle Fra's* original meaning was to commemorate the death of Luxemburgish soldiers who died in World War I. Hitler later ordered its removal but after World War II the statue was re-erected and became a 'symbol of [Luxembourg's] freedom thus sparking off the desperate resistance of a deeply humiliated nation whose only weapon was its bravery'.<sup>94</sup> The memorial's meaning and significance changed due to that country's changing history. The argument is that our Constitution should be able to adapt to changing circumstances, such as our changing

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<sup>88</sup> Ibid at 12.

<sup>89</sup> Ibid at 13.

<sup>90</sup> Ibid at 14-15.

<sup>91</sup> Ibid at 17.

<sup>92</sup> Ibid at 19.

<sup>93</sup> Snyman (note 69 above) at 320.

<sup>94</sup> This narrative appears on a plaque on the statue, observed during a research visit to Luxembourg for purposes of writing this thesis. My own bracketed alteration.

history. Snyman argues that just as the Women's Memorial in Bloemfontein should not simply warn its onlooker about a specific 'fetishized' injustice (in other words the violence perpetrated against Boer Women by the British during the South African War of 1899-1902) but should give a generalised warning that no injustices should be committed in future again.<sup>95</sup> It is unfortunate that the Afrikaner people did not pay heed to such a generalised warning from the Women's Memorial when its government implemented apartheid. It is this type of generalised warning (continuously being able to be applied to different circumstances) that should be used in the constitutional interpretive strategy. The history that is employed must always be subject to adapting to new circumstances and new vocabularies. This is so because in the process of constructing history some voices are always given prominence at the expense of others that are silenced.<sup>96</sup> As De Vos notes, it simply is not good enough to focus only on the systemic exclusion of race and gender, even though these are very important grounds to consider. For example, the reality exists that all religions other than Christianity have been systemically silenced over the years and that there are cases decided by the Constitutional Court where this fact has been completely overlooked because the issue of religious 'othering' does not fall within the scope of the conventional grand narrative of South African history.<sup>97</sup> If one employs the 'generalised warning' strategy proposed above, it will be possible to achieve outcomes that are in line with the social justice demanded by our transformative constitution.<sup>98</sup>

If the transformative promises of the Constitution are to be realised, the Constitution must stay a living and relevant document that is not cemented (and therefore severely limited) by a narrow version of racial and gendered history that simply tells a story of exclusion from voting. A more generalised approach to determining historical context is needed where all forms of injustice are fought against and not only those based on race and gender. South Africa's battles against poverty, religious oppression and (financial) corruption are but a few serious problems that cannot be satisfactorily addressed if 'historical context' in constitutional interpretation is cemented in race and gender relations alone. In this context De Vos concludes: 'What is required is not a rigid, exclusive and nationalistic version of history, but the fragile, self-reflexive and somewhat ironic history of the present.'<sup>99</sup>

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<sup>95</sup> Snyman (note 69 above) at 335.

<sup>96</sup> De Vos (note 81 above) at 20.

<sup>97</sup> Ibid at 23.

<sup>98</sup> Ibid at 26-27 and the cases discussed there that illustrate that point.

<sup>99</sup> Ibid at 33.

With the above in mind, Davis J can be commended for the way in which he reflected on the history of South Africa in his interpretation of the obligations of the police. The judge did not get stuck in the ‘grand narrative’ of black on white violence to give content to the value of dignity but realised that even though both the victim and the police officers concerned were probably white and that the arrest had not been made on political grounds, the police service has a history of gross human rights violations and that this cannot be tolerated today, regardless of the identity of the perpetrators and victims, and regardless of the motive for arrest and detention. The historical consciousness employed in this judgment illustrates how history can be compellingly utilised to reinforce the principle that state conduct will be wrongful if a constitutional or other legal rule is breached without a ground of justification. It is regrettable that the Supreme Court of Appeal made no mention of the importance of memory in its judgment. Instead, Brand JA simply stated that the section 35(2)(e) right of a detainee to adequate medical treatment supports the common-law duty on police to this end. In fact, the Supreme Court of Appeal was of the view that Davis J had exaggerated the change in police behaviour that the Constitution expects.<sup>100</sup> Such criticism is short-sighted and fails to understand that even though the police might have had a common-law duty to provide adequate medical care to its detainees, it did not always fulfil that duty and police officers were quite capable of getting away with the crime of murder, let alone delicts.

Cawthra draws attention to the fact that during apartheid ‘[t]he police [had] increasingly become a law unto themselves; a process aided by the State of Emergency which exonerated police from civil or criminal prosecutions for acts of violence and criminality, provided they were carried out “in good faith”’. This is supported by the observation that ‘...the SAP largely abandoned the concept of the rule of law...’ and ‘[l]ike all South African government organs, the SAP became more and more secretive’, thus making it very difficult for civilians to institute claims against police officers who might not have acted in ‘good faith’.<sup>101</sup> The South African author Antjie Krog, reporting on the South African Truth and Reconciliation Commission, tells the story of Richard Mutase who was assaulted by a police officer during the apartheid era and instituted a claim against the Minister of Law and Order. Shortly after that he and his wife were murdered by the South African Police.<sup>102</sup> Johnson Mlambo’s body was buried while police

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<sup>100</sup> *Geldenhuys SCA* (note 7 above) at para 25.

<sup>101</sup> Cawthra (note 57 above) at 3.

<sup>102</sup> A Krog *Country of My Skull: Guilt, Sorrow and the Limits of Forgiveness in the New South Africa* (1998) at 106.

officers urinated in his mouth. Indres Naidoo and others were sodomized while in custody.<sup>103</sup> Bram Fischer was repeatedly refused medical treatment which eventually led to secondary cerebral injuries that ultimately caused his death.<sup>104</sup> The futility of instituting civil claims against the police was exacerbated by the fact that numerous inquiries into police delicts concluded that it was uncertain whether the police or the military were responsible for the injuries and to save time and costs no court case should follow.<sup>105</sup> To quote the famous answer provided by Sheperd Lekotse to the question why he did not make a case against the police for assault:<sup>106</sup>

We never took any initiative to report this matter to the police, because how can you report policemen to policemen? They were going to attack us. That is why I said to them, 'Kill us all so that there is no trouble thereafter. It is much better to die – all of us'.

Thus, even though rules might have been in place to hold police officers accountable during apartheid, the jurisprudence of police delicts remained, to some extent at least, underdeveloped. As the security specialist Shaw writes, the apartheid system of police accountability was poorly developed or non-existent.<sup>107</sup> The dawning of a non-racial democracy in South Africa demands a more accountable police service.<sup>108</sup>

The only insightful contribution that Brand JA offered in addition to what Davis J outlined, is that the omission in question would undoubtedly be wrongful if the police officers bore special knowledge of Geldenhuys' condition and failed to obtain the necessary medical assistance,<sup>109</sup> thus illustrating that the existence of a 'special relationship' between the wrongdoer and the victim could also justify a finding of wrongfulness in a case such as this.<sup>110</sup> For the sake of completeness, the High Court and Supreme Court of Appeal's finding on negligence and causation are summarised directly below.

## 2.4 Concluding Thoughts on *Geldenhuys HC*

Davis J held that the failure of the police officers to notice Geldenhuys' injuries and speedily to obtain the necessary medical care to treat his condition had been negligent. The police officers

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<sup>103</sup> Ibid at 264.

<sup>104</sup> Ibid at 269.

<sup>105</sup> Ibid at 58-59.

<sup>106</sup> Ibid at 284.

<sup>107</sup> Shaw (note 63 above) at 13.

<sup>108</sup> Ibid at 37.

<sup>109</sup> *Geldenhuys SCA* (note 7 above) at para 26.

<sup>110</sup> Loubser & Midgley (note 24 above) at 222; and Neethling & Potgieter (note 24 above) at 69-71;

had knowledge of the altercation that had taken place between Du Toit and Geldenhuys, yet they either ignored his injuries or did not take the trouble to inspect him for possible injuries.<sup>111</sup> The court was concerned that the inadequate and inconsistent evidence produced by the three police officers in question created the impression that they had acted unreasonably.<sup>112</sup> Phrased differently, their evidence came across as being a smokescreen to cover guilty consciences and their cover-up had to be rebuked. The Supreme Court of Appeal disagreed with this finding. Brand JA held that the police officers could not be blamed for mistaking Geldenhuys' symptoms with drunkenness because his breath smelt of alcohol and the evidence showed that even medical practitioners often confuse head injuries with drunkenness.<sup>113</sup> Furthermore, there was no evidence to show that if Geldenhuys had been inspected, any visible injuries would have been observed, which leads to the next issue of causation.<sup>114</sup>

As to the question of whether the omission caused the damage to Geldenhuys, Davis J identified factual causation as the determining issue in dispute. The neurosurgeon who operated on Geldenhuys testified that the prognosis could have been different if the operation had been conducted at an earlier stage.<sup>115</sup> Thus, but for the omission, the damage incurred could have been reduced. The Minister's expert witness who had been called to counter this evidence was described by the court as a hired gun who fought a case for the Minister instead of giving an objective account of the facts and his evidence was consequently disregarded.<sup>116</sup> Brand JA on the other hand found that factual causation had not been proven, one reason being that both neurosurgeons were of the view that irreparable brain damage had occurred at the moment of impact to Geldenhuys' skull, and therefore whether or not the police inspected him and gave him medical care the result would ultimately be the same.<sup>117</sup> Another reason was that no evidence had been produced to show the exact time at which the bleeding on the brain could have been stopped and therefore the operating neurosurgeon's statement that the result 'should surely have been different' did not meet the balance of probabilities standard.<sup>118</sup>

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<sup>111</sup> *Geldenhuys HC* (note 4 above) at 730B-D.

<sup>112</sup> *Ibid* at 730D.

<sup>113</sup> *Geldenhuys SCA* (note 7 above) at para 29.

<sup>114</sup> *Ibid* at para 30.

<sup>115</sup> *Geldenhuys HC* (note 4 above) at 731E.

<sup>116</sup> *Ibid* at 732G. See the reasons provided for this description of the witness at 733.

<sup>117</sup> *Geldenhuys SCA* (note 7 above) at para 34.

<sup>118</sup> *Ibid* at para 39.

Davis J awarded Geldenhuys a total of R1 036 720 in damages with costs. It was made clear that the inconsistent testimonies of the police officers and their inability to explain clearly why they did not properly examine Geldenhuys formed the basis for the decision.<sup>119</sup> Remembering the carelessness and callousness of police brutality in the past sketched the outline of a path (later filled in with the detailed legal position) towards the success of Geldenhuys' claim. The one point of criticism to be raised against Davis J's judgment is perhaps that the judge was at such pains to reprimand the police officers for their misbehaviour that he lost sight of the fact that the elusive Mr Du Toit who 'sorted Geldenhuys out'<sup>120</sup> and who regularly visited the police cells that evening to check up on Geldenhuys' condition (possibly with a guilty conscience) was conceivably the person who should have been held liable for the injuries inflicted upon Geldenhuys and not the police. By that I do not suggest that the police should have escaped all liability. Their responsibility should simply have been determined through the appropriate disciplinary measures.<sup>121</sup>

Even though Davis J's account of the prolific impact that memory could play in common-law development is commendable and should be taken seriously in future cases, it would have been better suited here in a disciplinary hearing against the police officers. In other words, it should not be denied that the police officers acted inappropriately. However, that fact alone should not outweigh the evidence in this case emphasised by Brand JA that showed that the factual cause of Geldenhuys' injuries had been the initial blow to his head and not the failure of the police to look after the detained Geldenhuys. It therefore seems sensible that Brand JA upheld the appeal in favour of the Minister and left Geldenhuys without any compensation for his injuries.<sup>122</sup> The subtext of my concluding argument on the *Geldenbuys* judgments is that there are different ways in which the state can be held accountable. The discussion of the constitutional value of state accountability is taken further in the next section.

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<sup>119</sup> *Geldenbuys HC* (note 4 above) at 726.

<sup>120</sup> *Ibid* at 725A.

<sup>121</sup> Section 40 of the South African Police Services Act 68 of 1995 makes provision for disciplinary proceedings against police officers.

<sup>122</sup> *Geldenbuys SCA* at par 44.



### 3 THE FOUNDING VALUE OF STATE ACCOUNTABILITY

#### 3.1 Introducing State Accountability

The requirement that the state must be held accountable is embedded in various constitutional provisions. Section 1(d) of the Constitution stipulates '[u]niversal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness' as a set of founding values of the Republic of South Africa. Section 41(1)(c) burdens all spheres of government and all organs of state to 'provide effective, transparent, accountable and coherent government for the Republic as a whole'. Various members of the executive, at different levels of government, are to be held accountable for their conduct as laid down in sections 92, 93, 133 and 152. The accountability of government, organs of state, institutions supporting democracy, public and security services is overseen by the National Assembly as required by sections 55(2), 181(5), 195(f), 196(5), 199(8) and 215(1). The National Assembly itself must have rules in place to ensure its own accountability in terms of section 57(1)(b) and the same is true regarding the National Council of Provinces (section 70(1)(b) and 114(2)(a), 116(1)(b)).

The collection of constitutional provisions that establishes the need for an accountable state resonates well within the new 'culture of justification' that Mureinik and Klare identify as the paradigmatic core that the Constitution requires to ensure an effective democratic transition.<sup>123</sup> An appraisal of a transformative vision for state liability in South Africa would therefore be incomplete without an evaluation of the role of the value of state accountability in the determination of the wrongfulness of state conduct. Commenting on section 1 of the Constitution, Fowkes reads the founding values enshrined in that section as 'descriptive principles'.<sup>124</sup> Fowkes describes the function of section 1 in light of the decision in *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* where the Constitutional Court commented as follows:<sup>125</sup>

The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of section 1 itself, but also from

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<sup>123</sup> Klare (note 12 above).

<sup>124</sup> Fowkes (note 10 above) at 8.

<sup>125</sup> *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* [2004] ZACC 10, 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) para 21.

the way the Constitution is structured and in particular the provisions of Chapter 2 which contains the Bill of Rights.

Following Fowkes' reasoning, even though section 1 does not create a 'right' to an accountable government, the section does impose 'obligations' on the state that may be enforced in various ways.<sup>126</sup> Price explains that the obligation imposed on the state to act accountably can take one of two forms: On the one hand the state may need to 'explain or justify' its actions. In this regard one may consider, for example, the administrative-law right that a person has to written reasons where they have been adversely affected by administrative action.<sup>127</sup> On the other hand the state may need to be held responsible because in some instances the state must bear the 'adverse normative consequences' of its conduct.<sup>128</sup> In this regard one may consider, for example, the possibility of holding a state functionary politically accountable by voting him or her out of office or through the issuing of public declarations of the wrongdoing by the state. Legal methods of ensuring this type of accountability could involve what has been regarded as 'private-law remedies' such as holding the state liable for breaches of contract or the state's delictual wrongs.<sup>129</sup> Alternatively this type of accountability could involve conventional 'public-law remedies' such as criminal punishment, the issuing of declarations or granting of interdicts and even awards for constitutional damages.<sup>130</sup> Price therefore correctly observes, in my view, that there are a wide range of ways in which the state can be held accountable.

In the discussion of the value of state accountability that follows I aim to establish what rules and principles South African courts have employed in deciding how best to give effect to the value of state accountability in the context where the state causes harm to its citizens. This question will be answered by means of a juxtaposition of cases where the value of accountability expressly featured in either establishing the wrongfulness requirement for delictual liability or not. The seminal cases that illustrate the tensile role of the value of accountability in determining

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<sup>126</sup> Fowkes (note 10 above) at 22-24.

<sup>127</sup> Section 33(2) of the Constitution. See also section 5 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

<sup>128</sup> A Price 'State Liability and Accountability' (2015) *Acta Juridica* 313, 315.

<sup>129</sup> *Ibid* 318.

<sup>130</sup> *Ibid* at 316.

the delictual liability of the state are *Fose v Minister of Safety and Security*<sup>131</sup> and *Olitzki Property Holdings v State Tender Board*.<sup>132</sup> *Fose* serves as an example of where a victim of state misconduct succeeded in claiming common-law damages from the state, while *Olitzki* serves as an example of where a victim was unsuccessful in such a claim.

In *Fose* the victim was one of many persons unlawfully and intentionally assaulted by police officers of the Riot and Related Crimes Investigation Unit.<sup>133</sup> The victim claimed common-law damages and satisfaction as well as constitutional damages for punitive reparation.<sup>134</sup> Even though this matter was decided in terms of the 1993 Constitution and no reference was made to the value of state accountability, the judgment laid the blueprint for how courts in future would give content to that value. In deciding whether to award common-law and/or constitutional damages Ackermann J emphasised that section 7(4)(a) of the 1993 Constitution required that ‘appropriate relief’ be given for infringements or threats of infringements of constitutional rights.<sup>135</sup> Appropriate relief was understood to mean a declaration of rights, the granting of an interdict or mandamus, or other relief that includes ‘new’ remedies

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<sup>131</sup> *Fose v Minister of Safety and Security* [1997] ZACC 6, 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) (‘*Fose*’). *Fose* has been referred to or applied in some way in nearly 90 cases. cursory references to *Fose* in journal articles proliferate. However, concise and meaningful commentaries of the judgment can be found in the following journal articles: C Okpaluba ‘Extraordinary Remedies for Breach of Fundamental Rights: Recent Developments’ (2002) 17 *SA Public Law* 98; JC von Bonde ‘State Liability vis-à-vis Victims of Crime in Post-1994 South African Case Law – Something New or a Reinvented Wheel?’ (2009) 30 *Obiter* 211, 213ff; JC von Bonde ‘Victims of Crime in International Law and Constitutional Law: Is the State Responsible for Establishing Restitution and State-Funded Compensation Schemes?’ (2010) 23 *South African Journal of Criminal Justice* 183, 201ff; C Okpaluba ‘The Development of Charter Damages Jurisprudence in Canada: Guidelines from the Supreme Court’ (2012) 23 *Stellenbosch Law Review* 55, 61ff.

<sup>132</sup> *Olitzki Property Holdings v State Tender Board* [2001] ZASCA 51, 2001 (3) SA 1247 (SCA) (‘*Olitzki*’), most pertinently discussed in J Neethling & JM Potgieter ‘Die Handves van Regte en Deliktuele Aanspreeklikheid weens Verbreking van ’n Statutere Voorskrif’ (2002) *Journal of South African Law* 381; C Okpaluba ‘Bureaucratic Bungling, Deliberate Misconduct and Claims for Pure Economic Loss in the Tender Process’ (2014) 26 *South African Mercantile Law Journal* 387; and J Neethling & JM Potgieter ‘Middelike Aanspreeklikheid vir ’n Opsetlike Delik’ (2007) *Journal of South African Law* 616.

<sup>133</sup> *Fose* (note 131 above) at para 11.

<sup>134</sup> *Ibid* at para 13.

<sup>135</sup> Section 38 of the 1996 Constitution reflects this position as a court may grant ‘appropriate relief’ where constitutional rights are infringed. Furthermore section 172(1)(b) empowers a court hearing a constitutional matter to ‘make any order that is just and equitable’. For a thorough consideration of appropriate remedies in terms of the Constitution see M Bishop ‘Chapter 9: Remedies’ in S Woolman & M Bishop *Constitutional Law of South Africa* (2<sup>nd</sup> Ed, OS, 2006).

that serve to protect constitutional rights.<sup>136</sup> The so-called new remedies could include the award for public-law or constitutional damages that can be ordered in cases where the common law does not provide an adequate remedy for a victim of state malfeasance, as evidenced by a large body of foreign law.<sup>137</sup>

Ackermann J held that the common law may in many cases be far-reaching enough to afford appropriate relief to vindicate the rights of a victim of the state.<sup>138</sup> In the present case the common law provided the victim with a remedy for damages that would be substantial due to the nature of the assault and for that reason additional constitutional damages would not be awarded.<sup>139</sup> In this context the Court explained:<sup>140</sup>

In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal.

Furthermore the Court held that even if constitutional damages could be awarded in a particular case, those damages could not be 'punitive' in nature because civil trials do not provide the same safeguards as criminal trials that have the ultimate aim of securing punishment of a law-breaker.<sup>141</sup> For purposes of the case at hand the Court eloquently explained as follows why constitutional damages could not be claimed in addition to common-law damages:<sup>142</sup>

In a country where there is a great demand generally on scarce resources, where the government has various constitutionally prescribed commitments which have substantial economic implications and where there are 'multifarious demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform', it seems to me to be inappropriate to use these scarce resources to pay punitive constitutional damages to plaintiffs who are already fully compensated for the

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<sup>136</sup> *Fose* (note 131 above) at para 19.

<sup>137</sup> *Ibid* at paras 25-54 the Court considered the legal positions regarding constitutional damages in the United States of America, Canada, the United Kingdom, Trinidad and Tobago, New Zealand, Ireland, India, Sri Lanka and Germany.

<sup>138</sup> *Ibid* at para 58.

<sup>139</sup> *Ibid* at para 67.

<sup>140</sup> *Ibid* at para 69.

<sup>141</sup> *Ibid* at para 70.

<sup>142</sup> *Ibid* at para 72. Footnotes omitted.

injuries done to them with no real assurance that such payment will have any deterrent or preventative effect. It would seem that funds of this nature could be better employed in structural and systemic ways to eliminate or substantially reduce the causes of infringement.

Hidden in the *Fose* judgment is the argument of Price to the effect that there are different ways of holding the state accountable. It is left to a court to determine which manifestation of state accountability would be most appropriate for a specific case with its peculiar facts. In *Fose's* case the most appropriate mode of effecting accountability was through awarding common-law damages. However, this is not always the most appropriate way to hold the state to account.

In *Olitzki*, also heard under the 1993 Constitution, the victim of state impropriety unsuccessfully tendered for the provision of office space for the Gauteng Provincial Government.<sup>143</sup> The victim claimed common-law damages based on the breach of the relevant constitutional provisions relating to tender procurement as well as constitutional damages based on a breach of the constitutional right to just administrative action.<sup>144</sup> Both claims were premised on the fact that the Gauteng Provincial Government had fettered the decision of the State Tender Board resulting in the tender being awarded to an ill-chosen party.<sup>145</sup>

As to the claim for common-law damages the court held that the question to be asked in a case such as this is whether the State Tender Board had a duty to refrain from causing harm to Olitzki Property Holdings.<sup>146</sup> This question relates to the determination of wrongfulness. The court emphasised that the wrongfulness enquiry involves a value judgment questioning whether the legal interest of the victim in question is worthy of legal protection. It is a value judgment as it requires a court to consider the 'general criterion' of reasonableness in its evaluation, considering morality, public policy and the legal convictions of the community that must today be understood to be underscored by constitutional norms.<sup>147</sup> Relying on the decision in *Knop v Johannesburg City Council*,<sup>148</sup> the court in *Olitzki* reiterated that in cases where the wrongfulness of statutory breaches had to be determined the statute in question had to be read as a whole with due regard paid to the statute's objects and the mischief that it seeks to address. The mere fact that a statutory duty has been infringed does not *ipso iure* lead to a finding of wrongfulness – it

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<sup>143</sup> *Olitzki* (note 132 above) at para 4.

<sup>144</sup> *Ibid* at para 5.

<sup>145</sup> *Ibid* at para 7.

<sup>146</sup> *Ibid* at para 10.

<sup>147</sup> *Ibid* at para 11.

<sup>148</sup> *Knop v Johannesburg City Council* [1994] ZASCA 159, 1995 (2) SA 1 (AD), [1995] 1 All SA 673 (A) ('*Knop*').

must be determined whether it is ‘reasonable in the circumstances’ to compensate the victim for the infringement.<sup>149</sup>

In *Olitzki* the statutory breach related to section 187 of the 1993 Constitution that required the public procurement system to be regulated by national and provincial legislation that had to create tender boards and provided that decisions of those tender boards had to be free from improper interference.<sup>150</sup> However, according to the court, no helpful guidance was provided by the 1993 Constitution or the old State Tender Board Act<sup>151</sup> as to whether an award for damages could or could not be granted for the breach of its provisions.<sup>152</sup> Instead, what the Act and the 1993 Constitution implied was that a party aggrieved by a Tender-Board decision had the remedies of review or interdict at their disposal.<sup>153</sup>

The court then held that it would not accord with the tenets of reasonableness, constitutionally understood, to impose a double burden on the state to pay for the services rendered by the successful tenderer and for the damage suffered by the unsuccessful tenderer.<sup>154</sup> In the earlier High Court judgment of *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* Davis J held that ‘the value of accountable government is promoted by ensuring that citizens have some form of relief against their government when the latter causes them harm pursuant to an operational decision’.<sup>155</sup> Following *Faircape HC* to the effect that the spirit, purport and objects of the Bill of Rights now inform the legal convictions of the community and that the constitutional norm of accountability gives content to the legal convictions of the community,

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<sup>149</sup> *Olitzki* (note 132 above) at para 12.

<sup>150</sup> Section 187 read as follows: ‘(1) The procurement of goods and services for any level of government shall be regulated by an Act of Parliament and provincial laws, which shall make provision for the appointment of independent and impartial tender boards to deal with such procurements. (2) The tendering system referred to in subsection (1) shall be fair, public and competitive, and tender boards shall on request give reasons for their decisions to interested parties. (3) No organ of state and no member of any organ of state or any other person shall improperly interfere with the decisions and operations of the tender boards. (4) All decisions of any tender board shall be recorded.’ The reflective provision in the 1996 Constitution is section 217 which does not need repetition here.

<sup>151</sup> State Tender Board Act 68 of 1986.

<sup>152</sup> *Olitzki* (note 132 above) at paras 15-21.

<sup>153</sup> *Ibid* at para 26.

<sup>154</sup> *Ibid* at para 30.

<sup>155</sup> *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* 2002 (6) SA 180 (C)(‘*Faircape HC*’) 195B.

the court in *Olitzki* rejected the victim's claim for common-law damages based on a breach of the constitutional and legislative procurement provisions, concluding as follows:<sup>156</sup>

The principle of public accountability is central to our new constitutional culture, and there can be no doubt that the accord of civil remedies securing its observance will often play a central part in realising our constitutional vision of open, uncorrupt and responsive government. What precise remedy or remedies within the range available, including interdict (mandatory or prohibitory), review and the award of damages (whether for out-of-pocket losses or more), will be appropriate to secure that vision, depends however on the context of the statutory provision in question; and in section 187 I can find no basis of interpretation and no applicable principle of public policy entitling the plaintiff to claim its lost bargain.

As to the claim for constitutional damages based on a breach of the victim's right to just administrative action, the court held that the victim could have interdicted the irregular tender from being awarded because the victim knew about the improper interference with the Tender Board's decision before the tender was awarded.<sup>157</sup> Thus, if the victim had applied for an interdict it would not have suffered the loss in question. The existence of alternative remedies, other than damages of some kind, is therefore a crucial consideration in determining what the appropriate relief for the infringement of constitutional rights would be.<sup>158</sup> The appropriate remedy here would have been the then relevant remedy of common-law review,<sup>159</sup> as that remedy heeds the concerns raised by the Constitutional Court in *Fose* regarding the unnecessary depletion of state funds through the over-enthusiastic granting of claims for damages against the state.<sup>160</sup> The claim for constitutional damages therefore also failed in *Olitzki*.<sup>161</sup>

The importance of the tension between the *Fose*- and *Olitzki* constructions is this: In some cases damages will best give effect to the need to hold the state accountable for its breaches of constitutional rights; however that will only be true where no remedy other than damages can effectively vindicate a victim's rights. When speaking about 'damages' in this context it must be noted that a claim for constitutional damages will only be considered on condition that common-law damages cannot or should not be claimed, in other words that no remedy can vindicate the victim's rights other than constitutional damages. As will be shown in the remainder of this chapter, cases where victims have succeeded in claiming common-law

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<sup>156</sup> *Olitzki* (note 132 above) at para 31.

<sup>157</sup> *Ibid* at para 37.

<sup>158</sup> *Ibid* at para 38.

<sup>159</sup> This remedy is now found in section 8 of PAJA.

<sup>160</sup> *Olitzki* (note 132 above) at para 41.

<sup>161</sup> *Ibid* at para 42.

damages (under the guidance of the norm of state accountability) mostly related to instances where state conduct resulted in some type of physical bodily harm, as evident in *Fose*. Cases where victims were the least successful in claiming common-law damages related to ‘pure economic loss’, that is in broad terms, financial loss that does not arise from physical harm to property or the person,<sup>162</sup> fitting into the *Olitzkei* mould. Constitutional damages appear to feature only in those cases where neither the conventional public-law remedies, nor common-law damages provide the requisite protection of victims’ rights.

### 3.2 Upholding State Accountability By Means of Common-Law Damages

When an individual has already suffered some type of harm to his or her person due to the state’s misconduct, prohibitory or mandatory interdicts, declarations of rights and reviews of decisions offer little or no effect in restoring that victim’s confidence in the state. It therefore comes as no surprise that where the state negligently caused physical harm to an individual, a common-law damages claim is often regarded by courts as being the most effective remedy to vindicate such a victim’s rights. The present discussion aims to show that the constitutional value of accountability most prominently requires a positive finding of wrongfulness (and therefore the imposition of an award for common-law damages) in cases where the state negligently inflicted physical harm on individuals.

Even though *Minister of Correctional Services v Tobani*<sup>163</sup> was only reported in 2003, the judgment had already been delivered in 2000. That means that this case was decided after *Fose* but before *Carmichele CC*. For that reason *Tobani* indirectly reflects the theme of accountability as was the case in *Fose*, without serious reliance on section 39(2) as was the case in *Carmichele CC*. In *Tobani* the Eastern Cape Division of the High Court was faced with a matter where the victim, a trial-awaiting prisoner, was detained in an overcrowded prison for 203 days after the charges against him had been dropped.<sup>164</sup> Jones and Govender JJ held that the right to individual liberty is so important that the state must have an objective ground of justification for violating that right.<sup>165</sup>

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<sup>162</sup> Loubser & Midgley (note 24 above) at 228-233; and Neethling & Potgieter (note 24 above) at 305-313.

<sup>163</sup> *Minister of Correctional Services v Tobani* 2003 (5) SA 126 (E)(‘*Tobani*’). See also J Neethling ‘Constitutional Compatibility of the Common Law of Wrongful and Malicious Deprivation of Liberty as *Iniuriae*’ (2004) 121 *South African Law Journal* 711.

<sup>164</sup> *Tobani* (note 163 above) at 131A-B.

<sup>165</sup> *Ibid* at 133F-G.



The common-law requirement that the state must be able to justify objectively the detention of all persons in its custody (often referred to as the common-law ground of justification of ‘statutory authority’)<sup>166</sup> is in line with the constitutional principle of legality (or rule of law) enshrined in section 1(c) of the Constitution.<sup>167</sup> The lawfulness of the state’s detention of awaiting trial prisoners is regulated by the Correctional Services Act and strict adherence to the rules laid down in that Act must be observed.<sup>168</sup> The court ultimately found the conduct of Correctional Services to be wrongful and therefore actionable because of the breach of a statutory duty (in other words the breach of the constitutional standard of legality) and because the principle of legality required an improvement in the administration of South African jails.<sup>169</sup> Even though this judgment makes no reference to the constitutional norm of accountability, this decision is certainly in line with that norm. The court in *Tobani* ultimately explained that the first step in determining the wrongfulness of state conduct would be to ask whether the state acted within the scope of its legal authority or not and that such an enquiry requires the state to *justify* its conduct. The requisite process of justification fits well within the realm of the constitutional value of accountability. It will be shown below that this concealed theme in *Tobani* was tacitly accepted in the cases discussed in the rest of this chapter.<sup>170</sup>

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<sup>166</sup> Ibid at 136F-G.

<sup>167</sup> Ibid at 134B-D & 136H-I.

<sup>168</sup> Ibid at 134B-135C. The court referred to the Correctional Services Act 8 of 1958 which has since been repealed by the Correctional Services Act 111 of 1998 read with the Child Justice Act 75 of 2008.

<sup>169</sup> *Tobani* (note 163 above) at 138G-H.

<sup>170</sup> The general tenor of *Tobani* has since been accepted by the Constitutional Court in *Zealand v Minister of Justice and Constitutional Development and Another* [2008] ZACC 3, 2008 (4) SA 458 (CC), 2008 (6) BCLR 601, 2008 (2) SACR 1 (CC) (*Zealand*). The Court in *Zealand* held that where a registrar of the High Court omitted to deliver a release warrant of a prisoner to Correctional Services and the prisoner consequently remained in custody for an extended period of time due to that omission, wrongfulness can be established on the basis of the breach of the constitutional norm of legality (section 1) and the right to freedom and security of the person (section 12). *Zealand* is not discussed in any further detail in this chapter. For discussions of *Zealand* see: C Okpaluba ‘The Right to the Residual Liberty of a Person in Incarceration: Constitutional and Common law Perspectives’ (2012) 28 *South African Journal on Human Rights* 458, 466ff; C Okpaluba ‘Protecting the Right to Personal Liberty in Namibia: Constitutional, Delictual and Comparative Perspectives’ (2014) 14 *African Human Rights Law Journal* 580, 590ff; and W Freedman ‘Constitutional Application’ (2009) 22 *South African Journal of Criminal Justice* 139, 143ff.

In *Minister of Safety and Security v Van Duivenboden* the victim was shot by a civilian, Brooks, who had a drinking problem and a violent disposition.<sup>171</sup> The victim claimed that the police service acted negligently in its failure to confiscate firearms from Brooks, despite having knowledge of his propensity to misuse his firearms,<sup>172</sup> and despite having the authority to do so in terms of section 11 of the Arms and Ammunition Act.<sup>173</sup> On a previous occasion Brooks had pointed his firearm towards his wife while being under the influence, leading to temporary confiscation of the firearm by the police.<sup>174</sup> On another occasion he threatened to kill his wife, children and himself requiring a team of police officers to take control of the situation.<sup>175</sup> Even though Brooks's wife had requested the police to confiscate the firearm after the latter incident, she refused to lay charges against her husband and on that ground the police did not heed her requests.<sup>176</sup> These facts indicate that many police officers knew about Brooks's unsuitability to possess a firearm and had the appropriate authority to confiscate his weapons but failed to do so. The larger segment of the judgment focused on determining whether the omission of the police had been wrongful.

Introducing the wrongfulness enquiry, the Supreme Court of Appeal explained that '[n]egligence is not inherently unlawful'.<sup>177</sup> What this statement really means is that fault and wrongfulness are separate elements of delictual liability and a positive finding of the one does not necessarily imply a positive finding of the other. The court noted that positive acts of negligence that cause physical harm are presumed to be wrongful but that in cases of negligent

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<sup>171</sup> *Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79, 2002 (6) SA 431 (SCA), [2002] 3 All SA 741 (SCA) ('*Van Duivenboden*') para 1. Commentaries that specifically focus on this decision include: J Neethling 'Die Hoogste Hof van Appèl Bevestig die Uityende Verantwoordelikheid van die Staat om die Reg op die Fisies-Psigiese Integriteit in die Lig van die Grondwet te Beskerm' (2003) *Journal of South African Law* 783; A Mukheibir 'Juggling the Elements of Delict' (2003) 24 *Obiter* 262; G Carpenter 'The Carmichele Legacy – Enhanced Curial Protection of the Right to Physical Safety' (2003) 18 *SA Public Law* 252, 257ff; Von Bonde (2009) (note 131 above) at 218ff; and C Okpaluba 'The Law of Bureaucratic Negligence in South Africa: A Comparative Commonwealth Perspective' (2006) *Acta Juridica* 117, 145ff.

<sup>172</sup> *Van Duivenboden* (note 171 above) at paras 2-3.

<sup>173</sup> Arms and Ammunition Act 75 of 1969. Section 11, as amended, provided that the Police Commissioner could declare a person unfit to possess a firearm and seize such a weapon, subject to requirements of procedural fairness. The Arms and Ammunition Act has since been repealed by the Firearms Control Act 60 of 2000. Chapter 12 of the latter Act contains similar provisions regarding declarations of unfitness to possess firearms.

<sup>174</sup> *Van Duivenboden* (note 171 above) at para 5.

<sup>175</sup> *Ibid* at para 6.

<sup>176</sup> *Ibid* at para 8.

<sup>177</sup> *Ibid* at para 12.

omissions, wrongfulness is established if the alleged wrongdoer bore a legal duty to avoid the negligent causation of harm and failed to do so.<sup>178</sup> Additionally the court indicated that even if conduct is said to be wrongful the further element of fault would have to be proven. As to the order of the elements the court noted:<sup>179</sup>

While the enquiry as to the existence or otherwise of a legal duty might be conceptually anterior to the question of fault (for the very enquiry is whether fault is capable of being legally recognised), nevertheless, in order to avoid conflating these two separate elements of liability it might often be helpful to assume that the omission was negligent when asking whether, as a matter of legal policy, the omission ought to be actionable.

This confusing statement of the relationship between the elements of wrongfulness and fault has not escaped criticism. Neethling and Potgieter,<sup>180</sup> as supported by Mukheibir,<sup>181</sup> argue that the court was correct insofar as it suggested that wrongfulness should be established before negligence. However, the court's conceptual clarity on the elements became more blurry once it appeared to suggest that negligence must be assumed for purposes of determining wrongfulness – a suggestion that appears to conflate negligence and wrongfulness.

However, in light of Fagan's review of the law of wrongfulness in South Africa,<sup>182</sup> read with the recent tacit endorsement of his summation on wrongfulness by the Constitutional Court in *Country Cloud CC*, it would appear that the *lex lata* is that wrongfulness and negligence may complementarily overlap in some cases. As the Court in *Country Cloud CC* explains, the fault requirement in the law of delict encompasses both intent and negligence. However, in some

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<sup>178</sup> Ibid.

<sup>179</sup> Ibid. Footnotes omitted.

<sup>180</sup> Neethling & Potgieter (note 171 above) at 788.

<sup>181</sup> Mukheibir (note 171 above) at 265ff.

<sup>182</sup> A Fagan 'Rethinking Wrongfulness in the Law of Delict' (2005) 122 *South African Law Journal* 90 especially at 24ff. See the similar view of FDJ Brand 'Reflections on Wrongfulness in the Law of Delict' (2005) 122 *South African Law Journal* 90. J Neethling & JM Potgieter lashed out against these views in 'Wrongfulness and Negligence in the Law of Delict: A Babylonian Confusion?' (2007) 70 *Journal of Contemporary Roman-Dutch Law* 120. Fagan replied to Neethling & Potgieter in 'Blind Faith: A Response to Professors Neethling & Potgieter' (2007) 124 *South African Law Journal* 285. Neethling now seems to agree that, based on the law that has developed in recent years, there may be some instances where considerations that are relevant for the determination of negligence may also be relevant for the determination of wrongfulness – see 'The Conflations of Wrongfulness and Negligence: Is It Always Such a Bad Thing for the Law of Delict?' (2006) 123 *South African Law Journal* 204 especially at 213-214. Other writers maintain that wrongfulness and negligence should never overlap – see RW Nugent 'Yes, It Is Always a Bad Thing for the Law: A Reply to Professor Neethling' (2006) 123 *South African Law Journal* 557.

cases, a delict will only be actionable if the wrongdoer acted intentionally and not merely negligently.<sup>183</sup> In order for the ‘generalising approach’<sup>184</sup> to the South African law of delict to be maintained, the element of wrongfulness should include a consideration as to whether intent or negligence constitutes the requisite manifestation of fault.<sup>185</sup> It is my view that if this is not the case, ‘fault’, broadly construed, would not be a general element of the definition of a delict but different types of delicts would have different definitions specifying the required form of fault for each delict – undesirably transforming the South African conceptual framework for delict into a casuistic model.<sup>186</sup>

Importantly, the court in *Van Duivenboden* once again confirmed the classic principle from *Ewels* that the legal convictions of the community must be used in determining whether the conduct complained of was indeed wrongful. After surveying the different tests for wrongfulness (or its equivalent) in foreign jurisdictions,<sup>187</sup> the court concluded that wrongfulness is imbued with policy considerations, norms and values that will necessarily differ between jurisdictions, thus illustrating the limits of the usefulness of comparative analyses in the determination of wrongfulness.<sup>188</sup> The court then proceeded to explain that the classical principle of the legal convictions of the community ‘must now necessarily be informed by the norms and values of our society as they have been embodied in the 1996 Constitution’ and that ‘no norms or values that are inconsistent with it can have legal validity - which has the effect of making the Constitution a system of objective, normative values for legal purposes’.<sup>189</sup> These comments are welcomed as they ultimately compliment the Court’s finding in *Carmichele CC* and also heed the words of caution of Neethling and Potgieter to the effect that foreign equivalents of wrongfulness should not be readily accepted into our law as the Anglo-American systems, for example, do not clearly distinguish between the elements of fault and wrongfulness as South African law does.<sup>190</sup>

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<sup>183</sup> *Country Cloud CC* (note 45 above) at para 39.

<sup>184</sup> Loubser & Midgley (note 24 above) at 16; and Neethling & Potgieter (note 24 above) at 4.

<sup>185</sup> *Country Cloud CC* (note 45 above) at para 39.

<sup>186</sup> Loubser & Midgley (note 24 above) at 16; and Neethling & Potgieter (note 24 above) at 4.

<sup>187</sup> *Van Duivenboden* (note 171 above) at paras 14-15.

<sup>188</sup> *Ibid* at para 16.

<sup>189</sup> *Ibid* at para 17.

<sup>190</sup> See eg Neethling & Potgieter (note 24 above) at 55 and 158. Cf A Fagan ‘A Duty without Distinction’ (2000) *Acta Juridica* 49 who argues that the English doctrine of ‘duty of care’ is not completely distinct from the South African ‘legal duty to prevent harm’.

Elaborating on the impact that the Constitution could have on the determination of wrongfulness, the court in *Van Duivenboden* explained that the laissez faire concerns that have historically restricted the imposition of liability for omissions on private parties (who have traditionally been allowed to ‘mind their own business’) do not apply to omissions of public authorities because they are often tasked with the role of protecting the interests of the community. The typical limitations placed on the liability for omissions of the state stem from concerns relating to effective government (in other words that the state must be given the freedom to carry on its business without the constant threat of litigation) and limitless liability (in other words that the state will be held liable for any loss that it causes – a concern that is actually addressed by the elements of negligence and causation).<sup>191</sup> Section 7 of the Constitution makes it clear that the state’s duties are not merely passive, while section 41(1) requires government to be accountable. The court reiterated the dictum from *Olitzki*<sup>192</sup> that civil remedies will often be the appropriate means of ensuring state accountability.<sup>193</sup> However, the court then famously noted:<sup>194</sup>

When determining whether the law should recognize the existence of a legal duty in any particular circumstances what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms. Where the conduct of the state, as represented by the persons who perform functions on its behalf, is in conflict with its constitutional duty to protect rights in the Bill of Rights in my view the norm of accountability must necessarily assume an important role in determining whether a legal duty ought to be recognized in any particular case. The norm of accountability, however, need not always translate constitutional duties into private law duties enforceable by an action for damages, for there will be cases in which other appropriate remedies are available for holding the state to account. Where the conduct in issue relates to questions of state policy, or where it affects a broad and indeterminate segment of society, constitutional accountability might at times be appropriately secured through the political process, or through one of the variety of other remedies that the courts are capable of granting. No doubt it is for considerations of this nature that the Canadian jurisprudence in this field differentiates between matters of policy and matters that fall within what is called the ‘operational’ sphere of government though the distinction is not always clear. There are also cases in which non-judicial remedies, or remedies by way of review and *mandamus* or interdict, allow for accountability in an appropriate form and that might also provide proper grounds upon which to deny an action for damages. However where the state’s failure occurs in circumstances that offer no effective remedy other than an action for damages the norm of accountability will, in my view, ordinarily demand the recognition of a legal duty unless there are other considerations affecting the public interest that outweigh that norm.

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<sup>191</sup> *Van Duivenboden* (note 171 above) at paras 19-20.

<sup>192</sup> *Olitzki* (note 132 above) at para 31.

<sup>193</sup> *Van Duivenboden* (note 171 above) at para 20.

<sup>194</sup> *Ibid* at para 21.

This long passage is quoted because it has featured as the basis of the *rationes decidendi* in many of the cases that will still be discussed in what follows in this chapter. What this extract from *Van Duivenboden* explains is that the value of state accountability will only translate into an award for common-law damages if the harm negligently caused by the state could not be remedied in another way. Neethling has cautioned against the stance of the court on accountability because the need for a claim for damages has nothing to do with the legal duty to act.<sup>195</sup> However, as the discussion on cases subsequent to *Van Duivenboden* show, where the state is the alleged wrongdoer, the value of accountability and the availability of alternative remedies will be relevant in the determination of wrongfulness, even though this will not necessarily be the case where private parties are involved in a delictual dispute.<sup>196</sup>

In light of the aforementioned explanation of the interplay between wrongfulness and the value of state accountability, the court in *Van Duivenboden* then identified the rights to dignity (section 10), life (section 11) and freedom and security of the person (section 12) as rights that the state was duty-bound to protect. In other words, these are rights on account of which the state could be held accountable if they were breached. However, the mere breach of these rights does not necessarily found wrongfulness on the part of the state as the norm of accountability may be outweighed by concerns of effective government, other constitutional norms or other considerations of public policy.<sup>197</sup> In the present case there were no countervailing considerations relating to public interest as to why the state should not be held liable in delict for the harm suffered by the victim and there was no other way of effectively holding the state accountable for its conduct other than by awarding common-law damages to the victim. Wrongfulness was thus established.<sup>198</sup>

As to the element of fault, the court held that the police officers had acted negligently as the reasonable police officer would reasonably have foreseen the type of harm that ensued and would have taken initiative to ensure that the harm did not follow by confiscating Brooks's weapons.<sup>199</sup> As to the elements of causation, the court held that factual causation had been

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<sup>195</sup> Neethling (note 5 above) at 586.

<sup>196</sup> See eg the general tenure of my argument in E Zitzke 'Realist Evolutionary Functionalism and Extra-Constitutional Grounds for Developing the Common Law of Delict: A Critical Analysis of *Heroldt v Wills* 2013 2 SA 530 (GSJ)' (2016) 79 *Journal of Contemporary Roman-Dutch Law* 103.

<sup>197</sup> *Ibid* at para 22.

<sup>198</sup> *Ibid*.

<sup>199</sup> *Ibid* at para 23.

established because if the police had acted on their knowledge of Brooks's violent behaviour in the past, the probable result would have been different for the victim.<sup>200</sup> Furthermore, legal causation was established as there had been a direct link between the omission of the police and the harm suffered by the victim and thus the Minister was held liable for the omissions of the police officers concerned.<sup>201</sup>

The legacy of *Van Duivenboden* (and by implication of *Carmichele CC* as well) has been vast. The jurisprudence of the Constitutional Court and the Supreme Court of Appeal on the value of state accountability and its relationship to the law of delict has become particularly coherent in the last decade. Later in 2002 the Supreme Court of Appeal heard another matter against the state for its omissions that had caused bodily harm: In *Van Eeden v Minister of Safety and Security* a young woman was assaulted, raped and robbed by a dangerous criminal who had escaped from police custody through an unlocked security gate.<sup>202</sup> Following the trend of *Van Duivenboden* the victim claimed that the police service owed her a duty to ensure that the dangerous criminal would not escape and cause her harm.<sup>203</sup> The appropriate basis for the Minister's liability (vicarious liability), negligence and causation were conceded by the Minister, leaving only the question of wrongfulness, in other words whether the state owed the victim a duty to prevent the harm that she had suffered.<sup>204</sup>

The court in *Van Eeden* commenced its determination of wrongfulness by repeating the classical wrongfulness criteria, namely, reasonableness, the legal convictions of the community and the existence of a legal duty to act to prevent harm.<sup>205</sup> The court emphasised that the question should not be whether the conduct complained of is socially, morally or religiously wrong but whether it would be unreasonable in the eyes of legal policy makers such as judges and the legislature.<sup>206</sup> That statement is to be welcomed in light of the fact that the Constitution,

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<sup>200</sup> Ibid at paras 24-26. The approach of the court to factual causation is lauded by PJ Visser 'Gedagtes oor Feitlike Kousaliteit in die Deliktereg' (2006) *Journal of South African Law* 581, 585.

<sup>201</sup> *Van Duivenboden* (note 171 above) at para 30.

<sup>202</sup> *Van Eeden v Minister of Safety and Security* [2002] ZASCA 132, 2003 (1) SA 389 (SCA), [2002] 4 All SA 346 (SCA) (*Van Eeden*) at paras 1-2. For commentaries on this case see Neethling (note 171 above) at 786ff; A Mukheibir 'The Impact of the Constitutional Imperative of the State to Avoid Harm on Delictual Liability for an Omission' (2003) 24 *Obiter* 498; Okpaluba (note 171 above) at 147ff.

<sup>203</sup> *Van Eeden* (note 202 above) at para 3.

<sup>204</sup> Ibid at para 4.

<sup>205</sup> Ibid at para 9.

<sup>206</sup> Ibid at para 10.

as the supreme law, will necessarily guide such legal policy makers. The court cited *Van Duivenboden* discussed above as authority for the fact that the legal convictions of the community are now necessarily influenced by the Constitution. The court in *Van Eeden* however added that the Constitution is not the ‘exclusive embodiment of the delictual criterion of the legal convictions of the community’ even though it may play a role in shaping it. This statement is also welcomed as I have repeatedly emphasised that the Constitution has never been understood to abolish the common law in totality because section 39(3) and Schedule 6 item 2 expressly preserve the common law to the extent that it is consistent with the supreme law.

The court nevertheless continued to frame the wrongfulness enquiry in this case in constitutional terms. Section 12(1)(c) of the Constitution grants everyone the right to be free from public and private sources of violence and when read with section 7(2) the state is under an obligation to protect that right actively and passively.<sup>207</sup> The court further noted that this obligation is bolstered by various international law provisions that, according to section 39(1)(b) of the Constitution, must inform the interpretation of constitutional rights. Particularly the preamble of the Universal Declaration of Human Rights (1948), the Declaration on the Elimination of Violence against Women (1993) and the Convention on the Elimination of All Forms of Discrimination against Women (1979) lead to the conclusion that the state must actively protect the rights of persons in the position of the victim.<sup>208</sup> Furthermore section 205(3) of the Constitution provides that the police service is responsible for, among other things, the protection and security of inhabitants of the Republic, as confirmed in the South African Police Services Act.<sup>209</sup>

Following *Van Duivenboden* the court in *Van Eeden* stated that all of the abovementioned constitutional provisions imply the value of state accountability and that that value should play an important role in determining the existence of a legal duty to act.<sup>210</sup> Also drawing from *Van Duivenboden* the court in *Van Eeden* noted that if no other effective remedy existed to vindicate a victim’s rights, a common-law damages claim would be the appropriate remedy.<sup>211</sup> Applied to the facts of *Van Eeden* the court held that the victim would benefit from no other relief except from

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<sup>207</sup> Ibid at paras 13-14.

<sup>208</sup> Ibid at para 15.

<sup>209</sup> Ibid at para 16 citing the South African Police Services Act 68 of 1995.

<sup>210</sup> *Van Eeden* (note 202 above) at para 17.

<sup>211</sup> Ibid at para 18.



a claim for damages.<sup>212</sup> Concerning the question of whether any countervailing principles should trump the norm of accountability the court found that the present matter did not involve a potential interference with ‘the manner in which the police performed their functions relating to the detection of crime and the apprehension of criminals’ and continued:<sup>213</sup>

These are matters in which public policy may well require that police should have a wide discretion. This case is concerned solely with the control that the police are required to exercise over a known dangerous criminal in police custody, in other words with the operational implementation of their own policies and not with the policy itself. The recognition of a legal duty in such circumstances will not disrupt the efficient functioning of the police, nor will it necessarily require additional resources. There is accordingly no reason to fear that it might inhibit the proper performance by the police of their primary functions or lead to defensive policing.

Concluding its positive finding of wrongfulness the court held that the police had owed the victim a duty in this case in light of the constitutional obligations imposed on the state, as well as the fact that the police had control of a dangerous person and that there had been reasonable and practical measures available to them to prevent the harm that ensued. This concluding argument married the common-law principle that a legal duty to prevent harm arises when one has control over a dangerous situation with constitutional norms. What makes the judgment in *Van Eeden* so powerful is that the court provided a clear and systematic blueprint for reasoning through the wrongfulness enquiry for omissions of the state in light of the Constitution: One starts with the basic common-law rules of wrongfulness, followed by the relevant constitutional (and concomitant international law and statutory) provisions, spiced with the norm of state accountability that, as I have argued in the introduction to this section, can establish obligations of the state even though that norm does not create a ‘right to accountability’.

In the following year the Supreme Court of Appeal adhered to the precedents established in *Van Duivenboden* and *Van Eeden* in the case of *Minister of Safety and Security v Hamilton*.<sup>214</sup> The police service issued a firearm licence to Ms McArdell.<sup>215</sup> A few months later she shot the victim causing him to become tetraplegic.<sup>216</sup> The victim alleged that the police service had owed him a duty to investigate McArdell’s fitness to possess a firearm properly and that it had breached that

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<sup>212</sup> Ibid at para 19.

<sup>213</sup> Ibid at para 21.

<sup>214</sup> *Minister of Safety and Security v Hamilton* [2003] ZASCA 98, 2004 (2) SA 216 (SCA), [2003] 4 All SA 117 (SCA)(‘*Hamilton*’).

<sup>215</sup> Ibid at para 2.

<sup>216</sup> Ibid at para 3.

duty when it failed to consider McArdell's temperament and character in approving the application for the firearm licence. On the facts it was clear that McArdell had suffered from paranoid psychosis, abused alcohol and was incapable of appreciating the wrongfulness of her conduct and that the police officer who considered her application for the firearm licence had not tested the veracity of McArdell's own assessment that she was fit to possess a firearm.<sup>217</sup>

As to the wrongfulness of the police's omission, the court in *Hamilton* cited *Van Eeden* with approval: In establishing the wrongfulness of an omission a court must determine whether the alleged wrongdoer owed a legal duty to the alleged victim to act positively in order to prevent harm. This enquiry is informed by the standard of reasonableness – the legal convictions of the community.<sup>218</sup> In this case the victim's common-law and constitutional right to bodily integrity had been infringed and that right had to be protected by the state.<sup>219</sup> The duty to protect the victim in this case was further bolstered by the Police Act in force at the time that detailed one of the primary functions of the police as the 'prevention of crime'.<sup>220</sup> Furthermore, upon a joint reading of the Arms and Ammunition Act, its regulations and Special Force Orders that had been in force at the time,<sup>221</sup> a relevant consideration in the granting or refusal of a firearm licence related to the applicant's 'past, character, physical and temperamental fitness, knowledge of weapons, etc'.<sup>222</sup> Interestingly the court added that the prevalence (and increasing statistics) of violent crimes committed with firearms in South Africa placed the spotlight on this duty.<sup>223</sup>

The mere fact that this important duty had been breached by the police service in its failure to investigate McArdell's fitness to possess a weapon did not automatically provide a positive finding of wrongfulness. Following *Van Duivenboden*<sup>224</sup> the court in *Hamilton* reiterated that common-law damages will only be granted by a court as a means of ensuring state accountability if there are no countervailing reasons to deny the delictual claim such as the availability of alternative remedies, the impairment of the effective functioning of the police, constrained resources or some other consideration of public policy.<sup>225</sup> The court then peculiarly

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<sup>217</sup> Ibid at para 6.

<sup>218</sup> Ibid at para 16; *Van Eeden* (note 202 above) at paras 9-10.

<sup>219</sup> *Hamilton* (note 214 above) at para 19.

<sup>220</sup> Ibid at para 20 citing the Police Act 7 of 1958 that has since been replaced by the Police Act 68 of 1995.

<sup>221</sup> Arms and Ammunition Act 75 of 1969 (now repealed by the Firearms Control Act 60 of 2000).

<sup>222</sup> *Hamilton* (note 214 above) at para 27.

<sup>223</sup> Ibid at para 33.

<sup>224</sup> *Van Duivenboden* (note 171 above) at para 22.

<sup>225</sup> *Hamilton* (note 214 above) at para 35.

concluded its positive finding of wrongfulness by holding that it had reached its decision ‘without relying directly on the provisions of the Bill of Rights’ and that it was satisfied that its conclusion was ‘consistent with the norms and values of South African society as embodied in both Constitutions’.<sup>226</sup> This move of constitutional avoidance is peculiar because the court in fact did place reliance on the constitutional right to bodily integrity (section 12(1)(c)), as well as the constitutional norm of state accountability.

Finally, the court in *Hamilton* concluded that negligence had been established as reasonable servants of the police service would have foreseen the possibility that a mentally unfit person could legally get hold of a weapon under the system that had been employed. The reasonable police officer would have verified McArdell’s self-evaluation that she was fit to possess a firearm.<sup>227</sup> As to causation the court held that factual causation was established because but for the police’s omission complained of, McArdell would probably not have obtained a firearm to shoot the victim in this case and that the omission was the direct legal cause of the victim’s harm.<sup>228</sup> Therefore the Minister was held liable for the police service’s omission in *Hamilton*.

Later in 2003 the Supreme Court of Appeal had to confront the facts of the *Carmichele*-saga for the second time.<sup>229</sup> To recapitulate, in *Carmichele SCA II* the victim was attacked by a criminal with a long history of violent crime after he had been released on bail pending another matter. He was only granted bail because the police officer and prosecutor involved in that case

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<sup>226</sup> Ibid at para 36.

<sup>227</sup> Ibid at paras 37-39.

<sup>228</sup> Ibid at paras 42-46.

<sup>229</sup> It will be recalled that in Chapter 3 I explained that Ms Carmichele was unsuccessful in the trial court, a judgment which is unreported (*Carmichele HC P*) and the first Supreme Court of Appeal judgment (also finding in favour of the Minister) is cited as *Carmichele v Minister of Safety and Security and Others* [2000] ZASCA 61, 2001 (1) SA 489 (SCA), [2000] 4 All SA 537 (A) (*Carmichele SCA I*). Ms Carmichele successfully appealed to the Constitutional Court – see *Carmichele CC* (note 1 above). The Constitutional Court referred the matter back to the High Court to establish the facts of the case in more detail. The subsequent High Court judgment, decided in favour of Ms Carmichele, is reported as *Carmichele v Minister of Safety and Security and Another* 2003 (2) SA 656 (C), 2002 (10) BCLR 1100 (C) (*Carmichele HC II*). The 2003 High Court decision was unsuccessfully appealed against by the Minister of Safety and Security and is reported as *Minister of Safety and Security v Carmichele* [2003] ZASCA 117, 2004 (3) SA 305 (SCA), 2003 (4) All SA 565 (SCA) (*Carmichele SCA II*). It is this last instalment of the *Carmichele*-saga that is discussed in detail in this Chapter. On *Carmichele SCA II* see eg J Neethling ‘Die Carmichele-Sage Kom tot ‘n Gelukkige Einde’ (2005) *Journal of South African Law* 402.

had failed to inform the bail magistrate of his previous convictions.<sup>230</sup> After repeating the established general principles of wrongfulness discussed up to this point in the present chapter,<sup>231</sup> the court in *Carmichele SCA II* affirmed that the constitutional value of state accountability will only translate into an award for common-law damages if no other remedy could effectively vindicate the victim's rights.<sup>232</sup> In that regard the court noted that the establishment of a legal duty is grounded in the following question:<sup>233</sup>

Did the State owe a duty to the plaintiff? The answer lies in the recognition of the general norm of accountability: the State is liable for the failure to perform the duties imposed upon it by the Constitution unless it can be shown that there is compelling reason to deviate from that norm. In *Van Eeden* it is suggested that such a deviation might be warranted where it would not be in the public interest to inhibit the police (and by parity of reasoning the prosecution) in the proper performance of their duty. A deviation was not, however, considered to be necessary in that case.

Similarly, in the present matter the court could find no reason to refuse an award of common-law damages based on delict.<sup>234</sup> Ms Carmichele was finally successful in her claim against the Minister as negligence and causation had been proved,<sup>235</sup> following the guidelines from the decision in *Carmichele CC* fully canvassed in Chapter 3.

The principles relating to the interaction between the constitutional norm of accountability and the wrongfulness of state conduct were again applied in *Minister of Safety and Security v Rudman*.<sup>236</sup> In *Rudman* a small child fell into a swimming pool and the police were called to assist the family.<sup>237</sup> When the police officer arrived at the scene someone had already been administering cardio-pulmonary resuscitation (CPR) on the victim. The police officer however prohibited that person from continuing with the CPR and declared the victim dead. Later it turned out that the victim was still alive but had by that time suffered serious brain injury

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<sup>230</sup> See *Carmichele SCA II* (note 229 above) at paras 14-28 for a more detailed exposition of the facts. Those facts are also canvassed in detail in Chapter 3.

<sup>231</sup> *Ibid* at paras 29-36.

<sup>232</sup> *Ibid* at paras 37-38.

<sup>233</sup> *Ibid* at para 43. Footnotes omitted.

<sup>234</sup> *Ibid* at para 44.

<sup>235</sup> *Ibid* at paras 50-72.

<sup>236</sup> *Minister of Safety and Security and Another v Rudman and Another* [2004] ZASCA 68, 2005 (2) SA 16 (SCA), [2004] 3 All SA 667 (SCA) (*Rudman*). See also J Neethling 'Afwysing van 'n Regsplig op Polisiebeamptes om die Reg op die Fisies-Psigiese Integriteit en Sekerheid van die Persoon Buiteom Misdaadsituasies te Beskerm: Die Hoop Beskaam' (2006) 27 *Obiter* 369.

<sup>237</sup> *Rudman* (note 236 above) at para 1.

because of a lack of oxygen.<sup>238</sup> Wrongfulness was claimed on two alternative grounds: The policeman acted wrongfully either by his positive conduct in preventing the further administration of CPR, or by failing to administer CPR on the victim.

Regarding the claim relating to the policeman's positive conduct the court held that he had acted *prima facie* wrongfully. Because the policeman could not establish a ground of justification for his *prima facie* wrongful conduct, the presumption of wrongfulness had not been rebutted.<sup>239</sup> Even though the court did not mention this, this decision resembles the argument in *Tobani* based on the constitutional norm of legality. As to the claim relating to the policeman's omission the court, following the Supreme Court of Appeal cases discussed thus far in the context of accountability, expressed itself as follows:<sup>240</sup>

[W]here there is no effective way to hold the State to account other than by way of a private law action for damages, and in the absence of any norm or consideration of public policy that outweighs it, a legal duty should be recognised unless there are public policy considerations which point in the other direction.

The court then held that in this case there were considerations of public policy that outweighed the imposition of a legal duty, namely that imposing a duty on policemen to intervene in every case where a victim requires CPR would 'disrupt the effective functioning of the police and would require the provision of substantial additional training and resources'.<sup>241</sup> Therefore only the policeman's positive conduct was wrongful. That positive conduct was also negligent as the reasonable person in the position of the policeman, appreciating his lack of skill and expertise, would not have caused the CPR to be discontinued.<sup>242</sup> It appears that causation was not disputed and consequently the Minister was held liable for the acts of the policeman.<sup>243</sup>

The two remaining and most recent cases where victims of state malfeasance were successful in their claims for common-law damages against the state in light of the value of state

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<sup>238</sup> Ibid at para 3.

<sup>239</sup> Ibid at paras 57 & 64.

<sup>240</sup> Ibid at para 62.

<sup>241</sup> Ibid at para 63.

<sup>242</sup> Ibid at para 75.

<sup>243</sup> Ibid at para 90.

accountability are *Lee v Minister of Correctional Services*<sup>244</sup> and *Mashongwa v PRASA*.<sup>245</sup> These two cases are particularly noteworthy because the judgments referred to the value of accountability in new ways when compared to the body of judicial pronouncements laid out in this section thus far. In *Lee* the Court made a passing reference to the constitutional value of accountability in the context of wrongfulness and legal causation. In *Mashongwa* the Constitutional Court also affirmed the role of accountability in the wrongfulness enquiry but added that accountability is also relevant in the context of the determination of negligence. The possible incorporation of accountability in legal causation and negligence warrants some reflection.

Dudley Lee was incarcerated at Pollsmoor maximum security prison between 1999 and 2004. The agreed facts indicated that Mr Lee did not have tuberculosis (TB) when he arrived at the prison and that the authorities were aware of the risk of contracting TB faced by prisoners in the jam-packed cells in Pollsmoor as TB spreads easily in enclosed spaces.<sup>246</sup> Mr Lee tested positively for TB three years after his incarceration but was nonetheless sent back into a cell with another inmate.<sup>247</sup> The High Court upheld Mr Lee's claim for common-law damages, for the effects of contracting TB, in delict.<sup>248</sup> The Supreme Court of Appeal agreed that the state's breach of its legal duties owed to its inmates had established wrongfulness<sup>249</sup> and that negligence

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<sup>244</sup> *Lee v Minister of Correctional Services* [2012] ZACC 30, 2013 (2) SA 144 (CC), 2013 (2) BCLR 129 (CC), 2013 (1) SACR 213 (CC) ('*Lee*'). The criticism against the Constitutional Court's understanding of factual causation has been criticised from a number of angles: J Neethling & JM Potgieter 'Aanspreeklikheid van die Staat vir Tuberkulose in die Gevangenis' (2013) 10 *Litnet Akademies* 1; A Nienaber 'Liability for the Wrongful Transmission of Communicable Diseases in South African Prisons: What about HIV?' (2013) 28 *SA Public Law* 163, 166ff; B Wessels 'Alternatiewe Benaderings ten opsigte van Feitlike Kousaliteit in die Deliktereg' (2013) 10 *Litnet Akademies* 68; A Paizes 'Factual Causation: Which "Conditio" Must be a "Sine Qua Non"?' A Critical Discussion of the Decision in *Lee v Minister of Correctional Services*' (2014) 131 *South African Law Journal* 500; A Price 'Factual Causation after *Lee*' (2014) 131 *South African Law Journal* 491; D Davis 'Where is the Map to Guide Common-Law Development?' (2014) 25 *Stellenbosch Law Review* 3, 9ff; LTC Harms 'The Puisne Judge, the Chaos Theory and the Common Law' (2014) 131 *South African Law Journal* 3; A Fagan 'Causation in the Constitutional Court: *Lee v Minister of Correctional Services*' (2014) 5 *Constitutional Court Review* 104; CJ Visser & C Kennedy-Good 'The Emergence of a "Flexible" Conditio Sine Qua Non to Factual Causation?' (2015) 36 *Obiter* 150; and L Boonzaier & M Mbikiwa 'The Constitutional Court in Harms' Way: A Response' (2015) 132 *South African Law Journal* 769.

<sup>245</sup> *Mashongwa v PRASA* [2015] ZACC 36, 2016 (2) BCLR 204 (CC) ('*Mashongwa*').

<sup>246</sup> *Lee* (note 244 above) at para 8.

<sup>247</sup> *Ibid* at para 10.

<sup>248</sup> *Lee v Minister of Correctional Services* [2011] ZAWCHC 13, 2011 (6) SA 564 (WCC), 2011 (2) SACR 603 (WCC).

<sup>249</sup> *Minister of Correctional Services v Lee* [2012] ZASCA 23, 2012 (3) SA 617 (SCA), [2012] 2 All SA 586 (SCA), 2012 (1) SACR 492 (SCA) paras 36 & 42.

was founded on the fact that the state had a sporadic (or nearly non-existent) system in place for the detection and prevention of the spread of TB in Pollsmoor.<sup>250</sup> The Supreme Court of Appeal however found that factual causation had not been established because Mr Lee did ‘not know the source of his infection’ and that he had not proved that if a proper system for the detection and prevention of TB had been in place, it would have entirely excluded the possibility of Mr Lee contracting the disease.<sup>251</sup>

On appeal to the Constitutional Court the only issue in dispute was whether the failure of the state to implement an effective system to prevent the spread of TB had factually caused Mr Lee’s infection. It was argued that either the Supreme Court of Appeal had incorrectly applied the test for factual causation in light of the balance-of-probabilities standard of proof or, if it had been correctly applied, that the common law required development to improve the protection of the constitutional rights of prison inmates. Alternatively it was contended that Mr Lee’s constitutional rights to bodily integrity (section 12) and to be detained with dignity (section 35) had been violated by the state and that it required an award of constitutional damages if common-law damages could not be awarded.<sup>252</sup>

The Court in *Lee* explained that the element of causation is established by two conjoint sub requirements namely factual and legal causation.<sup>253</sup> Factual causation is a factual enquiry that is determined by way of the *conditio sine qua non* test. In the case of positive conduct one asks whether but for the wrongful conduct the same result would ensue – if the same result would in any case follow then it cannot be said that the positive act caused the harm.<sup>254</sup> In the case of an omission, such as the state’s failure in the present case, one eliminates the wrongful omission and substitutes lawful action in its place – if the harm would nevertheless follow, then the omission did not factually cause the harm.<sup>255</sup> The Court referred to a number of earlier decisions, notably *Van Duivenboden* discussed above, that had showed that the correct standard of proof according to which the *conditio sine qua non* test should be measured is one of ‘probability’ and not ‘certainty’ as the Supreme Court of Appeal may have thought.<sup>256</sup> On the evidence it was held that it was

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<sup>250</sup> Ibid at para 44.

<sup>251</sup> Ibid at para 64.

<sup>252</sup> *Lee* (note 244 above) at para 23.

<sup>253</sup> Ibid at para 38.

<sup>254</sup> Ibid at para 41.

<sup>255</sup> Ibid at para 40.

<sup>256</sup> Ibid at paras 43-50.

more probable than not that Mr Lee had contracted TB during his period of incarceration at Pollsmoor.<sup>257</sup> The common law therefore provided sufficient protection for the constitutional rights of prisoners such as Mr Lee and the common law did not need development in this regard.<sup>258</sup> What is of importance for purposes of the present discussion is that the Court concluded its findings with passing comments on the other elements of delictual liability.<sup>259</sup>

The Court approved the finding in *Van Duivenboden* with regard to the interaction between accountability and wrongfulness discussed above.<sup>260</sup> In light of the ever-expanding body of case law that has relied on the value of state accountability to inform the wrongfulness enquiry, this stance of the Court should not be faulted. However, the Court then turned, ‘for completeness’, to the question of whether legal causation had been established. In this regard the Court explained that the second leg of the causation enquiry ensures that only conduct with a ‘reasonable connection’ to the harm in question is actionable.<sup>261</sup> According to the Court the values of ‘accountability, responsiveness and rule of law’ demanded a positive finding of legal causation. This is so because only if legal causation was established in this case would these imperative values be vindicated so that a constitutional crisis could be prevented.<sup>262</sup>

It would appear that the implication of the Court’s comments on wrongfulness and legal causation is that all of the normative elements of delictual liability had to be established in this case to prevent a constitutional crisis. In other words, even if some of the elements of delictual liability would not normally be established on the facts of *Lee* in light of the common-law rules, the value of accountability required all the elements to be met. This has never been the role of accountability in the South African law of delict. As it has been reiterated throughout this section of the present chapter, state accountability can be ensured in many different ways and it should not always translate into delictual claims for damages. The Court, in a moment of constitutional over-excitement, neglected to discuss the common-law rules of legal causation. Instead the Court simply applied the founding constitutional values as if they were the ‘rules’ of legal causation.

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<sup>257</sup> Ibid at para 60.

<sup>258</sup> Ibid at para 72.

<sup>259</sup> I therefore do not endeavour to analyse the correctness of the Constitutional Court’s understanding of factual causation. Their approach has indeed been subject to criticism. See the authority listed in note 244 above.

<sup>260</sup> *Lee* (note 244 above) at para 64.

<sup>261</sup> Ibid at para 68.

<sup>262</sup> Ibid at paras 69-70.



As explained in Chapter 2, the complete avoidance of established common-law rules and principles is as injurious to the law of delict as a complete avoidance of the Constitution. What is required is a moderate and integrated approach where the Constitution and the common law can provide collaborative support in deciding delictual matters. Of course the Constitution should be regarded as the supreme law but that does not mean that constitutional provisions should obliterate and replace common-law rules in every single case. Common-law rules remain valid subject to constitutional scrutiny – that is what the Constitution itself provides.<sup>263</sup> Therefore the complete avoidance of the common law as in *Lee* is not to be supported. A theoretically more sound approach would have been to consider the flexible approach to legal causation that has been employed by our courts since *S v Mokogethi*,<sup>264</sup> as well as the subsidiary factors that inform that test, for example, the Court could have held that the state’s omission had been both the ‘foreseeable and adequate cause’<sup>265</sup> and ‘direct cause’<sup>266</sup> of Mr Lee’s harm and that no *novus actus interveniens* had broken the chain of events between the state’s omission and Mr Lee contracting TB.<sup>267</sup> Accountability in itself cannot justify a finding of legal causation because, as Price notes, one must be accountable ‘to’ someone and ‘for something’.<sup>268</sup> Legal causation ensures that if the state is to be held accountable, it must be held accountable for harm that it actually inflicted on somebody else.

To illustrate the problem of the Court’s constitutionally over-excited reasoning the following example can be employed: Suppose that during Mr Lee’s incarceration he escaped from prison for a few month and during that time lived in an overcrowded hostel before he was tracked down and arrested again. Upon arrest he tests positive for TB. In that case it could have been argued that Mr Lee could have contracted TB in the hostel and that even though the evidence may have shown that it was *possible* for him to have contracted TB in prison (thus establishing factual causation on the law laid down in *Lee*), his escapade outside of prison could be argued to be a *novus actus interveniens* as it was an independent act that could have caused Mr Lee’s infection (thus leading to the conclusion that the state was not the legal cause of Mr Lee’s

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<sup>263</sup> Section 39(3) read with Schedule 6 item 2 of the Constitution.

<sup>264</sup> *S v Mokogethi* [1989] ZASCA 105, 1990 (1) SA 32 (A), [1990] 1 All SA 320 (A) (*‘Mokogethi’*). Cases subsequent to *Mokogethi* that have applied the flexible approach to legal causation are cited by Neethling & Potgieter (note 24 above) at 200, fn 111.

<sup>265</sup> Loubser & Midgley (note 24 above) at 95-97; and Neethling & Potgieter (note 24 above) at 203-204 & 214-216.

<sup>266</sup> Loubser & Midgley (note 24 above) at 94-95; and Neethling & Potgieter (note 24 above) at 205-206.

<sup>267</sup> Loubser & Midgley (note 24 above) at 99-100; and Neethling & Potgieter (note 24 above) at 216-219.

<sup>268</sup> Price (note 128 above) at 315.

harm). In this hypothetical example, even though accountability may require a positive finding of wrongfulness, it cannot justify a finding of legal causation. If legal causation is not established on the hypothetical facts, the reality would be that Mr Lee would be left without a remedy and that the state would be entitled to continue with its inadequate disease-screening procedures. If it is true that legal causation is concerned with the tenets of ‘reasonableness, fairness and justice’<sup>269</sup> it would be clear that Mr Lee, in the hypothetical set of facts, should not succeed with his claim against the Minister as that could be holding the state liable for injuries that an inmate had suffered while not being under the Minister’s care, therefore removing the matter from the ambit of the state’s duty to protect its detainees in light of section 35 of the Constitution. The Minister of Correctional Services cannot and should not be held accountable (nor delictually liable) for illnesses that non-detained people contract outside prison. Therefore the finding that the Minister was not liable on the hypothetical facts would be consistent with the Constitution. However, state accountability could still be promoted by issuing a mandamus requiring the state to remedy its defective disease-prevention system, in other words holding the state accountable for its systemic failure to implement an adequate system of disease prevention in its prisons, even though that system might not have caused physical harm to anyone. This is so because accountability can be secured in forms other than claims for damages and for different types of state conduct.

However, on the real facts of *Lee* the victim should have had a claim, as the Court held, perhaps for common-law reasons that are consistent with the Constitution and not on the constitutional founding values alone. In reality constitutional crises need not be remedied only by the law of delict, and sensitivity to this complex notion of state accountability is best shown when accountability features, as it has for more than a decade, during the wrongfulness enquiry. It would seem that if accountability is to feature in the legal causation enquiry, as suggested by the Court in *Lee*, it would serve to impose strict liability on the state for infringements of constitutional rights that could lead to a constitutional crisis. Perhaps courts would do well in future to bear in mind that, in the context of wrongfulness, the question should be whether an award for common-law damages is an appropriate *mode* of ensuring state accountability, while accountability in the legal causation enquiry should ask whether the state will be held accountable *to the correct party/parties* who suffered harm. One should not lose sight of this distinction in the role of accountability in the different delictual elements as the Court may have done in *Lee*.

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<sup>269</sup> *Mogethi* (note 264 above) at 40-41.

The same cautionary words can be raised against the Constitutional Court's decision in *Mashongwa* where the victim was robbed on a PRASA train and thrown out of the moving train by the robbers.<sup>270</sup> In determining whether the state (here in the form of its organ of state, PRASA) should be held liable for the injuries suffered by Mr Mashongwa, the Constitutional Court specifically addressed the wrongfulness, negligence and causation of the state's conduct. The conduct in this case was identified as the state's failure to provide security guards on their trains and/or its failure to keep the train doors shut while the train is moving.<sup>271</sup> Here the Court held that wrongfulness had been established as the legal duty owed to Mr Mashongwa had been breached. That legal duty was founded on the common-law ground of a 'special relationship'<sup>272</sup> existing between a passenger and his or her carrier, as well as the transformed common-law ground of breach of a constitutional duty because section 12 read with section 7 of the Constitution was breached here.<sup>273</sup> Furthermore it was held that accountability of the state (and the need for the availability of an effective remedy for the victim) could not be ensured in any way other than through an award for damages.<sup>274</sup> That was especially so because the organ of state concerned had previously had a number of cases brought against it for similar incidents of violence on trains and by reason of the vulnerability of train passengers.<sup>275</sup>

The particularly interesting part of the judgment in *Mashongwa* is that the value of accountability also featured in the negligence enquiry. The Court applied the conventional approach to negligence by asking whether a reasonable organ of state in the position of PRASA would have reasonably foreseen the possibility of harm and would have taken reasonable steps to guard against that harm and whether those steps were in fact taken.<sup>276</sup> The harm was reasonably foreseeable here because many similar cases had been brought to the courts in the past.<sup>277</sup> As to what steps PRASA could have taken the court emphasised that PRASA did not need to guarantee the security of its passengers due to limited resources.<sup>278</sup> However, a

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<sup>270</sup> *Mashongwa* (note 245 above) at paras 5-6.

<sup>271</sup> *Ibid* at para 9.

<sup>272</sup> *Ibid* at para 20.

<sup>273</sup> *Ibid* at para 26.

<sup>274</sup> *Ibid* at para 24.

<sup>275</sup> *Ibid* at paras 18 & 25.

<sup>276</sup> *Ibid* at paras 31 & 40.

<sup>277</sup> *Ibid* at para 25.

<sup>278</sup> *Ibid* at para 34.

‘reasonable organ of state’ would have to ground its conduct in the Constitution.<sup>279</sup> That requires the organ of state to act accountably and the value of state accountability would involve the organ of state giving reasons for using its resources as it does, so that negligence can be properly evaluated in light of all the relevant circumstances.<sup>280</sup> In the present case PRASA provided some explanation as to why it had used its resources as it did and that informed the Court’s decision to hold that negligence had not been established insofar as the absence of security guards on the trains was concerned.<sup>281</sup> The Court held that negligence had been established in so far as PRASA’s failure to ensure that the train doors closed when the train was in motion was concerned. That is so because it is reasonably foreseeable that open train doors could lead to passengers falling out of the train and furthermore because it would require no additional resources for PRASA to ‘do the obvious’ and close the train doors while the train is in motion.<sup>282</sup>

From the Court’s discussion of negligence it would appear that the state and organs of state should not be allowed to allege a ‘lack of resources’ without appropriate evidence as a ground for expunging fault. If the state is to be held accountable, the reasons that it proffers for using its available resources in the way that it does should be rational, failing which the state could be required to provide such reasons in order to uphold the value of accountability. The Court was however not prepared to go so far as to hold that if the state or its organs fail to provide reasons for its conduct (and evidence supporting the reasons) negligence could be inferred from the facts alleged by the victim. The Court’s approach in this regard is congruent with the spirit of state accountability because demands for reasons for state conduct are critical for the promotion of good and responsible governance.<sup>283</sup>

Furthermore, the Court in *Mashongwa* held that factual causation had been proved, as on the evidence it would have been too difficult for the robbers to have forced the train doors open by themselves in order to throw Mr Mashongwa out of the train.<sup>284</sup> In a thinly reasoned manner the Court concluded that legal causation had also been present as PRASA’s conduct ‘ought to attract liability’ because of its constitutional duties and the general criteria of justice,

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<sup>279</sup> Ibid at para 41.

<sup>280</sup> Ibid at para 36.

<sup>281</sup> Ibid at para 42.

<sup>282</sup> Ibid at paras 51-52.

<sup>283</sup> J Klaaren & G Penfold ‘Chapter 63: Just Administrative Action’ in S Woolman & M Bishop *Constitutional Law of South Africa* (2<sup>nd</sup> Ed, OS, 2006) 113-114.

<sup>284</sup> Ibid at paras 66-67.

reasonableness and fairness.<sup>285</sup> This type of sparse reasoning in the context of legal causation is undesirable for the reasons that I have detailed above in the discussion on *Lee*. It is hoped that courts in future will rise to the occasion of fashioning an approach to legal causation that strikes a balance between the applicable common-law rules and the Constitution.

In this sub-section the role that state accountability played in cases where the state was held to have acted wrongfully has been evaluated. It has been shown that in cases where the state's positive conduct or omissions caused bodily harm in a negligent manner that resulted in the breach of the state's constitutional and/or other obligations, the norm of accountability would ordinarily require that the state should be held delictually liable for its conduct. That is so because once bodily harm has been inflicted to an identifiable victim an award for damages is often the only way in which that victim can experience some type of solace for his or her lost confidence in the state. In the next sub-section cases where victims instituted delictual actions against the state, but where the courts held that there were alternative ways in which the state could have been held accountable and therefore that awards for common-law damages were not appropriate, will be explored. It will be shown that in those cases the harm complained of always took on the form of pure economic loss.

### **3.3 Upholding State Accountability in Different Ways: Unsuccessful Common-Law Damages Claims**

The string of cases where the value of state accountability in terms of the 1996 Constitution did not support a positive finding of wrongfulness of the state's conduct was sparked by the Supreme Court of Appeal judgment in *Premier, Western Cape v Faircape Property Developers*.<sup>286</sup> In *Faircape SCA* a property developer applied for the removal of certain building restrictions registered against the title deed of a specific property. At first the developer's intention was to erect townhouses on the property. That intention was accordingly advertised to interested parties and the relevant local authority recommended final approval of the application to the Premier's delegate.<sup>287</sup> Building plans were submitted to the Premier's delegate that showed that a block of

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<sup>285</sup> Ibid at para 69.

<sup>286</sup> *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* [2003] ZASCA 42, 2003 (6) SA 13 (SCA), [2003] 2 All SA 465 (SCA) (*Faircape SCA*). See also J van Wyk 'Developers, Municipalities, Wrong Decisions, Liability and the Constitution' (2004) 19 *SA Public Law* 422; and A Pillay 'Reviewing Reasonableness: An Appropriate Standard for Evaluating State Action and Inaction?' (2005) 122 *South African Law Journal* 419, 432ff; and Okpaluba (note 171 above) at 151ff.

<sup>287</sup> *Faircape SCA* (note 286 above) at paras 6-7.

flats, and not townhouses, would be erected on the property.<sup>288</sup> Nevertheless, the Premier's delegate approved the application.<sup>289</sup> After the developer started the building process, concerned residents in the area obtained a prohibitory interdict to halt the developer's activities while they applied for a review of the decision to approve the developer's application.<sup>290</sup> The decision of the Premier's delegate was set aside on review and the developer had to re-apply for the removal of the building restrictions.<sup>291</sup> It was alleged that the Premier's delegate negligently breached a duty of care owed to the developer and that the developer incurred additional building- and legal costs caused by the delegate's failure to apply his mind to the application.<sup>292</sup> Davis J in *Faircape HC* held that the Premier was liable in delict to the developer, primarily because the element of wrongfulness had to be informed by the constitutional value of accountability.<sup>293</sup>

Nugent JA, writing for a unanimous court on appeal, agreed that accountability would necessarily play an important role in the determination of wrongfulness as the Supreme Court of Appeal had held in *Olitzki, Van Duivenboden, Van Eeden and Carmichele SCA II*.<sup>294</sup> However, he disagreed that accountability would have to translate into a positive finding of wrongfulness in this case. Nugent JA emphasised that when determining the wrongfulness of a state official's conduct regard must be had to the nature of that official's function and the statutory duty that he or she bears.<sup>295</sup> A court would be averse to finding wrongfulness in a case where a state official incorrectly exercised his or her discretion, such as in this case.<sup>296</sup> The court repeated that accountability could be ensured by means other than a common-law damages claim by applying remedies such as interdicts, review proceedings, or the obtaining of a mandamus and that accountability could be outweighed by the need for effective government or other constitutional norms.<sup>297</sup> The court in *Faircape SCA* held that wrongfulness had not been established because the Premier's delegate could not reasonably have foreseen the possibility of causing harm to the developer by approving its application<sup>298</sup> and because the developer should have taken steps to

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<sup>288</sup> Ibid at para 13.

<sup>289</sup> Ibid at para 15.

<sup>290</sup> Ibid at para 16.

<sup>291</sup> Ibid at para 23.

<sup>292</sup> Ibid at para 28.

<sup>293</sup> *Faircape HC* (note 155 above).

<sup>294</sup> *Faircape SCA* (note 286 above) at para 32.

<sup>295</sup> Ibid at para 37.

<sup>296</sup> Ibid.

<sup>297</sup> Ibid at para 40.

<sup>298</sup> Ibid at para 46.

protect its own rights, as the developer was fully aware that the initial advertisement and the final building plans were contradictory.<sup>299</sup> Furthermore, the Premier's delegate simply did what the developer had asked – to approve the application.<sup>300</sup> For those reasons, the developer's claim had to fail.

In my view the significance of *Faircape SCA* lies in the court's indication of factors that could outweigh the awarding of common-law damages in light of the norm of accountability. Those are: (i) The availability of alternative remedies; (ii) the need to protect the decision-making autonomy of the state official concerned where a discretion must be exercised by the official; (iii) the fact that an award of damages would impede the effective functioning of government; (iv) the fact that the state official concerned could not reasonably have foreseen the possibility of harm; and (v) any other constitutional norm. It will appear from the case discussions which follow that other factors may be added to this list.

In 2006 the Constitutional Court heard the matter of *Steenkamp NO v Provincial Tender Board, Eastern Cape*,<sup>301</sup> where the affected company tendered for the installation of certain payment systems for the Departments of Health and Welfare in the Eastern Cape.<sup>302</sup> The tender was granted by the Tender Board but it failed to consider the technical expertise of the victim company rationally and consequently the tender was set aside on review.<sup>303</sup> Between the points in time that the tender had been awarded and set aside the victim company incurred R4.35 million worth of out-of-pocket expenses. After the tender had been set aside, the victim company was liquidated and therefore those expenses were wasted.<sup>304</sup> After the High Court and Supreme Court of Appeal had dismissed the delictual claim of the victim company for its pure economic

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<sup>299</sup> Ibid at para 47.

<sup>300</sup> Ibid at para 48.

<sup>301</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2006] ZACC 16, 2007 (3) SA 121 (CC), 2007 (3) BCLR 300 (CC) (*Steenkamp*). See also C Okpaluba 'Delictual Liability of Public Authorities – Pitching the Constitutional Norm of Accountability against the Floodgates Argument' (2006) 20 *Speculum Juris* 248; G Quinot 'Worse than Losing a Government Tender: Winning It' (2008) 19 *Stellenbosch Law Review* 101; S Sibanda 'Wanted: A Principled Approach to the Balancing of Public Policy Considerations' (2008) 1 *Constitutional Court Review* 335; Okpaluba (note 132 above) 400ff; and R Roos & S de la Harpe 'Good Governance in Public Procurement: A South African Case Study' (2008) 2 *Potchefstroom Electronic Law Journal* 1.

<sup>302</sup> *Steenkamp* (note 301 above) at para 4.

<sup>303</sup> Ibid at paras 7-8.

<sup>304</sup> Ibid at para 11.

loss, the Constitutional Court on appeal had to decide whether the state, in the form of the Provincial Tender Board, had acted wrongfully.<sup>305</sup>

The Constitutional Court in *Steenkamp* commenced its enquiry by framing the dispute in terms of the 1996 Constitution. The Tender Board had to act in accordance with the values of fairness, equity, transparency, competitiveness and cost-effectiveness ingrained in section 217 of the Constitution. The Court noted that section 217 must be read with section 33, providing a right to just administrative action, and section 195(1) that provides, for example, that ‘public administration must be accountable’.<sup>306</sup> The mere fact that the right to just administrative action had been breached by the Tender Board did not necessarily mean that the victim company was entitled to private-law damages.<sup>307</sup> In addition to the breach of constitutional rights the victim would have to prove that it is ‘just and reasonable’ to hold the defendant liable in delict in order for wrongfulness to be established.<sup>308</sup> Factors that assist courts in determining whether it would be just and reasonable to find that the state’s conduct was wrongful include whether the relevant statutory provisions directly or by implication envision claims for damages; the statute aims to protect individual or public interests; the statute bestows a discretionary power on the state official concerned; alternative public law remedies could provide a victim with effective relief; an award for damages would impede the efficient functioning of the state; the harm was foreseeable; and the victim contributed to his or her own loss.<sup>309</sup>

Applied to the facts at hand the Court held that neither the Constitution nor any other legislation created the impression that *bona fide* but negligent administrative decisions necessitated the imposition of delictual liability.<sup>310</sup> Furthermore, the Tender Board serves to protect public interest at large (not individual interests alone), it exercises a discretion and if it does so in good faith an award for common-law damages would impede the efficiency of the Tender Board and further drain its limited resources.<sup>311</sup> Even though the affected company did not have ordinary public law remedies at its disposal to protect its rights, it could have re-tendered (had it not been liquidated),<sup>312</sup> and could have entered into an agreement with the state after the tender had been

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<sup>305</sup> Ibid at paras 13-14.

<sup>306</sup> Ibid at paras 32-35.

<sup>307</sup> Ibid at paras 36-37.

<sup>308</sup> Ibid at para 40.

<sup>309</sup> Ibid at para 42.

<sup>310</sup> Ibid at para 47.

<sup>311</sup> Ibid at para 55.

<sup>312</sup> Ibid at para 49.



awarded that the state would be liable for restitution of out-of-pocket expenses should anything happen to the tender. Ultimately the company took no steps to guard its own interests.<sup>313</sup> There were no alternative constitutional provisions that gave rise to the need to impose delictual liability on the state on these facts and therefore the negligent but *bona fide* awarding of a tender was not regarded as wrongful for purposes of the law of delict.<sup>314</sup> Even though PAJA had not taken effect at the time of *Steenkamp*, it is noteworthy that Sachs J in his concurring but separate judgment noted that in future cases victims might be able to claim administrative-law compensation in exceptional circumstances based on section 8(1) of PAJA.<sup>315</sup>

The Court's finding in *Steenkamp* alters and adds to the list of five factors that weigh against positive findings of wrongfulness in light of the norm of accountability first developed in *Faircape SCA*. Firstly, *Steenkamp* makes it clear that item (i) on the list, namely that consideration must be given to the availability of alternative remedies, includes extra-judicial (practical) remedies that the victim could have taken to prevent its own loss – in other words the victim should not have contributed to his or her losses. Secondly, the item (ii) on the list that exempts state functionaries from liability where they exercise a discretion subject to the proviso that the discretion has to be exercised in a *bona fide* manner. In other words, if a state official exercises his or her discretion in a *mala fide* way, the state could possibly be held liable for the discretionary decision. Thirdly, to the list in *Faircape SCA* one can add: (vi) the silence or express prohibition of an applicable statute on burdening the state with delictual liability for a breach of its provisions; and (vii) the state official concerned acts primarily to protect public (instead of private) interests.

The proviso to item (ii) was again reiterated in *Claassen v Minister of Justice and Constitutional Development*.<sup>316</sup> After his first appearance on charges relating to theft and malicious injury to property, Mr Claassen was released by the presiding magistrate with a warning to appear in court

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<sup>313</sup> Ibid at paras 50-52.

<sup>314</sup> Ibid at paras 56-63.

<sup>315</sup> Ibid at para 100.

<sup>316</sup> *Claassen v Minister of Justice and Constitutional Development* [2009] ZAWCHC 190, 2010 (6) SA 399 (WCC), [2010] 4 All SA 197 (WCC), 2010 (2) SACR 451 (WCC) ('*Claassen*'). See N Botha 'The Broader Influence of the International Covenant for the Protection of Civil and Political Rights in South African Municipal Law: Do We Need Incorporation?' (2010) 35 *South African Yearbook of International Law* 270; and M Killander 'Judicial Immunity, Compensation for Unlawful Detention and the Elusive Self-Executing Treaty Provision' (2010) 26 *South African Journal on Human Rights* 386.

on a specific date, in terms of section 72(1) of the Criminal Procedure Act.<sup>317</sup> On the specified date Mr Claassen did not appear and a warrant for his arrest was issued. He was arrested and when he appeared before the magistrate on account of his non-appearance the magistrate immediately decided to detain him until his hearing.<sup>318</sup> This decision of the magistrate was made in contravention of section 72(2)(a) and 72(4) of the Criminal Procedure Act that require presiding officers to enquire into the reasons for an accused's failure to appear in court on the required date. If satisfactory reasons can be provided an accused may be released with a warning to appear once again but in this case the magistrate failed to ascertain why Mr Claassen did not appear as he had been warned to do.<sup>319</sup> Mr Claassen alleged that he had been unlawfully detained as a result of the magistrate's negligent failure to comply with the provisions of the Criminal Procedure Act and as a result had suffered pure economic loss.<sup>320</sup>

The court in *Claassen* held that the magistrate had clearly breached the constitutional norm of legality when he failed to enquire why Mr Claassen did not appear on the stipulated date, because the Criminal Procedure Act had not been complied with and Mr Claassen's constitutional right not to be deprived of his freedom arbitrarily or without just cause (section 12(1)(a)) had been violated.<sup>321</sup> The court however held that, on the evidence, the magistrate had not acted in a *mala fide* manner when he failed to pay heed to the requirements of the Criminal Procedure Act and the Constitution.<sup>322</sup> The court distinguished the present case from *Zealand* mentioned above. In *Zealand* a registrar of the High Court neglected to deliver a release warrant to Correctional Services resulting in the relevant prisoner being detained for a long period of time without justification<sup>323</sup> and the Constitutional Court held the Minister of Justice vicariously liable for that breach of legality and the right not be deprived of freedom unnecessarily.<sup>324</sup> The facts of *Zealand* were held to be distinguishable from those in *Claassen* because judicial officers have always enjoyed immunity from civil claims, whereas the registrars of courts have not,<sup>325</sup> as remarked in passing in *Telematrix v ASASA*.<sup>326</sup>

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<sup>317</sup> Criminal Procedure Act 51 of 1977.

<sup>318</sup> *Claassen* (note 316 above) at para 7.

<sup>319</sup> *Ibid* at para 9.

<sup>320</sup> *Ibid* at para 3.

<sup>321</sup> *Ibid* at para 13.

<sup>322</sup> *Ibid* at para 16.

<sup>323</sup> *Zealand* (note 170 above) at paras 2-7.

<sup>324</sup> *Ibid* at paras 46-47.

<sup>325</sup> *Claassen* (note 316 above) at paras 19-22.

According to the court in *Claassen* the immunity granted to judicial officers against civil claims does not offend the spirit, purport and objects of the Bill of Rights.<sup>327</sup> This is so because the accountability of the judiciary can be secured without the need for a common-law damages claim: 'There are the options of review, appeal and applications for judges to be removed from office – judges are in the business of disappointing at least one party to every dispute and removing the immunity afforded to them would impede the requirement of section 165(2) of the Constitution that judges should act independently, impartially and 'without fear, favour or prejudice'.<sup>328</sup> It appears from that judgment that only if the magistrate acted *mala fide* would he have exposed himself to a claim for common-law damages (following section 9(3) of the English Human Rights Act),<sup>329</sup> which he did not do in this case.<sup>330</sup>

The most recent instalment of cases relating to pure economic loss caused by the state is *Country Cloud CC* that once again related to irregular tender processes. A provincial government tender for a building project was awarded to a construction company called Ilima that borrowed R12 million from Country Cloud to finance the execution of the tender.<sup>331</sup> During the building process the government cancelled the contract with Ilima with the consequence that Ilima could not settle its debt owed to Country Cloud.<sup>332</sup> Country Cloud was unsuccessful in claiming its financial loss in both the High Court and Supreme Court of Appeal and ultimately appealed to the Constitutional Court, pleading that the Court should determine whether the government had acted wrongfully towards Country Cloud in cancelling the contract with Ilima.<sup>333</sup> The Court held that the government did not act wrongfully towards Country Cloud in cancelling its contract with Ilima. This finding was supported on four main grounds.

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<sup>326</sup> *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* [2005] ZASCA 73, 2006 (1) SA 461 (SCA), [2006] 1 All SA 6 (SCA) paras 17 & 24.

<sup>327</sup> *Claassen* (note 316 above) at para 28.

<sup>328</sup> *Ibid* at paras 30-31.

<sup>329</sup> Human Rights Act 1998 (c42).

<sup>330</sup> *Ibid* at paras 35 & 39.

<sup>331</sup> *Country Cloud CC* (note 45 above) at paras 1-6. See also J Neethling & JM Potgieter 'Breach of Contract and Delictual Liability to Third Parties' (2015) 78 *Journal of Contemporary Roman-Dutch Law* 711; J Neethling & JM Potgieter "'Vulnerability to Risk" as a Factor Determining Delictual Liability for Pure Economic Loss' (2015) 78 *Journal of Contemporary Roman-Dutch Law* 635, 640ff; and A Mukheibir 'Limitless Liability – Tokoloshe or Real Danger?' (2015) 132 *South African Law Journal* 22, 30ff.

<sup>332</sup> *Ibid* at para 10.

<sup>333</sup> *Ibid* at paras 13-16.

Firstly, the governmental conduct did not fit comfortably in the mould of an ‘intentional interference with a contractual relationship’ which is historically regarded as a factual construction that normally warrants a positive finding of wrongfulness where financial loss is caused.<sup>334</sup> The construction of an ‘intentional interference with a contractual relationship’ conventionally involves two contracting parties and an independent third party who induces one of the contracting parties to breach the contract. In the present case the independent third party suffered a loss because one of the contracting parties breached the contract of its own volition, which is a matter for the law of contract to resolve and not a matter for delict.<sup>335</sup>

Secondly, the Court in *Country Cloud CC* held that the government official who had cancelled the contract with Ilima did not act with dishonest, fraudulent or corrupt motives.<sup>336</sup> According to the Court the blameworthy state of mind of the alleged wrongdoer, traditionally conceived of as a factor relevant only to the determination of fault, is relevant for the determination of wrongfulness. This is so because the element of fault can generally be satisfied by either negligence or intent; however some specific forms of delict require, for example, intention (or even intention with malice) in order to be actionable. The fault-related factors required by the specific type of delict is stipulated by the element of wrongfulness.<sup>337</sup> On my interpretation of the judgment this does not mean that the two elements are conflated but rather that the two elements function complementarily. The fact that negligence and wrongfulness are not conflated is supported by the significant indication by the Court that ‘foreseeability’ would not stand as a separate consideration in determining wrongfulness: It would only feature indirectly insofar as fault-related considerations are relevant to the determination of wrongfulness, for example, if the element of wrongfulness indicates that the requisite form of fault is negligence then foreseeability of harm (which forms half of the negligence enquiry) is indirectly implicated.<sup>338</sup> It would appear from the Court’s judgment in *Country Cloud CC* that ‘foreseeability’ will possibly no longer play a direct role in the determination of wrongfulness as the Court previously held in *Faircape SCA* and *Steenkamp*. This is a sensible suggestion that makes sense of existing case law with similar provisions relating to foreseeability as found in *Faircape SCA* and *Steenkamp* without the unnecessary conflation of the elements for delictual liability.

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<sup>334</sup> Ibid at paras 27-29. For more on intentional contractual interferences see Neethling & Potgieter (note 24 above) at 323-327; and Loubser & Midgley (note 24 above) at 234-237.

<sup>335</sup> *Country Cloud* (note 45 above) at para 30.

<sup>336</sup> Ibid at paras 46-47.

<sup>337</sup> Ibid at paras 39-40.

<sup>338</sup> Ibid at para 41.

The third reason why the Court in *Country Cloud CC* held that wrongfulness had not been established is that state accountability could be ensured more directly here in other ways. For example, Ilima could claim specific performance or damages from the government on the basis of breach of contract. In that way Ilima would have the necessary funds to settle its debt with Country Cloud.<sup>339</sup> Alternatively Country Cloud could have taken steps to protect itself from the loss that it suffered. For example, Country Cloud could have called on the sureties to the loan agreement to settle Ilima's debt.<sup>340</sup>

The fourth and final reason for the Court's finding in *Country Cloud CC* is that Country Cloud had not been in a position of vulnerability towards the government.<sup>341</sup> Country Cloud is a 'commercially sophisticated' and 'well-advised' plaintiff who willingly provided a loan to a company that it knew had been struggling financially. In this sense Country Cloud was not a helpless or involuntary victim – it took the risk onto itself to provide the loan to the penniless Ilima.<sup>342</sup> Country Cloud was therefore certainly not vulnerable in relation to the government.

The decision in *Country Cloud CC* fundamentally supports items (i) and (ii) on the list of factors that could indicate that the state's conduct causing financial loss is not wrongful. The one factor that the Court added to the list is that non-vulnerable victims stand a greater chance of failing with their claims for financial loss against the state. On the other hand, the Court effectively deleted the criterion of 'foreseeability' (item (vii)) from the list. Concluding this subsection on unsuccessful common-law damages claims in light of the constitutional value of state accountability, the following open list of factors that are indicative of the absence of wrongfulness in cases where the state causes pure economic loss is suggested:

- (i) The availability of alternative remedies – including 'non-legal' steps that a victim could have taken to prevent their own loss;
- (ii) the need to protect the decision-making autonomy of the state official concerned where a discretion must be exercised by the official – on condition that the official did not act in a *mala fide* (that is, fraudulent, dishonest or corrupt) manner;

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<sup>339</sup> Ibid at para 50.

<sup>340</sup> Ibid at paras 55-56.

<sup>341</sup> Ibid at para 60.

<sup>342</sup> Ibid at para 61.

- (iii) the fact that an award of damages would impede the effective functioning of government;
- (iv) the fact that the state official concerned could not reasonably have foreseen the possibility of harm;
- (v) the fact that a constitutional norm other than state accountability militates against the imposition of liability in delict;
- (vi) the silence or express prohibition of an applicable statute on whether the state should be burdened with delictual liability for a breach of its provisions;
- (vii) the fact that the state official concerned acts primarily to protect public (instead of private) interests; and
- (viii) the fact that the victim was not vulnerable or helpless with regard to the state in that it availed itself to the potentially detrimental effects of the state's conduct.

In the next sub-section the appropriateness of an award for constitutional instead of common-law damages where the state has caused some type of harm to its legal subjects is evaluated.

### **3.4 Reaching the End of the Rope: Constitutional Damages and Accountability**

It has already been indicated that the Constitutional Court in *Fose* held that even though constitutional damages could in principle be awarded in appropriate cases where constitutional rights have been infringed, constitutional damages cannot be claimed in addition to common-law damages as a punitive or deterrent measure.<sup>343</sup> Furthermore, in light of the case analyses reached in this section thus far, common-law damages can only be claimed from the state if there is no other remedy that could effectively vindicate the rights of a victim of the state's malfeasance. The implication of *Fose* read with the other cases is that the primary remedies for addressing state misconduct are public-law remedies (for example interdicts, review, appeal, or an application for the removal of an official from office and so forth) or 'non-legal' remedies (for example, requiring the victim to have implemented sensible and practical business sense to guard against his or her own losses). In the absence of an effective primary remedy, the secondary remedy is to claim common-law damages. The tertiary remedy, which would most likely only feature in the absence of both primary and secondary remedies, is a claim for constitutional damages. Truly,

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<sup>343</sup> *Fose* (note 131 above) at para 70.

the victim must have reached the end of the ‘remedy rope’ before a constitutional damages claim can be considered.

The Constitutional Court for the first time awarded constitutional damages to a victim of state impropriety in *President of the Republic of South Africa v Modderklip Boerdery*.<sup>344</sup> The case ultimately revolved around the state’s failure to execute an eviction order. In synoptic terms the owners of a farm were confronted with 40,000 unlawful occupiers who established an informal settlement on the farmland. The farm owners first laid charges of trespass against the unlawful occupiers with no practical success as the occupiers were released on warning.<sup>345</sup> The assistance of the police service, various organs of state and the municipality was requested and the farm owners even offered their land for expropriation but their pleas fell on deaf ears.<sup>346</sup> The farm owners successfully obtained an eviction order in the Johannesburg High Court but that order was not complied with by the state.<sup>347</sup> The farm owners approached the President of the Republic and various cabinet Ministers for their assistance but to no avail.<sup>348</sup> The farm owners then approached the Pretoria High Court for a declaration of rights and an order for the removal of the occupiers or an order for their arrest.<sup>349</sup> The Pretoria High Court declared that the farm

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<sup>344</sup> *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5, 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) (‘*Modderklip*’). See also AJ van der Walt ‘The State’s Duty to Protect Property Owners v The State’s Duty to Provide Housing: Thoughts on the Modderklip Case’ (2005) 21 *South African Journal on Human Rights* 144; M Swart ‘Left Out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor’ (2005) 21 *South African Journal on Human Rights* 215, 228ff; D Davis ‘Adjudicating the Socio-Economic Rights in the South African Constitution: Towards “Deference Lite”?’ (2006) 22 *South African Journal on Human Rights* 301, 312ff; K Hofmeyr ‘A Central-Case Analysis of Constitutional Remedial Power’ (2008) 125 *South African Law Journal* 521, 538ff; S Wilson ‘Breaking the Tie: Evictions from Private Land, Homelessness and New Normality’ (2009) 126 *South African Law Journal* 270, 276ff; K Tissington ‘Demolishing Development at Gabon Informal Settlement: Public Interest Litigation beyond Modderklip?’ (2011) 27 *South African Journal on Human Rights* 192; J Strydom & S Viljoen ‘Unlawful Occupation of Inner-City Buildings: A Constitutional Analysis of the Rights and Obligations Involved’ (2014) 17 *Potchefstroom Electronic Law Journal* 1206, 1228ff; and C Ngang ‘Judicial Enforcement of Socio-Economic Rights in South Africa and the Separation of Powers Objection: The Obligation to Take “Other Measures”’ (2014) 14 *African Human Rights Law Journal* 655, 675ff.

<sup>345</sup> *Modderklip* (note 344 above) at para 5.

<sup>346</sup> *Ibid* at para 6.

<sup>347</sup> *Ibid* at para 8. The Johannesburg High Court judgment is reported as *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (W).

<sup>348</sup> *Modderklip* (note 344 above) at para 9.

<sup>349</sup> *Ibid* at para 11. The Pretoria High Court judgment is reported as *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika en Andere* [2003] 1 All SA 465 (T).

owners' constitutional rights to property (section 25(1)) and equality (section 9) had been breached and it further issued a structural interdict requiring the state to provide a plan to demonstrate how it would go about enforcing the eviction order.<sup>350</sup> The state then unsuccessfully appealed to the Supreme Court of Appeal.<sup>351</sup>

The Supreme Court of Appeal held that the farm owners' right to property (section 25) had been infringed and that the occupiers' right to access to adequate housing (section 26) had been breached by the state.<sup>352</sup> However, the court held that an order for eviction or a structural interdict giving effect thereto would only uphold the farm owners' right. As an alternative the court indicated that an order jointly requiring the state to pay constitutional damages to the farm owners while allowing the occupiers to continue occupying the land would vindicate the rights of the farm owners and the occupiers.<sup>353</sup>

The state again appealed, this time to the Constitutional Court, requesting the Court to find that the farm owners should have applied for an urgent eviction order in terms of section 5 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act,<sup>354</sup> and that by failing to do so they brought about their own demise.<sup>355</sup> The Court reasoned that an award for constitutional damages was most appropriate in these circumstances and I argue that its decision was premised on three foundational constitutional values with little to no reference to substantive constitutional rights. These constitutional values are the norm of accountability, the petition for historical self-consciousness and the ideal of the rule of law. These constitutional values will now be discussed in turn.

The state's main argument based on the fact that the farmers should have obtained an urgent eviction order is interesting because it boils down to an argument based on the principles derived from the constitutional norm of accountability which stipulates that awards for common-law or constitutional damages should not be made if alternative remedies are available. However, neither the state nor the Constitutional Court made mention of state accountability with the

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<sup>350</sup> *Modderklip* (note 344 above) at paras 15-16.

<sup>351</sup> *Ibid* at para 18. The Supreme Court of Appeal judgment is reported as *Modderklip East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic and Others v Modderklip Boerdery (Pty) Ltd* [2004] ZASCA 47, [2004] 3 All SA 169 (SCA).

<sup>352</sup> *Ibid* at para 19.

<sup>353</sup> *Modderklip* (note 344 above) at para 20.

<sup>354</sup> Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE Act').

<sup>355</sup> *Modderklip* (note 344 above) at para 21.



result that that norm's influence is at most indirectly observed in this case. In response to the state's averment the Court held that the farm owners would probably not have succeeded with an application for an urgent eviction order because none of the requirements for such an order could have been met.<sup>356</sup> The Court further noted that a remedy had to be fashioned that would protect the rights of the farm owners and the occupiers alike and therefore any type of enforcement of the eviction order would be impractical because the occupiers would simply occupy another owner's land and so perpetuate a circle of unlawful occupation and injustice.<sup>357</sup> Additionally, a declaratory order for the breach of the farm owners' right to property may have laid the foundation for them to bring a delictual claim against the state but the farmers needed a more effective (and I would add, a more immediate) remedy after a protracted history of litigation. The question arises whether the Court here followed a systematic approach to determining the appropriate remedy, in light of the norm of state accountability.

It has been suggested above that courts should distinguish between primary, secondary and tertiary remedies. In this case it is clear that the victims attempted to obtain every possible public law and 'non-legal' form of relief at their disposal and so the primary remedies could not give effect to their rights. The secondary remedy, which is a common-law claim for damages, was not directly pleaded by the victims or directly addressed or considered by the Court. Even though the Court did not properly consider the possibility of granting delictual damages in this case, I argue that a claim for delictual damages would not necessarily have succeed even if it had been pleaded. The unlawful occupation of land as it featured in *Modderklip* does not constitute physical harm to property in the conventional sense because the land itself is not physically damaged. At most the nature of the land is altered resulting in financial loss to the farmer owners who can no longer use the land to generate an income. As I have shown in the previous subsection, pure economic loss is seldom successfully claimed against the state. In this case a particularly difficult obstacle that the farmers would have had to overcome in order to succeed with a delictual claim against the state would be to show *mala fide*, dishonest, fraudulent or corrupt intentions on the part of the state officials who testified that their concern with the enforcement of the eviction order was the cycle of injustice that would ensue for the unlawful

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<sup>356</sup> Ibid at para 30. The requirements for the granting of an urgent eviction order per section 5(1) of PIE are: (a) There is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not forthwith evicted from the land. (b) The likely hardship to the owner or any other affected person if an order for eviction is not granted, exceeds the likely hardship to the unlawful occupier against whom the order is sought if an order for eviction is granted. (c) There is no other effective remedy available.

<sup>357</sup> *Modderklip* (note 344 above) at para 58.

occupiers who would occupy another person's land, only to be evicted once again. In addition, the state bodies involved in these proceedings are generally concerned with upholding the public good and not necessarily protecting individual interests. There is a strong possibility that the common-law claim would have been unsuccessful, still leaving the farmers with violated constitutional rights. This last-mentioned reason coupled with the long history of litigation that had no practical effect on the violated rights of the farm owners indeed justified the Court's conclusion that the tertiary remedy of constitutional damages would have to be considered.

In its reasoning the Court referred to the preambular call for the injustices of the past to be acknowledged. In this regard the Court said:<sup>358</sup>

The problem of homelessness is particularly acute in our society. It is a direct consequence of apartheid urban planning which sought to exclude African people from urban areas, and enforced this vision through policies regulating access to land and housing which meant that far too little land and too few houses were supplied to African people. The painful consequences of these policies are still with us eleven years into our new democracy, despite government's attempts to remedy them. The frustration and helplessness suffered by many who still struggle against heavy odds to meet the challenge merely to survive and to have shelter can never be underestimated. The fact that poverty and homelessness still plague many South Africans is a painful reminder of the chasm that still needs to be bridged before the constitutional ideal to establish a society based on social justice and improved quality of life for all citizens is fully achieved.

This extract from the judgment can be regarded as a bolstering reason as to why the enforcement of an eviction order would not be appropriate in this case. This historically self-conscious observation therefore complimented the Court's finding that no alternative effective remedies were at the farm owners' disposal.

The Court also considered to what extent the state had already fulfilled its obligations to the farm owners and the occupiers by ensuring that these private parties had the mechanisms available to them to resolve the dispute among themselves, in other words, the Court enquired whether the state sufficiently protected the parties' rights by providing them with a well-functioning system of courts.<sup>359</sup> The Court held that the courts can only be well-functioning if the state additionally ensures that court orders are complied with, otherwise courts would have no practical power. It is clear that in this case only the state could assist the farm owners in the

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<sup>358</sup> Ibid at para 35.

<sup>359</sup> Ibid at para 38.

enforcement of the eviction order.<sup>360</sup> The constitutional norm of legality required the state to ensure compliance with court orders so that anarchy would not ensue.<sup>361</sup>

The effect of the Court's conclusion that constitutional damages had to be paid by the state in this case effectively allowed the farm owners to obtain compensation for their losses (that would almost certainly be perpetuated in future) as if their land had been expropriated. However, the Court did not go so far as to order the expropriation of the land because such an order would infringe the separation of powers doctrine as expropriations fall within the jurisdictional competence of the executive branch of government. The Court's sensible, pragmatic and systematic approach to fashioning appropriate remedies for breaches of constitutional rights is to be welcomed and serves as an excellent example of a case where constitutional damages were properly awarded.

A slightly different approach was followed by the Supreme Court of Appeal the following year in *MEC, Department of Welfare, Eastern Cape v Kate*.<sup>362</sup> Mrs Kate applied for a governmental grant for her disability.<sup>363</sup> Her application was attested to on 16 April 1996 which also signals the date on which the grant would accrue to her on condition that it would be approved by the relevant authorities.<sup>364</sup> Her grant was approved approximately three months after the application had been attested to. However, she was only informed of the approval of the grant 40 months later without any explanation for the delay.<sup>365</sup> Arrangements were subsequently made for Mrs Kate to collect the grants that were in arrears plus interest calculated from the date on which she became aware of the success of her application in terms of the relevant regulations.<sup>366</sup> The question for determination here was whether Mrs Kate was entitled to interest calculated from the date on which the application had been attested to, which was more than three years earlier than when she became aware of the success of her application; the additional three-years' worth of interest was claimed as constitutional damages.<sup>367</sup>

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<sup>360</sup> Ibid at para 43.

<sup>361</sup> Ibid at para 44.

<sup>362</sup> *MEC, Department of Welfare, Eastern Cape v Kate* [2006] ZASCA 49, 2006 (4) SA 478 (SCA), [2006] 2 All SA 455 (SCA) ('*Kate*'). See also Bishop (note 135 above) at 151-164.

<sup>363</sup> *Kate* (note 362 above) at para 8.

<sup>364</sup> Ibid at para 9.

<sup>365</sup> Ibid at para 10.

<sup>366</sup> Ibid at para 14.

<sup>367</sup> Ibid at para 17.

The court in *Kate* granted the victim of the state's tardiness the constitutional damages prayed for. It reached this conclusion by considering three factors, namely the nature and importance of the constitutional rights infringed, the availability of alternative remedies and the consequences of the constitutional breach.<sup>368</sup>

Firstly, the state's breach of its constitutional administrative-law duties (in terms of section 33) in this case simultaneously breached the substantive right to social assistance (section 27) and both of these rights are crucial to protecting the interests of persons with disabilities such as Mrs Kate.<sup>369</sup>

Secondly, the court noted that the decisions in *Fose* and *Modderklip* created the possibility of claiming constitutional damages in appropriate cases where the 'real world' and 'constitutional ideals' had to meet,<sup>370</sup> and that no other relief would vindicate Mrs Kate's rights. Declaratory orders can be useful at times but only if government takes the declarations seriously. Here it was known to the court that the Eastern Cape Department of Welfare had systemically failed to fulfil its constitutional and statutory functions to persons with disabilities and so a declaration of Mrs Kate's rights would be of no assistance to her.<sup>371</sup> A mandamus can also constitute appropriate relief in some cases but here the endemic incompetence of the Department of Welfare in the Eastern Cape would require at least 2000 such orders that would probably result in further wasteful litigation by other parties who would be harmed in future by the Department's malfeasance.<sup>372</sup> The court indicated that delictual awards could also be useful in some cases but that awards for constitutional damages are not remedies of last resort.<sup>373</sup> This is a peculiar statement that flies in the face of *Fose* where the Constitutional Court held that if the common law provides sufficient protection for a fundamental right, constitutional damages should not be claimed. This problematic dictum in *Kate* creates the impression that common-law damages and constitutional damages claims exist concurrently and that a court can award whichever type of damages it chooses. A choice in favour of constitutional damages should be favoured, according to the court, where there are endemic breaches of constitutional rights.<sup>374</sup> This stance of the

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<sup>368</sup> Ibid at para 25.

<sup>369</sup> Ibid at para 22.

<sup>370</sup> Ibid at paras 23-24.

<sup>371</sup> Ibid at paras 28-29.

<sup>372</sup> Ibid at paras 30-31.

<sup>373</sup> Ibid at para 27.

<sup>374</sup> Ibid.

court is theoretically unsound. In this regard one may argue that delicts committed by the police service, infringing the rights to bodily integrity and dignity in various ways, have become so rife that constitutional damages should be granted in future instead of common-law damages. The most pertinent difficulty with such an approach is to determine the elements that would have to be proved to establish a cause of action for constitutional damages. If the delictual elements of fault, causation and wrongfulness would not have to be established, then this approach would effectively impose strict liability on the state. If those elements would still be relevant to founding a case for constitutional damages, the only difference between claims for constitutional and common-law damages would be in name. The sweeping statement that claims for common-law and constitutional damages can run parallel to one another without a reasonable explanation as to why this is the case and how this will work in practice opens up the door to theoretical and doctrinal chaos. A better approach would have been to show why the law of delict will not assist Mrs Kate here and why constitutional damages would therefore be the most appropriate award to make. In this case, similar to *Modderklip CC*, the state caused the victim financial loss which can only be claimed if the state acts in a *mala fide* manner. Despite being grossly incompetent in fulfilling its functions there was no evidence in *Kate* to prove dishonesty, fraud or corruption on the part of the state and so the victim would in all probability have failed with a delictual claim against the state. For that reason, constitutional damages is the most suitable remedy to vindicate Mrs Kate's rights. Supporting considerations justifying the award for constitutional damages would be the applicable state machinery's systemic ineffectiveness.<sup>375</sup> Additionally, an award for constitutional damages would require the Department to request more funding from Parliament for purposes of paying damages of this kind which in turn ensures that the Department is accountable to the legislature.<sup>376</sup> However, it may be argued that these supporting considerations should take a backseat to the consideration that Mrs Kate had no other primary or secondary remedies to protect her rights.

Thirdly, as to the consequences of the breach, the court held that this matter is not simply about the financial loss that Mrs Kate had suffered because of the state's incompetence. This case also relates to the state's systemic failure to respect the dignity of persons with disabilities in South Africa, who often require more resources than non-disabled persons in order to live their day-to-day lives.<sup>377</sup> For these three reasons the court required the state to pay interest to Mrs

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<sup>375</sup> Ibid at para 30.

<sup>376</sup> Ibid at para 32.

<sup>377</sup> Ibid at para 33.

Kate, subject to the *in duplum* rule, on the grants that she had not received from the moment her application had been attested to.<sup>378</sup>

The decision in *Kate* deserves support to some extent. Once it has been established that no primary or secondary remedies will vindicate a victim's constitutional rights, a court should seriously consider the possibility of awarding constitutional damages. Such an award can be further justified by various factors mentioned by the Supreme Court of Appeal, for example the fact that many constitutional rights are simultaneously infringed, those infringements are systemic in nature and an award for constitutional damages would indirectly force the state department concerned to be held accountable to the legislature. However, the scope of application of *Kate* to future cases is inherently limited because the issues in *Kate* arose before the PAJA came into effect: *Kate's* application for the grant was made in 1996 while the Act's commencement date was 30 November 2000.

In *Jayiya v MEC for Welfare, Eastern Cape Provincial Government*<sup>379</sup> the Supreme Court of Appeal in passing criticised decisions similar to *Kate* that were heard after PAJA's commencement, for example *Mahambehlala v MEC for Welfare, Eastern Cape*<sup>380</sup> and *Mbanga v MEC for Welfare, Eastern Cape*<sup>381</sup> in which constitutional damages were awarded instead of administrative-law damages based on section 8 of the PAJA. In administrative law cases handed down after *Jayiya* where the victims of poor administrative decisions have suffered some type of financial loss, courts have given due consideration to the possibility of granting administrative-law damages (effectively a public-law remedy grounded in legislation) in 'exceptional cases' as detailed in section 8(c)(ii)(bb) of the PAJA.<sup>382</sup> These developments in this part of the law are surely acceptable as they pay due regard to a systematic approach to the remedies proposed throughout this chapter.

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<sup>378</sup> Ibid at para 35.

<sup>379</sup> *Jayiya v MEC for Welfare, Eastern Cape Provincial Government and Another* [2003] ZASCA 38, 2004 (2) SA 611 (SCA), [2003] 2 All SA 223 (SCA).

<sup>380</sup> *Mahambehlala v MEC for Welfare, Eastern Cape and Another* 2002 (1) SA 342 (SE).

<sup>381</sup> *Mbanga v MEC for Welfare, Eastern Cape* 2002 (1) SA 359 (SE).

<sup>382</sup> See eg *Minister of Defence and Others v Dunn* [2007] ZASCA 75, 2007 (6) SA 52 (SCA), [2008] 2 All SA 14 (SCA); *Darson Construction (Pty) Ltd v City of Cape Town and Another* 2007 (4) SA 488 (C); and *Trustees of the Simcha Trust v De Jongh and Others* [2015] ZASCA 45, 2015 (4) SA 229 (SCA), [2015] 3 All SA 161 (SCA). Cf however the confusing judgment in *Kouga Municipality v De Beer and Another* [2007] ZAECHC 118, 2008 (5) SA 503 (E) where the court's stance on constitutional, administrative and common-law damages is completely unclear.

The need for a systematic approach to determining the appropriate remedy for holding the state accountable as required by the founding provisions of the Constitution was recently echoed by the Supreme Court of Appeal in *Minister of Police v Mboweni*.<sup>383</sup> In *Mboweni* the mothers of daughters fathered by Mr Mboweni claimed constitutional damages from the Minister of Police for the children's loss of parental care (as enshrined in section 28(1)(b) of the Constitution) after a brutal police assault had caused the death of Mr Mboweni.<sup>384</sup> The High Court awarded a claim for constitutional damages.<sup>385</sup> The Supreme Court of Appeal overturned that decision for many reasons, at least one of them being that the tertiary remedy of constitutional damages should only be considered if the primary and secondary remedies are deficient. In this regard Wallis JA said:<sup>386</sup>

The court below did not consider whether a remedy by way of a claim for damages for loss of support was an appropriate remedy for any breach of the children's rights in this case. Its approach was that the Constitutional Court in *Fose* had recognised the possibility of a claim for constitutional damages as an appropriate remedy for a breach of a constitutional right and the only issue was whether such damages should be awarded for a breach of the right in s 28(1)(b) of the Constitution. That approach was incorrect. The court should first have considered the adequacy of the existing remedy. If it was inadequate then it should have considered whether the deficiency could be remedied by a development of the common law to accommodate a claim more extensive than one for pecuniary loss. Ackermann J pointed out in *Fose* that the common law of delict is flexible and falls to be developed with due regard to the spirit, purport and objects of the Bill of Rights. Another consideration is that the infringement of constitutional rights may often be appropriately vindicated by resort to public law remedies.

From this dictum it is clear that the Supreme Court of Appeal has, thankfully, changed its view regarding the concurrent availability of common-law and constitutional remedies since *Kate*.

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<sup>383</sup> *Minister of Police v Mboweni and Another* [2014] ZASCA 107, 2014 (6) SA 256 (SCA), [2014] 4 All SA 452 (SCA) (*Mboweni?*). See also JA Robinson & R Prinsloo 'The Right of the Child to Care and Constitutional Damages for the Loss of Parental Care: Some Thoughts on M v Minister of Police and Minister of Police v Mboweni' (2015) 18 *Potchefstroom Electronic Law Journal* 1670; and J Parker & FN Zaal 'Small Comfort for Bereaved Children. A Cautious Response to Loss of Parental Care Claims' (2016) 79 *Journal of Contemporary Roman-Dutch Law* 146.

<sup>384</sup> *Mboweni* (note 383 above) at paras 1-3.

<sup>385</sup> *M and Another v Minister of Police of the Government of South Africa* [2013] ZAGPPHC 201, 2013 (5) SA 622 (GNP). See also J Parker & FN Zaal 'Damages for Deprivation of Parental Care: Initiating a Groundbreaking New Remedy for Children' (2015) 36 *Obiter* 164.

<sup>386</sup> *Mboweni* (note 383 above) at para 22. Footnotes omitted.

#### 4 CONCLUDING THOUGHTS ON THE DELICTUAL LIABILITY OF THE STATE

The chapters in this Part on the ‘State as Wrongdoer’ have shown how the Constitution has moulded the common law of delict to conform to the imperatives of South Africa’s transformative democracy. Drawing from the methodology developed in this thesis, I have continuously argued a case in favour of the constitutional framing of all delictual disputes between the state and private parties. The constitutional framing is best done by considering at the commencement of every case what constitutional right(s) has/have been potentially violated by the state or one of its organs, most pertinently discussed in Chapter 3 above. The state’s obligation to respect the rights that have been infringed may be relevant in determining whether the state functionary concerned acted within the course and scope of his or her employment, thereby establishing vicarious liability as explained in Chapter 4. These rights must be understood in light of relevant constitutional values such as the preambular call for historical self-consciousness as well as the founding ideals of state accountability and rule of law expounded in the present chapter.

Interpreting the rights in historical context is crucial to the transformative enterprise of the Constitution that simultaneously memorialises and monumentalises our past. The past should be memorialised to the extent that recognition must be given to our failures while South Africa’s triumphs should be appropriately monumentalised. However, in memorialising and monumentalising our past, we should be cautious not to fall into the trap of sketching a ‘grand narrative’ whereby a falsely singular and coherent version of South African history is portrayed. Due recognition should be given to the impossibility of utilising a unitary version of history due to the plurality of voices in our history and because our understanding of history changes over time and new histories are created.

The value of state accountability should play an important role in how lawyers think about remedies against state impropriety. The case law surveyed in the present chapter shows that accountability requires one to turn to public or non-legal remedies first, before resorting to claims for common-law or constitutional damages. The effect of accountability on remedies is largely consistent with the effects of applying adjudicative subsidiarity as a transformative method for delictual problems where the state is the alleged wrongdoer. It will be recalled from Chapter 2 that after one has identified the right(s) that the state has actively or passively infringed in light of section 7 of the Constitution, you proceed to determine whether legislation gives



effect to the right(s) in question. If legislation applies and perhaps provides a remedy for loss caused by the state, the statute should be interpreted in light of section 39(2). Here one could imagine the wide array of PAJA remedies such as review, the granting of interdicts and so forth. If no legislation applies it should be determined whether the common law could be applied consistently with the Constitution, or whether it should be developed to give effect to the constitutional rights concerned as required by section 8 of the Constitution. If neither the common law's application nor its development can effectively vindicate the right(s) of the victim, an award for constitutional damages may be awarded.

This discussion has thus far focused on situations where constitutional rights have been infringed by the state. If no constitutional rights have been violated by the state in a particular case, one will nevertheless firstly consider whether legislation provides the victim with a statutory remedy for the harm suffered. If it does, the Constitution will feature in the interpretation of the statute in terms of section 39(2). If there is no remedial legislation, one proceeds to consider whether the common law might provide a remedy through its application or development consistent with constitutional imperatives. Of course, not only constitutional rights are relevant in determining the constitutional consistency of the common law – other constitutional provisions may also be relevant to the dispute. If the common law fails to give effect to the constitutional obligations of the state, the possibility of constitutional damages will always act as a final safety net to hold the state to account.

This concludes the discussion on state liability in South Africa in light of the Constitution. In Part Three the impact of the Constitution on cases where both victim and wrongdoer are private parties is considered. A glance through the law reports reveals that the influence of the Constitution on the law of delict has been less profound and less vast in cases relating to private wrongdoers. Therefore Part Three is considerably briefer than Part Two. This does not mean that the potential of the Constitution in private relations is inherently limited. It is indeed possible that the Constitution's potential for disrupting private structures of power has simply not been fully realised yet. However, it should be kept in mind that the scope of this study is limited to evaluating the performance of our courts up to this point and not to venture into an endless variety of hypothetical situations that could require constitutional infiltration in future.

PART THREE

# PRIVATE WRONGDOERS

# The Constitutional Framework for Holding Private Wrongdoers Liable: Thoughts on *Khumalo v Holomisa*<sup>1</sup>

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## 1 INTRODUCTION

A provocative aspect of the influence of the Constitution on the South African law of delict is that the Constitution has exerted a greater influence in the realm of state liability when compared to cases relating to private wrongdoers. The reason for this state of affairs is open to speculation but at least two causes can be identified.

Firstly, constitutions are traditionally regarded as instruments with the primary purpose of protecting private parties from state tyranny.<sup>2</sup> For that reason lawyers may be eager to invoke the Constitution as the essential source of the state's obligations in the context of delictual disputes between the government and private parties where it has to be determined whether those obligations have been breached. This approach is supported by the fact that in terms of the 'grand narrative' of South African history there is a tendency to think about apartheid as a political regime that was principally enforced by the state and that the Constitution therefore simply aims to capsize the way in which the state governs.<sup>3</sup> If one follows this line of reasoning it is easy to see why the Constitution has played such a prominent role in the law of state liability in South Africa.

Secondly, even though Klare may argue that the Constitution is 'postliberal' in nature to the extent that it could be read as being oriented towards the achievement of a more egalitarian society in real terms, for example because of the provisions relating to substantive equality, socio-economic rights and horizontality,<sup>4</sup> the Constitution can be and has been interpreted and

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<sup>1</sup> *Khumalo v Holomisa* [2002] ZACC 12, 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) ('*Khumalo*').

<sup>2</sup> See eg A Heywood *Politics* (3<sup>rd</sup> Ed, 2007) 323.

<sup>3</sup> See eg P de Vos 'A Bridge Too Far? History as Context in the Interpretation of the South African Constitution' (2001) 17 *South African Journal on Human Rights* 1, 8.

<sup>4</sup> K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 153.

understood as a predominantly liberal invention.<sup>5</sup> The core value of liberalism is individual freedom. Individual freedom is realised when ‘each person is able to act as he or she pleases or chooses’ subject to certain minimalistic limitations imposed by the law.<sup>6</sup> Those limitations aim to ensure that one person’s liberty does not pose a threat to the liberty of others. Liberals therefore tend to reject laws that regulate the private sphere in ways that do not afford the maximum amount of liberty and autonomy to all individuals. In contrast to this paradigm, horizontality has at its heart a concern for social or substantive equality. Truly, it has some potential to militate against privatised apartheid and to disrupt existing hegemonic power relations in society that have largely subsisted in ‘post’-apartheid South Africa.<sup>7</sup> The core value and potential of the horizontal application of fundamental rights therefore flies in the face of liberal ideals. The slighter impact of the Constitution on private delictual disputes could be, tacitly or even unconsciously, informed by a reluctance of private litigators and/or our courts to deviate from the liberal notion of justice. In terms of the American legal realist school of thought it might be argued that this is because lawyers, in all varieties of guises, stand to lose a lot from a disruption of existing structures of power,<sup>8</sup> while critical legal theorists might contend that lawyers simply adhere to the liberal paradigm in a state of false consciousness – the belief that the liberal notion is the only way of comprehending the Constitution.<sup>9</sup>

In this Part the ways in which the Constitution has influenced private relations through the law of delict will be explored. The present chapter specifically places the constitutional

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<sup>5</sup> See eg T Roux ‘Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference?’ (2009) 20 *Stellenbosch Law Review* 258, 261; and S Sibanda ‘Not Purpose Made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty’ (2011) 22 *Stellenbosch Law Review* 482, 484.

<sup>6</sup> Heywood (note 2 above) at 45-46.

<sup>7</sup> See eg J van der Vyver ‘The Private Sphere in Constitutional Litigation’ (1994) 57 *Journal of Contemporary Roman-Dutch Law* 378, 387; H Cheadle & D Davis ‘The Application of the 1996 Constitution in the Private Sphere’ (1997) 13 *South African Journal on Human Rights* 44, 45; J van der Walt ‘Die Toekoms van die Onderskeid tussen die Publiekreg en Privaatreg in die Lig van die Horisontale Werking van die Grondwet (Deel 1)’ (2000) *Journal of South African Law* 416, 417; and C Albertyn & D Davis ‘Legal Realism, Transformation and the Legacy of Dugard’ (2010) 26 *South African Journal on Human Rights* 188, 205.

<sup>8</sup> See eg J Dugard ‘The Judicial Process, Positivism and Civil Liberty’ (1971) 88 *South African Law Journal* 181, 187-188.

<sup>9</sup> For a South African and direct take on ‘false consciousness’ see eg J van Doren ‘Critical Legal Studies and South Africa’ (1989) 106 *South African Law Journal* 648, 651; and A van Blerk ‘Critical Legal Studies in South Africa’ (1996) 113 *South African Law Journal* 86, 94.

framework that applies to private delictual disputes in light of O'Regan J's judgment in the seminal case of *Khumalo* under the spotlight. To contextualise *Khumalo*, § 2 of the present chapter reviews a number of key delictual cases that preceded *Khumalo*, decided under the 1993 Constitution. § 3 then turns to an analysis of *Khumalo* to determine whether any substantial differences exist between the 1993 and 1996 Constitutions in the context of horizontality. § 4 opens a discussion on what horizontality might mean for private delicts in future.

## 2 HORIZONTALITY UNDER THE 1993 CONSTITUTION

The watershed moment for horizontality under the 1993 Constitution was undoubtedly the Constitutional Court's pronouncement in *Du Plessis v De Klerk*.<sup>10</sup> At one point there was uncertainty about whether the Constitution allowed for the horizontal application of the Bill of Rights,<sup>11</sup> but the majority judgment in *Du Plessis* clarified the position. In *Du Plessis* the injured party alleged that he had been defamed by the *Pretoria News* newspaper in that it published articles to the effect that he had been involved in an arms deal with Angolan rebels.<sup>12</sup> Multiple traditional grounds for justification were originally raised by the newspaper but after the 1993 Constitution came into force the newspaper applied to amend its pleadings by adding a defence

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<sup>10</sup> *Du Plessis and Others v De Klerk and Another* [1996] ZACC 10, 1996 (3) 850 (CC), 1996 (5) BCLR 658 (CC) ('*Du Plessis*').

<sup>11</sup> Cases decided in favour of (some type of) horizontality include: *Mandela v Falati* 1995 (1) SA 251 (W), 1994 (4) BCLR 1 (W); *Motala and Another v University of Natal* 1995 (3) BCLR 374 (D); *Gardener v Whitaker* 1995 (2) 672 (E), 1994 (5) BCLR 19 (E); *Baloro and Others v University of Bophuthatswana and Others* 1995 (4) SA 197 (B), 1995 (8) BCLR 1018 (B); and *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) [1996] 1 All SA 478 (W), 1996 (6) BCLR 836 (W). Cases where horizontality was rejected include: *De Klerk and Another v Du Plessis and Others* 1995 (2) SA 40 (T), 1994 (6) BCLR 124 (T); and *Potgieter en 'n Ander v Kilian* 1995 (11) BCLR 1498 (N) 1996 (2) SA 276 (N). On the position prior to *Du Plessis* see eg J van der Vyver 'Constitutional Free Speech and the Law of Defamation' (1995) 112 *South African Law Journal* 572; L du Plessis 'Enkele Gedagtes oor die Historiese Interpretasie van Hoofstuk 3 van die Oorgangswet' (1995) 58 *Journal of Contemporary Roman-Dutch Law* 504; PJ Visser 'A Successful Constitutional Invasion of Private Law' (1995) 58 *Journal of Contemporary Roman-Dutch Law* 745; A van Aswegen 'The Implications of a Bill of Rights for the Law of Contract and Delict' (1995) 11 *South African Journal on Human Rights* 50; HA Strydom 'The Private Domain and the Bill of Rights' (1995) 10 *SA Public Law* 52; M Mbao 'The Province of the South African Bill of Rights Determined and Redetermined – A Comment on the Case of Baloro & Others v University of Bophuthatswana & Others' (1996) 113 *South African Law Journal* 33; PJ Visser 'Horisontaliteit van Fundamentele Regte Afgewys' (1996) 59 *Journal of Contemporary Roman-Dutch Law* 510; S Woolman 'Defamation, Application and the Interim Constitution' (1996) 113 *South African Law Journal* 428; and L Wolhuter 'Horizontality in the Interim and Final Constitutions' (1996) 11 *SA Public Law* 512.

<sup>12</sup> *Du Plessis* (note 10 above) at paras 1-2.

based solely on section 15 of the 1993 Constitution, protecting the right to freedom of expression.<sup>13</sup> Even though the majority of the Court ultimately refused the application based on the fact that the 1993 Constitution did not have retrospective effect,<sup>14</sup> much-needed guidance on the horizontality issue was nevertheless provided.

In his judgment Kentridge AJ drew a distinction between the ‘direct’ and ‘indirect’ horizontal application of the 1993 Constitution. Direct horizontal application appears to involve a declaration of unconstitutionality and invalidity of a law that is relevant to a dispute between private parties.<sup>15</sup> Indirect horizontal application seems to mean that laws must be interpreted or, specifically in the case of the common law, developed in a manner that is consistent with the Bill of Rights.<sup>16</sup> The Court considered an unpublished paper of Cockrell in which he argues that the question of horizontality should be approached by answering two questions about the 1993 Constitution: Firstly one determines what law the Bill of Rights applies to and, secondly, one establishes who is bound by it.<sup>17</sup>

As to the first issue, section 7(2) of the 1993 Constitution provided that all law was subject to the Bill of Rights. Both the common law and legislation constitute the ‘law’ spoken of in section 7(2).<sup>18</sup> As to the second issue, section 7(1) of the 1993 Constitution made it plain that only the executive and legislative branches of government were expressly bound by the Bill of Rights. The section made no mention of private parties or the judiciary.<sup>19</sup> However, section 35(3) required courts to have regard to the spirit, purport and objects of the Bill of Rights in the application and development of the common law.<sup>20</sup>

The Court relied on the above provisions to conclude that constitutional rights could only be directly relied on by private individuals acting against the state, for example by arguing that legislation or some type of state conduct was unconstitutional, while the common law could only be subjected to constitutional scrutiny if the state was a party to the dispute.<sup>21</sup> Significantly

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<sup>13</sup> Ibid at para 5.

<sup>14</sup> Ibid at para 65.

<sup>15</sup> Ibid at paras 51-53.

<sup>16</sup> Ibid at para 60.

<sup>17</sup> Ibid at para 43.

<sup>18</sup> Ibid at para 44.

<sup>19</sup> Ibid at para 45.

<sup>20</sup> Ibid at para 46.

<sup>21</sup> Ibid at para 49.

the Court held that the common law could not be declared unconstitutional because such a finding would apparently leave a gap in the law. Such a gap, according to the Court, could not be filled by courts because they lack legislative capacity.<sup>22</sup> If, for example, a common-law crime flew in the face of the Bill of Rights the appropriate remedy would have been to attack the conduct of the state in prosecuting the crime in question and not to attack the common law itself.<sup>23</sup> In brief, the Bill of Rights could only be applied directly, in the sense of invalidating non-common-law rules, in matters relating to the state. However, the Supreme Court was indeed given the power to develop the common law consistent with the Bill of Rights in terms of section 35(3). That resulted in the approval of a model of indirect application of the Bill of Rights between private parties *inter se*.<sup>24</sup> Thus the 1993 Constitution did not have general horizontal application but could, in principle, only be utilised indirectly in private disputes,<sup>25</sup> and the newspaper was not entitled to rely directly on section 15(1) that protected the right to freedom of expression.<sup>26</sup>

Woolman and Davis<sup>27</sup> as well as Froneman<sup>28</sup> disapprove of the Court's finding because it reflected a formalist mode of reasoning, in other words a black-letter-law approach, which is undesirable for purposes of constitutional interpretation. It is formalist in the sense that the Court regarded the omission by the constitutional drafters of 'private parties' and the 'judiciary' in the application clauses of the 1993 Constitution as being more important than the deeper substantive issue of whether the supreme law required a prevention of privatised apartheid. Even though I regard this criticism as valuable, it should be added that the distinction between direct and indirect application, as the Court in *Du Plessis* understood it, has very little practical significance. Ultimately one could argue that the striking down of a common-law rule constitutes one of the many types of development required by the spirit, purport and objects of the Bill of Rights. The Court's concern that a court that invalidates a common-law rule would have to provide a substitute, thereby taking on the role of the legislature, can be rebutted by arguing that

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<sup>22</sup> Ibid at para 53.

<sup>23</sup> Ibid at para 54.

<sup>24</sup> Ibid at para 60.

<sup>25</sup> Ibid at para 63.

<sup>26</sup> Ibid at para 67.

<sup>27</sup> S Woolman & D Davis 'The Last Laugh: *Du Plessis v De Klerk*, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and Final Constitutions' (1996) 12 *South African Journal on Human Rights* 361, 366ff. See also Woolman's elaboration on his earlier critique with Davis in S Woolman 'Chapter 31: Application' in S Woolman & M Bishop *Constitutional Law of South Africa* (2<sup>nd</sup> Ed, OS, 2006) 23-29.

<sup>28</sup> JC Froneman 'Legal Reasoning and Legal Culture: Our "Vision" of Law' (2005) 16 *Stellenbosch Law Review* 3, 4ff.

there may be cases where no substitution would be necessary. For example in the recent case of *DE v RH* the Constitutional Court struck down the common-law rule, that allowed delictual claims based on adultery, under the guise of a ‘development’ of the common law.<sup>29</sup>

Furthermore, Van der Walt originally contended that the controversial issue was not whether the Bill of Rights could delete a common-law provision or whether it could merely influence the development of the common law – the real problem was that the Bill of Rights, on the law laid down in *Du Plessis*, could not influence private relationships in the ‘non-legal’ sphere.<sup>30</sup> Later on Van der Walt suitably abandoned his earlier stance and took the view that there is in fact no part of the private sphere that is ungoverned by law.<sup>31</sup> Even if there is no explicit rule regulating a specific form of private conduct, the law’s silence on the issue tacitly empowers individuals to do as they please.<sup>32</sup> I argue that Van der Walt is correct because the entitlement to a private sphere is founded on the common-law and constitutional rights to privacy and personal freedom. Therefore the private sphere is not entirely unregulated. In light of the above hypothesis Van der Walt argues that tacit acceptance by the common law or statutory law of the private conduct concerned may be subject to indirect horizontal application, thereby militating against the privatisation of apartheid.<sup>33</sup>

Despite these criticisms of the judgment, the positive effect of *Du Plessis* was felt in a number of cases, subject to positive interpretation by the courts.<sup>34</sup> For example, in *Rivett-Carnac v Wiggins* the director of a company under curatorship distributed a communication to stakeholders arguing that the curator did not conduct a fair appraisal of the company’s financial position.<sup>35</sup> The curator thereupon claimed damages based on defamation in that the director

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<sup>29</sup> *DE v RH* [2015] ZACC 18, 2015 (5) SA 83 (CC), 2015 (9) BCLR 1003 (CC) (*‘DE v RH’*).

<sup>30</sup> J van der Walt ‘Justice Kriegler’s Disconcerting Judgment in *Du Plessis v De Klerk*: Much Ado about Direct Horizontal Application (Read Nothing)? (1996) *Journal of South African Law* 732.

<sup>31</sup> J van der Walt ‘Perspectives on Horizontal Application: *Du Plessis v De Klerk* Revisited’ (1997) 12 *SA Public Law* 1, 4.

<sup>32</sup> This point is taken further in J van der Walt ‘Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-Operative Relation between Common-Law and Constitutional Jurisprudence’ (2001) 17 *South African Journal on Human Rights* 341.

<sup>33</sup> *Ibid* at 352-353.

<sup>34</sup> For an elementary example see the finding in *Gardener v Whitaker* [1996] ZACC 11, 1996 (6) BCLR 775 (CC), 1996 (4) SA 337 (CC) where it was held that the Constitutional Court had no jurisdiction over the Supreme Court’s indirect application of the Bill of Rights to a defamation dispute.

<sup>35</sup> *Rivett-Carnac v Wiggins* 1997 (3) SA 80 (C) (*‘Rivett-Carnac’*) 85B-C.



created the impression that the curator was unprofessional and incompetent.<sup>36</sup> Davis AJ held that even though many common-law rules relating to defamation were constitutionally compatible, some rules might not be.<sup>37</sup> On the interaction between the common law and the Constitution the court held as follows:<sup>38</sup>

[T]he Constitution could never have envisaged such a fundamental rejection of precedent so as to empower an individual judge to overturn decades of precedent developed by the Appellate Division. Nonetheless the Constitution mandates each court to examine the common law rules afresh and if necessary to ensure that the content thereof accords with the principles thereof. This must be done cautiously after a careful examination of the existing principles which underpin the common law rules and a comparison thereof with the key principles of the Constitution. Whatever the outcome of the enquiry, a court is required to undertake this form of constitutional audit in terms of the obligation imposed on all courts by section 35(3) of the Constitution.

The court further held that even if a common-law rule is consistent with the Constitution the court should give reasons for such finding.<sup>39</sup> This would especially be true in cases where policy considerations feature, such as the ‘legal convictions of the community’ standard, because those convictions have now been reduced to written form in the Constitution.<sup>40</sup> Applied to the facts at hand Davis AJ indicated that in determining whether the statements made by the director had been defamatory in nature a court had to enquire how the ‘reasonable reader’ would interpret it. This also involved policy considerations that had to be informed by the Constitution.<sup>41</sup> The court held that the curator’s esteem had not been reduced in the eyes of the reasonable reader because such a person would be conscious of the constitutional concern for ‘transparency and deliberation’, ‘debate’ and ‘robust exchange’.<sup>42</sup> Ultimately the statements of the director simply reflected a difference in professional opinion between the curator and the director which should be encouraged in a democracy such as ours.<sup>43</sup>

Even though the High Court in *McNally v M & G Media* opined that the strict liability imposed on the media in terms of the common law of defamation might have to be reconsidered

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<sup>36</sup> Ibid at 85G-86A.

<sup>37</sup> Ibid at 87B-C.

<sup>38</sup> Ibid at 87C-E.

<sup>39</sup> Ibid at 87F-G.

<sup>40</sup> Ibid at 87I.

<sup>41</sup> Ibid at 89E-G.

<sup>42</sup> Ibid at 89I.

<sup>43</sup> Ibid at 92H-93B.

in future in light of the right to freedom of expression, it nevertheless held that introducing a new standard for culpability would be too radical an alteration of the existing law.<sup>44</sup> However, in *National Media v Bogosbi* the Supreme Court of Appeal was more enthusiastic about the possibility of reconsidering the fault requirement for media liability in defamation cases.<sup>45</sup> The *City Press* newspaper published a set of allegedly defamatory articles prompting the defendant to institute an action for defamation against the publisher, editor, distributor and printer of the newspaper.<sup>46</sup> The original plea of the defendants had been truth and public interest but they later sought to amend their pleadings to include an additional defence for the distributor and printer, namely that *animus iniuriandi* had been lacking, that those defendants had been unaware of the content of the articles and that they had not been negligent.<sup>47</sup> A further proposed amendment sought to introduce a defence based on the absence of wrongfulness on account of the protection of the constitutional right to freedom of expression.<sup>48</sup> The High Court refused the proposed amendments on the basis that the defences were bad in law.<sup>49</sup>

The Supreme Court of Appeal focused its enquiry around the correctness of its pre-constitutional decision in *Pakendorf v De Flamingh* that imposed strict liability on the media for defamation.<sup>50</sup> *Pakendorf* was authority for the position that the media could not claim a lack of *animus iniuriandi* as a defence in defamation cases as the opposite position would be ‘unjust’ to the victims of the media’s public influence.<sup>51</sup> The court held that *Pakendorf* had been incorrectly decided because it had failed to square the competing rights of freedom of expression (of the media) and dignity (of the alleged victim). The right to dignity in this sense should be understood in a broad sense to include both the self-esteem of the individual and his or her reputation. *Pakendorf* overemphasised the right to dignity while omitting to consider the significance of

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<sup>44</sup> *McNally v M & G Media and Others* 1997 (4) SA 267 (W), [1997] 3 All SA 584 (W), 1997 (6) BCLR 818 (W)(‘*McNally*’) at 275F-I.

<sup>45</sup> *National Media Ltd and Others v Bogosbi* [1998] ZASCA 94, 1998 (4) SA 1196 (SCA), [1998] 4 All SA 347 (A)(‘*Bogosbi*’).

<sup>46</sup> *Ibid* at 1201G.

<sup>47</sup> *Ibid* at 1201H-I.

<sup>48</sup> *Ibid* at 1202A.

<sup>49</sup> *Ibid* at 1202A-B.

<sup>50</sup> *Pakendorf en Andere v De Flamingh* [1982] ZASCA 2, 1982 (3) SA 146 (A)(‘*Pakendorf*’).

<sup>51</sup> *Bogosbi* (note 45 above) at 1205E-H.

freedom of expression for purposes of culturing a healthy democracy.<sup>52</sup> The Court reasoned as follows:<sup>53</sup>

Freedom of expression, albeit not entrenched, did exist in the society that we knew at the time when *Pakendorf* was decided (*Hix Networking Technologies v System Publishers (Pty) Ltd and Another* 1997 (1) SA 391 (A) at 400D-G) although its full import, and particularly the role and importance of the press, might not always have been acknowledged. If we recognise, as we must, the democratic imperative that the common good is best served by the free flow of information and the task of the media in the process, it must be clear that strict liability cannot be defended and should have been rejected in *Pakendorf*. Much has been written about the "chilling" effect of defamation actions but nothing can be more chilling than the prospect of being mulcted in damages for even the slightest error.

The improper balancing of rights in *Pakendorf*, coupled with the fact that strict liability for the media had been rejected in many foreign jurisdictions, led the Supreme Court of Appeal to overrule its earlier decision. With strict liability out of the picture the court turned to (what it regarded as) two interrelated issues, namely, the appropriateness of the respective defences based on the exclusion of wrongfulness and the absence of *animus iniuriandi*.

As to a ground of justification excluding wrongfulness, the court decided to follow the Australian position by affording the media a right to raise 'reasonable conduct' as a defence for the publication of defamatory material.<sup>54</sup> If the media can prove that its publication of false defamatory material was reasonable in the circumstances of the case, its conduct will not be regarded as wrongful.<sup>55</sup> Relevant circumstances include the nature, extent and tone of the statements; the presence or absence of unnecessary sting; whether the statements were made in the context of a political discussion; whether the potential victim was given the opportunity to respond; and the need to publish the statements before the truth thereof could be properly established.<sup>56</sup> This ground of justification is today variously known as 'media privilege', 'reasonable publication of an untruth'<sup>57</sup> or simply 'reasonable publication'.<sup>58</sup>

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<sup>52</sup> Ibid at 1207E-1208A.

<sup>53</sup> Ibid at 1210F-H.

<sup>54</sup> Ibid at 1211D-E.

<sup>55</sup> Ibid at 1212F-G.

<sup>56</sup> Ibid at 1212G-1213B.

<sup>57</sup> J Neethling & JM Potgieter *Neethling-Potgieter-Visser Law of Delict* (7<sup>th</sup> Ed, 2015) 360ff.

<sup>58</sup> M Loubser & JR Midgley (eds) *Law of Delict in South Africa* (2<sup>nd</sup> Ed, 2012) 369ff.

The last issue that the court addressed was whether the media could allege a 'lack of consciousness of wrongfulness' as a defence excluding *animus iniuriandi*. The court held as follows:

If media defendants were to be permitted to do so, it would obviously make nonsense of the approach which I have indicated to the lawfulness of the publication of defamatory untruths. In practical terms (because intoxication, insanity, provocation and jest could hardly arise in the present context) the defence of lack of *animus iniuriandi* is concerned with ignorance or mistake on the part of the defendant regarding one or other element of the delict (Burchell op cit at p 283; see also Raifeartaigh Fault Issues and Libel Law - A Comparison between Irish, English and United States Law [1991] 40 ICLQ 763). The indicated approach is intended to cater for ignorance and mistake at the level of lawfulness; and in a given case negligence on the defendant's part may well be determinative of the legality of the publication. In such a case a defence of absence of *animus iniuriandi* can plainly not be available to the defendant. Defendants' counsel, rightly in my view, accepted that there are compelling reasons for holding that the media should not be treated on the same footing as ordinary members of the public by permitting them to rely on the absence of *animus iniuriandi* and that it would be appropriate to hold media defendants liable unless they were not negligent in the circumstances of the case.

This extract is open to interpretation. On the one hand, some authors interpret it to mean that *Bogoshi* introduces two new defences: Reasonable publication (at the level of wrongfulness) as well as an absence of negligence (in other words lowering the standard of fault for media defamation to negligence).<sup>59</sup> On the other hand, Burchell,<sup>60</sup> Midgley<sup>61</sup> and Fagan<sup>62</sup> interpret the extract in a way that makes negligence a relevant consideration in the determination of wrongfulness. Burchell, Midgley and Fagan's interpretation ultimately provides that *Bogoshi*

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<sup>59</sup> See eg J Burchell 'Media Freedom of Expression Scores as Strict Liability Receives the Red Card: National Media Ltd v Bogoshi' (1999) 116 *South African Law Journal* 1, 7ff; J Neethling & JM Potgieter 'Die Lasterreg en die Media: Strikte Aanspreeklikheid word ten Gunste van Nalatigheid Verwerp' (1999) 62 *Journal of Contemporary Roman-Dutch Law* 442; J Neethling 'Die Lasterreg, die Grondwet en National Media v Bogoshi' (1999) 24 *Journal for Juridical Science* 104; T Floyd 'Delict: Liability for the Press for Defamation' (1999) 40 *Codicillus* 86; M Jansen 'Defamation: Defences Used by the Media' (1999) 40 *Codicillus* 94; J Neethling 'The Constitutional Court Gives the Greenlight to the Common Law of Defamation' (2002) 119 *South African Law Journal* 700, 701ff; J Knobel 'Nalatige Persoonlikheidskrenking' (2002) 65 *Journal of Contemporary Roman-Dutch Law* 24; J Neethling 'The Protection of False Defamatory Publications by the Mass Media: Recent Developments in South Africa against the Backdrop of Australian, New Zealand and English Law' (2007) 40 *Comparative and International Law Journal of Southern Africa* 103, 111; and Neethling & Potgieter (note 57 above) at 365. In *Heyns v Venter* 2004 (3) SA 200 (T) para 14 the court relied on *Bogoshi* to replace the *animus iniuriandi* requirement with 'gross negligence' for malicious prosecution cases.

<sup>60</sup> J Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) 226ff.

<sup>61</sup> JR Midgley 'Media Liability for Defamation' (1999) 116 *South African Law Journal* 211.

<sup>62</sup> A Fagan 'Rethinking Wrongfulness in the Law of Delict' (2005) 122 *South African Law Journal* 90, 101ff.

abolished the strict liability imposed on the media and again introduced the requirement of *animus iniuriandi*. They argue that *Bogoshi* makes it clear that media houses may refute the presumption of the *animus iniuriandi* by proving the absence of consciousness of wrongfulness. However, the element of wrongfulness then dictates a further requirement, namely that the publication must have been made reasonably, in other words, not negligently. Loubser and Midgely indicate that much uncertainty exists with regard to the exact reach of *Bogoshi*.<sup>63</sup> I tentatively contend that in light of the recent Constitutional Court decision in *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng*,<sup>64</sup> where it was held that fault-related criteria are indeed relevant for the wrongfulness enquiry, Burchell, Midgely and Fagan's approach to the issue in *Bogoshi* could be textually (and now also precedentially) correct.

Whatever the correct ambit of the defence(s) in *Bogoshi* might be, it is significant for present purposes to note that in its concluding remarks the court justified its decision to overrule *Pakendorf* in terms of section 35(3) of the 1993 Constitution. The court reasoned that the common law as it had been determined in *Bogoshi* now properly balanced the constitutional rights to freedom of expression and dignity. As Van der Walt observes, it was a strange move by the Supreme Court of Appeal to decide that *Pakendorf* was wrong on the basis that that decision did not properly weigh up competing interests recognised at common law, while in truth *Pakendorf* is now considered to be wrong because of the influence of the Bill of Rights.<sup>65</sup> Thus, even though the court should be commended for at least justifying its decision in light of the spirit, purport and objects of the Bill of Rights, it can be criticised for not overruling *Pakendorf* on the sole basis of the changing legal convictions of the community in light of constitutional norms. In an earlier publication I similarly stressed that the law at the time of *Pakendorf* reflected the legal convictions of the apartheid community (which can hardly be classified as a democracy in the proper sense of the word) and that the finding in *Bogoshi* was ultimately inspired by the new emphasis that the 1993 Constitution brought to freedom of expression as it features in a true democracy.<sup>66</sup> In the same article I argued, in summary, that the effect of the 1993 Constitution on the common law

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<sup>63</sup> Loubser & Midgely (note 58 above) at 356

<sup>64</sup> *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2014] ZACC 28, 2015 (1) SA 1 (CC), 2014 (12) BCLR 1397 (CC) at para 39.

<sup>65</sup> Van der Walt (note 32 above) at 357-358.

<sup>66</sup> E Zitzke 'Realist Evolutionary Functionalism and Extra-Constitutional Grounds for Developing the Common Law of Delict: A Critical Analysis of *Heroldt v Wills* 2013 2 SA 530 (GSJ)' (2016) 79 *Journal of Contemporary Roman-Dutch Law* 103, 118.

was that in giving content to various policy considerations in the law of delict a court had to take note of the following:<sup>67</sup>

[T]he morality of South African society was now informed by constitutional aspirations. In a sense, this approach mimics evolutionary functionalism as it still sees the need for the law to develop to be relevant for society. Nevertheless, this approach contains a vitally important change in thinking: judges are not simply required to keep the law up-to-date because of small changes in the community. Judges now had to envision a new path for the law with transformative constitutional aspirations that are inherently political and ideological in nature. The test for development no longer involved a tapping into the “objective and deterministic” *spiritus mundi* of white South Africa. The test now involved balancing conflicting rights and interests in the Constitution in a way that best promoted an open and democratic South Africa based on the values of human dignity, equality and freedom.

As it will become clear in the next section, the essence of the position under the 1993 Constitution has been absorbed in our current dispensation with a few minor changes.

### 3 HORIZONTALITY UNDER THE 1996 CONSTITUTION: THE BLUEPRINT SKETCHED IN *KHUMALO*

The *Sunday World* newspaper published an article stating that the South African politician Bantu Holomisa had been a member of a gang of bank robbers.<sup>68</sup> The newspaper took exception to Holomisa’s particulars of claim in that he failed to allege the falseness of the defamatory statement. Due to the fact that falseness has never been one of the elements of defamation in South African law, the newspaper argued that it should be an element in cases of political or public importance, based on either the direct application of section 16 of the 1996 Constitution, or development of the common law in terms of section 39(2) thereof.<sup>69</sup> The High Court dismissed the exception,<sup>70</sup> leading to a direct appeal to the Constitutional Court because a constitutional issue was raised.<sup>71</sup>

This was the first case in which the issue of direct horizontality arose under the 1996 Constitution and consequently the Court was required to consider whether the new Constitution changed the position laid down in *De Klerk* that had been followed in a number of cases as discussed above. The Court sensibly started its enquiry by determining what the common-law

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<sup>67</sup> Ibid at 109.

<sup>68</sup> *Khumalo* (note 1 above) at para 1.

<sup>69</sup> Ibid at para 2-3.

<sup>70</sup> *Holomisa v Khumalo and Others* 2002 (3) SA 38 (T).

<sup>71</sup> *Khumalo* (note 1 above) at para 8.

rules of defamation involve. Delictual claims for defamation are based on the Roman *actio iniuriarum* with a number of modifications: The elements of defamation are ‘(a) the wrongful and (b) intentional (c) publication of (d) a defamatory statement (e) regarding the plaintiff.’<sup>72</sup> Once the publication of a defamatory statement has been proved presumptions of wrongfulness and *animus iniuriandi* arise. Wrongfulness can be rebutted by the defendant by raising the defences of truth and public interest, fair comment, privilege, the defence developed in *Bogoshi* regarding reasonable publication, or any other defence that can be manufactured consistent with the legal convictions of the community.<sup>73</sup> The reasonable-publication defence is noteworthy in this context because it allows for the publication of false statements that were reasonable to make in the circumstances, clearly showing that falseness is not an element of defamation.<sup>74</sup>

The Court then proceeded to consider the relevant constitutional provisions at stake in this case. On the one hand the right to freedom of expression is important because it is ‘constitutive of the dignity and autonomy of human beings’ and encourages public debate and informed decision making.<sup>75</sup> Furthermore, the media is an important democratic institution as it holds the power (and is perhaps even subject to an ethical duty) to expose corrupt activity by exercising their right to freedom of expression.<sup>76</sup> On the other hand there is the right to dignity which is regarded as a founding value of the 1996 Constitution.<sup>77</sup> Dignity in the constitutional sense encompasses both the intrinsic worth that each human being possesses as well as the right that every individual has to a good name that is shaped by his or her unique characteristics – the former may be called the ‘internal’ manifestation of dignity while the latter constitutes the ‘external’ manifestation of dignity.<sup>78</sup> The question was whether the law of defamation, as summarised above, strikes a proper balance between freedom of expression and dignity.<sup>79</sup>

That question turned on the application of the Bill of Rights to the private parties engaged in the dispute. The newspaper alleged that the Bill of Rights had direct application to matter at hand because section 8(1) of the 1996 Constitution made the Bill of Rights binding on the executive, legislative and judicial branches of government – a position distinct from the 1993

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<sup>72</sup> Ibid at paras 17-18.

<sup>73</sup> Ibid at para 18.

<sup>74</sup> Ibid at para 19.

<sup>75</sup> Ibid at para 21.

<sup>76</sup> Ibid at paras 22-24.

<sup>77</sup> Ibid at para 26.

<sup>78</sup> Ibid at para 27.

<sup>79</sup> Ibid at para 28.

Constitution that omitted to mention the judiciary.<sup>80</sup> Instead, O'Regan J held that the constitutional provision establishing direct horizontal application is section 8(2) which bestows constitutional rights on private parties if and to the extent that they are applicable in light of the nature of the rights and their correlating obligations. The reason for relying on section 8(2) instead of section 8(1) is to ensure that section 8(2) and 8(3) are not nugatory provisions.<sup>81</sup> The right to freedom of expression that the newspaper invoked here is of such a nature that it can be applied directly between private parties by reason of the 'intensity of the right' and the 'potential invasion' thereof by non-state actors.<sup>82</sup> In order to give effect to the right to freedom of expression the Court held that it had to determine whether the common law as it stood unjustifiably limited that right and therefore required development.

Even though a person can have no legal interest in protecting a fake reputation,<sup>83</sup> the Court provided two premises according to which it reasoned that the common law as it stood did not unjustifiably limit the right to freedom of expression. Firstly the Court noted the difficulty, if not impossibility, of proving the truth or falseness of defamatory statements in all cases. It would be especially unfair to require a plaintiff to prove the falseness of a defamatory statement as such a statement could be based on knowledge peculiar to the defendant; records relating to events surrounding the defamatory statement could have been lost (especially if the event occurred long ago); and there could be a lack of eyewitnesses to the event in question.<sup>84</sup> Secondly the Court indicated that a plaintiff's dignity is sufficiently protected against false defamatory statements in light of the reasonable-publication defence developed in *Bogoshi*.<sup>85</sup> The conclusion drawn from these premises is that the common law, as it stands, avoids a 'winner takes all' situation because it requires due care by the media (while not imposing a severe form of self-censorship and limitation of freedom of expression) and does not impose an insurmountable burden on the plaintiff to prove the falseness of the defamatory statement.<sup>86</sup>

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<sup>80</sup> Ibid at paras 29-30.

<sup>81</sup> Ibid at para 32.

<sup>82</sup> Ibid at para 33.

<sup>83</sup> Ibid at para 35.

<sup>84</sup> Ibid at paras 38 & 42.

<sup>85</sup> Ibid at paras 39 & 43.

<sup>86</sup> Ibid at paras 43-45.



Neethling regards *Khumalo* as a ‘well-considered, reasoned and clear decision’.<sup>87</sup> He reasons that *Khumalo* is an excellent decision because it confirmed the finding in *Bogoshi*, thus bringing legal certainty on the reasonable publication defence. The decision is also welcomed, Neethling declares, because the overview that the court provided of the common law of defamation is doctrinally sound.<sup>88</sup> Despite these important notes of praise, there are equally pertinent points of criticism that can be raised against O’Regan’s judgment.

It is important to note that at the time of hearing *Khumalo* the Constitutional Court had already provided guidelines on the common law’s development in *Carmichele v Minister of Safety and Security*.<sup>89</sup> *Carmichele CC*’s reasoning was dense and intricate but the key part of that judgment related to the two-step process to common-law development: A court should firstly consider whether the common law is inconsistent with the Constitution. If answered in the affirmative, the court then questions how the common law should be developed in a way that promotes constitutional norms.<sup>90</sup> The first step therefore requires a thorough exposition and evaluation of the common law as well as the relevant constitutional provisions. In *Khumalo* the Court eloquently conducted the first step of *Carmichele CC* even though it made no explicit reference to the latter case and the methodology suggested by it.<sup>91</sup> It could be argued that no explicit reference to *Carmichele CC* was necessary because *Khumalo* dealt with direct application of the Constitution in terms of section 8 thereof while *Carmichele CC* related to the indirect application of the Constitution in terms of section 39(2). However, this assumption is incorrect for a number of reasons.

The Court in *Carmichele CC* did not purport to apply the Constitution in an indirect manner based solely on section 39(2). In *Carmichele CC* the Court referred to Schedule 6, section 173, section 8(1) and section 39(2) of the Constitution that supposedly, on a joint reading, meant that ‘where the common law deviates from the spirit, purport and objects of the Bill of Rights

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<sup>87</sup> Neethling (note 59 above) at 706. See also the general tenor of M Loubser ‘Laster: Waarheid en Bewyslas’ (2003) 14 *Stellenbosch Law Review* 364.

<sup>88</sup> Neethling (note 59 above).

<sup>89</sup> *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22, 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) (*Carmichele CC*). *Carmichele CC* was decided on 16 August 2001 while *Khumalo* was decided on 14 June 2002.

<sup>90</sup> *Carmichele CC* (note 89 above) at para 40.

<sup>91</sup> Reference to *Carmichele CC* is made in footnote 16 of *Khumalo* but simply in the context of the definition of wrongfulness.

the courts have an obligation to develop it by removing that deviation'.<sup>92</sup> The Court in *Carmichele CC* seemed to find the distinction between direct and indirect horizontal application of the Constitution to be unimportant. The Court in *Carmichele CC* made no mention of the model of application that it employed and appeared to have blended direct and indirect horizontality when it stated that sections 8(1) and 39(2) ultimately mean the same thing. Conflictingly, in *Khumalo* the Court appeared to have made a clear distinction between direct and indirect constitutional application when it held that section 8(2) of the Constitution makes the right to freedom of expression directly binding on the parties to the dispute, without any mention of section 39(2). Even though *Carmichele CC* perhaps constitutes an oversimplification of the various constitutional provisions relating to the common law's development,<sup>93</sup> the Court was correct insofar as it collapsed the distinction between direct and indirect constitutional application because there appears to be little or no difference between these two models.

Following the methodology proposed in this thesis, section 8(2) is the starting point for delictual disputes between private parties. It requires a court to consider whether there are constitutional rights that bind one or both of the parties. From here section 8(3) dictates that the enquiry should be whether legislation governs the relationship between the parties in order to give effect to the constitutional rights in question. If it does, that legislation must be interpreted to promote the spirit, purport and objects of the Bill of Rights as demanded by section 39(2). The interpretation of legislation should be broadly understood to include, but not be limited to, declaring statutes to be objectively unconstitutional.<sup>94</sup> If no legislation exists, section 8(3) requires a court to make a justified choice between applying and developing the common law, considering that the interests of justice require a uniform legal system that is consistent with the Constitution in terms of section 173 read with Schedule 6. If a court decides to develop the common law because it fails to protect a constitutional right as it stands, it must promote the spirit, purport and objects of the Bill of Rights when it does so as required by section 39(2). Greater methodological clarity in this regard would have been welcomed in *Khumalo*, so that the Court's position on the importance of the distinction between direct and indirect application would become clearer.<sup>95</sup>

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<sup>92</sup> *Carmichele CC* (note 89 above) at para 33.

<sup>93</sup> See the argument developed in Chapter 3 above.

<sup>94</sup> Cf Woolman (note 27 above) at 48-52.

<sup>95</sup> This is echoed by Woolman (note 27 above) at 53ff.

Roederer similarly argues that the distinction between direct and indirect horizontal application ‘makes no difference’ as section 8(2) read with section 8(3) combines elements of direct and indirect horizontal application.<sup>96</sup> His reasoning is that section 8(2) explicitly (read directly) makes constitutional rights binding on private parties but that the rights are then read through legislation or the common law in an indirect manner as stipulated by section 8(3), similar to what section 39(2) requires. He argues that whether one relies on section 8 or section 39(2) the aim is the same: The common law should not be regarded as a body of law that is divorced from the Constitution<sup>97</sup> and, within the Constitution itself, the difference between rights and values is of little importance because section 39(1) requires a court to interpret the rights in the Bill of Rights in a way that promotes democratic values.<sup>98</sup> Thus, whether one relies on section 8 or section 39(2) the common law is subject to constitutional scrutiny and the rights and values enumerated in the Bill of Rights will always feature in unison.<sup>99</sup> Roederer further indicates that the difference between direct and indirect application does not matter because after *Carmichele CC* it is clear that the application of section 39(2) raises a constitutional issue just as section 8 does and so one cannot argue that the distinction once had an impact on founding jurisdiction for the Constitutional Court.<sup>100</sup>

Woolman raises a further point of concern regarding the principles of constitutional application laid down in *Khumalo*. O’Regan J was clear on the fact that section 8(1) of the

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<sup>96</sup> C Roederer ‘Post-Matrix Legal Reasoning: Horizontality and the Rule of Values in South African Law’ (2003) 19 *South African Journal on Human Rights* 57, 70. Similar concerns are raised by N Friedman ‘The South African Common Law and the Constitution: Revisiting Horizontality’ (2014) 30 *South African Journal on Human Rights* 63, 66ff; and G Ferreira ‘The Direct and the Indirect Application of the Bill of Rights: Constitutional Imperative or Questionable Academic Innovation?’ (2006) 20 *Speculum Juris* 241.

<sup>97</sup> Roederer (note 96 above) at 73.

<sup>98</sup> *Ibid* at 78.

<sup>99</sup> See the similar view of D Bhana ‘The Horizontal Application of the Bill of Rights: A Reconciliation of Sections 8 and 39 of the Constitution’ (2013) 29 *South African Journal on Human Rights* 351, 358. Cf however S Woolman ‘The Amazing, Vanishing Bill of Rights’ (2007) 124 *South African Law Journal* 762 who argues a case in favour of developing a stronger reliance on rights instead of values in the context of common-law development. C Roederer responded to Woolman in ‘Remnants of Apartheid Common Law Justice: The Primacy of the Spirit, Purport and Objects of the Bills of Rights for Developing the Common Law and Bringing Horizontal Rights to Fruition’ (2013) 29 *South African Journal on Human Rights* 219 showing (once again) why the spirit, purport and objects of the Bill of Rights do not actually stifle the horizontal application of the Constitution.

<sup>100</sup> Roederer (note 96 above) at 79. Cf however the pre-*Carmichele CC* views of eg C Sprigman & M Osborne ‘Du Plessis is Not Dead: South Africa’s 1996 Constitution and the Application of the Bill of Rights to Private Disputes’ (1999) 15 *South African Journal on Human Rights* 25.

Constitution is not the appropriate authority for the fact that the Constitution is directly binding on private parties and that a contrary conclusion would render sections 8(2) and 8(3) nugatory. However, the Court failed to provide meaning to section 8(1) that stipulates that the judiciary is bound by the Bill of Rights and that all law is subject to it. Woolman contends that these two stipulations found in section 8(1) are in fact rendered nugatory by the Court when it excludes the section from the horizontality analysis.<sup>101</sup> It is suggested here that section 8 should be read in its complex entirety instead of insulating section 8(1) from sections 8(2) and 8(3). Thus the more rigorous approach to the horizontal application would be to reason that courts (and the law that they apply) are subject to the Bill of Rights in terms of section 8(1) and that they are therefore under a duty to consider whether the Constitution applies to private parties by reason of sections 8(2) and 8(3).<sup>102</sup>

Concluding the reflection on *Khumalo*, the judgment is to be welcomed insofar as it alluded to the fact that section 8 should be the starting point in legal disputes arising between private parties. However, the unfortunate use of the direct-indirect application distinction in the judgment is to be rejected because it complicates and confuses the issue as the Bill of Rights will nearly always be applied in terms of legislation or the common law as there are very few areas of private life, if any, that are left unregulated by these forms of law. Thus, *Khumalo* does not represent a truly radical break from the conclusion reached in *Du Plessis*. As the next section of this chapter will reveal, many horizontal application cases that followed on *Khumalo* related to matters that were regulated by the common law. However, it will be shown that there could be cases where the Bill of Rights can be directly invoked between private parties – ‘direct’ in this sense referring to a cause of action founded solely on a right in the Bill of Rights without the common law or legislation regulating the relationship in question.

#### 4 THE POSSIBILITIES OF HORIZONTALITY FOR THE TRANSFORMATIVE PROJECT OF THE CONSTITUTION

In the introduction of this chapter some reasons as to why the Constitution’s impact on private relations has been weaker when compared to disputes between the state and individuals have been alluded to. Whatever these reasons may be, the position since *Khumalo* is clear: Private parties may be bound by the provisions of the Bill of Rights and thus the Constitution may

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<sup>101</sup> Woolman (note 27 above) at 53ff.

<sup>102</sup> This is similar to the argument presented by IM Rautenbach ‘Engaging the Text of Section 8 of the Constitution in Applying the Bill of Rights to Law Relating to Private Relations’ (2002) *Journal of South African Law* 747, 752ff.

disrupt what may historically have been called the ‘private’ common law of delict. As far as Woolman and Davis are concerned this state of affairs can be philosophically justified, even in liberal terms, ‘since the state constructs and enforces all law – and makes possible the continuation of existing and often radically unequal forms of private relationships – all law and all private relationships should be measured against constitutional standards’.<sup>103</sup> It would appear that the quoted philosophy probably inspired the drafters of the 1996 Constitution.

In cases that followed on *Khumalo*, the issue of constitutional methodology has usually featured less prominently even though the Constitution featured substantively in many decisions. Brief mention will be made here of three recent Constitutional Court decisions relating to private delictual disputes discussed at length in Chapter 2 above: *Loureiro v iMvula*,<sup>104</sup> *H v Fetal Assessment Centre*<sup>105</sup> and *DE v RH*.<sup>106</sup>

In *Loureiro CC* the Court had to determine, among other things, whether a security guard had acted wrongfully when he let robbers masquerading as police officers onto the plaintiff’s property, resulting in a robbery. The Court noted that wrongfulness is based on an enquiry into whether the conduct of the alleged wrongdoer offends the legal convictions of the community which involves constitutional considerations after *Carmichele CC*.<sup>107</sup> The Court defined wrongfulness, at common law, as follows:<sup>108</sup>

The wrongfulness enquiry focuses on the conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability.

Applying the law to the facts at hand, the Court held that the constitutional rights to ‘personal safety’ and ‘property’ were infringed by the security guard in this case. Furthermore, a relevant policy consideration is that security companies should be held responsible when they fail to do the exact job that they have been contracted to do.<sup>109</sup> The Court did not appear to follow the

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<sup>103</sup> Woolman & Davis (note 27 above) at 399-400.

<sup>104</sup> *Loureiro and Others v iMvula Quality Protection (Pty) Ltd* [2014] ZACC 4, 2014 (3) SA 394 (CC), 2014 (5) BCLR 511 (CC) (*Loureiro CC*).

<sup>105</sup> *H v Fetal Assessment Centre* [2014] ZACC 34, 2015 (2) SA 193 (CC), 2015 (2) BCLR 127 (CC) (*Fetal Assessment Centre CC*).

<sup>106</sup> *DE v RH* (note 29 above).

<sup>107</sup> *Loureiro CC* (note 104 above) at para 34.

<sup>108</sup> *Ibid* at para 53.

<sup>109</sup> *Ibid* at para 56.

typical methodology provided in *Carmichele CC* or *Khumalo*. In terms of *Carmichele CC* the Court should have considered to what extent the common law fell short of constitutional imperatives in order to determine whether the common law needed development. In terms of *Khumalo* the Court would have to approach the issue of horizontal application by firstly determining whether the constitutional rights in question actually bind private parties in light of the nature of the rights and their correlative duties and then proceed to weigh up the common law and the Constitution. Neither the methodology in *Carmichele CC* nor that in *Khumalo* was followed in *Loureiro CC*. In *Loureiro CC* the Court accepted, as a matter of fact, that the section-12 right to bodily integrity and the section-25 right to property bound the security company. It then accepted that a breach of those rights would justify a positive finding of wrongfulness.

As Scott argues, in *Loureiro CC* the security guard committed a positive act by letting the robbers onto the protected property, leading to damage suffered resulting from a breach of subjective rights. It is recognised at common law that positive conduct causing physical harm is presumed to be wrongful.<sup>110</sup> Thus, according to the common law, the security company would be held liable because of the infringement of the victims' subjective rights. At most, the Court should have considered whether that legal position could withstand constitutional scrutiny. In that regard a logical step would have been to explain, as the Court did in *Khumalo*, why the constitutional rights in question bind private parties. As I have argued in Chapter 2 above, the Court could have better synthesised the common law and the Constitution in *Loureiro CC*, but at least the basic notion of *Khumalo* has remained intact: The Constitution can apply to private parties and when it does, it usually does so through the development or application of the common law.

A few months later in *Fetal Assessment Centre CC* the Court followed a line of reasoning closer to that of *Khumalo*. In *Fetal Assessment Centre CC* the mother of a child born with Down's syndrome brought a claim on behalf of her child against the mother's medical practitioners who took care of her during the course of her pregnancy. The claim was based on the negligent misinformation communicated to the mother of the child about the risks of the pregnancy, resulting in the child being born (instead of being aborted) and suffering as a result of life with a disability. Historically, claims of this nature have failed in South African courts on account of the absence of wrongfulness.<sup>111</sup> The Court was asked to reconsider the common law. Implicitly

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<sup>110</sup> TJ Scott 'Loureiro and Others v iMvula Quality Protection (Pty) Ltd 2014 3 SA (SCA)' (2014) 47 *De Jure* 374, 388.

<sup>111</sup> *Fetal Assessment Centre CC* (note 105 above) at paras 1-3.

following the two-stage approach of *Carmichele CC*, the Court firstly explained the reasons why the common law as it stood did not regard the conduct of the medical practitioners as being wrongful, after which it considered the constitutional compatibility of the common law. At common law claims of this nature were denied because the law should never make a determination about whether it would have been better for a child not to have been born at all.<sup>112</sup> In short, the Court held that there could be no area of private life or law that could remain untouched by the Constitution and therefore the High Court would have to rehear the matter and consider the Constitution's influence on this claim.<sup>113</sup> The Court suggested that the constitutional rights to equality, dignity and the best interests of children are all relevant considerations that could potentially change the common-law position and, to the extent that the High Court had originally failed to consider these rights, it had erred.<sup>114</sup> The same line of reasoning was followed in *DE v RH* where the Constitutional Court weighed up the common-law rules that entitled a claimant to request damages from a third party who committed adultery with the claimant's spouse. The Court held that the common law did not effectively protect the adulterous spouse and the third party's constitutional rights to dignity, bodily integrity, privacy and freedom of association.<sup>115</sup> Thus, the common law had to be developed in a way that the conduct of the third party would no longer be regarded as wrongful towards the claimant.<sup>116</sup>

The line of reasoning in *Fetal Assessment Centre* and *DE v RH* is closer to *Khumalo* in the sense that the common law was first explained, followed by a brief glimpse of the potential constitutional provisions at stake in this matter. The only methodological point of criticism that is raised against both *Fetal Assessment Centre CC* and *DE v RH* is that the Court would have done better if it explained why the listed constitutional rights bind private parties and only then proceeded to consider the common law's constitutionality. Once again the Constitution was applied to private parties through the common law.

In conclusion, it must be noted that a radically alternative understanding of horizontality featured in the matter of *Ramakatsa v Magashule*.<sup>117</sup> Even though in the context of an internal political party dispute and not in the context of delict, the Court in *Ramakatsa* effectively held

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<sup>112</sup> Ibid at para 6.

<sup>113</sup> Ibid at para 23.

<sup>114</sup> Ibid at para 49.

<sup>115</sup> *DE v RH* (note 29 above) at paras 41-53.

<sup>116</sup> Ibid at para 60.

<sup>117</sup> *Ramakatsa and Others v Magashule and Others* [2012] ZACC 31, 2013 (2) BCLR 202 (CC) ('*Ramakatsa*').

that section 19(1)(b) of the 1996 Constitution, providing that every citizen has the right to ‘participate in the activities of... a political party’, could be directly invoked between private parties without recourse being had to the common law or legislation. In this case members of the African National Congress (ANC) were aggrieved by the fact that the ANC prevented certain eligible members and constituencies from voting for their choice of delegates to represent them at a provincial conference of the party.<sup>118</sup> The majority of the Court held that section 19(1)(b) could be directly relied upon by the aggrieved ANC members and concluded that the party’s conduct was invalid to the extent that it violated the Constitution.<sup>119</sup>

Although Dafel argues that *Ramakatsa* indicated that a new and ‘true’ form of direct horizontal application in the sense that constitutional rights may be invoked between private parties without the mediating influence of the common law or legislation,<sup>120</sup> I contend that the issue in *Ramakatsa* should have been dealt with on the common-law basis of breach of contract committed by the political party concerned, as the Court itself recognised that the relationship between political parties and their members is regulated by contract.<sup>121</sup> A dogmatically sounder approach would have been to frame the dispute in terms of section 19(1)(b) and to show how the political party simultaneously breached its contract with its members – by failing to observe its own rules – and violated a constitutional right. An order for specific performance (requiring the ANC to follow its own rules) or the fashioning of a new contractual remedy in terms of section 8(3) read with section 39(2) that would give effect to section 19(1)(b) would have been a better fit in the pattern of the existing law of horizontality. There is no conceptual barrier to such an approach. In fact, that approach would have been more consistent with *Khumalo* as well as the general tenor of the seminal contract law case of *Barkhuizen v Napier* where common-law rules of contract were simply interpreted in light of the Constitution, instead of the common law being forgotten in favour of the constitutional rights in question.<sup>122</sup> However, on the law as it stands after *Ramakatsa* it would appear that the possibility exists for constitutional rights to feature in

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<sup>118</sup> Ibid at paras 5-6.

<sup>119</sup> Ibid at para 124.

<sup>120</sup> M Dafel ‘The Directly Enforceable Constitution: Political Parties and the Horizontal Application of the Bill of Rights’ (2015) 31 *South African Journal on Human Rights* 56, 81. See also P de Vos ‘It’s My Party (And I’ll Do What I Want To)?: Internal Party Democracy and Section 19 of the South African Constitution’ (2015) 31 *South African Journal on Human Rights* 30, 35.

<sup>121</sup> *Ramakatsa* (note 117 above) at para 88.

<sup>122</sup> *Barkhuizen v Napier* [2007] ZACC 5, 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC).



private disputes beyond the *Khumalo* construction. In the context of the delict-Constitution interface, this situation has (thankfully) not yet arisen.

In the last two substantive chapters that follow, a number of cases illustrating various kinds of disruptions of long-standing common-law rules that were brought about by the employment of a methodology similar to that in *Khumalo* will be surveyed. In Chapter 7 the role that the constitutional right to equality has played in transforming the common law of delict in the context of private wrongdoers will be considered and in Chapter 8 the role of the constitutional right to dignity in the law of delict will be evaluated.

## Theories of Equality in Delict

## 1 INTRODUCTION

Equality in South Africa is a myth. To qualify: Historically equality has been and, in a material sense still is, at most an untruth, at least an illusion. Terreblanche even ventures to suggest that the entirety of the South African story since 1652 can be described as ‘a history of inequality’.<sup>1</sup> Although it cannot be doubted that democratisation in South Africa has led to a number of positive developments with regard to realising the right to equality in our country,<sup>2</sup> vast disparities still exist between the traditional binary categories of oppression (namely, rich and poor,<sup>3</sup> white and black,<sup>4</sup> men and women,<sup>5</sup> straight people and homosexuals,<sup>6</sup> and between

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<sup>1</sup> S Terreblanche *A History of Inequality in South Africa 1652-2002* (2002).

<sup>2</sup> See generally C Albertyn & B Goldblatt ‘Chapter 35: Equality’ in S Woolman & M Bishop *Constitutional Law of South Africa* (2<sup>nd</sup> Ed, OS, 2006); and C Albertyn ‘Chapter 4: Equality’ in M Cheadle, D Davis & N Haysom *South African Constitutional Law: The Bill of Rights* (2<sup>nd</sup> Ed, OS, 2002).

<sup>3</sup> See eg Terreblanche (note 1 above) at 30-44 who empirically demonstrates how and why poverty persists in post-apartheid South Africa in relation to unemployment, unequal property distribution and various social problems such as crime, access to healthcare and a culture of violence.

<sup>4</sup> See eg the growing South African critical race scholarship of J Modiri ‘The Grey Line in-between the Rainbow: (Re)thinking and (Re)talking Critical Race Theory in Post-Apartheid Legal and Social Discourse’ (2011) 26 *SA Public Law* 177; J Modiri ‘Towards a “(Post-) Apartheid” Critical Race Jurisprudence: “Divining our Racial Themes”’ (2012) 27 *SA Public Law* 232; J Modiri ‘The Colour of Law, Power and Knowledge: Introducing Critical Race Theory in (Post-) Apartheid South Africa’ (2012) 28 *South African Journal on Human Rights* 405; J Modiri ‘Race as/and the Trace of the Ghost: Jurisprudential Escapism, Horizontal Anxiety and the Right to be Racist in BOE Trust Limited’ (2013) 16 *Potchefstroom Electronic Law Journal* 581; and J Modiri ‘Race, Realism and Critique: The Politics of Race and AfriForum v Malema in the (In)equality Court’ (2013) 130 *South African Law Journal* 274. See also T Mosikatsana ‘Chapter 11: Critical Race Theory’ in C Roederer & D Moellendorf *Jurisprudence* (2004) 272ff.

<sup>5</sup> See eg the feminist scholarship of C Albertyn ‘Chapter 12: Feminism and the Law’ in C Roederer & D Moellendorf *Jurisprudence* (2004) 291ff; C Albertyn ‘Defending and Securing Rights through Law: Feminism, Law and the Court in South Africa’ (2005) 32 *South African Journal of Political Studies* 217; C Albertyn ‘“The Stubborn Persistence of Patriarchy”? Gender Equality and Cultural Diversity in South Africa’ (2009) 2 *Constitutional Court Review* 165; C Albertyn ‘Gendered Transformation in South African Jurisprudence: Poor Women and the Constitutional Court’ (2011) 22 *Stellenbosch Law Review* 591; C Albertyn ‘Law, Gender and Inequality in South Africa’ (2011) 39 *Oxford Developmental Studies* 139; and E Bonthuys & C Albertyn *Gender, Law and Justice* (2007).

persons with and without disabilities)<sup>7</sup> and between various possible intersections of those and other categories.<sup>8</sup> One might be quick to say that these forms of persistent inequality have very little to do with the law of delict – a field that is conventionally regarded as being mathematically concerned with restitution and compensation for various forms of legally recognised harm.<sup>9</sup> That view on the scope of equality in delict is disagreeable and in this chapter I shall endeavour to show what impact the constitutional right to equality has had on the South African law of delict to date.

In § 2 competing theoretical understandings of the South African equality discourse will be delineated. It would be an impossible task to attempt, in the space of a single chapter, to provide a full overview of South African case law and academic commentary on the constitutional right to equality. For that reason this study is specifically limited to two thought-provoking South African jurisprudential understandings of equality, namely ‘substantive’ and ‘complex’ equality. It will be proposed that the equality case law relevant to the law of delict shows a need to embrace the complex-equality model. The sections that follow are intended to prove that proposition. § 3 shows how the constitutional right to equality has influenced the evolving nature of legally-recognised family relationships that are relevant to establishing loss-of-

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<sup>6</sup> See eg J Barnard-Naude & P de Vos ‘Disturbing Heteronormativity: The “Queer” Jurisprudence of Albie Sachs’ (2010) 25 *SA Public Law* 209; and P de Vos ‘Chapter 13: Gay and Lesbian Legal Theory’ in C Roederer & D Moellendorf *Jurisprudence* (2004) 328ff.

<sup>7</sup> See eg the excellent Africa-centred review by I Grobbelaar-Du Plessis & T van Reenen *Aspects of Disability Law in Africa* (2011).

<sup>8</sup> Various intersections of categories can occur. For example, Terreblanche (note 1 above) at 5 notes the unfortunate relationship between poverty and race in South Africa, as does J Modiri ‘Law’s Poverty’ (2015) 18 *Potchefstroom Electronic Law Journal* 123. Similar overlaps have been noted in the South African context relating to gender and poverty – see eg V Southwell ‘The Case of the Invisible Woman: Essentialism, Intersectionality and Marginalisation in Feminist Discourse’ (1994) 27 *Comparative and International Law Journal of Southern Africa* 357; and C Walker ‘Elusive Equality: Women, Property Rights and Land Reform in South Africa’ (2009) 25 *South African Journal on Human Rights* 467. These are just some South African reflections on intersectionality listed here for purposes of basic illustration.

<sup>9</sup> See eg M Loubser & JR Midgley (eds) *The Law of Delict in South Africa* (2<sup>nd</sup> Ed, 2012) 8ff; and J Neethling & JM Potgieter *Neethling-Potgieter-Visser Law of Delict* (7<sup>th</sup> Ed, 2015) 3ff.

support claims and also reflects on the theme of equality hidden in the judgment of *NM v Smith*<sup>10</sup> (relating to the protection of the personality rights of persons with HIV) which was made more explicit in the recent decision of *H v Fetal Assessment Centre*<sup>11</sup> (relating to children with disabilities). § 4 finally weighs the potential success of the listed cases against the Constitutional Court's unfortunate decision in *Le Roux v Dey*<sup>12</sup> insofar as it relates to the realisation of the equality of gay people.

## 2 GENRES OF EQUALITY IN SOUTH AFRICAN CONSTITUTIONAL JURISPRUDENCE

### 2.1 The Right to Equality in Context

First-year law students studying South African legal history are often dazed by the fact that the constitution of the Boer Republic of the Orange Free State contained a Bill of Rights providing

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<sup>10</sup> *NM and Others v Smith and Others* [2007] ZACC 6, 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC) ('*NM*'). See H Scott 'Liability for the Mass Publication of Private Information in South African Law: *NM v Smith*' (2007) 18 *Stellenbosch Law Review* 387; T Gidron 'Publication of Private Information: An Examination of the Right to Privacy from a Comparative Perspective (Part 2)' (2010) *Journal of South African Law* 271ff; and G Penfold & D Milo 'Media Freedom and the Law of Privacy: *NM and Others v Smith and Others* (Freedom of Expression Institute as Amicus) 2007 (5) SA 250 (CC)' (2008) 1 *Constitutional Court Review* 311.

<sup>11</sup> *H v Fetal Assessment Centre* [2014] ZACC 34, 2015 (2) SA 193 (CC), 2015 (2) BCLR 127 (CC) ('*Fetal Assessment Centre CC*'). See IM Rautenbach 'Overview of Constitutional Court Judgments on the Bill of Rights – 2014' (2015) *Journal of South African Law* 379, 381ff; C Chürr 'Wrongful Life Claims under South African Law: An Overview of the Legal Framework' (2015) 36 *Obiter* 745, 748ff; J Neethling & JM Potgieter 'Aksie weens Onregmatige Lyding vanweë Gestremdheid (Wrongful Life)' (2015) 12 *LitNet Akademies* 364; P Mahery 'A Child's Potential Claim for Negligent Misdiagnosis: The Case of *H v. Fetal Assessment Centre*' (2016) 106 *South African Medical Journal* 348; and M Rabie 'Die Eis om Onregmatige Lewe: Bestaanbaar in die Deliktereg of Word die Gemenerereg Buite sy Perke Gestrek?' (2016) 13 *LitNet Akademies* 502.

<sup>12</sup> *Le Roux and Others v Dey* [2011] ZACC 4, 2011 (3) SA 274 (CC), 2011 (6) BCLR 577 (CC) ('*Dey*'). See J Neethling & JM Potgieter 'Defamation of School Teachers by Learners: *Le Roux v Dey* 2011 3 SA 275 (CC)' (2011) 32 *Obiter* 721; A Fagan 'The Constitutional Court Loses Its (and Our) Sense of Humour: *Le Roux v Dey*' (2011) 128 *South African Law Journal* 395; J Campbell 'Pleading Meaning in Defamation Cases: *Le Roux v Dey*' (2011) 128 *South African Law Journal* 419; M Buthelezi 'In Dissent: A Critical Review of the Minority Judgment of Yacoob J' (2012) 33 *Obiter* 719; M Stubbs 'In Loco Parentis: *Le Roux v Dey*' (2013) 24 *Stellenbosch Law Review* 377; and L Mills 'Failing Children: The Courts' Disregard of the Best Interests of the Child in *Le Roux v Dey*' (2014) 131 *South African Law Journal* 847.

for, among others, the right to equality.<sup>13</sup> Their surprise however quickly abates when they learn that this Bill of Rights only applied to white burghers.<sup>14</sup> When certain categories of people have entrenched rights while others do not, it is obvious that there is no serious commitment to equality. In the years that followed, the Union and later the Republic of South Africa were founded and the notion of even a *faux* Bill of Rights disappeared.<sup>15</sup> Anti-equality jurisprudence reached its pinnacle form with the introduction of apartheid,<sup>16</sup> which is now prohibited by the Rome Statute of the International Criminal Court (2002) as a crime against humanity and is defined in article 7(2)(h) as an ‘institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime’.

When the formalised apartheid regime came to an end the unqualified constitutional notion of equality was introduced in South African law for the first time.<sup>17</sup> Section 1 of the Constitution lists ‘the achievement of equality’ as one of the founding values of the Republic of South Africa. Section 7(1) also lists equality as a democratic value affirmed by the Bill of Rights and section 36(1) establishes equality as a relevant consideration in the limitations analysis of constitutional rights. Equality explicitly informs various constitutional rights,<sup>18</sup> but features most clearly in section 9 of the Constitution which creates the enforceable right to equality. The section reads as follows:

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<sup>13</sup> See eg PhJ Thomas, CG van der Merwe & BC Stoop *Historical Foundations of South African Private Law* (2<sup>nd</sup> Ed, 2000) 103.

<sup>14</sup> *Ibid.*

<sup>15</sup> The Union was established by the South Africa Act 9 Edw. VII c. 9 of 1909 and the Republic was established by The Republic of South Africa Constitution Act 32 of 1961. Later, The Republic of South Africa Constitution Act 110 of 1983 sought to amend the 1961 Constitution. None of those Constitutions contained a Bill of Rights. In fact, those Constitutions enabled the governments since 1948 to implement the political ideology of apartheid.

<sup>16</sup> See eg Albertyn & Goldblatt (note 2 above) at 3-5.

<sup>17</sup> Section 8 of the 1993 Constitution entrenched the right to equality at the brink of democratisation. See eg C Albertyn & J Kentridge ‘Introducing the Right to Equality in the Interim Constitution’ (1994) 10 *South African Journal on Human Rights* 149 and the authority cited there.

<sup>18</sup> See eg section 3 that, in the relevant parts, provides as follows: ‘(1) There is a common South African citizenship. (2) All citizens are – (a) equally entitled to the rights, privileges and benefits of citizenship; and (b) equally subject to the duties and responsibilities of citizenship.’ Section 25(2) requires that compensation for the expropriation of property be determined on an ‘equitable’ basis. Equity also features in the list of factors that the state must consider in ensuring mother-tongue education in schools in terms of section 29(2).

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

It is reiterated that the focus of this chapter is not on exploring the legal intricacies of equality or the tricky relationship between unfair discrimination and affirmative action.<sup>19</sup> Instead, the intention is to investigate two prominent jurisprudential approaches to the right to equality in the remainder of this section, namely the substantive and complex theories of equality.

## 2.2 The Formal/Substantive Equality Debate

Albertyn and Kentridge note that the formal approach to equality is based on the liberal notion that freedom can only be achieved when all people are bearers of the same rights and duties.<sup>20</sup> Formal equality presupposes that all people find themselves in the same material situation and therefore inequality can only be caused by protective laws that have irrational, partial application. Thus, formal-equality proponents would argue that, after apartheid, the only change that had to be brought about to bring inequality to an end in South Africa would have been to abolish apartheid legislation.<sup>21</sup> In terms of formal equality, the act of removing the oppressive laws would *ipso iure* result in a situation of equality because everyone would then have ‘a level playing field’ where individuals, each with their own unique abilities, could compete with each other and improve their lives through the combination of hard work and talent.<sup>22</sup>

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<sup>19</sup> The most recent instalment of unfair discrimination in South African law is the matter of *South African Police Services v Solidarity obo Barnard* [2014] ZACC 23, 2014 (6) SA 123 (CC), 2014 (10) BCLR 1195, [2014] 11 BLLR 1025 (CC), (2014) 35 ILJ 2981 (CC). The footnotes of that case are rich with references to earlier decisions on the issue of unfair discrimination and affirmative action in South African law.

<sup>20</sup> Albertyn & Kentridge (note 17 above) at 152.

<sup>21</sup> *Ibid* at 153.

<sup>22</sup> See eg A Heywood *Politics* (3<sup>rd</sup> Ed, 2007) 46.

The key problem with formal equality is that it fails to recognise the ‘structural’ or ‘systemic’ nature of the inequality that apartheid had brought about. The inequality is structural in the sense that various social institutions, for example the law, politics, education, religion and the economy maintain that inequality.<sup>23</sup> Therefore, even though the basic notion of formal equality is arguably entrenched in section 9(1) of the Constitution which makes all people symbolically equal before the law,<sup>24</sup> on my interpretation subsections 9(2)-(5) display a concern with undoing material inequality so that those disadvantaged in the past by oppressive state practices may get to know true equality with the assistance of the new democratic state. What the latter subsections also show is that inequality is not simply about undoing the racial inequality brought about by the state through apartheid but rather that many different and intersecting categories of inequality, some possibly unrelated to apartheid and the state, are relevant to the transformative aims of the Constitution.

In critical response to formal equality stands the concept of substantive equality. Substantive equality acknowledges the systemic or structural nature of inequality; in other words, it takes note of the fact that if inequality is embedded in the make-up of a society the mere abolition of explicitly oppressive laws will not *ipso iure* undo all forms of inequality, and additional mechanisms may be needed to contribute actively towards undoing the structural discrimination.<sup>25</sup> Albertyn and Goldblatt demonstrate that the Constitutional Court has interpreted equality as a constitutional *value* (in other words the call for the ‘achievement of equality’) in harmony with the substantive-equality paradigm and, in furtherance thereof, the Court has interpreted equality as a *right*, namely as the legal apparatus that individuals may employ to realise the substantive concern with equality.<sup>26</sup> Thus, substantive equality can be regarded as the most dominant theory in the South African equality discourse. Albertyn can be regarded as one of the most prominent defenders of the substantive-equality paradigm in South Africa and therefore her précis of this theory, often provided in collaboration with other writers, is of significance to the present study.

On my interpretation, Albertyn’s understanding of substantive equality is based on two main themes: Firstly, she calls for a clear rejection of formal equality and other liberal notions

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<sup>23</sup> Albertyn & Kentridge (note 17 above) at 152.

<sup>24</sup> Albertyn & Goldblatt (note 2 above) at 6.

<sup>25</sup> *Ibid.*

<sup>26</sup> C Albertyn & B Goldblatt ‘Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality’ (1998) 14 *South African Journal on Human Rights* 248, 249.

closely related to it. She discards formal equality partly because it fails to recognise that inequality is socially constructed (and is not only maintained by overtly repressive laws) and also because formal equality is slanted in favour of protecting individual freedom and choice at the expense of appreciating the fact that inequality is often shared by particular groups of people.<sup>27</sup> For that reason Albertyn further expresses concern regarding the view that the constitutional value of dignity should inform the right to equality because dignity has the potential to direct the equality analysis along individualistic lines.<sup>28</sup> Understandably Albertyn seems to be concerned that wealthy white persons would be able to allege that they have been unfairly discriminated against by a policy or law that aims to redress the effects of apartheid on the ground that their ‘dignity’ has been violated, which is in fact damaging to the ‘achievement of equality’. The peculiar aspect of her unequivocal rejection of dignity as a value informing the right to equality is that she goes as far as to question the transformative impact of cases that have focused solely on extending legal recognition to formerly disadvantaged groups, especially where it relates to their legal freedom of choice, like the extension of the right to marry to homosexuals.<sup>29</sup> The rejection of dignity as a value informing equality has also led her to argue that persons belonging to certain groups inevitably always have constrained autonomy because of their socio-economic position. For example, Albertyn seems to suggest, in line with radical feminist thought, that women as a vulnerable group do not have the agency truly to consent to engaging in sex work.<sup>30</sup>

The second theme, closely related to the first, is her emphasis on group-based disadvantage in the interpretation of the constitutional guarantee of equality.<sup>31</sup> Albertyn urges courts to concentrate on contextual analyses and the impact of inequality on specific groups (in order to assess what material inequalities exist) and to show an appreciation for the structural character of inequality.<sup>32</sup> The contextual analysis required by substantive equality places a number of issues at the heart of discrimination inquiries. The socio-economic conditions of the complainant’s group must be central to a court’s reasoning, followed by a consideration of the

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<sup>27</sup> See Albertyn & Kentridge (note 17 above) at 153; Albertyn & Goldblatt (note 2 above) at 6; and Albertyn & Goldblatt (note 26 above) at 250.

<sup>28</sup> See Albertyn & Goldblatt (note 2 above) at 10; and Albertyn & Goldblatt (note 17 above) at 256-257.

<sup>29</sup> C Albertyn ‘Substantive Equality and Transformation in South Africa’ (2007) 23 *South African Journal on Human Rights* 253, 271-275.

<sup>30</sup> Ibid at 269. Cf C Boudin & M Richter ‘Adult, Consensual Sex Work in South Africa – The Cautionary Message of Criminal Law and Sexual Morality’ (2009) 25 *South African Journal on Human Rights* 179.

<sup>31</sup> This emphasis is mostly advocated in Albertyn (note 29 above).

<sup>32</sup> Ibid at 258.



‘social patterns’ that maintain the group-based disadvantage complained of and a court must be alert to the possibility of intersecting categories of discrimination.<sup>33</sup> Thus, the material position of the complainant’s group is weighed up against the material position of groups that may enjoy more systemic privilege. Structural inequality and the lived experience of inequality of certain groups of people are thus brought to the fore<sup>34</sup> and courts are encouraged to engage actively in the task of undoing structural inequality. The undoing of structural inequality practically means that a court should not merely aim for results that lead to the ‘inclusion’ of a specific group by granting them legal recognition, for example, by simply granting homosexual people the right to marry. Albertyn argues that courts should go even further by dismantling current power relations that exist between different groups.<sup>35</sup>

### 2.3 The Call for Complex Equality

The potential shortcomings of Albertyn’s notion of substantive equality become clear when it is juxtaposed with Botha’s call for a complex understanding of equality.<sup>36</sup> Botha’s complex equality is not completely opposed to the idea of substantive equality as the two approaches share many commitments.<sup>37</sup> In the case discussions conducted below it will be seen that the two theories of equality are not always in direct conflict with one another. However, complex equality responds to three problems related to Albertyn’s substantive equality which are, firstly, her refusal to entertain the amalgamation of the value of dignity and the right to equality,<sup>38</sup> secondly, her over-reliance on groups-based disadvantage that could be the cause of perpetuating dangerous stereotypes regarding those groups<sup>39</sup> and, thirdly, her failure to recognise that different struggles for equality may require different outcomes despite the weight that she attaches to ‘context’ and ‘impact’.<sup>40</sup> It is noteworthy that Albertyn also problematises the incorporation of dangerous stereotypes in various equality judgments,<sup>41</sup> although Botha shows that the language of group-

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<sup>33</sup> Albertyn & Goldblatt (note 17 above) at 261.

<sup>34</sup> Albertyn (note 29 above) at 259.

<sup>35</sup> Ibid at 256.

<sup>36</sup> ‘Complex equality’ is most clearly discussed in H Botha ‘Equality, Dignity, and the Politics of Interpretation’ (2004) 19 *SA Public Law* 724; and ‘Equality, Plurality and Structural Power’ (2009) 25 *South African Journal on Human Rights* 1.

<sup>37</sup> Botha 2004 (note 36 above) at 751.

<sup>38</sup> Botha 2004 (note 36 above) at 733; Botha 2009 (note 36 above) at 3.

<sup>39</sup> Botha 2009 (note 36 above) at 4.

<sup>40</sup> Ibid.

<sup>41</sup> Albertyn (note 29 above) at 263-264.

based disadvantage advocated by Albertyn lends itself to the invocation of stereotypes – thereby defeating the purpose of substantive equality – whereas complex equality does not.<sup>42</sup> In his original description of complex equality Botha notes three characteristics thereof:<sup>43</sup>

(i) *Complex equality recognises that the equality analysis is impacted upon by the values of human dignity and democracy.* Even though human dignity may at first glance appear to support individualistic results that are inattentive to structural disadvantage, Botha makes two important observations. Firstly, the potentially individualistic effects of the value of dignity in the equality analysis are largely prevented by the competing value of ‘democracy’ which requires a sensitivity towards the two ideals of embracing plurality (that all human beings are unique in ‘speech and action’ but are nevertheless interrelated in community) and a commitment to constantly-shifting power relations in society.<sup>44</sup> Secondly, the value of dignity, as it relates to autonomy and freedom, could be important in certain forms of struggle for equality expounded on in point (ii) directly below.

(ii) *Complex equality recognises that struggles for equality are often fought with different aims.* When complainants bring cases to courts relating to their ‘status’, they often seek equal ‘recognition’ before the law. In other words, because of some description of their ‘identity’ (for example, sexual orientation) the complainant is disadvantaged by the law as it stands. Those types of disadvantages are usually easily resolved by abolishing a clearly oppressive law or by simply including the complainant onto a list of already-benefiting groups of persons. Sufferers of this category of discrimination usually want legal acceptance of some type of behaviour, for example homosexuals who fought to obtain the right to marry so that they could have equal dignity with heterosexual people.<sup>45</sup> Contrary to Albertyn, Botha notes that this type of recognition is not about assimilating ‘the other’ into the ‘norm’ and thereby destroying difference and plurality in favour of similarity – it is about rendering visible people who are invisible according to traditional norms in society.<sup>46</sup> In other cases, complainants suffer disadvantage not because of their status alone but because of a number of structural mechanisms (for example social conventions, judicial notice being taken of group-based stereotypes and the impact of previously oppressive laws coupled with non-redistributive policies and laws) that maintain their unequal

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<sup>42</sup> Botha 2009 (note 36 above) at 4.

<sup>43</sup> Botha 2004 (note 36 above) 747-748.

<sup>44</sup> Botha 2009 (note 36 above) at 11.

<sup>45</sup> Botha 2009 (note 36 above) at 8.

<sup>46</sup> *Ibid* at 13.

material position. Those complaints seek ‘redistribution’ rather than recognition. Gender inequality fits into this category of inequality more comfortably than it would in the first. Women suffering gender discrimination often want more than just recognition as they wish current power structures to be disrupted. Thus, if a certain law affords privileges or benefits to mothers but not to fathers based on the rationale that women have historically faced the challenge of childrearing more so than men, complex equality would find that law to perpetuate inequality rather than reversing it. The reason why complex equality would reject the law in question is that it perpetuates the stereotypical notion that women are caregivers and men are not. That traditional notion supported by the law structurally embeds gender inequality. By attacking that law, women are not desirous of equal status or recognition with men but they are interested in breaking down gendered stereotypes and changing their perceived social position or redistributing social power.<sup>47</sup> Both of the struggles for equality discussed here would be regarded as legitimate under the umbrella of complex equality.

(iii) *Complex equality takes cognisance of the intersectional nature of discrimination and that discrimination can take place in different spheres.* Different intersections of discrimination (for example being a black, poor, lesbian woman) and discrimination in different spheres of life (for example the workplace, the home, the governmental sphere) may require different forms of analysis. Complex equality thus cautions that there cannot be one concretised approach to equality for homosexuals and another for black people and so on.<sup>48</sup> That is true because there is no universal black experience or gay experience. For example, the experience of an unmarried, black lesbian living with her partner and a child in an informal settlement may be vastly different to that of an affluent white lesbian living in a liberal neighbourhood with her wife and child. They experience discrimination in different forms with different intensities in different contexts. Their acceptance in their respective communities might be different. Their struggle to find employment might be different if one is a nurse and the other a trained theologian. If the two women’s partners both die, the consequences relating to intestate succession and claims for loss of support will be different. Thus, in different spheres and contexts the different women may have different aims in seeking equality – either recognition or redistribution. Both should be regarded as legitimate aims. There can be no ‘one-size-fits-all’ when it comes to complex equality. One could argue that Albertyn’s substantive equality also requires context and impact to be placed at the centre of an equality analysis and therefore no distinction exists between substantive and complex equality in

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<sup>47</sup> Ibid at 8-9.

<sup>48</sup> Ibid at 10.

this regard. However, complex equality focuses so closely on the complainant's individualised position that the group (and the stereotypes associated with that group) to which he or she belongs becomes almost irrelevant, whereas substantive equality places much more emphasis on the broader group to which the complaint belongs. That is where Albertyn's substantive equality lends itself to the possibility of reifying dangerous group-based stereotypes, while Botha's complex equality militates against that type of reductionism.

Aspect (i) of the theory of complex equality responds to the first problem in Albertyn's theory by showing how the value of dignity can potentially be used in a non-individualistic way. Aspects (ii) and (iii) respond to the second and third problems in Albertyn's work by relying on an interpretation of equality that avoids the potential reductionism of the groups-based inequality preoccupation with fixed categories of discrimination. The main advantage of Botha's approach is that it is arguably more nuanced and even more context-sensitive than the model of substantive equality proposed by Albertyn because it considers structural disadvantage that affects specific groups of people without eliminating the possibility that some members of a group could have more autonomy to make freer decisions than others.

In the next section Albertyn's and Botha's theories of equality will be put to the test by analysing the key cases in which the constitutional right to equality has featured in delict. The two broad categories into which these cases fall are loss-of-support claims and matters relating to persons with disabilities. Specific attention will firstly be given to the method of constitutional application relied on in each case. At the conclusion of each category's discussion it will be considered how the relevant judgments engaged with the right to equality, which theory of equality the judgments resonate with and whether the outcomes of those cases are desirable from the perspective of transformative constitutionalism.

### 3 EQUALITY IN DELICTUAL DISPUTES BETWEEN PRIVATE PARTIES

#### 3.1 The Right to Equality in Loss-of-Support Claims

When a maintenance provider is killed or injured wrongfully and culpably his or her dependants may have a claim for loss of support against the alleged wrongdoer.<sup>49</sup> The claim is based on patrimonial loss and has its historical roots in the Germanic customary adaptation of the *actio legis*

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<sup>49</sup> Loubser & Midgley (note 9 above) at 286; and Neethling & Potgieter (note 9 above) at 292.

*Aquiliae* that was received into Roman-Dutch law and eventually transplanted to South Africa.<sup>50</sup> The purpose of the claim is therefore to ensure that dependants are put in the same financial position as they would have been but for the death or injury to the breadwinner.<sup>51</sup> The alleged wrongdoer's conduct will be said to be wrongful towards the dependants if the deceased owed the dependants a legal duty of support and the dependants had an associated right to that support.<sup>52</sup> The right and duty to support most often arises from familial relations.<sup>53</sup> In light of the global reality that the nature of the family is constantly evolving, a contested area of South African law relates to the types of familial relationships that are worthy of legal recognition and protection.<sup>54</sup> More specifically, a challenging part of South African law relates to the types of unions between partners that are legally recognised and protected.

At common law a marriage was defined as the legal union of one man and one woman to the exclusion of all others.<sup>55</sup> Unions that were not solemnised in terms of the common-law were thus not regarded to be worthy of legal protection. That principle has been radically altered by the influence of the Constitution. For example, black people married according to African customary law, whether in a monogamous or polygamous marriage, are now regarded as being legally married after the legislature's intervention in promulgating the Recognition of Customary Marriages Act<sup>56</sup> which aims to equalise the protection afforded to common-law and customary marriages. But those are not the only relationships that have been legally recognised since the introduction of the Constitution. Three important delict cases are discussed in this context below: *Amod v Multilateral Motor Vehicle Assurance Fund*<sup>57</sup> that related to the legal protection

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<sup>50</sup> CJ Davel *Die Dood van 'n Broodwinner as Skadevergoedingsoorzaak* (1984) LLD Thesis, University of Pretoria, published as CJ Davel *Skadevergoeding aan Afhanklikes* (1987) 1. References to Davel in this note that follow refer to the published work.

<sup>51</sup> *Ibid* at 90.

<sup>52</sup> Loubser & Midgley (note 9 above) at 289; and Neethling & Potgieter (note 9 above) at 293-294.

<sup>53</sup> Loubser & Midgley (note 9 above) at 290ff; Neethling & Potgieter (note 9 above) at 294ff; and Davel (note 50 above) at 69-78.

<sup>54</sup> See eg J Eekelaar & T Nhlapo (eds) *The Changing Family: Family Forms & Family Law* (1998).

<sup>55</sup> See eg *Mashia Ebrahim v Mahomed Essop* 1905 TS 59 at 61; *Seedat's Executors v The Master (Natal)* 1917 AD 302 at 309; and *Ismail v Ismail* 1983 (1) SA 1006 (A) at 1019.

<sup>56</sup> Recognition of Customary Marriages Act 120 of 1998.

<sup>57</sup> *Amod v Multilateral Motor Vehicle Accidents Fund* [1999] ZASCA 76, 1999 (4) 1319 SA (SCA) [1999] 4 All SA 421 (A) ('*Amod*'). See CJ Davel 'Die Ontwikkeling van die Aksie van Afhanklikes' (2000) *Acta Juridica* 158; and B Goldblatt 'Amod v Multilateral Motor Vehicle Accidents Fund' (2000) 16 *South African Journal on Human Rights* 138.

afforded to Islamic marriages; *Du Plessis v Road Accident Fund*<sup>58</sup> that related to the recognition of unmarried homosexual persons before the promulgation of the Civil Union Act;<sup>59</sup> and *Paixão v Road Accident Fund*<sup>60</sup> that related to the issues arising from heterosexual, unmarried persons who are in domestic partnerships. Interestingly all three these cases involved claims against South African statutory bodies created for the purpose of compensating victims (and their dependants) for bodily injury or death resulting from motor vehicle accidents. As Klopper notes, the Road Accident Fund Act<sup>61</sup> and its predecessors have the aim of maintaining the common-law rules of delict and simply substitutes the defendant in actions based on motor vehicle accidents with a statutory body that acts as a national insurer.<sup>62</sup> Therefore the common-law rule pertaining to loss-of-support claims apply *mutatis mutandis* to claims against the Road Accident Fund.<sup>63</sup>

According to the agreed statement of facts in *Amod* the deceased was negligently killed in a motor vehicle accident. He was married to the plaintiff according to Islamic rites (which involve a legal duty to support the wife) but they never concluded or registered a civil marriage.<sup>64</sup> The High Court held that the law had historically provided no recognition to Islamic marriages and that it was bound by that position which meant that the plaintiff had no claim for loss of

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<sup>58</sup> *Du Plessis v Road Accident Fund* [2003] ZASCA 86, 2004 (1) SA 359 (SCA), 2003 (11) BCLR 1220 (SCA) ('*Du Plessis*'). See L Steynberg & M Mokotong 'The Common-Law Duty of Support: Developed and Extended to Include the Surviving Homosexual Partner' (2005) 68 *Journal of Contemporary Roman-Dutch Law* 330.

<sup>59</sup> Civil Union Act 17 of 2006 ('Civil Union Act').

<sup>60</sup> *Paixão and Another v Road Accident Fund* [2012] ZASCA 130, 2012 (6) SA 377 (SCA), [2012] 4 All SA 262 (SCA) ('*Paixão*'). See TJ Scott 'Erkenning van Deliktuele Vordering van Deelgenoot aan Permanente Heteroseksuele Verhouding weens Doodslag van Ander Deelgenoot' (2013) *Journal of South African Law* 777; A Barratt 'Private Contract or Automatic Court Discretion? Current Trends in Legal Regulation of Permanent Life-Partnerships' (2015) 26 *Stellenbosch Law Review* 110, 125ff; and L Calvino & D Iyer 'Advancing the Rights of Heterosexual Life Partners in Respect of Loss of Support' (2014) 35 *Obiter* 162.

<sup>61</sup> Road Accident Fund Act 56 of 1996 ('Road Accident Fund Act').

<sup>62</sup> HB Klopper *The Law of Third-Party Compensation* (3<sup>rd</sup> Ed, 2012) 2.

<sup>63</sup> This is the implication of section 17(1) of the Road Accident Fund Act. For a brief overview of the Road Accident Fund see Loubser & Midgley (note 9 above) at 294ff.

<sup>64</sup> *Amod* (note 57 above) at para 1.

support against the Fund.<sup>65</sup> In the Supreme Court of Appeal the argument was either that the law as it stood recognised the plaintiff's right to maintenance or, alternatively, that the common law had to be developed to provide her with a claim for loss of support.<sup>66</sup> Mahomed CJ traced the development of claims based on loss of support and concluded that it had always been a flexible remedy,<sup>67</sup> in terms of which a plaintiff would succeed in a claim if he or she could prove that (a) the deceased bore a duty of support towards to the dependant; (b) the duty was legally enforceable; and (c) that the dependant's right to support was worthy of legal protection; (d) in light of the *boni-mores* criterion.<sup>68</sup>

The court held that requirement (a) had been met because the deceased bore a duty to support the plaintiff in this case in accordance with the Islamic marriage contract<sup>69</sup> and that the duty was legally enforceable in light of a concession made by the Fund in that regard, thus establishing requirement (b).<sup>70</sup> The court supported its conclusion by emphasising that the question is not whether a civil marriage was entered into but rather whether a legal duty, in the expansive sense of the law, has been established.<sup>71</sup> On the issue of whether the dependant's right deserved legal protection in light of the *boni mores* the Supreme Court of Appeal held that 'the new ethos of tolerance, pluralism and religious freedom' brought about by the process of democratisation in South Africa required an answer in the affirmative.<sup>72</sup> It is noteworthy that the court referred to the process of democratisation as a process that started before the 1993 Constitution had come into operation. The court noted that the previous legal position had been based on the cultural and political exclusion of religions other than Judaism and Christianity,<sup>73</sup>

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<sup>65</sup> The High Court judgment is reported as *Amod v Multilateral Motor Vehicle Accidents Fund* 1997 (12) BCLR 1716 (D). The plaintiff appealed directly to the Constitutional Court in *Amod v Multilateral Motor Vehicle Accidents Fund* [1998] ZACC 11, 1998 (4) SA 753 (CC), 1998 (10) BCLR 1207 (CC) but unsuccessfully so – the Court held that matters relating to common-law development should be dealt with by the Supreme Court of Appeal (as it is a court with specialised knowledge in the common law) before finally being appealed to the Constitutional Court that would focus primarily on the whether the Supreme Court of Appeal correctly applied constitutional principles to the case at hand.

<sup>66</sup> *Amod* (note 57 above) at para 5.

<sup>67</sup> *Ibid* at para 10.

<sup>68</sup> *Ibid* at para 12.

<sup>69</sup> *Ibid* at para 14.

<sup>70</sup> *Ibid* at para 15.

<sup>71</sup> *Ibid* at para 19.

<sup>72</sup> *Ibid* at para 20.

<sup>73</sup> *Ibid* at para 21.

and that Judeo-Christian principles can no longer be regarded as universally constitutive of the *boni mores* in light of the new democratic commitment to diversity.<sup>74</sup> Ultimately the court aimed to redress the ‘inequality, intolerance and inequity’ of the common-law position.<sup>75</sup> The court specifically limited the scope of this judgment to monogamous Muslim marriages, comparable to Christian or Jewish marriages, and left the question open whether protection would be afforded to polygamous unions.<sup>76</sup> The court concluded that the common law was developed in this case without the need to turn to the constitutional provisions relating to horizontality because the common law was flexible enough to assist the plaintiff here.

The methodology in *Amod* is disappointing in the sense that the court avoided the issue of constitutional application. However, the court probably did this to avoid answering difficult questions regarding the application of the 1993 and 1996 Constitutions to disputes that had arisen before those came into force.<sup>77</sup> The important theme in *Amod* is that the new democratic order brought about a change of thought regarding the dominance of traditionally ‘white’ values and assumptions in the law and it thus laid a solid foundation for the fact that the *boni mores* would be influenced by democratic values in future decisions. Since *Amod*, Muslim spouses have been afforded greater legal protection, notably in the realm of the law of succession, in light of the constitutional commitment to the achievement of equality.<sup>78</sup> The Constitutional Court first held in *Daniels v Campbell*<sup>79</sup> that a spouse in a monogamous Islamic marriage qualifies as a ‘spouse’ for purposes of the Intestate Succession Act<sup>80</sup> and later also included spouses to polygamous Islamic marriages in the ambit of that definition in *Hassam v Jacobs*.<sup>81</sup> In light of these recent developments it would seem that the rights flowing from both monogamous and polygamous Islamic marriages are worthy of legal protection and could give rise to claims for loss of support in future.

Four years after *Amod* the Supreme Court of Appeal in *Du Plessis* had to determine whether a homosexual domestic partnership could create a reciprocal duty of support. At the

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<sup>74</sup> Ibid at para 22.

<sup>75</sup> Ibid at para 23.

<sup>76</sup> Ibid at para 24.

<sup>77</sup> Ibid at para 30.

<sup>78</sup> See eg M Paleker ‘Chapter 2: Intestate Succession’ in J Jamneck & C Rautenbach (eds) *The Law of Succession in South Africa* (2<sup>nd</sup> Ed, 2012); and MJ de Waal & MC Schoeman-Malan *Law of Succession* (5<sup>th</sup> Ed, 2015) 18-19.

<sup>79</sup> *Daniels v Campbell and Others* [2004] ZACC 14, 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC).

<sup>80</sup> Intestate Succession Act 81 of 1987.

<sup>81</sup> *Hassam v Jacobs NO and Others* [2009] ZACC 19, 2009 (5) SA 572 (CC), 2009 (11) BCLR 1148 (CC) (‘*Hassam*’).



time that *Du Plessis* was heard, homosexual marriages were prohibited according to the common-law definition of marriage. That position has since changed after the decision of the Constitutional Court in *Minister of Home Affairs v Fourie*<sup>82</sup> which led to the promulgation of the Civil Union Act in 2006. The judgment nevertheless remains important in terms of the interplay between the common law of delict and the Constitution. Antonie du Plessis and his partner lived together, underwent an artificial wedding ceremony and were regarded by their friends as a ‘married’ couple, even though the law did not recognise their union.<sup>83</sup> The couple supported each other financially and nominated each other as the sole beneficiary in their respective wills.<sup>84</sup> Cloete JA traced the development of loss-of-support claims until *Amod*, and split the discussion according to the two requirements for those claims, namely the existence of a legal duty to support and the right of the dependant to that support being recognised by the law.<sup>85</sup>

As to the legal duty of support, the court noted that the behaviour of the partners in this case showed that the deceased undertook a contractual duty to support Mr Du Plessis.<sup>86</sup> On the question of whether Mr Du Plessis’ right to support was worthy of legal protection the court indicated that it had to be established whether the alleged wrongdoer had acted wrongfully towards the dependant.<sup>87</sup> The element of wrongfulness required the court to consider the *boni mores* which, after *Carmichele v Minister of Safety and Security*<sup>88</sup> and *Minister of Safety and Security v Van Duivenboden*<sup>89</sup> has to be interpreted in light of the spirit, purport and objects of the Bill of Rights as required by section 39(2) of the Constitution.<sup>90</sup> In this regard the court identified the constitutional rights to dignity and equality to be of importance.<sup>91</sup>

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<sup>82</sup> *Minister of Home Affairs and Another v Fourie and Another* [2005] ZACC 19, 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) (*‘Fourie’*).

<sup>83</sup> *Du Plessis* (note 58 above) at para 3.

<sup>84</sup> *Ibid* at para 4.

<sup>85</sup> *Ibid* at para 10.

<sup>86</sup> *Ibid* at para 16.

<sup>87</sup> *Ibid* at para 17.

<sup>88</sup> *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22, 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC).

<sup>89</sup> *Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79, 2002 (6) SA 431 (SCA), [2002] 3 All SA 741 (SCA).

<sup>90</sup> *Du Plessis* (note 58 above) at para 18.

<sup>91</sup> *Ibid* at paras 19-21.

The court explained how these constitutional rights have been utilised since democratisation to provide legal protection to gay and lesbian people in a variety of contexts: Until that stage our courts had protected homosexual life partners in the contexts of their sexual autonomy,<sup>92</sup> immigration law,<sup>93</sup> guardianship of children,<sup>94</sup> artificial insemination<sup>95</sup> and the benefits afforded to ‘spouses’ in terms of legislation.<sup>96</sup> In all of those matters the law’s failure to provide the same protection afforded to straight people, who were spouses in a civil marriage, to homosexual couples constituted unfair discrimination on the ground of sexual orientation prohibited by section 9(4) read with 9(5) of the Constitution.

The protection of the rights to dignity and equality of homosexual people who had at that stage been prohibited from concluding civil marriages led the court in *Du Plessis* to develop the common law to the effect that Mr Du Plessis’s right to support was held to be worthy of legal protection.<sup>97</sup> The court explained that this is not a matter that should be remedied by the legislature because the common law has always been subject to development and that such developments are acceptable according to the Constitution. Section 173 of the Constitution provides that the common law may be developed in accordance with the interests of justice; section 8 indicates that a court must develop the common law if effect is to be given to a constitutional right; and section 39(2) requires a court to promote the spirit, purport and objects of the Bill of Rights when developing the common law.<sup>98</sup> The development in question in *Du Plessis*, namely that the *boni mores* should recognise as legitimate the right of a homosexual partner to support, was an incremental change that fell within the jurisdiction of the courts.<sup>99</sup> As in *Amod* the court in *Du Plessis* was cautious not to extend the scope of its judgment too far and therefore

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<sup>92</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15, 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) (‘*National Coalition I*’).

<sup>93</sup> *National Coalition of Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17, 2000 (2) SA 1 (CC), 2002 (1) BCLR 39 (CC) (‘*National Coalition II*’).

<sup>94</sup> *Du Toit v Minister of Welfare and Population Development and Others* [2002] ZACC 20, 2003 (2) SA 198 (CC), 2002 (10) BCLR 1006 (CC).

<sup>95</sup> *J and Another v Director General, Department of Home Affairs and Others* [2003] ZACC 3, 2003 (5) SA 621 (CC), 2003 (5) 463 BCLR (CC).

<sup>96</sup> *Satchwell v President of the Republic of South Africa and Another* [2002] ZACC 18, 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC).

<sup>97</sup> *Du Plessis* (note 58 above) at para 33.

<sup>98</sup> *Ibid* at para 35.

<sup>99</sup> *Ibid* at para 42.

left the question open whether unmarried heterosexual life partners would receive the same legal protection.<sup>100</sup>

The methodology followed in *Du Plessis* is to be welcomed. Even though the court did not explicitly discuss the relationship between sections 8, 39(2) and 173, it nevertheless practically showed that the method to be used firstly requires an exposition of the relevant common-law rules and principles followed by the identification of relevant constitutional rights and the associated case law and finally an evaluation of the possible impact of the Constitution on the common law. In broad strokes, this approach resonates with the methodology proposed in this thesis. The last case under the present discussion of claims for loss of support relates to the issue left open in *Du Plessis*, namely whether heterosexual, unmarried life partners are entitled to reciprocal rights to support that are worthy of legal protection.

It must be noted that at the time when the Supreme Court of Appeal decided *Paixão*, heterosexual domestic partners were not given much protection by the law. Despite the protection that had been extended to customary marriages, Islamic marriages and homosexual civil unions, the Constitutional Court decided in *Volks NO v Robinson*<sup>101</sup> that unmarried heterosexual life partners could not qualify as ‘spouses’ for purposes of the Maintenance of Surviving Spouses Act.<sup>102</sup> The Court reached its decision by pointing out that the institution of marriage was of profound social importance<sup>103</sup> and that discrimination based on marital status with regard to maintenance upon the death of one party would not be unfair for purposes of section 9(4) of the Constitution because a contract of marriage *ipso iure* created consequences in this regard that do not flow from domestic partnerships.<sup>104</sup> Furthermore, the Court created the impression that the legal position of unmarried heterosexual couples could not be compared to the position of unmarried homosexual couples – the former could exercise a choice whether or not to get married, while at that stage homosexual couples, like the partners in *Du Plessis*, could not enter into a legal marriage according to the common law as it stood.<sup>105</sup> Thus, the legal freedom given to heterosexual couples to get married, if they so desired, protected them sufficiently. Since 2007 homosexual people have been given the right to marry in terms of the

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<sup>100</sup> Ibid at para 43.

<sup>101</sup> *Volks NO v Robinson and Others* [2005] ZACC 2, 2005 (5) BCLR 446 (CC) (‘*Volks*’).

<sup>102</sup> Maintenance of Surviving Spouses Act 27 of 1990 (‘Maintenance of Surviving Spouses Act’).

<sup>103</sup> *Volks* (note 101 above) at para 52.

<sup>104</sup> Ibid at paras 55-56.

<sup>105</sup> Ibid at paras 91-93.

Civil Union Act. One could argue that since the promulgation of that Act, homosexual domestic partners had to be treated on the same footing as the partnership in *Volks*, not only in the context of the Maintenance of Surviving Spouses Act but perhaps also in matters relating to loss of support in delict. However, the 2012 decision in *Paixão* casts some doubt on the reach of *Volks* for loss-of-support cases.

A widow and mother of three, Maria Paixão, entered into a relationship with José Gomes. A year into their relationship, Gomes paid for the wedding of one of Paixão's daughters.<sup>106</sup> When Gomes fell ill later that year, he moved in with Paixão, never left her and their domestic partnership began.<sup>107</sup> Gomes took on the role of the sole provider for his partner and her children after Paixão had been retrenched.<sup>108</sup> Paixão and Gomes signed a joint will in which reference was made to 'our daughters' and evidence was produced to the effect that, some time before Gomes' death in a motor vehicle accident, the parties had intended to enter into a marriage with each other.<sup>109</sup>

Cachalia JA repeated the two requirements for establishing the wrongfulness of the negligent driver's actions towards the dependants, namely the existence of a legal duty of support and the correlative right to support worthy of legal protection. It was furthermore reiterated that the right to claim support would be worthy of legal protection if the *boni mores*, as informed by the Constitution, would require it.<sup>110</sup> The court held that on the evidence Gomes had 'at least tacitly, undertaken a reciprocal duty of support' and therefore the existence of a legal duty had been established.<sup>111</sup> In deciding that Paixão's right to claim maintenance was legally enforceable against third parties such as the Road Accident Fund the court made three key observations: Firstly, that *Volks* did not pose a barrier to Paixão's claim; secondly, that courts have the capacity to effect incremental developments to the common law; and, thirdly, that the changing nature of familial relations in our society requires this development.

Cachalia JA interpreted *Volks* to mean that even though unmarried people do not *ipso iure* acquire rights to support, those people are not prevented in law to undertake a duty to support. Furthermore, the court noted that the common-law claim in delict based on loss of support has

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<sup>106</sup> *Paixão* (note 60 above) at para 6.

<sup>107</sup> *Ibid* at para 7.

<sup>108</sup> *Ibid* at para 8.

<sup>109</sup> *Ibid* at paras 9-11.

<sup>110</sup> *Ibid* at para 13.

<sup>111</sup> *Ibid* at para 19.

always been more flexible than the more rigid Maintenance of Surviving Spouses Act that featured in *Volks*.<sup>112</sup> As to the development that the court wished to bring about, it cited section 173 of the Constitution as the provision that empowers courts to effect incremental changes to the common law.<sup>113</sup> The reason why the court decided to develop the common law to grant surviving heterosexual domestic partners loss-of-support claims was grounded in considerations of ‘our ideas of morals and justice, and of equity and decency’ and the practical reality that the traditional nuclear family is no longer the only type of family in South Africa,<sup>114</sup> as it had been recognised by the High Court two years earlier in *Verbeem v Road Accident Fund*.<sup>115</sup> Peculiarly Cachalia JA concluded his discussion on the common law’s development with the cautionary note that the constitutional right to equality, that prohibits unfair discrimination, played no role in his reasoning.<sup>116</sup>

Cachalia JA’s reasoning can be described as being anti-constitutional, as defined and explained in Chapter 2 above, because even though the court clearly grounded its capacity to develop the common law in constitutional terms, it nevertheless proceeded expressly to circumvent the true substantive impact of the Constitution in the actual process of developing the common law. The reasoning in *Paixão* is flawed because its conclusion would have been very different but for the normative influence of the Constitution. This is true because before democratisation there was little respect for plural understandings of the family and therefore customary and Islamic marriages were not afforded the same privileges as common-law marriages while many homosexual partnerships were, for all practical purposes, outlawed.<sup>117</sup> The reason provided for the common law’s development here was ‘the reality’ of the changing nature of the family coupled with a cursory reference to ‘justice’ and ‘equity’. It is certainly welcomed that the court took cognisance of changing social realities but it would have done better by justifying why the law should be concerned with changing social realities. That justification would have been effectively done with reference to the inequality that loss-of-support claims would cause if married persons could claim support while unmarried persons were prevented from doing so. What the court effectively did was to bring the constitutional right to equality to fruition between different types of family relations. Additionally the court gave the green light to

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<sup>112</sup> *Ibid* at para 26.

<sup>113</sup> *Ibid* at para 30.

<sup>114</sup> *Ibid* at para 36.

<sup>115</sup> *Verbeem v Road Accident Fund* [2010] ZAGPPHC 282, 2012 (2) SA 409 (GNP).

<sup>116</sup> *Paixão* (note 60 above) at para 37.

<sup>117</sup> The crime of sodomy was only abolished in 1998 in *National Coalition I* (note 92 above).

the constitutional right to dignity by affirming the different types of choices that people make regarding the form and substance of their families.

The three principal cases discussed here all share the common thread of bringing about equality. In *Amod* the issue was bringing about equality between Western and Eastern notions of the family. In *Du Plessis* the concern was the equality between homosexual and heterosexual persons. Finally, in *Paixão* the problem related to the equality between different conceptions of the family or even between married and unmarried persons. The question remains whether these cases reflect the theme of equality in the substantive or complex sense.

Three aspects regarding Albertyn's notion of substantive equality deserve repetition here: It is fixated on addressing groups-based disadvantage; it rejects the notion of 'inclusion' in equality discourse because it tends to assimilate the 'other' into the 'norm'; and it does not regard dignity as an important consideration in equality matters. Regarding *Amod* and *Du Plessis* Albertyn might argue that those cases simply served to 'include' new sets of persons on the list of beneficiaries of the law's protection similar to the traditional and dominant version of a monogamous, Christian marriage and, for that reason, the cases fall short of the substantive-equality standard where the courts focused on the fact that Mrs Amod had been in a monogamous Islamic marriage and that Mr Du Plessis had performed a sham wedding ceremony mimicking the common-law tradition.

With regard to the critique against assimilation, substantive equality is indeed useful. However, as noted above, since *Amod* the case of *Hassam* has made it clear that the law is willing to protect surviving spouses in polygamous Islamic marriages as well, thereby avoiding the dangers of assimilation. It may seem, at first glance, that substantive equality has been achieved in the context of Islamic marriages. However, Albertyn might reason that, because Islamic law only allows men to marry multiple women and not *vice versa*, the legal protection afforded to Muslim spouses does not truly realise substantive equality, on the ground of gender inequality.

To the contrary, Botha would argue that complex equality demands the recognition of Islamic marriages even if they are polygamous in nature. That is so because, as Cronjé and Heaton indicate, the non-recognition of Islamic marriages 'most probably results in far greater inequality and indignity for Muslim women'.<sup>118</sup> Complex equality would reject the notions that all Muslim women in polygamous relationships are discriminated against and the similarly

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<sup>118</sup> DSP Cronjé & J Heaton *South African Family Law* (2<sup>nd</sup> Ed, 2004) 222.

problematic perception that those women have limited or no decision-making autonomy when entering such relationships. Of course there may be situations where Muslim women are discriminated against or where their autonomy is severely limited by their socio-economic circumstances but the law should at all costs avoid reifying dangerous stereotypical notions of Muslim women as non-empowered and inescapably oppressed by patriarchy. Complex equality would be sensitive to the fact that Mrs Amod and Mrs Hassam required nothing more than recognition before the law for their constitutional rights to equality and dignity to be affirmed. Similarly, the equality and dignity of Mr Du Plessis and Ms Fourie could only be secured by paying heed to their pleas for inclusion and recognition before the law of their homosexual status so that they could be made ‘visible’ before the eyes of the law. This is why complex equality is reflected and to be welcomed in *Amod* and *Du Plessis*.

The theme of equality that I have argued is hidden in *Paixão* is interesting because it demonstrates the overlap between the substantive and complex theories of equality. Albertyn criticises *Volks* by arguing that the Court in that case failed to deal decisively with unfair discrimination based on marital status inherent in the affording of exclusive legal privileges to married persons.<sup>119</sup> Botha agrees that the problem in *Volks* relates to the Court’s failure to remedy structural disadvantage slanted against non-traditional notions of the family and that the Court should have been less enthusiastic about lauding the institution of marriage as it has historically been a site of privilege.<sup>120</sup> In *Paixão* Cachalia JA to some extent remedied the shortcoming of *Volks* by recognising the changing nature of the family and by disrupting the dominant tradition of privileging the institution of marriage. What is of particular interest in *Paixão* is the court’s mention of the fact, contrary to what was held in *Volks*, that the choice of persons to get married is influenced by religious, legal, social, cultural and financial considerations and that reserving legal protection exclusively for married persons effectively forces individuals to get married in the face of legal denial<sup>121</sup> – a situation that I would argue infringes the constitutional right to dignity that is meant to ensure that everyone’s decision-making autonomy be secured.<sup>122</sup>

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<sup>119</sup> Albertyn (note 29 above) at 265ff.

<sup>120</sup> Botha 2009 (note 36 above) at 18-19.

<sup>121</sup> *Paixão* (note 60 above) at para 32.

<sup>122</sup> On ‘dignity as autonomy’ see eg *Barkhuizen v Napier* [2007] ZACC 5, 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC) at para 57,

It appears that the legislature has attempted to respond to the plight of substantive and complex equality by publishing draft legislation in the form of the Domestic Partnerships Bill, 2008 for comment.<sup>123</sup> Clause 26 of the Bill provides, among many other things, for maintenance orders after the death of one of the partners to an unregistered domestic partnership. Skelton and Carnelley opine that clause 26 includes ‘delictual maintenance orders’.<sup>124</sup> A court would have to consider a number of contextual factors in deciding whether to award a maintenance order if the legislation is eventually passed. Those factors listed in clause 26(2) relate to the parties’ relationship, their household, financial dependence, property ownership and children. In my view the maintenance aspect of the Bill is a welcome development because it seems to achieve the aim of recognition (or inclusion) as well as the aim of disrupting the structural privilege traditionally afforded to the institution of marriage. From a complex-equality perspective the Bill enhances the right to dignity of unmarried persons while balancing it with the values of a plural democracy to prevent unfair discrimination based on marital status.

### 3.2 Equality for People Living with Disabilities

There are two cases under this discussion relating to the realisation of the right to equality of persons with disabilities. The first matter is *NM* where HIV-positive women primarily claimed that their constitutional rights to privacy and dignity had been infringed but, as will be argued below, the reasoning of the Constitutional Court in that case also tacitly reflects a concern with the complex notion of equality for people with disabilities.<sup>125</sup> The second matter is *Fetal Assessment Centre CC* relating to claims brought by children with disabilities against doctors who fail to afford mothers the opportunity to make informed decisions regarding terminating pregnancies where foetuses show signs of disability. The Constitutional Court in that case made important observations that correlate with the ideas underpinning complex equality.

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<sup>123</sup> Domestic Partnership Bill, 2008 (Notice 36 of 2008).

<sup>124</sup> A Skelton & M Carnelley (eds) *Family Law in South Africa* (2010) 228-229.

<sup>125</sup> In a 2009 report by UNAIDS, World Health Organisation & Office of the High Commissioner for Human Rights entitled ‘Disability and HIV Policy Brief’ (2009), 1 (available at [http://www.who.int/disabilities/jc1632\\_policy\\_brief\\_disability\\_en.pdf](http://www.who.int/disabilities/jc1632_policy_brief_disability_en.pdf)), it is noted that persons living with HIV may qualify for protection in terms of the Convention on the Rights of Persons with Disabilities (2007). The reason of this is that Article 1 of the Convention provides the following: ‘Persons with disabilities include those who have long-term physical, mental, intellectual or physical impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.’



The famous South African politician Patricia de Lille had a biography published in which she divulged the names of three HIV-positive women who she had helped in a dispute against doctors who had allegedly conducted unethical clinical trials on them.<sup>126</sup> The three women claimed damages from De Lille, the author of the book and its publisher. The High Court awarded R15,000 damages to each woman with an order for the removal of their names from future prints of the books.<sup>127</sup> The three women appealed that decision on the basis that the damages awarded were too insignificant to remedy the prejudice that they had suffered. The Constitutional Court started with an enquiry into whether the women's claim could succeed before addressing the issue of *quantum*. The women based their claim for the wrongful and intentional infringement of their privacy, dignity and psychological integrity on the *actio iniuriarum*, as supported by the Constitution.<sup>128</sup>

Concerning the head of damage relating to the infringement of the women's privacy the Court held that information pertaining to their medical status constituted 'private facts' because the women had the desire to keep the facts private and the disclosure of those facts had led to severe mental stress.<sup>129</sup> The Court further held that the privacy of a person's HIV status must be respected in light of the South African milieu where 'intolerance and discrimination' often results from its disclosure<sup>130</sup> and that the infringement had been wrongfully caused because the respondents could not prove a pressing public interest in the disclosure of the sensitive information.<sup>131</sup> Under the head of damage pertaining to the women's dignity the Court emphasised that there is nothing inherently dishonourable or degrading about being HIV positive but that courts must be attentive to the stigma that has been socially constructed around the status. Therefore the fact that a person is HIV positive is not an encroachment on his or her dignity but the disclosure of private information could well be.<sup>132</sup> The Court held that on the facts of this case intention had been proved on both counts of harm and that therefore there was no need to develop the common law to diminish the fault requirement to negligence.<sup>133</sup> The Court finally determined that the High Court had not attached enough weight to the women's

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<sup>126</sup> *NM* (note 10 above) at para 1.

<sup>127</sup> The High Court judgment is reported as *NM and Others v Smith and Others* [2005] 3 All SA 457 (W).

<sup>128</sup> *NM* (note 10 above) at para 29.

<sup>129</sup> *Ibid* at para 34.

<sup>130</sup> *Ibid* at para 42.

<sup>131</sup> *Ibid* at para 47.

<sup>132</sup> *Ibid* at para 48.

<sup>133</sup> *Ibid* at paras 56-65.

rights to privacy and dignity in its determination of the quantum of damages and therefore the amount was increased to R35,000 for each woman.<sup>134</sup>

Although the Court explicitly referred only to the rights to privacy and dignity, it succeeded in showing implied support for Botha's complex version of equality. I argue that Botha would regard *NM* as a sound judgment for two reasons. The Court firstly took a clear stance against the structural discrimination that people living with HIV often face on account of societal attitudes which dictate that sufferers of the virus are undignified. The Court did that when it stated that a positive HIV status is not an affront to dignity. Secondly, the Court was simultaneously sensitive to the needs of the HIV-positive women in a society that *de facto* discriminates against them on the basis of their status. That move shows that due regard was paid to their concrete context and need to be protected from the intolerance of others, which might be rejected by those who closely follow the substantive equality paradigm because the protection afforded the women's privacy here contributed nothing to the dismantling of structural disadvantage and discriminatory social attitudes. Followers of the substantive-equality model might argue that the Court should have demolished social attitudes by not affording the women a claim because the women should not be anxious about the publication in a society that should be expected not to discriminate on the basis of HIV status.

On the other hand, complex-equality proponents would support *NM* because it does just enough for rejecting society's prejudice while also responding to the particular needs of people in the women's specific group – being poor women who do not want their HIV statuses made known because they find themselves in a violently discriminatory society. The Court made it clear that the women concerned did not want their statuses to be made public and that they required the law's protection. If there are people who want to publicise their HIV statuses, the judgment leaves the space for them to do so with the implicit acknowledgement that not all HIV-positive people have the same experiences. Therefore a shared materiality of all people living with HIV cannot and should not be constructed by the courts even though the substantive-equality model might so require because of its emphasis on group-based disadvantage.

Similar observations can be made regarding the case of *Fetal Assessment Centre CC*. A child brought a claim against the doctors who had overseen its mother's pregnancy. The allegation was that the doctors should have informed the mother of the potential disability that the child could

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<sup>134</sup> Ibid at para 82.

be born with so that the mother could have made an informed decision whether or not to abort the foetus.<sup>135</sup> The High Court rejected the claim for ‘wrongful life’ on the basis that even though our courts have recognised similar claims brought by the parents of children who are born with disabilities on account of increased maintenance costs (that would not have ensued if they were given the correct facts by the medical practitioners during the course of the pregnancy because the parents would then have aborted the child), our law has historically been reluctant to allow claims of this nature because of the social commentary that it makes regarding children with disabilities.<sup>136</sup> The historical assertion has been that it is impossible to make a legal judgment on whether a child would have been better off if he or she had not been born at all.<sup>137</sup> In other words the law should not describe the life of the child as being wrongful. The High Court concluded its judgment by noting that public policy, informing the wrongfulness enquiry into the doctors’ conduct, dictates that people with disability show great resilience in overcoming the challenges that they face.<sup>138</sup>

The Constitutional Court rejected the reasoning of the High Court for a number of reasons. Notably for purposes of this discussion the Constitutional Court indicated that claims of this nature do not label the child’s life as ‘wrongful’<sup>139</sup> but these claims have the potential to allow the law to acknowledge the ‘reality’ which many disabled people face in terms of additional financial burdens that arise from their disability. This is particularly true for children whose parents do not or are unable to bring claims for their financial loss.<sup>140</sup> If a court labels the conduct of the doctors as ‘wrongful’ in these circumstances it will have the effect of upholding the child’s right to, among others, equality because it will allow the child to live as comfortably as he or she possibly can.<sup>141</sup>

I argue that *Fetal Assessment Centre CC* also supports the overlap between the complex and substantive models of equality. The case shows the difficulty of an equality analysis – on the one hand a court should be careful not to reify the dangerous stereotype that disabled people are vulnerable and needy of protection but on the other hand courts must be sensitive not to be

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<sup>135</sup> *Fetal Assessment Centre CC* (note 11 above) at paras 1-5.

<sup>136</sup> The High Court judgment is reported as *H v Kingsbury Foetal Assessment Centre* [2014] ZAWCHC 61. The difference in spelling between ‘Fetal’ and ‘Foetal’ appears in the respective judgments.

<sup>137</sup> *Ibid* at para 20.

<sup>138</sup> *Ibid* at para 29.

<sup>139</sup> *Fetal Assessment Centre CC* (note 11 above) at para 19-21.

<sup>140</sup> *Ibid* at para 61.

<sup>141</sup> *Ibid* at para 49 read with para 72.

bent on disrupting social perceptions of a specific group at the expense of recognising the difficulties that those groups face. From the perspective of substantive equality one might argue that people with disabilities as a group do face certain financial burdens that other people do not necessarily bear. Complex equality requires one simultaneously to be wary of falling into the trap of overemphasising groups-based disadvantage in a way that insults the dignity of persons with disabilities by categorising them all as inevitable sufferers. However, complex equality is flexible enough to accommodate the fact that different circumstances require different approaches to equality. In the case at hand the Court may have created the impression in some parts of its judgment that all persons with disabilities are vulnerable and suffer great financial inconvenience in that there is a single ‘reality’ that all persons with disabilities experience. However, it would have been irresponsible of the Court to pretend that all disabled people are resilient and overcome challenges with ease even if they suffer financially. Furthermore, upon a closer reading of the judgment it becomes clear that only persons with disabilities who in fact suffer financially on account of their disability will succeed with claims of this nature and it seems as if it might be the case that children with disabilities will only succeed with their claims if their parents or guardians have not or cannot institute claims for their financial losses. Therefore I would argue that the Court did not reduce all disabled persons to vulnerable victims because it effectively held that even though disabled persons often inspire us with their resilience, sight must not be lost of financial difficulties that *some* persons with disabilities face. The finding of the Court in this regard resonates well with the notion of complex equality.

#### 4 THE INEQUALITY IN *DEY* AND A GLIMPSE INTO THE FUTURE

The law of defamation and dignity infringements primarily strike at the constitutional right to dignity. However, what will be shown in this concluding section of this chapter is that courts should not become complacent in thinking about the types of constitutional rights that might be relevant to a given factual complex. Even though the right to dignity will surely be important in most if not all defamation and dignity-infringement cases, other rights can also feature in these cases. In the matter of *Dey* the Constitutional Court perhaps overemphasised the right to dignity<sup>142</sup> while failing to think about the implication of the judgment for the right to equality. In *Dey* a group of schoolboys found a photograph of two naked men sitting next to each other with their hands provocatively in the area of their own genitals. The boys edited the photo so that the faces of their headmaster and deputy-headmaster appeared on the two naked bodies with the

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<sup>142</sup> *Dey* (note 12 above) at para 124.

school crest covering the offensive segments.<sup>143</sup> The deputy headmaster, Dr Louis Dey, claimed that he had either been defamed or that his dignity had been infringed because he had been depicted as a homosexual or because he had been depicted as living a life without morals on account of his indecent behaviour.<sup>144</sup>

The judgment is lengthy and complex but for present purposes I shall focus only on the following: The Court found that Dr Dey had certainly not been defamed simply because he had been depicted as being gay.<sup>145</sup> To that extent the judgment is to be welcomed from the perspective of either theory of equality because it deviates from archaic social attitudes towards homosexuality. However, the majority of the Court held that the photograph was defamatory of Dr Dey because of the meaning conveyed by the image:

In short, the vision created is one of two promiscuous men who allowed themselves to be photographed in what can only be described as a situation of sexual immorality, which would be embarrassing and disgraceful to the ordinary members of society.

Barnard-Naudé and De Vos criticise this specific aspect of the judgment as being tainted with ‘heteronormativity’. By heteronormativity they mean the societal attitudes and assumptions that regard monogamous heterosexual relationships as being normal and acceptable while homosexuals are seen as abnormal and even abominable human beings.<sup>146</sup> Their argument is that if Dr Dey had been portrayed in the photograph with a woman, the Court would probably not have described the image as being indecent.<sup>147</sup>

What Barnard-Naudé and De Vos indicate is that the interpretation of the picture is based on the problematic premise that the men depicted are promiscuous. As the authors note, promiscuity is defined as frequently changing sexual partners. Nothing in the photograph suggests that the men were promiscuous: There were only two of them and they were not even touching each other.<sup>148</sup> The authors argue that the Court came to its conclusion on the basis of the homophobic assumption that men who are gay are by nature promiscuous.<sup>149</sup> Of course, as

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<sup>143</sup> Ibid at paras 12-20.

<sup>144</sup> Ibid at paras 22-23.

<sup>145</sup> Ibid at para 150.

<sup>146</sup> J Barnard-Naudé & P de Vos ‘The Heteronormative Observer: The Constitutional Court’s Decision in *Le Roux v Dey*’ (2011) 128 *South African Law Journal* 407,408.

<sup>147</sup> Ibid at 409.

<sup>148</sup> Ibid at 415.

<sup>149</sup> Ibid at 416.

Barnard-Naudé and De Vos also argue, there is factually nothing in the image to even suggest that the two men were in fact gay and therefore supposedly promiscuous and immoral – the two men could have been straight and simply sitting in the nude next to each other. A constitutionally-minded observer would therefore not have been outraged by the photograph because constitutionally-thinking people should not be homophobic.<sup>150</sup>

Even though Barnard-Naudé and De Vos do not refer to the constitutional right to equality in their argument, I contend that their critique implicitly calls for a greater sensitivity in the adjudication of matters that have implications for the equality of people not directly engaged in a dispute. Thus, if one accepts that the majority judgment of the Court in *Dey* is homophobic, the Court failed to give effect to the substantive and complex notions of equality. As a rule, substantive equality requires lawyers to work towards dismantling structural discrimination against specific groups, such as homosexuals, that has become such an inherent part of society that we have become blind to it. In certain circumstances complex equality would also support the rejection of structural discrimination against homosexuals. Complex equality would support the critique on *Dey* because the structural discrimination prevalent in the judgment has maintained stereotypical notions regarding homosexuality.

Barnard-Naudé and De Vos, and I would argue by extension also Albertyn and Botha, require courts to bear an immense onus regarding the realisation of the right to equality. On the one hand courts must be sensitive to the context of the parties engaged in a specific legal battle, while concurrently considering the effects of the judgment on people who are not parties to the dispute. Moreover, the right to equality should not only feature in the analysis of substantive law but it should also extend to the way in which courts set out the facts of a particular case. In *Dey* it was not the law that impeded the right to equality. Instead it was the description of the photograph that effectively maintained social discrimination against homosexuals.

In conclusion, in light of the methodology proposed in this dissertation, when lawyers embark on any matter they should consider the constitutional rights that are at stake to the parties involved *and* society as a whole, while being equivalently alert to the reality that both the law *and* the way in which facts are canvassed can result in the violation of certain rights. Even though this chapter has shown that great strides have been made in the realisation of the constitutional call for true equality, lawyers must be attentive to the ways in which they plead,

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<sup>150</sup> Ibid at 417.

argue, decide and comment on cases so that they do not accidentally fall into the trap of perpetuating instead of dismantling problematic social attitudes and inequalities.

# Commodity Dignity and *Ubuntu* Dignity in the Constitution and the Common Law of Delict

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## 1 INTRODUCTION

Human dignity lies at the heart of the ‘legal revolution’<sup>1</sup> brought about by the South African Constitution and it has been called one of the ‘most important of all human rights’.<sup>2</sup> The constitutional right to dignity was understood in *Khumalo v Holomisa* to include both ‘internal’ and ‘external’ manifestations: The internal manifestation of dignity relates to the affirmation of an individual’s self-worth while the external manifestation thereof affirms the worth of individuals in society and thus protects the individual’s reputation.<sup>3</sup>

The external manifestation of the constitutional right to dignity mirrors the common-law right to *fama* or reputation which entitles a person to institute a claim for non-patrimonial damages if his or her good name or status has been reduced in the community.<sup>4</sup> Traditionally the common-law right to *fama* was regarded as distinct from dignity,<sup>5</sup> but this position has clearly changed since *Khumalo*.<sup>6</sup> Suppose that Karin and Koos are hypothetical colleagues working at the

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<sup>1</sup> LWH Ackermann ‘The Legal Nature of the South African Constitutional Revolution’ (2004) *New Zealand Law Review* 633, 647.

<sup>2</sup> *S v Makwanyane* [1995] ZACC 3, 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), [1996] 2 CHRLD 164 (CC), 1995 (2) SACR 1 (CC) (‘*Makwanyane*’).

<sup>3</sup> See eg *Khumalo v Holomisa* [2002] ZACC 12, 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) (‘*Khumalo*’) para 27 read with Chapter 6 § 3 above.

<sup>4</sup> See generally J Burchell *The Law of Defamation in South Africa* (1985); J Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) 139ff; D Milo *Defamation and Freedom of Speech* (2008); M Loubser & JR Midgley (eds) *The Law of Delict in South Africa* (2<sup>nd</sup> Ed, 2012) 339ff; A Fagan ‘The Gist of Defamation in South African Law’ in E Descheemaeker & H Scott *Iniuria and the Common Law* (2013); J Neethling, JM Potgieter & PJ Visser *Neethling’s Law of Personality* (2<sup>nd</sup> Ed, 2015) Part III; and J Neethling & JM Potgieter *Neethling-Potgieter-Visser Law of Delict* (7<sup>th</sup> Ed, 2015) 352ff.

<sup>5</sup> See eg Loubser & Midgley (note 4 above) at 320-321; and Neethling & Potgieter (note 4 above) at 341.

<sup>6</sup> See eg J Burchell ‘Personality Rights in South Africa: Re-Affirming Dignity’ in NR Whitty & R Zimmerman *Rights of Personality in Scots Law* (2009) who contends at 361 that there is virtually no difference between the common-law and constitutional notions of dignity.



same university. If Koos writes and publishes a vindictive and untrue newspaper article in which Karin is referred to as an ‘incompetent idiot’ who is acting ‘unprofessionally’, that could constitute defamation because Karin’s external manifestation of her constitutional right to dignity has been infringed. Consequently, Karin could be entitled to claim common-law damages from Koos on the basis of an infringement of the common-law right(s) to *fama* and/or dignity.

The internal manifestation of the constitutional right to dignity includes the common-law right to dignity, which has conventionally involved the protection of individuals against insulting or belittling behaviour that affects the individual’s attitude towards herself but not necessarily the attitude of the community towards the individual.<sup>7</sup> To refer back to the above example, if Koos instead sent a vindictive and untrue but private email to Karin in which she is called an ‘incompetent idiot’ who is acting ‘unprofessionally’ that could constitute the common-law delict of insult which entails an infringement of her common-law right to dignity as well as a simultaneous infringement of her constitutional right to dignity as it is internally manifested. Once again, Karin would be entitled to claim common-law damages from Koos. However, the internal manifestation of the constitutional right to dignity involves a lot more than the common-law right to dignity.

Woolman provides five possible additional definitions of the constitutional right to internal or inherent dignity that feature in the jurisprudence of the Constitutional Court.<sup>8</sup> Internal Dignity firstly involves what the great German idealist Immanuel Kant refers to as the ‘categorical imperative’ which stipulates that every human being must be treated as an ‘end’ in himself and not merely as a ‘means’ to an end. In relation to the Constitution, Woolman observes that even though everyone will at some stage be used as an instrument by someone else, the categorical imperative ensures that someone may not solely be instrumentalised – which

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<sup>7</sup> See eg Loubser & Midgley (note 4 above) at 320ff; and Neethling & Potgieter (note 4 above) at 369ff.

<sup>8</sup> S Woolman ‘Chapter 36: Dignity’ in S Woolman & M Bishop *Constitutional Law of South Africa* (2<sup>nd</sup> Ed, OS, 2006) 7ff. Woolman’s discussion does not draw a clear distinction between internal and external dignity as it has been conceptualised in this discussion. However, his understanding of dignity relates to the inherent worth afforded to all human beings and therefore accords with the internal manifestation of dignity as discussed here. On the South African Kantian philosophy of constitutional dignity see eg Ackermann (note 1 above); D Cornell ‘A Call for a Nuanced Constitutional Jurisprudence: Ubuntu, Dignity and Reconciliation’ (2004) 19 *SA Public Law* 666; D Cornell & K van Marle ‘Exploring Ubuntu: Tentative Reflections’ (2005) 5 *African Human Rights Law Journal* 195; and D Cornell ‘Bridging the Span toward Justice: Laurie Ackermann and the Ongoing Architectonic of Dignity Jurisprudence’ (2008) *Acta Juridica* 18.

is why slavery is prohibited by section 13 of the Constitution.<sup>9</sup> Furthermore, the categorical imperative can also be regarded as the Court's underlying rationale in *Makwanyane* to abolish the death penalty so that all human beings could have their humanity and intrinsic worth preserved.<sup>10</sup> The second definition of dignity provides that each human being must give equal respect to fellow human beings by recognising that we are all 'autonomous moral agents'.<sup>11</sup> It is suggested that this definition of dignity underlies the decision in *Barkhuizen v Napier* where it was held that the constitutional right to dignity is given effect to when individuals decide to enter into contracts as an expression of their autonomy.<sup>12</sup> Closely related to the idea of 'dignity as autonomy' is the third definition that regards dignity as 'self-actualisation'. Dignity in this sense is closely related to the right to freedom and affords every individual the right to discover his or her distinctive talents and to grow those abilities to realise them fully.<sup>13</sup> Fourthly, dignity also relates to the right that every human being has to self-governance and to participate in democratic life.<sup>14</sup> As Woolman notes, the fourth definition of dignity featured most clearly in *August v Electoral Commission* where Sachs J observed that the right to vote is a 'badge of dignity' indicating that 'everybody counts' in the democratic community.<sup>15</sup> The last definition that Woolman provides relates to dignity as a quality shared by society.<sup>16</sup> With reference to the Constitutional Court's rich body of precedent on socio-economic rights, Woolman notes that the dignity of society as a whole is affronted when the state marginalises the vulnerable.<sup>17</sup> In this sense the welfare of the rich is tied to the welfare of the poor and only if the circumstances of the most vulnerable members in society are enhanced can it be said that South African society, as a whole, can develop.<sup>18</sup>

What Woolman neglects to address in his writing on dignity is the fact that in numerous South African cases the courts have explicitly linked the constitutional right to dignity to the

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<sup>9</sup> Woolman (note 8 above) at 9.

<sup>10</sup> Ibid at 9.

<sup>11</sup> Ibid at 10.

<sup>12</sup> *Barkhuizen v Napier* [2007] ZACC 5, 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC) para 57.

<sup>13</sup> Woolman (note 8 above) at 11.

<sup>14</sup> Ibid at 13.

<sup>15</sup> *August and Another v Electoral Commission and Others* [1999] ZACC 3, 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) para 17.

<sup>16</sup> Woolman (note 8 above) at 13.

<sup>17</sup> Ibid at 15.

<sup>18</sup> Ibid at 16-17.

African-philosophical concept of *ubuntu* in more than 60 reported judgments.<sup>19</sup> *Ubuntu* is often explained with reference to the Zulu maxim *umuntu ngumuntu ngabantu*, translated as ‘I am a person because of other people’.<sup>20</sup> Cornell and Muvangua argue that although the South African dignity jurisprudence can be understood as a partial reflection of Kantian philosophy, our courts have opted for a definition of dignity that is much closer to the notion of *ubuntu*.<sup>21</sup> Western notions of dignity, such as Kant’s categorical imperative, ground the call for dignity in the existence of a fictitious social contract. The philosophy of *ubuntu* on the other hand grounds a human being’s dignity in the fact that people are born into kinship and into a material (thus non-fictitious) and complex network of obligations owed to others and to themselves.<sup>22</sup> However, *ubuntu* is not pure communitarianism as it involves an embracing of ‘participatory difference’ and ‘sympathetic impartiality’ – the former concept recognises that all individuals are unique and that their uniqueness must be developed in order for each person to make a significant contribution to society; the latter concept requires individuals to place themselves in the shoes of others because of the ethical relations that all humans are born into.<sup>23</sup> In her earliest academic work on *ubuntu* Mokgoro notes that *ubuntu* ‘represents personhood, humanity, humaneness and morality’.<sup>24</sup> Cornell and Muvangua further note that *ubuntu* dignity therefore ‘secures human beings in their being’<sup>25</sup> and at its core laments that no individual or his or her life is ‘cheap or worthless’.<sup>26</sup> Thus, corporations should not be entitled to this right because it specifies *human* dignity and reference is made in section 10 of the Constitution to ‘inherent’ dignity that must be

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<sup>19</sup> The *locus classicus* in this regard is *Makwanyane* (note 2 above) at paras 223-229; 237-260; 306-312; & 374. The link between dignity and *ubuntu* has been articulated in more than 60 judgments reported by Juta. For an overview of some prolific cases where this link has been made see the case extracts in D Cornell & N Muvangua ‘Part 1: Legal Cases’ in D Cornell & N Muvangua (eds) *Ubuntu and the Law: African Ideals and Post-Apartheid Jurisprudence* (2012) 31ff.

<sup>20</sup> Y Mokgoro ‘Ubuntu and the Law in South Africa’ (1998) 1 *Potchefstroom Electronic Law Journal* 1, 2. A similar version of this paper also appeared as Y Mokgoro ‘Ubuntu and the Law in South Africa’ (2004) 4 *Buffalo Human Rights Law Review* 15. Subsequent references to Mokgoro in this note however refer to the original piece published in 1998.

<sup>21</sup> D Cornell & N Muvangua ‘Preface’ in D Cornell & N Muvangua (eds) *Ubuntu and the Law: African Ideals and Post-Apartheid Jurisprudence* (2012) xi-xii.

<sup>22</sup> D Cornell & N Muvangua ‘Introduction: The Re-Cognition of uBuntu’ in D Cornell & N Muvangua (eds) *Ubuntu and the Law: African Ideals and Post-Apartheid Jurisprudence* (2012) 2-3.

<sup>23</sup> *Ibid* at 4.

<sup>24</sup> Mokgoro (note 20 above) at 2.

<sup>25</sup> Cornell & Muvangua (note 22 above) at 8.

<sup>26</sup> *Ibid* at 11.

respected.<sup>27</sup> From this brief exposition of *ubuntu* it is clear that Woolman's five definitions of dignity are consistent with *ubuntu* dignity and because our courts have grounded their dignity jurisprudence in *ubuntu* I shall proceed from the assumption that *ubuntu* dignity is the desired philosophical approach to reading the constitutional right to dignity.

A jurisprudential dilemma arises from the exposition on the law of dignity provided thus far. Ultimately there are two seemingly contradictory philosophical approaches to the protection of dignity. At common law, dignity and reputation are protected by awards of non-patrimonial damages. Claims for non-patrimonial damages allow a victim of a personality infringement to claim a figurative amount of money for solace or satisfaction on account of the non-patrimonial damage suffered.<sup>28</sup> Other remedies for *iniuria* exist but a claim for damages has historically been regarded as the primary remedy.<sup>29</sup> What is interesting about claims for non-patrimonial damages is that the most intimate parts of our humanity have become 'commodified' or 'reified' in the sense understood by neo-Marxists like Lukács – the changing of human beings or human qualities into things with tradable values.<sup>30</sup> In traditional Marxism commodification referred to people's unique talents and abilities that were given tradable values in the context of employment law but it will be shown in this chapter that the concept can be equally useful in discussions on personality rights. The common-law approach to the purpose and protection of dignity will therefore be referred to as 'commodity dignity'.

Although the Constitutional Court has incorporated the common-law rights to dignity and reputation under the umbrella of the constitutional right to dignity, our constitutional jurisprudence also shows a radically different comprehension of what the right to dignity should do, namely to secure human beings in their being. In terms of the tenets of *ubuntu*, the right to dignity resists the commodification of human life and attributes. African customary law scholarship is quite clear that customary personality infringements do not regard compensation, in the financial sense of the term, as fundamental to restoring peaceful relations in a community. Instead, tokens given to a victim by a wrongdoer in customary law represent an

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<sup>27</sup> See eg N Haysom 'Chapter 5: Dignity' in H Cheadle, D Davis & N Haysom *South African Constitutional Law: The Bill of Rights* (2<sup>nd</sup> Ed, OS, 2002) 17.

<sup>28</sup> Ibid at 342.

<sup>29</sup> See eg PhJ Thomas, CG van der Merwe & BC Stoop *Historical Foundations of South African Private Law* (2<sup>nd</sup> Ed, 2000) 382.

<sup>30</sup> One of the earliest and most thought-provoking accounts of commodification or reification is provided by G Lukács *History and Class Consciousness: Studies in Marxist Dialectics* (1968)(trans R Livingstone, 1971) in the chapter entitled 'Reification and the Consciousness of the Proletariat' 83ff.

acknowledgement of the wrong and as reparation for damaged social relationships through a symbol of apology – ultimately inspired by the spirit of *ubuntu*.<sup>31</sup> This second approach to the purpose and protection of dignity will therefore be called ‘*ubuntu* dignity’.

The dilemma revealed by these two approaches to the protection of dignity is that our constitutional jurisprudence on the right to dignity is built on two incompatible and contradictory philosophies. It will presently be shown that commodity dignity and *ubuntu* dignity cannot peacefully co-exist, due to the fact that they are mutually destructive of each other. To be clear, the problematic tension explored in this chapter does not relate to the tension between the internal and the external manifestations of the constitutional right to dignity. The tension simply relates to two different jurisprudential outlooks on the function and protection of the constitutional right to dignity.

In an attempt to expose and unpack the dignity dilemma, § 2 of this chapter considers *ubuntu* dignity in the context of the High Court decision in *Mineworkers Investment Company v Modibane*<sup>32</sup> and the minority judgments of Mokgoro J and Sachs J in *Dikoko v Mokhatla*.<sup>33</sup> In § 3 these decisions are then weighed against the Supreme Court of Appeal’s judgment in *Media 24 v SA Taxi Securitisation*,<sup>34</sup> which I shall argue is a prime example of commodity dignity. Finally, § 4 will conclude with proposals on the implication of the tension between *ubuntu* and commodity dignity and what it means for common-law development in future.

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<sup>31</sup> C Rautenbach & JC Bekker *Introduction to Legal Pluralism in South Africa* (4<sup>th</sup> Ed, 2014) 165-167.

<sup>32</sup> *Mineworkers Investment Company v Modibane* [2002] ZAGPHC 6, 2002 (6) SA 512 (W) (‘*Mineworkers Investment*’). See J Neethling & JM Potgieter ‘Herlewing van die Amende Honorable as Remedie by Laster’ (2003) 66 *Journal of Contemporary Roman-Dutch Law* 329.

<sup>33</sup> *Dikoko v Mokhatla* [2006] ZACC 10, 2006 (6) SA 235 (CC), 2007 (1) BCLR 1 (CC) (‘*Dikoko*’). See T Bekker ‘The Re-Emergence of Ubuntu: A Critical Analysis’ (2006) 21 *SA Public Law* 333, 339ff; N Bohler-Müller ‘Some Thoughts on the Ubuntu Jurisprudence of the Constitutional Court’ (2007) 28 *Obiter* 590, 595ff; A Mukheibir ‘Ubuntu and the Amende Honorable – A Marriage between African Values and Medieval Canon Law’ (2007) 28 *Obiter* 583, 586ff; A Skelton ‘Face to Face: Sachs on Restorative Justice’ (2010) *SA Public Law* 94, 99ff; CJ Visser ‘The Revival of the Amende Honorable as Applied to Defamation by the Media’ (2011) 128 *South African Law Journal* 327, 331ff; TW Bennett ‘Ubuntu: An African Equity’ (2011) 14 *Potchefstroom Electronic Law Journal* 30, 44ff; and C Himonga, M Taylor & A Pope ‘Reflections on Judicial Views of Ubuntu’ (2013) 16 *Potchefstroom Electronic Law Journal* 369, 400ff.

<sup>34</sup> *Media 24 and Others v SA Taxi Securitisation* [2011] ZASCA 117, 2011 (5) SA 329 (SCA), [2011] 4 All SA 9 (SCA) (‘*Media 24*’). See E Descheemaeker ‘Three Keys to Defamation: Media 24 in a Comparative Perspective’ (2013) 130 *South African Law Journal* 435.

## 2 UBUNTU DIGNITY IN CASE LAW

In *Mineworkers Investment* a number of statements were made by the defendant in various newspapers to the effect that the plaintiff corporation had been mismanaged by fraudsters.<sup>35</sup> After surveying a large body of precedent Willis J found that the statements of the defendant had been defamatory because the plaintiff had been depicted as ‘dishonest’ and ‘incompetent’.<sup>36</sup> The defamatory nature of the statements led to the presumptions of wrongfulness and *animus iniuriandi* and because the presumptions had not been rebutted by the defendant, he was liable to the plaintiff in delict.<sup>37</sup> The plaintiff prayed for an interdict prohibiting the future publication of defamatory statements relating to the plaintiff’s alleged dishonesty as well as an award of damages or, in the alternative to damages, an order for the publication of a written apology in the relevant newspaper.<sup>38</sup> The court’s approach to remedies and specifically the ordering of an apology is of particular interest for purposes of the present discussion.

The court noted that it had not been in vogue in South African law to claim an apology for defamation. Relying on a wide array of common-law authorities Willis J observed that Roman-Dutch law made provision for retraction (*retractio*) and apology (*deprecatio*) in terms of a remedy called the *amende honorable*.<sup>39</sup> The court noted that the remedy was never accepted in full force in South Africa probably because an apology could only be enforced with the threat of civil imprisonment.<sup>40</sup> However, no court had as yet unequivocally rejected the remedy in its *ratio decidendi*. In theory the remedy still exists and, as the court noted, it was ‘a little treasure lost in a nook in our legal attic’.<sup>41</sup> The court further noted that even if it were wrong in holding that the *amende honorable* was a valid remedy, good reasons existed for a similar remedy to be created. Firstly, the absence of such a remedy would indirectly limit freedom of expression because excessive awards for damages are deterrents to free speech. Secondly, the absence of the remedy would result in inadequate protection of reputation because a retraction and an apology can ‘set the record straight’.<sup>42</sup>

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<sup>35</sup> *Mineworkers Investment* (note 32 above) at paras 4-9.

<sup>36</sup> *Ibid* at paras 10-12.

<sup>37</sup> *Ibid* at para 13.

<sup>38</sup> *Ibid* at para 14.

<sup>39</sup> *Ibid* at paras 17-18.

<sup>40</sup> *Ibid* at paras 18-21.

<sup>41</sup> *Ibid* at para 24.

<sup>42</sup> *Ibid* at para 25.

In light of these arguments in favour of the *amende honorable* or a remedy similar to it the court turned to section 173 of the Constitution that allows courts to develop the common law in line with the interests of justice. Additionally section 39(2) of the Constitution requires a court to promote the spirit, purport and objects of the Bill of Rights which must be read with sections 38 and 172(1)(b) that grant courts the authority to provide ‘appropriate relief’ and ‘just and equitable orders’ respectively. The Court then noted that the *amende honorable* accords with the spirit, purport and objects of the Bill of Rights and that in suitable circumstances a defendant should be enabled to apologise. In the present case the *amende honorable* was an appropriate remedy because the defendant was given a choice between an apology and damages.<sup>43</sup>

The court concluded its judgment, determining the equitable quantum of non-patrimonial damages to be a total of R200 000.<sup>44</sup> However, the damages would only become payable if the defendant refused to publish a public apology; thereby the court circumvented the problem of civil imprisonment.<sup>45</sup> The court finally held that the requirements for an interdict had been met because the plaintiff had proved a clear right to reputation and that no other appropriate relief existed with regard to the potential of prospective defamation by the defendant.<sup>46</sup>

Neethling and Potgieter commend the court’s judgement insofar as it relates to the issue of remedies for defamation.<sup>47</sup> They regard the *amende honorable* as an appropriate remedy for defamation on four main grounds. Firstly, the remedy has the potential truly to restore the honour of the defamed party.<sup>48</sup> Secondly, the financial consequences for the wrongdoer will be less severe when compared to an award for damages.<sup>49</sup> Thirdly, the remedy promotes freedom of expression and, finally, the authors opine that the *amende honorable* ensures a fairer balancing of the constitutional rights relating to freedom of expression and reputation.<sup>50</sup> The remarks of Neethling and Potgieter are certainly laudable, although a note of caution and an elaboration on their views are appropriate.

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<sup>43</sup> Ibid at para 28.

<sup>44</sup> Ibid at paras 29-30 & 33.

<sup>45</sup> Ibid at para 33.

<sup>46</sup> Ibid at para 31.

<sup>47</sup> Neethling & Potgieter (note 32 above).

<sup>48</sup> Ibid at 332.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid at 333.

One may read *Mineworkers Investment* as an embracing of the *ubuntu* dignity paradigm. To a certain extent this is correct because Willis J effectively provided an uncommodified vision of personality rights and displayed a sincere concern with the reparation of social relations. What is noteworthy is that the judge made no substantive reference to the constitutional right to dignity in his reasoning relating to the *amende honorable*. This omission is understandable and excusable in this case because the relationship between the external manifestation of the constitutional right to dignity and the law of defamation was only clarified in *Khumalo* which had been decided a few days before *Mineworkers Investment*. However, hidden in the text one can extract affirmation that the constitutional right to dignity should not simply involve the award of an arbitrary monetary award to sooth hurt feelings. Instead, the protection of dignity requires the restoration of peace between individuals who are equally worthy of respect and who owe each other certain ethical obligations.

Another reason why the court probably did not make much of the constitutional right to dignity here is that it is conventionally accepted that corporations are not afforded the right to *human* dignity like the plaintiff in this matter. This is where a cautionary note must be raised: If the judgment is read as providing the constitutional right to human dignity to corporations, it is inconsistent with the notion of *ubuntu* dignity because the right then no longer secures human beings in their being. However, the judgment can be saved from this criticism by reading it differently and more generously. Due to the fact that the judgment makes no explicit reference to the constitutional right to dignity it could be read to mean that the competing constitutional rights in cases such as these are freedom of expression (section 16) and the right to freedom of trade (section 22). The latter right is the more appropriate constitutional provision for cases where juristic persons claim an infringement of their reputation because, in the true sense of the term, a corporation's *human* dignity cannot be violated. Moreover, the corporation nevertheless has a right to trade freely and an infringement to its reputation ultimately curtails its trade, whether practiced for profit or otherwise. Acknowledgment must be afforded to the potential criticism against my reliance on section 22 because the right to freedom of trade in the Constitution is only afforded to citizens. However, as Lagrange argues, if a corporation is a citizen's (or a few citizens') alter ego then there should be no objection to securing the right to freedom of trade for that corporation.<sup>51</sup> On the facts of *Mineworkers Investment* it would appear that it was the people who constituted the management of the company who were defamed and

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<sup>51</sup> R Lagrange 'Chapter 17: Economic Activity Rights' in H Cheadle, D Davis & N Haysom *South African Constitutional Law: The Bill of Rights* (2<sup>nd</sup> Ed, OS, 2002) 6.



perhaps the argument could be presented that the corporation here deserves constitutional protection. The way in which the hidden subtext of *ubuntu* dignity nevertheless crept into the judgment is through the employment of section 39(2) in the process of the common law's development. Davis and Klare argue that the spirit, purport and objects of the Bill of Rights, which must be promoted in terms of section 39(2), encapsulate the notion of *ubuntu*.<sup>52</sup> If these suggestions are accepted as correct, the judgment in *Mineworkers Investment* becomes reconcilable with the specific provisions of the Constitution and the spirit of *ubuntu* because, on this interpretation, intimate human qualities were not given to a corporation and the broader principle to be extracted from the case is that the constitutional right to dignity should not necessarily be commodified.

In my view there are thus three ways in which *Mineworkers Investment* could be redeemed from the accusation of commodification. One could firstly conceptualise the defamation in this case to relate to the managers of the corporation and not to the corporation itself. Thus, it was the dignity of the managers that was at stake and not that of the corporation. Alternatively, one could argue that the common-law was developed in this case to accommodate claims for apologies with the purpose of protecting the constitutional right to freedom of trade and not of dignity. Lastly, one could argue that the common law should simply have been developed on the basis that it fell short of the spirit, purport and objects of the Bill of Rights – a standard that is flexible enough to be used to infuse *ubuntu* into the common law. However, following the method proposed in this thesis, the spirit, purport and objects of the Bill of Rights should not be used as the standard against which the common-law should be tested. Instead, it should be shown that the common law is inconsistent with a specific constitutional right or other substantive constitutional provision before it can be said that the common law must be developed.

The second important matter where *ubuntu* dignity featured in the context of the law of defamation is *Dikoko*. The case related to defamatory statements made by one municipal councillor about another. The primary issue for determination was whether municipal councillors enjoy immunity from civil claims based on information that they provide to the municipal council and its standing committees.<sup>53</sup> In this regard the majority of the Court held that, in terms of the relevant legislative framework, the privilege afforded to municipal

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<sup>52</sup> D Davis & K Klare 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 *South African Journal on Human Rights* 403, 411-413.

<sup>53</sup> *Dikoko* (note 33 above) at paras 1-8.

councillors for utterances in council does not extend to statements made before standing committees of council.<sup>54</sup> A further question that arose in the Constitutional Court, which is of particular importance for the present discussion, was whether the amount of damages awarded by the High Court and Supreme Court of Appeal was excessive.

The Court split on the issue of quantum: The majority per Moseneke DCJ held that the issue of quantum is best left to a trial court to determine and that only if the trial court had incorrectly applied a legal principle or if the award for damages had been ‘grossly disproportionate’ would an appeal court be allowed to interfere with the determination of the quantum of damages.<sup>55</sup> In this case Moseneke DCJ was of the view that all the correct legal principles and factors relating to the determination of quantum had been considered by the High Court and the Supreme Court of Appeal and for that reason the appeal on quantum was dismissed.<sup>56</sup> However, in their respective minority judgments Mokgoro J and Sachs J took a different stance on the issue of quantum with some important observations regarding the role that *ubuntu* dignity could play in defamation cases.

Mokgoro J ultimately agreed with the majority that an appeal court should only interfere with awards for damages in defamation cases when those are disproportionate or where there has been a misapplication of law or fact.<sup>57</sup> However, in her dissent she noted that the courts below did not properly substantiate their award of damages.<sup>58</sup> Mokgoro J specifically questioned whether the *amende honorable* should be the appropriate remedy in this case. The decision in *Mineworkers Investment* was cited with approval as well as the decision in *Young v Shaikh*<sup>59</sup> in which it was held that an apology must be sincere and adequate in the circumstances of the particular matter, showing that the *amende honorable* would not necessarily be an appropriate remedy in all cases.<sup>60</sup> In this regard Mokgoro J emphasised that the constitutional notion of human dignity is linked with *ubuntu* that endorses the ‘restoration of harmonious human and social relationships’.<sup>61</sup>

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<sup>54</sup> Ibid at paras 31-50.

<sup>55</sup> Ibid at paras 93-95.

<sup>56</sup> Ibid at paras 98-102.

<sup>57</sup> Ibid at para 60.

<sup>58</sup> Ibid at para 61.

<sup>59</sup> *Young v Shaikh* [2003] ZAWCHC 50, 2004 (3) SA 46 (C), 2003 JDR 0628 (C), [2003] JOL 12113 (C). See J Neethling ‘Laster: Die Amende Honorable, Apologie en die Quantum Solatium’ (2004) 67 *Journal of Contemporary Roman-Dutch Law* 698.

<sup>60</sup> *Dikoko* (note 33 above) at paras 63-67.

<sup>61</sup> Ibid at para 68.

The restoration of peace is not necessarily promoted by the award of damages because leaving a 'hole in the defendant's pocket' could result in even more bitterness and hostility between the parties, pushing them further apart instead of reuniting them. For Mokgoro J the primary purpose of a defamation dispute should be the restoration of dignity and relationships in the spirit of restorative justice which should not (and perhaps cannot) always be done in monetary terms.<sup>62</sup> An apology that is sincere and adequate has the potential to restore harmony by requiring the parties to show sensitivity towards each other's humanity – here the parties continued working together in a professional capacity and therefore an apology would have had a more material effect on their professional relationship.<sup>63</sup>

Sachs J concurred with the judgment of Mokgoro J but nevertheless offered additional reasons for proposing a shift in thinking from the fixation with monetary compensation towards a flexible approach envisaging apology as a legitimate remedy in defamation claims.<sup>64</sup> In this case the mere order to pay damages would not restore the integrity of the defamed party because no retraction and apology would be publicly made.<sup>65</sup> Sachs J then significantly noted the following:<sup>66</sup>

There is a further and deeper problem with damages awards in defamation cases. They measure something so intrinsic to human dignity as a person's reputation and honour as if these were marketplace commodities. Unlike businesses, honour is not quoted on the Stock Exchange. The true and lasting solace for the person wrongly injured is the vindication by the Court of his or her reputation in the community. The greatest prize is to walk away with head high, knowing that even the traducer has acknowledged the injustice of the slur. There is something conceptually incongruous in attempting to establish a proportionate relationship between vindication of a reputation, on the one hand, and determining a sum of money as compensation on the other. The damaged reputation is either restored to what it was, or it is not. It cannot be more restored by a higher award, and less restored by a lower one.

By ordering a retraction and apology a court would be emphasising the human element and not the monetary element involved in defamation cases.<sup>67</sup> This would result in an outcome that is more consistent with the spirit of *ubuntu* and restorative justice – the latter being a modern trend in South African law and abroad.<sup>68</sup> However, Sachs J also said that awards for damages should

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<sup>62</sup> Ibid.

<sup>63</sup> Ibid at para 69.

<sup>64</sup> Ibid at para 105.

<sup>65</sup> Ibid at para 106.

<sup>66</sup> Ibid at paras 109-110.

<sup>67</sup> Ibid at para 112.

<sup>68</sup> Ibid at paras 113-118.

not be abolished in totality because those awards serve the purpose of deterrence in a society obsessed with money. Thus it would appear that Sachs J suggested a remedy which combines retraction, apology and a gentle quantum of damages.<sup>69</sup>

The minority judgments of Mokgoro J and Sachs J are to be supported because they clearly engaged with the implication of the constitutional right to dignity and its link to *ubuntu* in the law of defamation. After *Dikoko*, Neethling argues, an apology in defamation cases can either (i) influence the determination of the quantum of damages, or (ii) be an order of the court as a stand-alone remedy, or a condition for an exemption from an order for damages, or a remedy coupled with damages.<sup>70</sup> Neethling's view is now indirectly supported by the Constitutional Court pronouncement in *Le Roux v Dey*, more fully discussed in Chapter 7, where the majority held that an apology can be ordered as relief for infringements to dignity.<sup>71</sup>

In my view Sachs J's judgment in *Dikoko* is of particular significance because he established a link between the right to dignity, *ubuntu* and an uncommodified vision of humanity which I have propagated thus far in the present chapter. Sachs J's view that damages may nevertheless be appropriate in tandem with retraction and an apology should not be regarded as a contradiction with his call for the decommmodification of dignity. As it has been shown in the introduction to the present chapter, African customary law requires defamers to provide their victims with a token of some kind that represents the willingness to admit the wrong and to seek forgiveness. The handing over of a reconciliatory token simultaneously serves the purposes of deterrence and reconciliation without commodifying the victim's dignity because the token does not represent the victim's dignity. Instead, it represents an offering of peace.

Therefore, courts should firstly be encouraged to apply a more understated or gentle approach to the awarding of damages for defamation claims whereby they do not attempt to place a commercial value on the dignity of human beings. Secondly, courts should be attentive to the possibility of linking awards of damages with orders for retraction and apology to ensure that a partially uncommodified result could potentially be achieved where the main aim of legal relief

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<sup>69</sup> Ibid at paras 120-121.

<sup>70</sup> J Neethling 'Die Amende Honorable (Terugtrekking en Apologie) as Remedie by die Laster – Resente Ontwikkeling in die Regspraak' (2009) 42 *De Jure* 286, 292-293. Cf Visser (note 33 above) 337ff who argues that Mokgoro J and Sachs J's comments on the restoration of social harmony will be less effective and appropriate where the wrongdoer is a member of the media.

<sup>71</sup> *Le Roux and Others v Dey* [2011] ZACC 4, 2011 (3) SA 274 (CC), 2011 (6) BCLR 577 (CC) ('*Dey*') paras 150 & 195-203.

is to mend ruptured social relations instead of turning dignity into a mere commodity. However, as I shall point out in the next section, the uncommodified and humane version of *ubuntu* dignity is not embraced by all South African courts.

### 3 COMMODITY DIGNITY IN CASE LAW

In *Media 24* a company claimed both patrimonial and non-patrimonial damages for a defamatory article that had published in the *City Press* newspaper.<sup>72</sup> The media house pleaded that the company's claim was bad in law because corporations were not historically entitled to claim non-patrimonial damages based on defamation, while the claim for patrimonial damages had to fail because it had to be determined on the basis of the *actio legis Aquiliae* and not the *actio iniuriarum*.<sup>73</sup> The High Court dismissed the plea resulting in an appeal to the Supreme Court of Appeal.<sup>74</sup> Brand JA, writing for the majority, firstly observed that the *actio legis Aquiliae* and the *actio iniuriarum* might have been two separate actions at Roman law but that modern South African practice shows that in one suit a plaintiff may claim damages in terms of both actions as long as all the necessary facts are pleaded for both.<sup>75</sup> In this case the necessary facts were pleaded in both claims, although the matter was framed as a defamation dispute, and therefore the court could proceed to analyse both claims respectively.<sup>76</sup>

Regarding the claim for patrimonial damages the court held that a claim for loss of profit is a claim based on pure economic loss. Thus, the wrongfulness of the media house's conduct would have to be established by proving the existence and breach of a legal duty as well as the reasonableness of imposing liability for the damage suffered. In this regard it must be emphasised that in defamation cases wrongfulness and fault are presumed once the defamatory nature of a statement is proven – that presumption does not apply when dealing with a patrimonial claim based on defamatory material.<sup>77</sup> The court further noted that the element of wrongfulness in matters relating to pure economic loss often involves intention and fraudulent conduct as relevant considerations for its determination. The court extended those considerations to apply to matters such as these. Thus, a plaintiff would have to allege and prove intent and falsehood in order to establish wrongfulness for patrimonial harm suffered on

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<sup>72</sup> *Media 24* (note 34 above) at paras 1-3.

<sup>73</sup> *Ibid* at para 4.

<sup>74</sup> *Ibid* at para 5.

<sup>75</sup> *Ibid* at para 8.

<sup>76</sup> *Ibid* at para 10.

<sup>77</sup> *Ibid* at para 11.

account of defamation.<sup>78</sup> On the facts of *Media 24* the plaintiff did not plead that the statements made by the media house had been false. The plea of the media house thus succeeded.<sup>79</sup>

Regarding the non-patrimonial claim Brand JA commenced by noting that the *actio iniuriarum* originally served as an action to claim compensation to soothe hurt feelings. Due to the fact that a corporation has no feelings that can be hurt, the upshot was that there should be no claim for non-patrimonial damages.<sup>80</sup> The court noted that a number of older decisions had made it clear that corporations had never had rights to bodily integrity, privacy or reputation.<sup>81</sup> Even if one were to argue that the ‘goodwill’ of a business constitutes its reputation, ‘goodwill’ forms part of the corporation’s patrimony which is protected by claims based on the *actio legis Aquiliae*.<sup>82</sup> On the other hand, the court took note of a great body of more recent precedent supporting the notion that trading and non-trading corporations could claim non-patrimonial damages for defamation.<sup>83</sup> The court held that, for logical reasons, corporations should be entitled to claim non-patrimonial damages: Defamation claims are no longer about soothing hurt feelings but are about restoring good name;<sup>84</sup> external dignity (in other words *fama*) is as important to corporations as it is to natural persons;<sup>85</sup> and it is difficult to show the true monetary value of loss of profit, loss of clientele and loss of employee pride.<sup>86</sup> The court then turned to determine the constitutionality of its finding on non-patrimonial damages.

Firstly, the court held that the constitutional right to equality demands that natural and juristic persons be treated on the same footing in the context of defamation claims.<sup>87</sup> Secondly, the court had to determine whether corporations are holders of the constitutional right to dignity that is a right worthy of more protection than the constitutional right to freedom of expression. Even though the Constitutional Court held in *Investigating Directorate v Hyundai Motor Distributors*

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<sup>78</sup> Ibid at paras 12-15.

<sup>79</sup> Ibid at para 16.

<sup>80</sup> Ibid at para 17.

<sup>81</sup> Ibid at paras 18-20.

<sup>82</sup> Ibid at para 21.

<sup>83</sup> Ibid at paras 22-30.

<sup>84</sup> Ibid at para 37.

<sup>85</sup> Ibid at para 39.

<sup>86</sup> Ibid at para 40.

<sup>87</sup> Ibid.

that a corporation holds the constitutional right to privacy but not dignity,<sup>88</sup> Brand JA ventured so far as to say that the Constitutional Court had been wrong because there is no conceptual difference between the rights to privacy and dignity, especially if dignity is to be understood broadly as having both internal and external manifestations.<sup>89</sup>

Responding to these two points I would firstly suggest that the equality analysis conducted by the court was legally shallow and unfounded. Discrimination on the basis of natural versus juristic personhood is not listed as a prohibited ground for discrimination in section 9(3) of the Constitution and thus a presumption of unfair discrimination does not arise. This type of differentiation is also not comparable to the other listed prohibited grounds for discrimination because the ground for differentiation in question does not affect the ‘inherent humanity and dignity’ of the juristic person.<sup>90</sup> That is so because a juristic person does not have inherent humanity or dignity as the Constitutional Court correctly held in *Hyundai*.

The second response to the Supreme Court of Appeal’s decision on this aspect is that its view that privacy and dignity are indistinguishable rights cannot be supported for the same reason – a corporation may have the right to privacy which includes the right not to have property searched or seized but a corporation surely cannot hold the right to dignity provided for by that section 10 if it is informed by *ubuntu*. This can be explained on the basis that *ubuntu* resists commodification and will counter the notion that the dignity of natural persons and corporations should be regarded as equally important. Additionally, it would appear from the Supreme Court of Appeal’s judgment that a corporation without an established reputation would virtually not be entitled to a claim for non-patrimonial damages based on defamation because corporations are not inherent bearers of a reputation and therefore they are also not inherent bearers of dignity. In summary, a corporation should not have the right to dignity if that right is inspired by the spirit of *ubuntu*. If the court was desirous of reaching the same result but with better constitutional reasoning, it is suggested that the emphasis should rather have been on protecting the corporation’s constitutional economic activity right enshrined in section 22 that has already been discussed earlier in the present chapter.

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<sup>88</sup> *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In re Hyundai Motor Distributors (Pty) Ltd and Others v Smith NO and Others* [2000] ZACC 12, 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) (“*Hyundai*”).

<sup>89</sup> *Media 24* (note 34 above) at paras 46-47.

<sup>90</sup> On the test for unfair discrimination see C Albertyn & B Goldblatt ‘Chapter 35: Equality’ in S Woolman & M Bishop *Constitutional Law of South Africa* (2<sup>nd</sup> Ed, OS, 2006) 42.

Finally, mention must be made of the fact that the judgment becomes even stranger when Brand JA referred to *Dey* as authority for the fact that an award of damages is the only remedy available for redressing non-patrimonial damage.<sup>91</sup> This comment is peculiar because Brand JA wrote the majority judgment in *Dey* which had explicitly endorsed the order made by Froneman J and Cameron J to the effect that the wrongdoers in that case were required to apologise to their victim.<sup>92</sup> To the extent that Brand JA's judgment grants a corporation the constitutional right to dignity and creates the impression that such right can only be protected in monetary terms, it is to be approached with caution because of the conflict that it creates with the jurisprudence of *ubuntu* dignity. It can thus be concluded that *Media 24* serves as a prime example of what I have identified as commodity dignity.

#### 4 CONCLUDING THOUGHTS ON THE TENSION BETWEEN UBUNTU AND COMMODITY DIGNITY

The tension between *ubuntu* and commodity dignity is irreconcilable. It is a fundamental contradiction of sorts. While the fundamental contradiction is traditionally viewed by critical legal scholars as the substantive tension in law between individualism and altruism,<sup>93</sup> the fundamental contradiction in the context of the South African dignity discourse features between the human and the commodity. It is a substantive tension in political and economic terms because the commitment to the human shows faithfulness to what Terreblanche calls a 'social democratic version of democratic capitalism'<sup>94</sup> which is consistent with *ubuntu*, while the commitment to the commodity shows faithfulness to laissez-faire capitalism and libertarianism according to which the profits of corporations are exalted and human qualities are turned into products with pecuniary values.<sup>95</sup>

Two arguments are made in light of this tension: Firstly it can be argued that although the fundamental contradiction is unresolvable, the *ubuntuist* version of dignity can be used strategically as 'deviationist doctrine'<sup>96</sup> to ensure that the transformative goals of the Constitution might be promoted. Secondly, it will be shown that even if *ubuntu* dignity is strategically

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<sup>91</sup> *Media 24* (note 34 above) at para 54.

<sup>92</sup> *Dey* (note 71 above) at para 203.

<sup>93</sup> See eg D Kennedy 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685.

<sup>94</sup> S Terreblanche *A History of Inequality in South Africa: 1652 – 2002* (2002) 419ff.

<sup>95</sup> See eg A Heywood *Politics* (3<sup>rd</sup> Ed, 2007) 184ff.

<sup>96</sup> See eg RM Unger 'The Critical Legal Studies Movement' (1983) 96 *Harvard Law Review* 561, 576ff. The notion of 'deviationist doctrine' is more fully canvassed in Chapter 1 § 3.3.



employed as a transformative philosophy underlying the law of defamation, it has its own shortcomings and its revolutionary potential is perhaps severely limited.

The recognition of *ubuntu* as a legitimate philosophy underpinning dignity is not simply a fashionable characteristic of the ‘new’ South Africa. The recognition of *ubuntu* in South African law is a response to the effects of colonialism and apartheid which firstly denied black people of their humanity and secondly caused what Ramose calls ‘epistemicide’ which is the killing of African ways of thinking and doing.<sup>97</sup> Although it can be argued that the denial of black humanity could be undone by the introduction of a constitutional right to dignity with virtually any philosophical foundation, the recognition of *ubuntu* as the underpinning of the constitutional right to dignity is particularly important from the perspective of undoing epistemicide and the historic delegitimation of African knowledge systems. As Ramose indicates, colonisation had the aims to ‘civilise’ African people and in the process aimed to ‘annihilate and obliterate all the experiences of the indigenous conquered peoples, replacing their experience and knowledge with its own unilaterally defined meaning of experience, knowledge and truth’ and this resulted in an ‘intellectual and spiritual holocaust’.<sup>98</sup>

It can therefore be argued that the recognition of *ubuntu* as a legitimate concern of South African constitutional jurisprudence makes a small but significant contribution to repairing the damage done to the knowledge of African people during the period of colonisation and apartheid. To this reasoning I would add that the constitutional commitment to the achievement of equality can be interpreted to mean that the systemic inequality which African thought has experienced in South Africa for a period of more than 300 years must be rectified and thus that the recognition of *ubuntu* in our constitutional jurisprudence would be a positive measure taken to undo the historic disadvantage. This would be consistent with the substantive and complex models of equality discussed in Chapter 7 above. The utility of *ubuntu* dignity as deviationist doctrine therefore primarily serves the purpose of undoing historic injustice and could perhaps serve to disrupt the power imbalance between Western and African thought in South African law.

However, the radical potential of *ubuntu* is restricted. Although Cornell and Muvangua<sup>99</sup> as well as Himonga *et al*,<sup>100</sup> Van Niekerk,<sup>101</sup> Mukheibir,<sup>102</sup> Winks<sup>103</sup> and Neethling<sup>104</sup> all appear to

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<sup>97</sup> MB Ramose ‘In Memoriam: Sovereignty and the ‘New’ South Africa’ (2007) 16 *Griffith Law Review* 310, 313.

<sup>98</sup> *Ibid*.

<sup>99</sup> Cornell & Muvangua (note 19 above).

be optimistic about the potential of institutionalising *ubuntu* in South African law, the concept has not escaped criticism. Some scholars note their concerns relating to the lack of certainty about the precise implication of *ubuntu* for the law.<sup>105</sup> Others object to its recognition on the ground that it serves to Africanise white people and does not create a space for true democratic plurality.<sup>106</sup>

The concern about the imprecise definition of *ubuntu* is not well-founded because, as it has been shown in this chapter, *ubuntu* is a well-documented concept. The concern that the constitutionalisation of *ubuntu* does not create the space for differing views should likewise be rejected in light of the concern of undoing historic epistemicide in South Africa. However, one last point of criticism on *ubuntu* dignity, which is particularly difficult to overcome, remains: the fact that *ubuntu* has not been truly ‘de-linked’ from Western thought.<sup>107</sup>

One of the most profound critiques on the constitutionalisation of *ubuntu* stems from the writings of Ramose.<sup>108</sup> As he argues, the *ubuntuist* conception of justice involves the restoration of harmony and peace.<sup>109</sup> True restoration can only be said to have taken place if the territorial and political sovereignty has been returned to African people.<sup>110</sup> Practically this involves two things: Firstly, Ramose argues that extinctive prescription for land claims should not exist and that black people must be given the land that currently belongs to white people.<sup>111</sup> Secondly, this involves a

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<sup>100</sup> Himonga, Taylor & Pope (note 33 above).

<sup>101</sup> G van Niekerk ‘Amende Honorable and Ubuntu: An Intersection of Ars Boni et Aequi in African and Roman-Dutch Jurisprudence?’ (2013) 19 *Fundamina* 397.

<sup>102</sup> Mukheibir (note 33 above).

<sup>103</sup> B Winks ‘A Covenant of Compassion: African Humanism and the Rights of Solidarity in the Banjul Charter on Human and Peoples’ Rights’ (2011) 11 *African Human Rights Law Journal* 447.

<sup>104</sup> Neethling (note 70 above).

<sup>105</sup> See eg Bekker (note 33 above); and Bennett (note 33 above) at 351ff.

<sup>106</sup> See eg R English ‘Ubuntu: The Quest for an Indigenous Jurisprudence’ (2006) 12 *South African Journal on Human Rights* 641; and I Keevy ‘The Constitutional Court and Ubuntu’s “Inseparable Trinity”’ (2009) 34 *Journal for Juridical Science* 61.

<sup>107</sup> See eg I Kroeze ‘Doing Things with Values II: The Case of Ubuntu’ (2002) 13 *Stellenbosch Law Review* 252; and F Mnyongani ‘De-Linking Ubuntu: Towards a Unique South African Jurisprudence’ (2010) 31 *Obiter* 134.

<sup>108</sup> See generally MB Ramose *African Philosophy through Ubuntu* (2002).

<sup>109</sup> MB Ramose ‘An African perspective on justice and race’ (2001) *polylog* (available at <http://them.polylog.org/3/fm-en.htm>) 4.

<sup>110</sup> MB Ramose ‘Reconciliation and Reconciliation in South Africa’ (2012) 5 *Journal on African Philosophy* 20, 21ff.

<sup>111</sup> Ramose (note 109 above) at 15.

rejection of constitutional supremacy because sovereignty should not rest in a neo-colonial document but it must be vested in the African people themselves.<sup>112</sup> Related to the second point is the fact that Ramose argues that the historical African kingdoms should be given sovereignty. For example, what is known today as the province of Kwa-Zulu Natal should be returned to the Kingdom of the Zulus.<sup>113</sup> Furthermore, African customary law should not be trumped by the Constitution because the Constitution is simply the ‘second conquest’ of African people.<sup>114</sup> It would appear that it is Ramose’s view that only once these two aspects have been addressed can *ubuntu*-based justice be achieved. Therefore it seems to be Ramose’s view that without the restoration of the territorial and political sovereignty of African people, the reliance on *ubuntu* in the context of the constitutional right to dignity is a fundamentally flawed and incomplete incorporation of *ubuntu* into South African law – so much so that the true essence of *ubuntu* is absent in South African law. Ramose’s views are certainly challenging and provocative and are deserving of serious political debate. However, for purposes of the present discussion, two observations will be made.

In the first instance it can be argued that the Constitution (including its supremacy and property clauses) is legitimate because it was passed as law by a democratically elected body. If the people of a state vest their democratically elected representatives with a right to pass a Constitution and it contains a supremacy clause, it would mean that the people decided to exercise their sovereignty through their Constitution. It does not mean that the people’s sovereignty has been compromised. Instead, it means that their sovereignty has been given effect to. Furthermore, it is highly unlikely that the supremacy of the Constitution, which contains the current property clause, will be amended by the South African people because even the most radical political party in South Africa at this juncture has placed the supremacy of the Constitution at the heart of their manifesto.<sup>115</sup>

In the second instance Ramose’s all-or-nothing approach to the incorporation of *ubuntu* into South African law loses sight of the fact that smaller battles eventually win the war. Thus, it

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<sup>112</sup> Ibid at 16. See also MB Ramose ‘Ubuntu: Affirming a Right and Seeking Remedies in South Africa’ in L Praeg & S Magadla *Ubuntu: Curating the Archive* (2014).

<sup>113</sup> Ramose (note 97 above) at 325.

<sup>114</sup> Ibid at 326.

<sup>115</sup> In the case of *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11, 2016 (3) SA 580 (CC), 2016 (5) BCLR 618 (CC) the Economic Freedom Fighters relied heavily on the supremacy of the Constitution to bring the current government to account.

might not be ideal in Ramose's view that *ubuntu* has been incorporated into our dignity discourse in an incomplete manner. However, even an incomplete incorporation is better than no incorporation of African values and philosophy at all. Therefore, it is my argument that even though the transformative value of *ubuntu* might be limited in the context of alleviating poverty and the redistribution of land in South Africa, sight must not be lost of the deviationist potential of the concept. As this chapter has shown, *ubuntu* dignity can serve to push the law of defamation in a more transformative direction, away from the commodified spectre of dignity. In this regard, I reemphasise Botha's call for a double-handed, critical approach to law:<sup>116</sup>

On the one hand, it needs to be uncompromising in its exposure of the gap between the radical promise of an egalitarian constitution which celebrates plurality and difference, and the inadequacy of legislative and judicial efforts to realise that promise. On the other hand, it must constantly be on the lookout for critical opportunities to exploit that gap.

As I have argued elsewhere, our concern as transformative lawyers is not simply to trash the law and leave it on a rubbish dump of illegitimate institutions – our endeavour is make the best of the tools that we have at our disposal.<sup>117</sup> And perhaps using *ubuntu* to form a new approach to the South African law of delict is one such endeavour.

In conclusion, the strategic use of *ubuntu* dignity could have various results. *Ubuntu* dignity will probably not result in the notion of non-patrimonial damages falling away completely. As Sachs J reminded us, we live in a world obsessed with money and sometimes monetary claims are an effective way to protect personality interests in light of that reality. However, what *ubuntu* dignity promotes is a change of understanding about the purpose of non-patrimonial damages claims for breaches of the constitutional right to dignity. The purpose should no longer be to believe fictitiously that solace can be effected by an award of money. Instead, monetary claims for constitutional dignity infringements should be viewed as symbolic tokens of acknowledgement of a wrong and a request for forgiveness and peace. Thus, the quantum of damages in these cases should be moderate and should not depend on how 'important' the victim is regarded by the community. Furthermore, moderate awards for non-patrimonial damages should be awarded in conjunction with orders for apology and retraction if the parties to the disputes are open to it. In this way *ubuntu* dignity could be used as a tool of resistance against the commodification of humanity. Finally, the right to dignity, in its external

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<sup>116</sup> H Botha 'Equality, Plurality and Structural Power' (2009) 25 *South African Journal on Human Rights* 1, 37.

<sup>117</sup> E Zitzke 'RH v DE 2014 6 SA 436 (SCA): A Case of Anti-Constitutional Common-Law Development' (2015) 48 *De Jure* 467, 475-476.

and internal forms, should not be extended to corporations because such an extension inevitably involves the corporatisation of dignity and the commodification of our humanity. If the Constitutional Court is ever presented with the opportunity to reconsider the law laid down in *Media 24*, it would do well to develop the common law on the basis of section 22 of the Constitution and not section 10. Alternatively, the Court could simply decide that *Media 24* was incorrectly decided and that no development is necessary, especially not at the cost of sacrificing the philosophical core of the constitutional right to human dignity.

PART FOUR

# CONCLUDING THOUGHTS

## 1 JUDICIAL AD HOCERY AND ADJUDICATIVE SUBSIDIARITY

In this study the haphazard methodology for effecting constitutional transformation in the South African law of delict has been problematised. Firstly, it has been shown that the popular conceptualisation of the constitutional-application debate as it relates to the law of delict provides insufficient guidance to lawyers on when the Constitution should feature in delictual disputes. Delict academics and the courts have not been able to explain why certain cases require direct constitutional application (in the sense of utilising constitutional rights to strike down common-law or statutory provisions) while others require indirect constitutional application (in the sense of infusing the law of delict with constitutional values through statutory interpretation or the development of the common law), and why the majority of the cases require no constitutional application.<sup>1</sup>

Secondly, the popular conceptualisation of constitutional application fails to recognise that purposive constitutional interpretation requires a holistic reading of a diverse range of constitutional provisions and it therefore falls into the traps of associating direct constitutional application with the invocation of section 8 of the Constitution and indirect constitutional application with section 39(2). Instead, these two sections and others should be regarded as complimentary rather than antagonistic provisions.<sup>2</sup>

Thirdly, it has been shown that the failures of the popular approach to constitutional application have led to undesirable ad hocery in the unification of the Constitution and the rules of delict. The ad hocery has sometimes resulted in constitutional over-excitement,<sup>3</sup> where constitutional rules and principles are applied to a dispute without regard being had to established common-law or statutory rules, as reflected in *Loureiro v iMvula Quality Protection*.<sup>4</sup>

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<sup>1</sup> Chapter 2 § 2 read with Diagram A above.

<sup>2</sup> Chapter 2 § 5 above.

<sup>3</sup> Chapter 2 § 4 above.

<sup>4</sup> *Loureiro and Others v iMvula Quality Protection (Pty) Ltd* [2014] ZACC 4, 2014 (3) SA 394 (CC), 2014 (5) BCLR 511 (CC).

However, it has mostly resulted in constitutional avoidance that takes on a variety of forms. Sometimes lawyers opt for a constitutionally wanting approach,<sup>5</sup> as the court did in *Heroldt v Wills*<sup>6</sup> where it window-dressed the legal issues in constitutional terms but nevertheless opted to develop the common law of delict in light of changing technology and thus circumvented a substantive application of the Constitution. In other cases lawyers are comfortable with the approach of constitutional heedlessness,<sup>7</sup> where no mention is made of the Constitution and the rules of delict are thus applied in a ‘business-as-usual’ fashion, even though a specific matter might require constitutional alteration, as evidenced in *iMvula Quality Protection v Loureiro*,<sup>8</sup> *Country Cloud v MEC Department of Infrastructure and Development, Gauteng*,<sup>9</sup> *Department of Health, Provincial Administration: Western Cape v Oppelt*<sup>10</sup> and *H v Kingsbury Foetal Assessment Centre*.<sup>11</sup> Constitutional avoidance may finally take on the form of anti-constitutionalism<sup>12</sup> seen in *RH v DE* where the Supreme Court of Appeal took notice of the fact that the Constitution could have applied to the matter at hand but nevertheless proceeded explicitly to reject the Constitution’s application in favour of common-law purity.<sup>13</sup> Neither constitutional avoidance nor constitutional over-excitement are desirable approaches to the law of delict. Constitutional avoidance runs the risk of venerating a conservative, purist common law (which constitutes the largest part of the law of delict) while constitutional over-excitement holds the danger of expecting too much of the Constitution which is also restrictive in many ways.

It has been suggested that the haphazard methodology for constitutional application that currently features in the law of delict stifles its transformation. It has therefore been proposed that the distinction between ‘direct’, ‘indirect’ and ‘no’ constitutional application should be abandoned. Instead, I have proposed the methodology of ‘adjudicative subsidiarity’ which I argue might hold the key to integrating the various sources of law that constitute the law of

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<sup>5</sup> Chapter 2 § 3.2 above.

<sup>6</sup> *Heroldt v Wills* 2013 ZAGPJHC 1, 2013 (2) SA 530 (GSJ), 2013 (5) BCLR 554 (GSJ), [2013] 2 All SA 218 (GSJ).

<sup>7</sup> Chapter 2 § 3.3 above.

<sup>8</sup> *iMvula Quality Protection (Pty) Ltd v Loureiro and Others* [2013] ZASCA 12, 2013 (3) SA 407 (SCA), [2013] 2 All SA 659 (SCA).

<sup>9</sup> *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2013] ZASCA 161, 2014 (2) SA 214 (SCA).

<sup>10</sup> *Department of Health, Provincial Administration: Western Cape v Oppelt* [2014] ZASCA 135, 2014 JDR 2015 (SCA).

<sup>11</sup> *H v Kingsbury Foetal Assessment Centre* [2014] ZAWCHC 61.

<sup>12</sup> Chapter 2 § 3.4 above.

<sup>13</sup> *RH v DE* [2014] ZASCA 133, 2014 (6) SA 436 (SCA).



delict.<sup>14</sup> In its most elementary form, adjudicative subsidiarity involves placing the Constitution at the heart of every legal dispute while simultaneously entailing that constitutional provisions may be given effect to by legislation or the common law – in which case the latter sources of law should be utilised to resolve the dispute and not simply the Constitution.

More specifically, on my technical reading of the Constitution the supreme law of the Republic should form the point of departure for all legal enquiries because all law and conduct are subject to constitutional scrutiny, as provided for in sections 2, 39(3) and Schedule 6 of the Constitution. When dealing with a dispute between private parties inter se and legislation gives effect to a specific constitutional provision (whether it be a constitutional right or some other provision), such legislation should be applied (following section 8(3) or the age-old principle that legislation enjoys precedence over the common law) in a way that best promotes the spirit, purport and objects of the Bill of Rights (following section 39(2)). If no legislation gives effect to the constitutional provision, the common law must either be applied or developed (in terms of section 8(3)) – the choice between application and development is a ‘power’ conferred on judges (in terms of section 173) and thus requires proper consideration and reasoning due to the fact that we find ourselves in a justificatory culture brought about by the Constitution. To be clear, even if the common law is simply being applied a court should justify why its mere application is appropriate in light of constitutional norms. If the common law is being developed, then the spirit, purport and objects of the Bill of Rights must be promoted in that exercise on the strength of the instruction given in section 39(2) to that effect. If neither legislation nor the common law can provide ‘appropriate relief’ as required by section 38, then an award for constitutional damages might be appropriate to restore the ruptured relationship between the conflicting parties. In cases where the state is the alleged wrongdoer, the same basic methodology is followed but instead of sub-sections 8(2) and (3) regulating the relationship between legislation and the common law one could rely on sections 7 and 8(1) read with the age-old principle of South African law that legislation takes preference over the common law.<sup>15</sup>

Reading the Constitution in a way that endorses adjudicative subsidiarity holds critical flair for at least three reasons. Firstly, it creates a space in which South African common-law false consciousness (in other words, a belief in the necessity and neutrality thereof) inbred in our legal culture may be challenged. Secondly, it shows that there are multiple ways of reading the Constitution due to gaps and ambiguities inherent in the text and that the current application

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<sup>14</sup> Chapter 2 § 5 above.

<sup>15</sup> Chapter 2 § 5 read with Diagrams B & C above.

models are not the only notional ways of conceptualising the issue of constitutional application. Thus, it exposes something about the radical indeterminacy of law. Thirdly, if one accepts that the Constitution is transformative, in the sense that it could be read to encourage social egalitarianism, then the Constitution's infiltration into the law of delict could contribute towards the continuous shaping and reshaping of a democratic South Africa.<sup>16</sup>

However, the method has many inherent limitations that flow from the limits of the notion of constitutionalism itself. These limits relate to, for example, the Constitution's failures to address poverty properly, restore the political-spiritual sovereignty of the African people, and radically address concerns relating to decolonisation because the Constitution may itself be regarded as a project of Western imperialism and neo-colonialism.<sup>17</sup> Furthermore, the method of adjudicative subsidiarity might pose barriers to the achievement of egalitarian results because, as has been explained in the critique of *Nkala v Harmony Gold Mining Company*,<sup>18</sup> it might make more sense from a strategic litigation perspective to place less reliance on constitutional rights and to emphasise the spirit, purport and objects of the Bill of Rights as the standard against which the common law should be tested. Thus, the transformative potential of adjudicative subsidiarity relies on a socially egalitarian, as opposed to a libertarian, interpretation of constitutional provisions.<sup>19</sup> Despite the limits of constitutionalism in general and adjudicative subsidiarity in particular, I maintain that a transformative approach to the law of delict involves a stronger emphasis being placed on the Constitution in our legal method, on condition that the Constitution should be used as deviationist doctrine to disrupt common-law veneration in a way that promotes social democratic aims. The endeavour might not always be successful or even possible but, if we take the reconstructive project of critical legal scholarship seriously, the methodology proposed in this thesis could be useful in effecting incremental changes to the law until the current political dispensation is decolonised.

## 2 STATE LIABILITY

A fair assessment of judicial performance with regard to the constitutional transformation of the law of delict should involve an acknowledgement that there have been moments of success. In

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<sup>16</sup> Chapter 1 § 3.4 above.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Nkala and Others v Harmony Gold Mining Company Limited and Others* [2016] ZAGPJHC 97, 2016 JDR 0881 (GJ), [2016] 3 All SA 233 (GJ), 2016 (7) BCLR 881 (GJ).

<sup>19</sup> Chapter 2 § 5.4 above.

the context of state liability, the Constitutional Court in the case of *Carmichele v Minister of Safety and Security* made it clear that the common law of delict may be developed on constitutional grounds and, in basic terms, a thorough knowledge of the common law and the Constitution are required for common-law development to be successful.<sup>20</sup> In *Carmichele CC* we see a vindication of a person's rights to dignity and bodily integrity where it was held that the state bears positive duties to take active steps to ensure that constitutional rights are protected.

The state's obligation to protect constitutional rights was once again reiterated in *K v Minister of Safety and Security* which is important because it adds substance to our understanding of the mechanism by which the state is held liable for the delicts of its employees, namely vicarious liability.<sup>21</sup> Upon a joint reading of *Carmichele CC* and *K v Minister CC* it seems that the state will be liable for the conduct of its employees if the requirements for vicarious liability are met. The victim of state malfeasance will have to prove that (1) the person who committed the delict was employed by the state, (2) the employee actually committed a delict, and (3) the employee was acting in the course and scope of employment when the delict was committed.<sup>22</sup>

With regard to requirement (2) it must be borne in mind that the state cannot act without the hands of its employees. State employees are therefore sometimes charged with fulfilling the state's constitutional obligations, depending on the terms of employment.<sup>23</sup> Thus it can be said that requirement (2) is met, for example, when a state prosecutor fails to inform a judge of an accused's previous convictions during a bail hearing because the state (acting through the prosecutor) bears the constitutional obligation to take positive steps to prevent harm from befalling others.<sup>24</sup> When determining whether or to what extent the state bears a specific constitutional duty to respect or actively protect constitutional rights, the matter of *Geldenhuys v Minister* reminds us, firstly, to be attentive to the transformative value of historical consciousness which requires all lawyers to understand constitutional rights and state obligations in their historical context.<sup>25</sup> Depending on the circumstances of the case, police obligations might have to be understood against the backdrop of the instrumental role that the police force played in the

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<sup>20</sup> *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22, 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) ('*Carmichele CC*').

<sup>21</sup> *K v Minister of Safety and Security* [2005] ZACC 8, 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC) ('*K v Minister CC*').

<sup>22</sup> Chapter 4 § 1 above.

<sup>23</sup> Chapter 4 § 4 above.

<sup>24</sup> Chapter 3 above.

<sup>25</sup> *Geldenhuys v Minister of Safety and Security and Another* [2002] ZAWCHC 2, 2002 (4) SA 719 (C), [2002] 3 All SA 82 (C) ('*Geldenhuys HC*').

maintenance of apartheid or even the role that it played in the Marikana massacre in 'post'-apartheid South Africa.<sup>26</sup> Secondly, in terms of *Fose v Minister*,<sup>27</sup> *Olitzki Properties*<sup>28</sup> and the cases that followed those precedents, regard must be had to the constitutional value of state accountability in the determination of state liability.<sup>29</sup> The value of accountability influences the wrongfulness enquiry by questioning what remedy would be most appropriate to ensure accountable government. If there are extra-judicial or public-law remedies (such as interdicts, mandamuses or judicial review), those should be used first. The secondary remedy is a claim for common-law damages. In the absence of the availability or success of the primary and secondary remedies for state misconduct, the tertiary remedy of awarding constitutional damages should always be considered.<sup>30</sup> For example, if the state is guilty of breaching the constitutional right to just administrative action, the appropriate remedy might be judicial review instead of damages and thus the state will not be held vicariously liable for the conduct of its transgressing administrator. It has been argued in this study that claims for pure economic loss most regularly require extra-judicial or public-law remedies<sup>31</sup> while claims for infringements to bodily integrity often result in successful claims for common-law damages.<sup>32</sup> Additionally, where constitutional rights have been infringed, the value of state accountability could influence the negligence enquiry by requiring the state to furnish satisfactory reasons as to why its allocation of resources in a particular matter was reasonable despite the harm that ensued, which fits comfortably in the culture of justification effected by the Constitution.<sup>33</sup>

Requirement (3) will be established upon an application of various rules depending on the factual construction concerned.<sup>34</sup> If a state employee was strictly speaking off-duty in terms of his or her employment contract when the delict was committed, it is possible for that employee to place him or herself on duty. If the employee was on duty and he or she completely abandoned his or her employment duties the abandonment-mismanagement rule and its subsidiary considerations (for example, whether the employee bore a duty not to cause the harm

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<sup>26</sup> Chapter 5 § 2 above.

<sup>27</sup> *Fose v Minister of Safety and Security* [1997] ZACC 6, 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC).

<sup>28</sup> *Olitzki Property Holdings v State Tender Board* [2001] ZASCA 51, 2001 (3) SA 1247 (SCA).

<sup>29</sup> Chapter 5 § 3 above.

<sup>30</sup> Chapter 5 § 3.1 above.

<sup>31</sup> Chapter 5 § 3.3 above.

<sup>32</sup> Chapter 5 § 3.2 above.

<sup>33</sup> *Ibid.*

<sup>34</sup> Chapter 4 § 5 above.

that ensued, the trust that the victim had in the employee, as well as the constitutional and statutory duties borne by the employee by virtue of state employment) will apply. If the employment duties were only partially abandoned, the subjective-objective rule will then apply. The objective leg of the test may be established by applying the discharge-of-duty rule, the promotion-of-employer-interest rule, the authority rule and/or the control rule. If the employee was fully engaged in the employer's work then the employer will clearly be held liable with little or no dispute on requirement (3).

A fair appraisal of judicial performance in the context of constitutional infiltration into the law of delict however also requires an identification of potential stumbling blocks to the transformation of delict. The judgment in *Carmichele CC* has been criticised in this thesis for seven main reasons. Firstly, the Court in *Carmichele CC* held that all the constitutional provisions that in some way relate to common-law development bear the same meaning – that the common law must be developed if it falls short of the spirit, purport and objects of the Bill of Rights. The conflation of a number of constitutional provisions evaded the complexity of constitutional interpretation and perhaps oversimplified the enquiry.<sup>35</sup>

Secondly, the spirit, purport and objects of the Bill of Rights should not necessarily be understood as the standard against which the common law should be evaluated. Instead, it should be regarded as the standard that guides common-development once it has been established that the common law as it stands fails to give effect to a constitutional right or fails to achieve broader constitutional compliance.<sup>36</sup>

Thirdly, the Court interestingly suggested that the spirit, purport and objects of the Bill of Rights can be equated to the phrase 'constitutional values'. In truth, the words 'spirit', 'purport' and 'objects' each have a meaning distinct from the word 'values'. Moreover, the Court understood the spirit, purport and objects of the Bill of Rights to involve the protection of the constitutional rights to dignity, equality, privacy and bodily integrity, thus being counterproductive to its own reduction of section 39(2) to simply meaning 'values'.<sup>37</sup>

Fourthly, if constitutional values are to feature in the endeavour of common-law development, that should be done in the process of interpreting the contents of the Bill of

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<sup>35</sup> Chapter 3 § 3.1 above.

<sup>36</sup> Chapter 3 § 3.2 above.

<sup>37</sup> Chapter 3 § 3.1 above.

Rights as required by section 39(1) and therefore constitutional rights and values act in tandem instead of in opposition to one another.<sup>38</sup>

Fifthly, also on the issue of constitutional interpretation, the Court in *Carmichele CC* probably placed too much emphasis on international law and foreign legal perspectives extrinsic to the African continent and thereby fell into the trap of Eurocentrism. Lawyers should therefore be attentive to considering African international law and foreign jurisdictions in the interpretation of constitutional rights.<sup>39</sup>

Sixthly, the Court in *Carmichele CC* problematically held that courts are subject to a general obligation to develop the common law which means that courts should not always consider whether the common law must be developed. The generality of the obligation to consider common-law development promotes ad hocery and fails to give effect to the culture of justification that the Constitution is supposed to bring about. A truly transformative methodology would require courts to justify, in every case, why the common law requires either development or application. That would give due recognition to the fact that the choice to develop or apply the common law stems from a constitutionally mandated power.<sup>40</sup>

Finally, *Carmichele CC* indicated that the common law should be developed according to its 'own paradigm'. Even though that phrase could be understood to mean that the Constitution should not have a truly substantive role to play in the common law's development, it could be strategically read to mean that the Constitution should play a strong role in developing the common law but that the common law should be properly examined and understood before any random and radical development is brought about.<sup>41</sup>

In the context of the decision in *K v Minister CC*, the Court provided a glimmer of hope in the context of re-interpreting section 39(2) when it noted that the section does not make it clear on which occasion the common law should be developed. However, the Court proceeded to indicate non-compliance with the spirit, purport and objects of the Bill of Rights as a ground for common-law development.<sup>42</sup> As in *Carmichele CC*, the Court in *K v Minister CC* may have appeared to argue that the common law had been inconsistent with the spirit, purport and

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<sup>38</sup> Chapter 3 § 3.6.2 above.

<sup>39</sup> Ibid.

<sup>40</sup> Chapter 3 § 3.4 above.

<sup>41</sup> Chapter 3 § 3.6.3 above.

<sup>42</sup> Chapter 4 § 3.1 above

objects of the Bill of Rights but in reality the entire legal dispute was framed around the infringement of the right to dignity and bodily integrity of the victim. Thus, the common law actually failed to give effect to Ms K's constitutional rights and that was the true reason why the common law required development.<sup>43</sup> In *K v Minister CC* the Court could have conducted a more profound study of the common-law principles of vicarious liability to make better sense of the 'common-law paradigm'. Its failure to do so might have created the impression that a large body of common-law rules had to be disregarded and that different factual constructions of vicarious liability (that require different policy considerations) would all be treated in the same way in future.<sup>44</sup> However, as it has been argued, there is a strategic way of reading *K v Minister CC* which circumvents the undesirably radical break from a vast body of precedent in this area of law that ensures greater doctrinal clarity with strong constitutional undertones.<sup>45</sup>

Focusing on the role of constitutional values in the common law's development, it is worth repeating that some courts fundamentally misunderstood the relationship between constitutional values and section 39(2) of the Constitution. Some courts appear to have been of the view that the spirit, purport and objects of the Bill of Rights equate to 'values' and that the common law should be developed for incompatibility with constitutional values. Nevertheless, from their reasoning it is apparent that those courts incongruously equate constitutional values (in other words, what they perceive to be the spirit, purport and objects of the Bill of Rights) to constitutional rights. However, in this thesis it has been suggested that constitutional values should play a subsidiary role in common-law development. A court should develop the common law on account of either the common law's failure to afford sufficient protection to a constitutional right or for broader constitutional unsuitability. Section 39(1) of the Constitution makes it clear that when interpreting the Bill of Rights, courts are enjoined to promote the values that underlie a democratic society. Thus, constitutional values should influence the interpretation of constitutional rights and, from a critical angle, could militate against the potentially individualistic social effects of constitutional rights.<sup>46</sup>

In this regard the values of historical self-consciousness and accountability have had an impressive impact on the South African law of state liability. However, these values have perhaps not yet reached their full potential. The judgment in *Geldenbuys HC* indicated that police

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<sup>43</sup> Ibid.

<sup>44</sup> Chapter 4 § 3.2 above.

<sup>45</sup> Chapter 4 § 5 above.

<sup>46</sup> Chapter 5 § 2.1 & 3.1 above.

delinquency must be understood against the backdrop of police brutality during the apartheid era. However, the Supreme Court of Appeal problematically by implication held that the High Court had overplayed police brutality during the apartheid era because of some reported judgments from that era indicative of the fact that the previous police force had been held to account for its delicts.<sup>47</sup> However, as pointed out in this thesis, testimonies before the Truth and Reconciliation Commission revealed that victims of police violence had been reluctant to institute claims against the police force out of fear of violent retaliation as well as the problem of unavoidable partiality within the police force against its delinquent members. Furthermore, with the exception of the pronouncement in *Geldenbuys HC* our courts have made no explicit attempts to situate police violence in historical context.<sup>48</sup>

Reference to the value of state accountability has been more pronounced and a relatively stable understanding of its influence on the determination of the wrongfulness of state conduct has emerged through the cases. However, three cautionary notes should be raised. Firstly, although the Supreme Court of Appeal in *MEC, Department of Welfare, Eastern Cape v Kate*<sup>49</sup> and the Constitutional Court in *President of the Republic of South Africa v Modderklip Boerdery*<sup>50</sup> effectively explained why no extra-judicial or public-law remedy would have assisted the claimants in the respective cases, those courts would have done better had they explained why the claimants would have failed with claims based on the secondary remedy of common-law damages. Although those judgments are reconcilable with the hierarchy of remedies developed by numerous courts in the context of state accountability, conceptual clarity required the courts in *Kate* and *Modderklip CC* to be more explicit about why constitutional damages (conventionally regarded as a remedy of last resort in the absence of extra-judicial, public-law and common-law remedies) had to be awarded in each case.<sup>51</sup>

Secondly, although the Constitutional Court eloquently incorporated the value of state accountability into the negligence enquiry in *Mashongwa v PRASA*,<sup>52</sup> the Court did so in a

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<sup>47</sup> *Minister van Veiligheid en Sekuriteit en 'n Ander v Geldenbuys* [2003] ZASCA 90, 2004 (1) SA 515 (SCA), [2003] 4 All SA 330 (SCA).

<sup>48</sup> Chapter 5 § 2.3.3 above.

<sup>49</sup> *MEC, Department of Welfare, Eastern Cape v Kate* [2006] ZASCA 49, 2006 (4) SA 478 (SCA), [2006] 2 All SA 455 (SCA) ('*Kate*').

<sup>50</sup> *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5, 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) ('*Modderklip CC*').

<sup>51</sup> Chapter 5 § 3.4 above.

<sup>52</sup> *Mashongwa v PRASA* [2015] ZACC 36, 2016 (2) BCLR 204 (CC).



restricted manner. The Court held that, if it is alleged that the state had acted negligently by improperly allocating its resources, the value of state accountability requires the state and its organs to provide clear reasons why its resources had been allocated in a particular way. The role of state accountability in this regard is restrictive. Perhaps the Court would have done better to hold that if the state fails to provide reasons for its allocation of resources in the context of claims of this nature, negligence should be inferred. Such a decision would have secured a penalty for the state's failure to act transparently and accountably. At present it seems that it would be politically responsible if the state provides reasons for its resource allocation but there would be no pertinent penalty if the state did not do that.<sup>53</sup>

Finally, as noted in the discussion of *Lee v Minister of Correctional Services*,<sup>54</sup> it has been argued that the value of state accountability should not be used as a catch-all standard that effectively imposes strict liability on the state. It will be recalled that in *Lee CC* the Court held that the value of state accountability could require a positive finding of legal causation. In that case the Court held that legal causation had been established without reference to established common-law rules and principles relating to legal causation. Even though constitutional values have an important role to play in the protection of our constitutional democracy, it should not lead to constitutional over-excitement in the way that it did in *Lee CC*.<sup>55</sup>

### 3 PRIVATE LIABILITY

The Constitution's influence on 'private' delictual liability has been less prominent when compared to matters relating to state liability. It has been suggested that this could be the manifestation of two classically liberal perspectives on constitutional law. One perspective is that constitutions primarily serve the purpose of protecting individuals from the state and therefore have little to do with regulating private conduct. Another equally significant perspective is that constitutions aim at securing the freedom of 'private' persons and that constitutional interference with relationships between non-state parties should be avoided because it amounts to totalitarianism.<sup>56</sup>

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<sup>53</sup> Chapter 5 § 3.2 above.

<sup>54</sup> *Lee v Minister of Correctional Services* [2012] ZACC 30, 2013 (2) SA 144 (CC), 2013 (2) BCLR 129 (CC), 2013 (1) SACR 213 (CC) (*Lee CC*).

<sup>55</sup> *Ibid.*

<sup>56</sup> Chapter 6 § 1 above.

On the contrary, in the South African context, it has been argued in this thesis that the Constitution is post-liberal because although there are certain constitutional provisions with a classical-liberal flair, there are also some provisions that show a break with classical liberalism. Most prominently the Constitution provides for its so-called horizontal application to non-state parties in a way that could combat privatised apartheid and other power imbalances in South African society. The exact way in which the Constitution had to influence non-state actors was hotly contested during the negotiations period of democratisation. The legal position under the 1993 Constitution was that private parties in dispute with one another would not be entitled to place direct reliance on constitutional rights. At most, the common law could be developed consistently with constitutional norms and therefore exert an indirect influence on private relationships.<sup>57</sup>

In terms of legal method, the Constitutional Court in *Khumalo v Holomisa* tacitly accepted the two-step approach proposed in *Carmichele CC* to the effect that the common law position should firstly be established after which its constitutional compatibility should be determined.<sup>58</sup> The Court crucially noted that section 8 of the 1996 Constitution clearly provided for the ‘direct’ application of constitutional rights to private disputes. In a fundamental sense the basic tenor of *Khumalo* is to be welcomed because it created the possibility for the infiltration of constitutional aspirations into private disputes.<sup>59</sup> However, the framework for common-law development created in *Khumalo* has not escaped criticism.

The Court in *Khumalo* once again oversimplified a number of potentially relevant constitutional provisions and effectively held that sub-sections 8(2) and (3) of the Constitution provide the sole authority for constitutional application to disputes between non-state actors. The methodology proposed in this thesis entails that a number of different constitutional provisions should be read holistically, in relation to each other, and that common-law development cannot be reduced to one or two sections in the Constitution alone. Furthermore, the Court’s description of the type of application in *Khumalo* as ‘direct application’ and its failure to define it properly is conceptually unsound. In *Carmichele CC* the Court did not give the type of application a name. Additionally, it seemed to suggest that sections 8 and 39(2) (among others) are complimentary and not mutually exclusive of one another. Thus, it is unclear what direct

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<sup>57</sup> Chapter 6 § 2 above.

<sup>58</sup> *Khumalo v Holomisa* [2002] ZACC 12, 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) (*‘Khumalo’*).

<sup>59</sup> Chapter 6 § 3 above.

versus indirect application is, as well as why *Khumalo* was uniquely a section-8 issue while *Carmichele CC* was not.<sup>60</sup>

Ultimately the key difficulty emerging from *Khumalo* is that the Court gave no guidance on the structural issue of when one should consider constitutional compatibility in the first place. From *Khumalo* it would appear that the Constitution would apply to non-state delictual disputes only if a crafty lawyer brought the court's attention to it, adding to the uncertainty in this regard first created by *Carmichele CC*'s 'general obligation' to develop the common law in 'some' random cases. This essential methodological issue with *Khumalo* has intensified rather than clarified the haphazard methodology governing the constitutional application to non-state delictual disputes.<sup>61</sup>

Substantively, the constitutional rights to equality and dignity have had a great impact on private delictual liability. The constitutional right to equality has caused the law of delict (and by implication family law as well) to enlarge the scope of family relationships that the law deems worthy of protection. The law now affords protection to Islamic marriages in polygamous and monogamous forms, customary marriages, same-sex marriages and domestic partnerships in addition to the time-honoured heterosexual civil marriage. Additionally the right to equality of persons living with disabilities has been successfully vindicated by courts that have been alert to the structural and practical difficulties that those persons face. These findings accord with the South African emblematic motto that we as South Africans are united in our diversity and have given effect to the theoretical notion of complex equality, which involves granting recognition to certain previously 'legally invisible' groups while dismantling structural privilege in other cases that require it.<sup>62</sup> The constitutional right to dignity has specifically led to serious developments in the awarding of non-patrimonial damages. Under the guise of constitutional dignity the courts have awarded orders for apology instead of damages in defamation cases and corporations have been granted the right to sue for non-patrimonial damages on account of their dignity being infringed.<sup>63</sup> Many of these developments have played a crucial role in the strengthening of South Africa's democracy but there have nevertheless been substantive shortcomings in how the rights to equality and dignity have been employed by the courts.

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<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Chapter 7 above.

<sup>63</sup> Chapter 8 above.

Regarding the constitutional right to equality it has been noted that the Supreme Court of Appeal in *Amod v Multilateral Motor Vehicle Accidents Fund* afforded legal recognition to Islamic marriages under the guise of ‘diversity and democracy’ without considering it appropriate to consult the Constitution in its enquiry.<sup>64</sup> The effect of *Amod* was a realisation of the constitutional right to equality but it is unfortunate that the court sought to circumvent the substantive effect of the Constitution on the matter. However, the court probably avoided the Constitution in that case to evade difficult questions regarding the retrospective application of the Constitution to disputes that arose before the Constitution had taken effect.<sup>65</sup>

Unfortunately anti-constitutionalism featured once again in the case of *Paixão v Road Accident Fund* where the Supreme Court of Appeal profoundly developed the common law by holding that domestic partnerships require legal protection on the grounds of ‘decency’ and ‘equity’ but explicitly not on the ground of the constitutional right to equality.<sup>66</sup> The recurring theme of anti-constitutionalism in the judgments of the Supreme Court of Appeal is highlighted with concern.<sup>67</sup>

Furthermore, in light of the criticism raised in this thesis against the Constitutional Court’s decision in *Le Roux v Dey*,<sup>68</sup> courts should be sensitive to the effects of their judgments on the equality of parties not necessarily engaged in the dispute at hand. For example, in *Dey* the equality of homosexual people was at stake in the Court’s description of an allegedly defamatory photograph. Homophobic, sexist, anti-poor or racist assumptions should thus not find a way into the exposition of facts or law in judgments because such assumptions would be harmful to the right to equality.<sup>69</sup>

Theoretical clarity on the constitutional right to dignity perhaps requires most work in the context of constitutional application to the law of delict. This is so because a fundamental tension exists between two competing theoretical understandings of human dignity, namely commodity dignity (whereby a quality that secures human beings in their being is commodified,

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<sup>64</sup> *Amod v Multilateral Motor Vehicle Accidents Fund* [1999] ZASCA 76, 1999 (4) 1319 SA (SCA) [1999] 4 All SA 421 (A) (‘*Amod*’).

<sup>65</sup> Chapter 7 § 3.1 above.

<sup>66</sup> *Paixão and Another v Road Accident Fund* [2012] ZASCA 130, 2012 (6) SA 377 (SCA), [2012] 4 All SA 262 (SCA).

<sup>67</sup> Chapter 7 § 3.1 above.

<sup>68</sup> *Le Roux and Others v Dey* [2011] ZACC 4, 2011 (3) SA 274 (CC), 2011 (6) BCLR 577 (CC) (‘*Dey*’).

<sup>69</sup> Chapter 7 § 4 above.

given financial value and even bestowed on corporations)<sup>70</sup> and *ubuntu* dignity (in terms of which dignity is regarded as a quality that must be respected for the sake of preserving our humanity in predominantly non-pecuniary terms).<sup>71</sup> The two models of dignity are not two different species of the same genus – they are rival visions of what it means to be human. If the right to dignity is so flexible that it can involve incompatible philosophical models, then it makes a mockery of one of the foundational components of our transformative democracy.

Indeterminacy of the law is inevitable but this type of theoretical disorder should not exist with regard to one of the most fundamental rights in our Constitution. In this regard courts would do well in future to link a corporation's right to claim non-patrimonial damages for defamation with constitutional business rights instead of the right to human dignity and to rethink the prominence and role of non-patrimonial damages in the protection of the right to dignity. It is not necessarily suggested that non-patrimonial damages claims should be abolished but its function and hegemonic character should be reconceptualised if our conception of dignity is to be a humane one.<sup>72</sup>

#### 4 OVERALL REFLECTION

Ultimately this study has aimed to provide an appraisal of the changing landscape of the law of delict in light of the democratisation of South Africa. It is hoped that it has been shown that great progress has been made with regard to the realisation of constitutional rights in the law of delict. State delictual liability has been most prominently affected by the Constitution, specifically in relation to the determination of the wrongfulness of state conduct and the founding of the state's vicarious liability. Although promising developments have also been made in the context of the delictual liability of non-state actors, the possibility exists for even greater constitutional enhancement of private disputes. Exactly what those enhancements will look like is beyond the scope of this study. For an even stronger endorsement of constitutional supremacy and an advancement of constitutional rights, it is maintained that the method of adjudicative subsidiarity may prove to be useful for the future conceptualisation of delictual problems. To reiterate, adjudicative subsidiarity avoids both problems of constitutional heedlessness in its various forms and constitutional over-excitement. It holds one of many keys to putting an end to the conceptually incoherent traditional approaches of direct and indirect constitutional application.

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<sup>70</sup> Chapter 8 § 3 above.

<sup>71</sup> Chapter 8 § 2 above.

<sup>72</sup> Chapter 8 § 4 above.

Additionally, it could also assist lawyers to rethink the generality of the obligation to develop the common law in a way that appropriately espouses constitutional supremacy both in disputes where the common law is to be applied or developed. In this way adjudicative subsidiarity acts as a critical and transformative method for applying the rules of the law of delict because it recognises that (1) no single source of law should be venerated in such a way that it is gullibly regarded as the prime solution to all legal problems, thereby responding to the false-consciousness thesis of critical legal scholarship with regard to the blind acceptance of the common law; and (2) there are different ways of reading the Constitution that could provide different outcomes but, on at least one technical reading, the Constitution could be placed at the heart of every delictual dispute regardless of whether one interprets legislation or applies or develops the common or customary law.

Change is inevitable and normal.<sup>73</sup> The law of delict has often proved this to be true. The way in which the law of delict has changed over time in South Africa is largely acceptable and desirable. However, as this study has suggested, perhaps the time has come for delict lawyers to rethink the way in which delictual problems are approached. Delict academics could consider changing forms of assessment to require more rigorous argument about how the law of delict should develop in light of constitutional imperatives or, at a minimum, do away with formalistic tests and examinations in terms of which there is one objectively correct answer or approach with only ten keywords that provide the student with a maximum of ten marks. The law is more complicated and flexible than that and is almost always subject to re-imagination and re-enchantment. Delict practitioners should be conscientious in playing their humble role in contributing to the maintenance of South African democracy and the uplifting of our society. Strategically that could mean acknowledging a transformative approach to delictual problems. Similarly, judicial officers who are faced with adjudicating delictual disputes should be attentive to the realisation of constitutional imperatives in what has been historically classified as ‘private-law’.

Conclusions should always be tentative and open to reconsideration because time is a great teacher. Thus, I cautiously conclude that despite the limitations inherent to the transformative methodology proposed in this thesis, its novelty could hold some critical potential for further re-imagination of the South African law of delict. In this way critical legal scholarship, constitutional theory and ‘private’ law may be effectively synchronised. The method proposed in

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<sup>73</sup> Chapter 1 § 1 above.

this thesis should however always be approached with circumspection so that it does not become crystallised, closed or venerated in itself. In order to be a truly critical method it must be self-reflective, subject to change and, if necessary, be open to deconstruction and reconstruction. This is so because, as the prolific poet Rumi teaches us, once we believe that we have mastered something, we should run from that false state of finality and accomplishment.<sup>74</sup>

Know the true definition of yourself.

That is essential.

Then, when you know your own definition, flee from it.

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<sup>74</sup> J Rumi *Masnavi i Ma'navi* (trans K Helminski & C Helminski, 2000) Book Five, 564-565.

## Bibliography

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### A

Ackermann LWH 'The Legal Nature of the South African Constitutional Revolution' (2004) *New Zealand Law Review* 633

Ackermann LWH 'Constitutional Comparativism in South Africa' (2006) 123 *South African Law Journal* 497

Albertyn C 'Chapter 12: Feminism and the Law' in Roederer C & Moellendorf D *Jurisprudence* (2004) Landsdowne: Juta

Albertyn C 'Defending and Securing Rights through Law: Feminism, Law and the Court in South Africa' (2005) 32 *South African Journal of Political Studies* 217

Albertyn C 'Chapter 4: Equality' in Cheadle M, Davis D & Haysom N *South African Constitutional Law: The Bill of Rights* (2<sup>nd</sup> Ed, OS, 2006)

Albertyn C 'Substantive Equality and Transformation in South Africa' (2007) 23 *South African Journal on Human Rights* 253

Albertyn C "'The Stubborn Persistence of Patriarchy"? Gender Equality and Cultural Diversity in South Africa' (2009) 2 *Constitutional Court Review* 165

Albertyn C 'Gendered Transformation in South African Jurisprudence: Poor Women and the Constitutional Court' (2011) 22 *Stellenbosch Law Review* 591

Albertyn C 'Law, Gender and Inequality in South Africa' (2011) 39 *Oxford Developmental Studies* 139

Albertyn C & Davis D 'Legal Realism, Transformation and the Legacy of Dugard' (2010) 26 *South African Journal on Human Rights* 188

Albertyn C & Goldblatt B 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *South African Journal on Human Rights* 248



Albertyn C & Goldblatt B 'Chapter 35: Equality' in Woolman S & Bishop M *Constitutional Law of South Africa* (2<sup>nd</sup> Ed, OS, 2006) Cape Town: Juta

Albertyn C & Kentridge J 'Introducing the Right to Equality in the Interim Constitution' (1994) 10 *South African Journal on Human Rights* 149

## **B**

Barlow TB *The South African Law of Vicarious Liability in Delict and a Comparison of the Principles of Other Legal Systems* (1939) Cape Town: Juta

Barnard-Naudé J 'Of Dorothy's Dog, "Poststructural" Fairy Tales... And the Real: Power, Poverty and the General Principles of the South African Law of Contract' (2013) 29 *South African Journal on Human Rights* 467

Barnard-Naudé J 'The Pedigree of the Common Law and the "Unnecessary" Constitution: A Discussion of the Supreme Court of Appeal's Decision in RH v DE' (2016) 133 *South African Law Journal* 16

Barnard-Naude J & De Vos P 'Disturbing Heteronormativity: The "Queer" Jurisprudence of Albie Sachs' (2010) 25 *SA Public Law* 209

Barnard-Naudé J & De Vos P 'The Heteronormative Observer: The Constitutional Court's Decision in Le Roux v Dey' (2011) 128 *South African Law Journal* 407

Barratt A 'Private Contract or Automatic Court Discretion? Current Trends in Legal Regulation of Permanent Life-Partnerships' (2015) 26 *Stellenbosch Law Review* 110

Bauman R *Critical Legal Studies: A Guide to the Literature* (1996) Boulder, Colorado: WestviewPress

Baxi U 'Preliminary Notes on Transformative Constitutionalism' in O Vieira, U Baxi & F Viljoen *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (2013) Pretoria: Pretoria University Law Press

Bekker T 'The Re-Emergence of Ubuntu: A Critical Analysis' (2006) 21 *SA Public Law* 333

Bennett TW 'Ubuntu: An African Equity' (2011) 14 *Potchefstroom Electronic Law Journal* 30

Bhana D 'The Role of Judicial Method in the Relinquishing of Constitutional Rights through Contract' (2008) 24 *South African Journal on Human Rights* 300

Bhana D 'The Horizontal Application of the Bill of Rights: A Reconciliation of Sections 8 and 39 of the Constitution' (2013) 29 *South African Journal on Human Rights* 351

Bilchitz D, Glaser D & Konstant A 'Determining the Internal Goals of South Africa's Constitution' in Bilchitz D (ed) *Assessing the Performance of the South African Constitution* (2016) Sweden: IDEA

Bishop M 'Chapter 9: Remedies' in Woolman S & Bishop M *Constitutional Law of South Africa* (2<sup>nd</sup> Ed, OS, 2006) Cape Town: Juta

Boberg PQR *The Law of Delict* (1984) Cape Town: Juta

Boezaart CJ 'n Kind met Gestremdheid en Onregmatige Lyding in die Suid-Afrikaanse Deliktereg' in JM Potgieter, J Knobel & RM Jansen (eds) *Essays In Honour of / Huldigingsbundel vir Johann Neethling* (2015) 93, 96ff

Bohler-Müller N 'Some Thoughts on the Ubuntu Jurisprudence of the Constitutional Court' (2007) 28 *Obiter* 590

Bonthuys E & Albertyn C *Gender, Law and Justice* (2007) Cape Town: Juta

Boonzaier L 'State Liability in South Africa: A More Direct Approach' (2013) 130 *South African Law Journal* 330

Boonzaier L & Mbikiwa M 'The Constitutional Court in Harms' Way: A Response' (2015) 132 *South African Law Journal* 769

Botha CJ *Statutory Interpretation: An Introduction for Students* (5<sup>th</sup> Ed, 2012) Juta: Cape Town

Botha H 'Privatism, Authoritarianism and the Constitution: The Case of Neethling and Potgieter' (1995) 58 *Journal of Contemporary Roman-Dutch Law* 496

Botha H 'Metaphoric Reasoning and Transformative Constitutionalism (Part 1)' (2002) *Journal of South African Law* 612

Botha H 'Metaphoric Reasoning and Transformative Constitutionalism (Part 2)' (2003) *Journal of South African Law* 20

Botha H 'Freedom and Constraint in Constitutional Adjudication' (2004) 20 *South African Journal on Human Rights* 249

Botha H 'Equality, Dignity, and the Politics of Interpretation' (2004) 19 *SA Public Law* 724

Botha H 'Equality, Plurality and Structural Power' (2009) 25 *South African Journal on Human Rights* 1

Botha M & Millard D 'The Past, Present and Future of Vicarious Liability in South Africa' (2012) 45 *De Jure* 225

Botha N 'The Role of International Law in the Development of South African Common Law' (2001) 26 *South African Yearbook of International Law* 253

Botha N 'The Broader Influence of the International Covenant for the Protection of Civil and Political Rights in South African Municipal Law: Do We Need Incorporation?' (2010) 35 *South African Yearbook of International Law* 270

Boudin C & Richter M 'Adult, Consensual Sex Work in South Africa – The Cautionary Message of Criminal Law and Sexual Morality' (2009) 25 *South African Journal on Human Rights* 179

Brand D *Courts, Socio-Economic Rights and Transformative Politics* (2009) (unpublished LLD Thesis, Stellenbosch University)

Brand FDJ 'Reflections on Wrongfulness in the Law of Delict' (2005) 122 *South African Law Journal* 90

Brand FDJ 'Influence of the Constitution on the Law of Delict' (2014) *Advocate* 42

Burchell J *The Law of Defamation in South Africa* (1985) Cape Town: Juta

Burchell J *Principles of Delict* (1993) Cape Town: Juta

Burchell J *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) Cape Town: Juta

Burchell J 'Media Freedom of Expression Scores as Strict Liability Receives the Red Card: National Media Ltd v Bogoshi' (1999) 116 *South African Law Journal* 1

Burchell J 'Personality Rights in South Africa: Re-Affirming Dignity' in NR Whitty & R Zimmerman *Rights of Personality in Scotts Law* (2009) Dundee: Dundee University Press

Buthelezi M 'In Dissent: A Critical Review of the Minority Judgment of Yacoob J' (2012) 33 *Obiter* 719

## C

- Calitz K 'The Close Connection Test for Vicarious Liability' (2007) 18 *Stellenbosch Law Review* 451
- Calvino L & Iyer D 'Advancing the Rights of Heterosexual Life Partners in Respect of Loss of Support' (2014) 35 *Obiter* 162
- Cameron E 'Legal Chauvinism, Executive-Mindedness and Justice – LC Steyn's Impact on South African Law' (1982) 99 *South African Law Journal* 38
- Campbell J 'Pleading Meaning in Defamation Cases: *Le Roux v Dey*' (2011) 128 *South African Law Journal* 419
- Carnelley M 'Die Doodskoot vir of Slegs die Verwonding van die Eis teen die Derdeparty-Egbreker?' (2015) 12 *LitNet Akademies* 333
- Carpenter G 'The Carmichele Legacy – Enhanced Curial Protection of the Right to Physical Safety' (2003) 18 *SA Public Law* 252
- Carpenter G & Botha CJ 'The "Constitutional Attack on Private Law": Are the Fears Well Founded?' (1996) 59 *Journal of Contemporary Roman-Dutch Law* 126
- Cawthra G *Policing South Africa* (1993) London: Zed Books
- Cheadle H 'Chapter 3: Application' in Cheadle H, Davis D & Haysom N *South African Constitutional Law: The Bill of Rights* (2<sup>nd</sup> Ed, OS, 2002) Durban: LexisNexis
- Cheadle H & Davis D 'The Application of the 1996 Constitution in the Private Sphere' (1997) 13 *South African Journal on Human Rights* 44
- Cheadle H, Davis D & Haysom N *South African Constitutional Law: The Bill of Rights* (2<sup>nd</sup> Ed, OS, 2002) Durban: LexisNexis
- Chetty D 'The Perspective of a High Court Judge' (2004) 121 *South African Law Journal* 493
- Chirwa D 'In Search of Philosophical Justifications and Suitable Models for the Horizontal Application of Human Rights' (2008) 8 *African Human Rights Law Journal* 294
- Chürr C 'Wrongful Life Claims under South African Law: An Overview of the Legal Framework' (2015) 36 *Obiter* 745, 748ff
- Clapham A *Human Rights in the Private Sphere* (1993) Oxford: Clarendon Press

- Cobbah J 'African Values and the Human Rights Debate: An African Perspective' (1987) 9 *Human Rights Quarterly* 309
- Cockrell A 'Private Law and the Bill of Rights: A Threshold Issue of Horizontality' in *Bill of Rights Compendium* (OS, 1996) Durban: LexisNexis
- Collins H 'Roberto Unger and the Critical Legal Studies Movement' (1987) 14 *Journal of Law and Society* 387
- Combrinck H 'The Dark Side of the Rainbow: Violence Against Women in South Africa After Ten Years of Democracy' (2005) 21 *Acta Juridica* 171
- Corbett MM 'The Role of Policy in the Evolution of Our Common Law' (1987) 104 *South African Law Journal* 52
- Cornell D 'A Call for a Nuanced Constitutional Jurisprudence: Ubuntu, Dignity and Reconciliation' (2004) 19 *SA Public Law* 666
- Cornell D 'Bridging the Span toward Justice: Laurie Ackermann and the Ongoing Architectonic of Dignity Jurisprudence' (2008) *Acta Juridica* 18
- Cornell D & Friedman N 'In Defence of the Constitutional Court: Human Rights and the South African Common Law' (2011) 5 *Malawi Law Journal* 1
- Cornell D & Muvangua N 'Introduction: The Re-Cognition of uBuntu' in Cornell D & Muvangua N (eds) *Ubuntu and the Law: African Ideals and Post-Apartheid Jurisprudence* (2012) New York: Fordham University Press
- Cornell D & Muvangua N 'Part 1: Legal Cases' in Cornell D & Muvangua N (eds) *Ubuntu and the Law: African Ideals and Post-Apartheid Jurisprudence* (2012) New York: Fordham University Press
- Cornell D & Muvangua N 'Preface' in Cornell D & Muvangua N (eds) *Ubuntu and the Law: African Ideals and Post-Apartheid Jurisprudence* (2012) New York: Fordham University Press
- Cornell D & Van Marle K 'Exploring Ubuntu: Tentative Reflections' (2005) 5 *African Human Rights Law Journal* 195
- Cronjé DSP & Heaton J *South African Family Law* (2<sup>nd</sup> Ed, 2004) Durban: LexisNexis Butterworths
- Currie I 'Judicious Avoidance' (1999) 15 *South African Journal on Human Rights* 138

Currie I & De Waal M *Bill of Rights Handbook* (6<sup>th</sup> Ed, 2013) Cape Town: Juta

## D

Dafel M 'The Directly Enforceable Constitution: Political Parties and the Horizontal Application of the Bill of Rights' (2015) 31 *South African Journal on Human Rights* 56

Davel CJ *Die Dood van 'n Broodwinner as Skadevergoedingsoorsaak* (1984) LLD Thesis, University of Pretoria

Davel CJ *Skadevergoeding aan Afhanklikes* (1987) Roodepoort: Digma

Davel CJ 'Die Ontwikkeling van die Aksie van Afhanklikes' (2000) *Acta Juridica* 158

Davis D *Democracy and Deliberation: Transformation and the South African Legal Order* (1999) Cape Town: Juta

Davis D 'Adjudicating the Socio-Economic Rights in the South African Constitution: Towards "Deference Lite"?' (2006) 22 *South African Journal on Human Rights* 301

Davis D 'How Many Positivist Legal Philosophers Can Be Made to Dance on the Head of a Pin?' (2012) 129 *South African Law Journal* 59

Davis D 'Where is the Map to Guide Common Law Development?' (2014) 25 *Stellenbosch Law Review* 3

Davis D 'Legal Transformation and Legal Education: Congruence of Conflict?' (2015) *Acta Juridica* 172

Davis D 'Twenty Years of Constitutional Democracy: A Preliminary Reflection' (2015/16) 60 *New York Law School Review* 40

Davis D & Klare K 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 *South African Journal on Human Rights* 403

De Vos P 'A Bridge Too Far? History as Context in the Interpretation of the South African Constitution' (2001) 17 *South African Journal on Human Rights* 1

De Vos P 'Chapter 13: Gay and Lesbian Legal Theory' in Roederer C & Moellendorf D *Jurisprudence* (2004) Landsdowne: Juta

- De Vos P 'It's My Party (And I'll Do What I Want To)': Internal Party Democracy and Section 19 of the South African Constitution' (2015) 31 *South African Journal on Human Rights* 30
- De Vos P & Freedman W (eds) *Constitutional Law in Context* (2014) Cape Town: Oxford University Press
- De Waal MJ & Schoeman-Malan MC *Law of Succession* (5<sup>th</sup> Ed, 2015) Cape Town: Juta
- De Wet E 'The "Friendly but Cautious" Reception of International Law in the Jurisprudence of the South African Constitutional Court: Some Critical Remarks' (2004-5) 28 *Fordham International Law Journal* 1529
- Delpont T 'An Ethical (Anti)Constitutionalism? Transformation for a Transfigured Public' (2014) 46 *Acta Academica* 104
- Descheemaeker E 'Three Keys to Defamation: Media 24 in a Comparative Perspective' (2013) 130 *South African Law Journal* 435
- Discher M 'A New Natural Law Theory as a Ground for Human Rights?' (1999-2000) 9 *Kansas Journal of Law & Public Policy* 267
- Douzinas C & Geary A *Critical Jurisprudence: The Political Philosophy of Justice* (2005) Oxford: Hart Publishing
- Du Bois F 'Getting Wrongfulness Right: A Ciceronian Attempt' (2000) *Acta Juridica* 1
- Du Bois F 'State Liability in South Africa: A Constitutional Remix' (2010) 25 *Tulane European and Civil Law Forum* 139
- Du Bois F 'Private Law in the Age of Rights' in Reid E & Visser DP (eds) *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (2014) Cape Town: UCT Press
- Du Plessis L 'Chapter 32: Interpretation' in Woolman S & Bishop M (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Ed, OS, 2006) Cape Town: Juta
- Du Plessis L 'Enkele Gedagtes oor die Historiese Interpretasie van Hoofstuk 3 van die Oorgangsgrondwet' (1995) 58 *Journal of Contemporary Roman-Dutch Law* 504
- Du Plessis L 'The South African Constitution as Memory and Promise' (2000) 11 *Stellenbosch Law Review* 385

Du Plessis L 'Subsidiarity: What's in the Name for Constitutional Interpretation and Adjudication?' (2006) 17 *Stellenbosch Law Review* 207

Du Plessis L 'The South African Constitution as monumental and memorial and the commemoration of the dead' in Pieroth B & Christensen R (eds) *Rechtstheorie in Rechtspraktischer Absicht* (2008) Berlin: Dunker & Humblot/FS Müller

Dugard J 'Judicial Process, Positivism and Civil Liberty' (1971) 88 *South African Law Journal* 181

Dugard J *International Law: A South African Perspective* (4<sup>th</sup> Ed, 2011) Juta: Cape Town

Dyzenhaus D 'L. C. Steyn in Perspective' (1982) 99 *South African Law Journal* 380

## **E**

Eekelaar J & Nhlapo T (eds) *The Changing Family: Family Forms & Family Law* (1998) Oxford: Hart Publishing

English R 'Ubuntu: The Quest for an Indigenous Jurisprudence' (2006) 12 *South African Journal on Human Rights* 641

## **F**

Fagan A 'A Duty without Distinction' (2000) *Acta Juridica* 49

Fagan A 'Rethinking Wrongfulness in the Law of Delict' (2005) 122 *South African Law Journal* 90

Fagan A 'Blind Faith: A Response to Professors Neethling & Potgieter' (2007) 124 *South African Law Journal* 285

Fagan A 'Reconsidering Carmichele' (2008) 125 *South African Law Journal* 659

Fagan A 'The Confusions of K' (2009) 126 *South African Law Journal* 156

Fagan A 'Letter by John Mullins SC in (2009) 126 SALJ 861' (2010) 127 *South African Law Journal* 363

Fagan A 'The Secondary Role of the Spirit, Purport and Objects of the Bill of Rights in the Common Law's Development' (2010) 127 *South African Law Journal* 661

Fagan A 'The Constitutional Court Loses Its (and Our) Sense of Humour: *Le Roux v Dey*' (2011) 128 *South African Law Journal* 395



Fagan A 'The Gist of Defamation in South African Law' in Descheemaeker E & Scott H *Iniuria and the Common Law* (2013) Oxford: Hart Publishing

Fagan A 'Causation in the Constitutional Court: Lee v Minister of Correctional Services' (2014) 5 *Constitutional Court Review* 104

Fagan E 'Roman-Dutch Law in Its South African Historical Context' in Zimmerman R & Visser DP *Southern Cross: Civil Law and Common Law in South Africa* (1996) Oxford: Clarendon Press

Ferreira G 'The Direct and the Indirect Application of the Bill of Rights: Constitutional Imperative or Questionable Academic Innovation?' (2006) 20 *Speculum Juris* 241

Floyd T 'Delict: Liability for the Press for Defamation' (1999) 40 *Codicillus* 86

Fowkes J 'Chapter 13: Founding Provisions' in Woolman S & Bishop M *Constitutional Law of South Africa* (2<sup>nd</sup> Ed, OS, 2006) Cape Town: Juta

Freedman W 'Constitutional Application' (2009) 22 *South African Journal of Criminal Justice* 139

Friedman N 'The South African Common Law and the Constitution: Revisiting Horizontality' (2014) 30 *South African Journal on Human Rights* 63

Friedmann D & Barak-Erez D *Human Rights in Private Law* (2002) Oxford: Hart Publishing

Froneman JC 'Legal Reasoning and Legal Culture: Our "Vision" of Law' (2005) 16 *Stellenbosch Law Review* 3

## G

Gidron T 'Publication of Private Information: An Examination of the Right to Privacy from a Comparative Perspective (Part 2)' (2010) *Journal of South African Law* 271

Goldblatt B 'Amod v Multilateral Motor Vehicle Accidents Fund' (2000) 16 *South African Journal on Human Rights* 138

Gordon R 'Critical Legal Histories' (1984) 36 *Stanford Law Review* 57

Grobbelaar-Du Plessis I & Van Reenen T *Aspects of Disability Law in Africa* (2011) Pretoria: PULP

## H

Hahlo HR & Kahn E *The South African Legal System and Its Background* (1968) Cape Town: Juta

Harms LTC 'The Puisne Judge, the Chaos Theory and the Common Law' (2014) 131 *South African Law Journal* 3

Haysom N 'Chapter 5: Dignity' in Cheadle H, Davis D & Haysom N *South African Constitutional Law: The Bill of Rights* (2<sup>nd</sup> Ed, OS, 2002) Durban: LexisNexis

Heywood A *Politics* (3<sup>rd</sup> Ed, 2007) England & New York: Palgrave Macmillan

Himonga C, Taylor M & Pope A 'Reflections on Judicial Views of Ubuntu' (2013) 16 *Potchefstroom Electronic Law Journal* 369

Hofmeyr K 'A Central-Case Analysis of Constitutional Remedial Power' (2008) 125 *South African Law Journal* 521

Humby T, Kotzé L & Du Plessis A *Law and Legal Skills in South Africa* (2012) Cape Town: Oxford University Press

Hunt A & Fitzpatrick A *Critical Legal Studies* (1987) New York: B Blackwell

## **J**

Jabbari D 'From Criticism to Construction in Modern Critical Legal Theory' (1992) 12 *Oxford Journal of Legal Studies* 507

Jansen M 'Defamation: Defences Used by the Media' (1999) 40 *Codicillus* 94

## **K**

Keevy I 'The Constitutional Court and Ubuntu's "Inseparable Trinity"' (2009) 34 *Journal for Juridical Science* 61

Kelman M *A Guide to Critical Legal Studies* (1987) Cambridge, Massachusetts: Harvard University Press

Kennedy D 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685

Kennedy D 'Freedom and Constraint in Adjudication: A Critical Phenomenology' (1986) 36 *Journal of Legal Education* 518

Killander M 'Judicial Immunity, Compensation for Unlawful Detention and the Elusive Self-Executing Treaty Provision' (2010) 26 *South African Journal on Human Rights* 386

Klaaren J & Penfold G 'Chapter 63: Just Administrative Action' in Woolman S & Bishop M *Constitutional Law of South Africa* (2<sup>nd</sup> Ed, OS, 2006) Cape Town: Juta

Klare K 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146

Klare K 'Legal Subsidiarity & Constitutional Rights: A Reply to AJ van der Walt' (2008) 1 *Constitutional Court Review* 129

Kleyn DG & Van Niekerk G 'Ulpian's Praecepta Iuris and Their Role in South African Law Part 1: Historical Context' (2014) 20 *Fundamina* 437

Kleyn DG & Van Niekerk G 'Ulpian's Praecepta Iuris and Their Role in South African Law Part 2: Modern-Day South African Practice' (2014) 20 *Fundamina* 446

Klopper HB *The Law of Third-Party Compensation* (3<sup>rd</sup> Ed, 2012) Durban: LexisNexis

Knobel J 'Liability of Organs of State for Omissions on Part of Police and Prosecutors' (2002) 43 *Codicillus* 96

Knobel J 'Nalatige Persoonlikheidskrenking' (2002) 65 *Journal of Contemporary Roman-Dutch Law* 24

Kok A 'An Appalling Lack of Judgment by the Supreme Court of Appeal' (2005) 68 *Journal of Contemporary Roman Dutch Law* 506

Kok A 'Is Law Able to Transform Society?' (2010) 127 *South African Law Journal* 59

Kroeze I 'Doing Things with Values II: The Case of Ubuntu' (2002) 13 *Stellenbosch Law Review* 252

Krog A *Country of My Skull: Guilt, Sorrow and the Limits of Forgiveness in the New South Africa* (1998) New York: Three Rivers Press

## **L**

Labuschagne P 'Memorial Complexity and Political Change: Paul Kruger's Statue's Political Travels through Space and Time' (2011) 26 *South African Journal of Art History* 142

Lagrange R 'Chapter 17: Economic Activity Rights' in Cheadle H, Davis D & Haysom N *South African Constitutional Law: The Bill of Rights* (2<sup>nd</sup> Ed, OS, 2002) Durban: LexisNexis

Langa P 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* 351

Le Roux WB 'Natural Law Theories' in Roederer C & Moellendorf D *Jurisprudence* (2004) Cape Town: Juta

Leinius B & Midgley JR 'The Impact of the Constitution on the Law of Delict: Carmichele v Minister of Safety and Security' (2002) 119 *South African Law Journal* 17

Linscott JA 'A Critical Analysis of the Majority Judgment in F v Minister of Safety and Security 2012 1 SA 536 (CC)' (2014) 17 *Potchefstroom Electronic Law Journal* 2915

Lombard A 'Vicarious Liability of Employer – Rape Committed by Employees of SAPD – NK v Minister of Safety and Security Case CCT 52/04' (2005) 46(2) *Codicillus* 93-96

Loubser M 'Laster: Waarheid en Bewyslas' (2003) 14 *Stellenbosch Law Review* 364

Loubser M & Midgley JR (eds) *The Law of Delict in South Africa* (2<sup>nd</sup> Ed, 2012) Cape Town: Oxford University Press

Lukács G *History and Class Consciousness: Studies in Marxist Dialectics* (1968)(trans R Livingstone, 1971) Cambridge, Massachusetts: The MIT Press

## **M**

Mahery P 'A Child's Potential Claim for Negligent Misdiagnosis: The Case of H v. Fetal Assessment Centre' (2016) 106 *South African Medical Journal* 348

Maseko T 'The Impact of the Principle of Separation of Powers on the Development of Common Law and the Protection of Rape Victim's Rights' (2008) 29 *Obiter* 53

Mbao M 'The Province of the South African Bill of Rights Determined and Redetermined – A Comment on the Case of Baloro & Others v University of Bophuthatswana & Others' (1996) 113 *South African Law Journal* 33

McInery R 'Natural Law and Human Rights' (1991) 36 *American Journal of Jurisprudence* 1

McKerron RG *The Law of Delict* (7<sup>th</sup> Ed, 1971) Cape Town: Juta

Meyerson D 'Rethinking Marriage and its Privileges' (2013) *Acta Juridica* 385

Michelman F 'Constitutional Authorship, "Solomonic Solutions", and the Unoriginalist Mode of Constitutional Interpretation' (1998) *Acta Juridica* 208

Michelman F 'On the Uses of Interpretive "Charity": Some Notes on Application, Avoidance, Equality and Objective Unconstitutionality from the 2007 Term of the Constitutional Court of South Africa' (2008) 1 *Constitutional Court Review* 1

Michelman F 'Liberal Constitutionalism, Property Rights, and the Assault on Poverty' (2011) 22 *Stellenbosch Law Review* 706

Midgley JR 'Media Liability for Defamation' (1999) 116 *South African Law Journal* 211

Mills L 'Failing Children: The Courts' Disregard of the Best Interests of the Child in *Le Roux v Dey*' (2014) 131 *South African Law Journal* 847

Milo D *Defamation and Freedom of Speech* (2008) New York: Oxford University Press

Milo D & Stein P *A Practical Guide to Media Law* (2013) Durban: LexisNexis

Mnyongani F 'De-Linking Ubuntu: Towards a Unique South African Jurisprudence' (2010) 31 *Obiter* 134

Modiri J 'The Grey Line in-between the Rainbow: (Re)thinking and (Re)talking Critical Race Theory in Post-Apartheid Legal and Social Discourse' (2011) 26 *SA Public Law* 177

Modiri J 'The Colour of Law, Power and Knowledge: Introducing Critical Race Theory in (Post-) Apartheid South Africa' (2012) 28 *South African Journal on Human Rights* 405

Modiri J 'Towards a "(Post-) Apartheid" Critical Race Jurisprudence: "Divining our Racial Themes"' (2012) 27 *SA Public Law* 232

Modiri J 'Race as/and the Trace of the Ghost: Jurisprudential Escapism, Horizontal Anxiety and the Right to be Racist in *BOE Trust Limited*' (2013) 16 *Potchefstroom Electronic Law Journal* 581

Modiri J 'Race, Realism and Critique: The Politics of Race and *AfriForum v Malema* in the (In)equality Court' (2013) 130 *South African Law Journal* 274.

Modiri J 'Law's Poverty' (2015) 18 *Potchefstroom Electronic Law Journal* 123

Mokgoro Y 'Ubuntu and the Law in South Africa' (1998) 1 *Potchefstroom Electronic Law Journal* 1

Mokgoro Y 'Ubuntu and the Law in South Africa' (2004) 4 *Buffalo Human Rights Law Review* 15

Moseneke D 'The Fourth Bram Fischer Memorial Lecture' (2002) 18 *South African Journal on Human Rights* 309

Moseneke D 'Transformative Constitutionalism: Its Implications for the Law of Contract' (2009) 20 *Stellenbosch Law Review* 3

Mosikatsana T 'Chapter 11: Critical Race Theory' in Roederer C & Moellendorf D *Jurisprudence* (2004) Landsdowne: Juta

Motala Z 'Towards an Appropriate Understanding of the Separation of Powers, and Accountability of the Executive and Public Service under the New South African Order' (1995) 112 *South African Law Journal* 503

Mukheibir A 'Juggling the Elements of Delict' (2003) 24 *Obiter* 262

Mukheibir A 'The Impact of the Constitutional Imperative of the State to Avoid Harm on Delictual Liability for an Omission' (2003) 24 *Obiter* 498

Mukheibir A 'Ubuntu and the Amende Honorable – A Marriage between African Values and Medieval Canon Law' (2007) 28 *Obiter* 583

Mukheibir A 'Limitless Liability – Tokoloshe or Real Danger?' (2015) 132 *South African Law Journal* 22

Mulligan G 'Bellum Juridicum (3): Purists, Pollutionists and Pragmatists' (1952) 69 *South African Law Journal* 25

Mullins J 'Article by Professor Anton Fagan "The Confusions of K" (2009) 126 SALJ 156' (2009) 126 *South African Law Journal* 861

Mureinik E 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31

Mutua M 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1995) 35 *Virginia Journal of International Law* 339

## N

Neethling J 'Die Lasterreg, die Grondwet en National Media v Bogoshi' (1999) 24 *Journal for Juridical Science* 104

Neethling J 'The Constitutional Court gives the green light to the common law of defamation' (2002) 119 *South African Law Journal* 700

Neethling J 'Die Hoogste Hof van Appèl Bevestig die Uitdyende Verantwoordelikheid van die Staat om die Reg op die Fisies-Psigiese Integriteit in die Lig van die Grondwet te Beskerm' (2003) *Journal of South African Law* 783

Neethling J 'Constitutional Compatibility of the Common Law of Wrongful and Malicious Deprivation of Liberty as Iniuriae' (2004) 121 *South African Law Journal* 711

Neethling J 'Laster: Die Amende Honorable, Apologie en die Quantum Solatium' (2004) 67 *Journal of Contemporary Roman-Dutch Law* 698

Neethling J 'Delictual Protection of the Right to Bodily Integrity and Security of the Person against Omissions by the State' (2005) 122 *South African Law Journal* 572

Neethling J 'Die Carmichele-Sage Kom tot 'n Gelukkige Einde' (2005) *Journal of South African Law* 402

Neethling J 'The Conflations of Wrongfulness and Negligence: Is It Always Such a Bad Thing for the Law of Delict?' (2006) 123 *South African Law Journal* 204

Neethling J 'Afwysing van 'n Regspelig op Polisiebeamptes om die Reg op die Fisies-Psigiese Integriteit en Sekerheid van die Persoon Buiteom Misdadaatsituasies te Beskerm: Die Hoop Beskaam' (2006) 27 *Obiter* 369

Neethling J 'The Protection of False Defamatory Publications by the Mass Media: Recent Developments in South Africa against the Backdrop of Australian, New Zealand and English Law' (2007) 40 *Comparative and International Law Journal of Southern Africa* 103

Neethling J 'Middelike Aanspreeklikheid vir 'n Opsetlike Delik' (2007) *Journal of South African Law* 616

Neethling J 'Die Amende Honorable (Terugtrekking en Apologie) as Remedie by die Laster – Resente Ontwikkeling in die Regspraak' (2009) 42 *De Jure* 286

Neethling J 'Liability of the State for Rape by a Policeman: The Saga Takes a New Direction' (2011) 32 *Obiter* 428

Neethling J 'Vicarious Liability of the State for Rape by a Police Official' (2011) *Journal of South African Law* 186

Neethling J 'Facebook en Persoonlikheidsbeskerming' (2014) 11 *LitNet Akademies* 40

Neethling J 'Persoonlikheidsregtelike Beskerming van Staatsgevangenes' (2014) *Journal of South African Law* 26

Neethling J 'Owerspel as Gedingsvatbare Aksiegrond' (2015) 12 *LitNet Akademies* 397

Neethling J & Potgieter JM 'Laster: Die Bewyslas, Mediaprivilegie en die Invloed van die Nuwe Grondwet' (1994) 57 *Journal of Contemporary Roman-Dutch Law* 513

Neethling J & Potgieter JM 'Die Lasterreg en die Media: Strikte Aanspreeklikheid word ten Gunste van Nalatigheid Verwerp' (1999) 62 *Journal of Contemporary Roman-Dutch Law* 442

Neethling J & Potgieter JM 'Die Handves van Regte en Deliktuele Aanspreeklikheid weens Verbreking van 'n Statutere Voorskrif' (2002) *Journal of South African Law* 381

Neethling J & Potgieter JM 'Toepassing van die Grondwet op die Deliktereg' (2002) 65 *Journal of Contemporary Roman-Dutch Law* 265

Neethling J & Potgieter JM 'Herlewing van die Amende Honorable as Remedie by Laster' (2003) 66 *Journal of Contemporary Roman-Dutch Law* 329

Neethling J & Potgieter JM 'Deliksvereistes vir Polisie-Aanspreeklikheid weens Versuim om die Fisiese-Psigiese Integriteit te Beskerm' (2004) 67 *Journal of Contemporary Roman-Dutch Law* 501

Neethling J & Potgieter JM 'Middelike Aanspreeklikheid van die Staat vir Verkragting deur Polisiebeamptes' (2005) *Journal of South African Law* 595

Neethling J & Potgieter JM 'Wrongfulness and Negligence in the Law of Delict: A Babylonian Confusion?' (2007) 70 *Journal of Contemporary Roman-Dutch Law* 120

Neethling J & Potgieter JM 'Middelike Aanspreeklikheid vir 'n Opsetlike Delik' (2007) *Journal of South African Law* 616

Neethling J & Potgieter JM 'Defamation of School Teachers by Learners: *Le Roux v Dey* 2011 3 SA 275 (CC)' (2011) 32 *Obiter* 721

Neethling J & Potgieter JM 'Deliktuele Staatsaanspreeklikheid weens Polisieverkragting' (2012) 9 *LitNet Akademies* 73

Neethling J & Potgieter JM 'Aanspreeklikheid van die Staat vir Tuberkulose in die Gevangenis' (2013) 10 *Litnet Akademies* 1



Neethling J & Potgieter J “Vulnerability to Risk” as a Factor Determining Delictual Liability for Pure Economic Loss’ (2015) 78 *Journal of Contemporary Roman-Dutch Law* 635

Neethling J & Potgieter JM ‘Breach of Contract and Delictual Liability to Third Parties’ (2015) 78 *Journal of Contemporary Roman-Dutch Law* 711

Neethling J & Potgieter JM ‘Aksie weens Onregmatige Lyding vanweë Gestremdheid (Wrongful Life)’ (2015) 12 *LitNet Akademies* 364

Neethling J & Potgieter JM *Neethling-Potgieter-Visser Law of Delict* (7<sup>th</sup> Ed, 2015) Durban: LexisNexis

Neethling J, Potgieter JM & Visser PJ *Neethling’s Law of Personality* (2<sup>nd</sup> Ed, 2015) Durban: LexisNexis

Ngang C ‘Judicial Enforcement of Socio-Economic Rights in South Africa and the Separation of Powers Objection: The Obligation to Take “Other Measures”’ (2014) 14 *African Human Rights Law Journal* 655

Nienaber A ‘Liability for the Wrongful Transmission of Communicable Diseases in South African Prisons: What about HIV?’ (2013) 28 *SA Public Law* 163

Nugent RW ‘Yes, It Is Always a Bad Thing for the Law: A Reply to Professor Neethling’ (2006) 123 *South African Law Journal* 557

## O

O’Regan K ‘The Best of Both Worlds? Some Reflections on the Interaction between the Common Law and the Bill of Rights in Our New Constitution’ (1999) 2 *Potchefstroom Electronic Law Journal* 1

Okpaluba C ‘Extraordinary Remedies for Breach of Fundamental Rights: Recent Developments’ (2002) 17 *SA Public Law* 98

Okpaluba C ‘The Law of Bureaucratic Negligence in South Africa: A Comparative Commonwealth Perspective’ (2006) *Acta Juridica* 117

Okpaluba C ‘Delictual Liability of Public Authorities – Pitching the Constitutional Norm of Accountability against the Floodgates Argument’ (2006) 20 *Speculum Juris* 248

Okpaluba C 'The Development of Charter Damages Jurisprudence in Canada: Guidelines from the Supreme Court' (2012) 23 *Stellenbosch Law Review* 55

Okpaluba C 'The Right to the Residual Liberty of a Person in Incarceration: Constitutional and Common law Perspectives' (2012) 28 *South African Journal on Human Rights* 458

Okpaluba C 'Bureaucratic Bungling, Deliberate Misconduct and Claims for Pure Economic Loss in the Tender Process' (2014) 26 *South African Mercantile Law Journal* 387

Okpaluba C 'Protecting the Right to Personal Liberty in Namibia: Constitutional, Delictual and Comparative Perspectives' (2014) 14 *African Human Rights Law Journal* 580

Okpaluba C & Osode PC *Government Liability: South Africa and the Commonwealth* (2010) Cape Town: Juta

Oliver D & Fedtke J (eds) *Human Rights and the Private Sphere* (2007) London & New York: Routledge

## **P**

Paizes A 'Factual Causation: Which "Conditio" Must be a "Sine Qua Non"? A Critical Discussion of the Decision in Lee v Minister of Correctional Services' (2014) 131 *South African Law Journal* 500

Paleker M 'Chapter 2: Intestate Succession' in J Jamneck & C Rautenbach (eds) *The Law of Succession in South Africa* (2<sup>nd</sup> Ed, 2012) Cape Town: Oxford University Press

Parker J & Zaal FN 'Damages for Deprivation of Parental Care: Initiating a Groundbreaking New Remedy for Children' (2015) 36 *Obiter* 164

Parker J & Zaal FN 'Small Comfort for Bereaved Children. A Cautious Response to Loss of Parental Care Claims' (2016) 79 *Journal of Contemporary Roman-Dutch Law* 146

Penfold G & Milo D 'Media Freedom and the Law of Privacy: NM and Others v Smith and Others (Freedom of Expression Institute as Amicus) 2007 (5) SA 250 (CC)' (2008) 1 *Constitutional Court Review* 311

Perello C 'On Supernatural Law: About the Origins of Human Rights and Natural Law in Antiquity' (2014) 20 *Fundamina* 15

Pieterse M 'The Right to be Free from Public or Private Violence after Carmichele' (2002) 119 *South African Law Journal* 27

Pieterse M 'What Do We Mean When We Talk about Transformative Constitutionalism?' (2005) 20 *SA Public Law* 155

Pillay A 'Reviewing Reasonableness: An Appropriate Standard for Evaluating State Action and Inaction?' (2005) 122 *South African Law Journal* 419

Potgieter JM 'Gedagtes oor die Nie-Christelike Aard van Menseregte' (1989) 53 *Journal of Contemporary Roman-Dutch Law* 386

Potgieter JM 'Menseregte – Verwyder die Skyn van Christelikheid' (1990) 54 *Journal of Contemporary Roman-Dutch Law* 413

Potgieter JM 'The Role of the Law in a Period of Political Transition: The Need for Objectivity' (1991) 54 *Journal of Contemporary Roman-Dutch Law* 800

Price A 'The Influence of Human Rights on Private Common Law' (2012) 129 *South African Law Journal* 330

Price A 'Factual Causation after Lee' (2014) 131 *South African Law Journal* 491

Price A 'The Contract/Delict Interface in the Constitutional Court' (2014) 25 *Stellenbosch Law Review* 501

Price A 'State Liability and Accountability' (2015) *Acta Juridica* 313

## **Q**

Quinot G 'Worse than Losing a Government Tender: Winning It' (2008) 19 *Stellenbosch Law Review* 101

## **R**

Rabie M 'Die Eis om Onregmatige Lewe: Bestaanbaar in die Deliktereg of Word die Gemeenereg Buite sy Perke Gestrek?' (2016) 13 *LitNet Akademies* 502

Ramose MB *African Philosophy through Ubuntu* (2002) Harare: Mond Books

Ramose MB 'In Memoriam: Sovereignty and the 'New' South Africa' (2007) 16 *Griffith Law Review* 310

- Ramosé MB 'Reconciliation and Reconciliation in South Africa' (2012) 5 *Journal on African Philosophy* 20
- Ramosé MB 'Ubuntu: Affirming a Right and Seeking Remedies in South Africa' in Praeg L & Magadla S *Ubuntu: Curating the Archive* (2014) Scottsville: University of Kwa-Zulu Natal Press
- Rautenbach C & Bekker JC *Introduction to Legal Pluralism in South Africa* (4<sup>th</sup> Ed, 2014) Durban: LexisNexis
- Rautenbach IM 'The Bill of Rights Applies to Private Law and Binds Private Persons' (2000) *Journal of South African Law* 296
- Rautenbach IM 'Engaging the Text of Section 8 of the Constitution in Applying the Bill of Rights to Law Relating to Private Relations' (2002) *Journal of South African Law* 747
- Rautenbach IM 'Overview of Constitutional Court Judgments on the Bill of Rights – 2014' (2015) *Journal of South African Law* 379
- Rautenbach IM & Malherbe EFJ *Constitutional Law* (5<sup>th</sup> Ed, 2009) Durban: LexisNexis
- Robinson JA 'The Evolution of the Concept of Marriage in South Africa: The Influence of the Bill of Rights in 1994' (2005) 26 *Obiter* 488
- Robinson JA & Prinsloo R 'The Right of the Child to Care and Constitutional Damages for the Loss of Parental Care: Some Thoughts on M v Minister of Police and Minister of Police v Mboweni' (2015) 18 *Potchefstroom Electronic Law Journal* 1670
- Roederer C 'Post-Matrix Legal Reasoning: Horizontality and the Rule of Values in South African Law' (2003) 19 *South African Journal on Human Rights* 57
- Roederer C 'The Constitutionally Inspired Approach to Vicarious Liability in Cases of Intentional Wrongful Acts by the Police: One Small Step in Restoring the Public's Trust in the South African Police Service' (2005) 21 *South African Journal on Human Rights* 575
- Roederer C 'The Transformation of South African Private Law After Ten Years of Democracy: The Role of Torts (Delict) in the Consolidation of Democracy' (2006) 37 *Columbia Human Rights Law Review* 447

Roederer C 'Working the Common Law Pure: Developing the Law of Delict (Torts) in Light of the Spirit, Purport and Objects of South Africa's Bill of Rights' (2009) 26 *Arizona Journal of International & Comparative Law* 427

Roederer C 'Remnants of Apartheid Common Law Justice: The Primacy of the Spirit, Purport and Objects of the Bills of Rights for Developing the Common Law and Bringing Horizontal Rights to Fruition' (2013) 29 *South African Journal on Human Rights* 219

Roos A & Slabbert M 'Defamation on Facebook: Isparta v Richter' (2014) 17 *Potchefstroom Electronic Law Journal* 2844

Roos R & De la Harpe S 'Good Governance in Public Procurement: A South African Case Study' (2008) 2 *Potchefstroom Electronic Law Journal* 1

Roux T 'Continuity and Change in a Transforming Legal Order: The Impact of Section 26(3) of the Constitution on South African Law' (2004) 121 *South African Law Journal* 466

Roux T 'Chapter 10: Democracy' in Woolman S & Bishop M (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Ed, OS, 2006) Cape Town: Juta

Roux T 'Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference?' (2009) 20 *Stellenbosch Law Review* 258

Rumi J *Masnavi i Ma'navi* (trans Helminski K & Helminski C, 2000) Boston & London: Shambhala

## S

Sangiuliano A 'Towards a Natural Law Foundationalist Theory of Universal Human Rights' (2014) 5 *Transnational Legal Theory* 218

Scott H 'Liability for the Mass Publication of Private Information in South African Law: NM v Smith' (2007) 18 *Stellenbosch Law Review* 387

Scott TJ 'K v Minister of Safety and Security 2005 6 SA 419 (CC)' (2006) 39 *De Jure* 471

Scott TJ 'Middelike Aanspreeklikheid van die Staat weens Manipulasie van 'n Tenderproses' (2007) *Journal of South African Law* 569

Scott TJ 'Middelike Aanspreeklikheid van die Staat vir Misdadige Polisie-Optrede: Die Heilsame Ontwikkeling Duur Voort' (2011) *Journal of South African Law* 135

Scott TJ 'Die Hoogste Hof van Appèl Smoor Heilsame Regsontwikkeling' (2011) *Journal of South African Law* 773

Scott TJ 'Effect of the Destruction of a Dwelling on the Personal Servitude of Habitatio' (2011) 74 *Journal of Contemporary Roman-Dutch Law* 155

Scott TJ 'Staatsaanspreeklikheid vir Opsetsdelikte van die Polisie – die Hoogste Hof van Appèl kry Nogmaals Bloedneus' (2012) *Journal of South African Law* 541

Scott TJ 'Vicarious Liability for Intentional Delicts – The Constitutional Factor Clinches Liability' (2013) *Journal of South African Law* 348

Scott TJ 'Erkenning van Deliktuele Vordering van Deelgenoot aan Permanente Heteroseksuele Verhouding weens Doodslag van Ander Deelgenoot' (2013) *Journal of South African Law* 777

Scott TJ 'Loureiro and Others v iMvula Quality Protection (Pty) Ltd 2014 3 SA (SCA)' (2014) 47 *De Jure* 374

Scott TJ 'Delictual Liability for Adultery: A Healthy Remedy's Road to Perdition' in JM Potgieter, J Knobel & RM Jansen (eds) *Essays In Honour of / Huldigingsbundel vir Johann Neethling* (2015) Durban: LexisNexis

Scott WE *Middelike Aanspreeklikheid in die Suid-Afrikaanse Reg* (1983) Durban: Butterworth

Seedorf S & Sibanda S 'Chapter 12: Separation of Powers' in Woolman S & Bishop M (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Ed, OS, 2006)

Shaw M *Crime and Policing in Post-Apartheid South Africa: Transforming Under Fire* (2002) Indiana: Indiana University Press

Sibanda S 'Wanted: A Principled Approach to the Balancing of Public Policy Considerations' (2008) 1 *Constitutional Court Review* 335

Sibanda S 'Not Purpose Made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty' (2011) 22 *Stellenbosch Law Review* 482

Sibanda S 'Not Quite a Rejoinder: Some Thoughts and Reflections on Michelman's "Liberal Constitutionalism, Property Rights and the Assault on Poverty"' (2013) 24 *Stellenbosch Law Review* 329

Silverthorn DU et al *Human Physiology: An Integrated Approach* (4<sup>th</sup> Ed, 2007) San Fransisco: Pearson

Singh A *Policing and Crime Control in Post-Apartheid South Africa* (2008) Aldershot England: Ashgate

Singh P ‘Social Media and the Actio Injuriarum in South Africa – An Exploration of New Challenges in the Online Era’ (2014) 35 *Obiter* 616

Skelton A ‘Face to Face: Sachs on Restorative Justice’ (2010) *SA Public Law* 94

Skelton A & Carnelley M (eds) *Family Law in South Africa* (2010) Cape Town: Oxford University Press

Snowden J ‘The Justification Story: Law as Integrity and Deviationist Doctrine’ (1991) 9 *Journal of Law & Religion* 49

Snyman J ‘Interpretation and the Politics of Memory’ (1998) *Acta Juridica* 312

Soanes C (ed) *South African Pocket Oxford Dictionary* (3<sup>rd</sup> Ed, 2002) Oxford University Press Southern Africa: Cape Town

Southwell V ‘The Case of the Invisible Woman: Essentialism, Intersectionality and Marginalisation in Feminist Discourse’ (1994) 27 *Comparative and International Law Journal of Southern Africa* 357

Sprigman C & Osborne M ‘Du Plessis is Not Dead: South Africa’s 1996 Constitution and the Application of the Bill of Rights to Private Disputes’ (1999) 15 *South African Journal on Human Rights* 25

Stacey W ‘The Theory and Ideas of Libertarianism’ (2015) 3 *Journal of Peace, Prosperity and Freedom* 103

Steynberg L & Mokotong M ‘The Common-Law Duty of Support: Developed and Extended to Include the Surviving Homosexual Partner’ (2005) 68 *Journal of Contemporary Roman-Dutch Law* 330

Strydom HA ‘The Private Domain and the Bill of Rights’ (1995) 10 *SA Public Law* 52

Strydom J & Viljoen S ‘Unlawful Occupation of Inner-City Buildings: A Constitutional Analysis of the Rights and Obligations Involved’ (2014) 17 *Potchefstroom Electronic Law Journal* 1206

Stubbs M 'In Loco Parentis: Le Roux v Dey' (2013) 24 *Stellenbosch Law Review* 377

Swart M 'Left Out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor' (2005) 21 *South African Journal on Human Rights* 215

## T

Terreblanche S *A History of Inequality in South Africa: 1652-2002* (2002) Scottsville: University of Kwa-Zulu Natal Press

Theophilopoulos C, Van Heerden CM & Boraine A *Fundamental Principles of Civil Procedure* (2<sup>nd</sup> Ed, 2012) Durban: LexisNexis

Thomas PhJ, Van der Merwe CG & Stoop BC *Historical Foundations of South African Private Law* (2<sup>nd</sup> Ed, 2000) Durban: LexisNexis

Tissington K 'Demolishing Development at Gabon Informal Settlement: Public Interest Litigation beyond Modderklip?' (2011) 27 *South African Journal on Human Rights* 192

## U

Unger RM 'The Critical Legal Studies Movement' (1983) 96 *Harvard Law Review* 561

Unger RM *The Critical Legal Studies Movement* (1983) Cambridge, Massachusetts: Harvard University Press

## V

Van Aswegen A 'Policy Considerations in the Law of Delict' (1993) 56 *Journal of Contemporary Roman-Dutch Law* 171

Van Aswegen A 'The Implications of a Bill of Rights for the Law of Contract and Delict' (1995) 11 *South African Journal on Human Rights* 50

Van Blerk A 'Critical Legal Studies in South Africa' (1996) 113 *South African Law Journal* 86

Van der Merwe D 'Constitutional Colonisation of the Common Law: A Problem of Institutional Integrity' (2000) *Journal of South African Law* 12

Van der Merwe NJ & Olivier PJJ *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (6<sup>th</sup> Ed, 1989) Pretoria: JP van der Walt en Seun



- Van der Vyver J 'The Private Sphere in Constitutional Litigation' (1994) 57 *Journal of Contemporary Roman-Dutch Law* 378
- Van der Vyver J 'Constitutional Free Speech and the Law of Defamation' (1995) 112 *South African Law Journal* 572
- Van der Walt AJ 'Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law' (1995) 11 *South African Journal on Human Rights* 169
- Van der Walt AJ 'Dancing with Codes – Protecting, Developing and Deconstructing Property Rights in a Constitutional State' (2001) 118 *South African Law Journal* 258
- Van der Walt AJ 'Tentative Urgency: Sensitivity for the Paradoxes of Stability and Change in Social Transformation Decisions of the Constitutional Court' (2001) 16 *SA Public Law* 1
- Van der Walt AJ 'The State's Duty to Protect Property Owners v The State's Duty to Provide Housing: Thoughts on the Modderklip Case' (2005) 21 *South African Journal on Human Rights* 144
- Van der Walt AJ 'Transformative Constitutionalism and the Development of South African Property Law (Part 1)' (2005) *Journal of South African Law* 655
- Van der Walt AJ 'Legal History, Legal Culture and Transformation in a Constitutional Democracy' (2006) 12 *Fundamina* 1
- Van der Walt AJ 'Normative Pluralism and Anarchy: Reflections on the 2007 Term' (2008) 1 *Constitutional Court Review* 77
- Van der Walt AJ *Property and Constitution* (2012) Pretoria: Pretoria University Law Press
- Van der Walt AJ 'Development of the Common Law of Servitude' (2013) 130 *South African Law Journal* 722
- Van der Walt J 'Justice Kriegler's Disconcerting Judgment in Du Plessis v De Klerk: Much Ado about Direct Horizontal Application (Read Nothing)' (1996) *Journal of South African Law* 732
- Van der Walt J 'Perspectives on Horizontal Application: Du Plessis v De Klerk Revisited' (1997) 12 *SA Public Law* 1
- Van der Walt J 'Die Toekoms van die Onderskeid tussen die Publiekreg en Privaatreg in die Lig van die Horisontale Werking van die Grondwet (Deel 1)' (2000) *Journal of South African Law* 416

- Van der Walt J 'Die Toekoms van die Onderskeid tussen die Publiekreg en die Privaatreg in die Lig van die Horisontale Werking van die Grondwet (Deel 2)' (2000) *Journal of South African Law* 605
- Van der Walt J 'Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-Operative Relation between Common-Law and Constitutional Jurisprudence' (2001) 17 *South African Journal on Human Rights* 341
- Van der Walt J 'A Special Relationship with Women' (2002) *Journal of South African Law* 148
- Van der Walt J 'Blixen's Difference: Horizontal Application of Fundamental Rights and the Resistance to Neo-Colonialism' (2003) *Journal of South African Law* 311
- Van der Walt J 'Horizontal Application of Fundamental Rights and the Threshold of the Law in View of the Carmichele Saga' (2003) 19 *South African Journal on Human Rights* 517
- Van der Walt J *Law and Sacrifice: Towards a Post-Apartheid Theory of Law* (2005) Johannesburg: Wits University Press
- Van der Walt J *The Horizontal Effect Revolution and the Question of Sovereignty* (2014) Berlin: De Gruyter
- Van der Walt JC & Midgley JR *Principles of Delict* (3<sup>rd</sup> Ed, 2005) Durban: LexisNexis Butterworths
- Van Doren J 'Critical Legal Studies and South Africa' (1989) 106 *South African Law Journal* 648
- Van Marle K 'Transformative Constitutionalism as/and Critique' (2009) 20 *Stellenbosch Law Review* 286
- Van Marle K 'Reflections on Legacy, Complicity and Legal Education' (2014) 46 *Acta Academica* 196
- Van Marle K, De Villiers I & Beukes E 'Memory, Space and Gender: Re-Imagining the Law' (2012) 27 *SA Public Law* 559
- Van Marle K & Le Roux W 'Critical Legal Studies' in Roederer C & Moellendorf D *Jurisprudence* (2006) Cape Town: Juta
- Van Marle K & Motha S (eds) *Genres of Critique: Law Aesthetics and Liminality* (2013) Stellenbosch: Sun Press

- Van Niekerk G 'The Endurance of the Roman Tradition in South African Law' (2011) 4 *Studia Universitatis Babeş-Bolyai Jurisprudentia* 20
- Van Niekerk G 'Amende Honorable and Ubuntu: An Intersection of Ars Boni et Aequi in African and Roman-Dutch Jurisprudence?' (2013) 19 *Fundamina* 397
- Van Wyk J 'Developers, Municipalities, Wrong Decisions, Liability and the Constitution' (2004) 19 *SA Public Law* 422
- Van Zyl DH *Geskiedenis van die Romeins-Hollandse Reg* (1979) Durban: Butterworth
- Various Authors *Bill of Rights Compendium* (OS, 1996) Durban: LexisNexis
- Visser CJ 'The Revival of the Amende Honorable as Applied to Defamation by the Media' (2011) 128 *South African Law Journal* 327
- Visser CJ & Kennedy-Good C 'The Emergence of a "Flexible" *Conditio Sine Qua Non* to Factual Causation?' (2015) 36 *Obiter* 150
- Visser DP 'Daedalus in the Supreme Court – The Common Law Today' (1986) 49 *Journal of Contemporary Roman-Dutch Law* 127
- Visser DP 'The Legal Historian as Subversive or: Killing the Capitoline Geese' in Visser DP (ed) *Essays on the History of Law* (1989) Cape Town: Juta
- Visser PJ 'A Successful Constitutional Invasion of Private Law' (1995) 58 *Journal of Contemporary Roman-Dutch Law* 745
- Visser PJ 'Horisontaliteit van Fundamentele Regte Afgewys' (1996) 59 *Journal of Contemporary Roman-Dutch Law* 510
- Visser PJ 'Geen Afsonderlike Eis om "Grondwetlike Skadevergoeding" Nie' (1996) 59 *Journal of Contemporary Roman-Dutch Law* 695
- Visser PJ 'Enkele Gedagtes oor die Moontlike Invloed van die Fundamentele Reg op Lewe in die Deliktereg' (1997) 30 *De Jure* 135
- Visser PJ 'Deliktuele Aanspreeklikheid van Polisie' (2005) 38 *De Jure* 183
- Visser PJ 'Gedagtes oor Feitlike Kousaliteit in die Deliktereg' (2006) *Journal of South African Law* 581

Visser PJ & Potgieter JM 'Some Critical Comments on South Africa's Bill of Fundamental Rights' (1994) 57 *Journal of Contemporary Roman-Dutch Law* 493

Von Bonde JC 'State Liability vis-à-vis Victims of Crime in Post-1994 South African Case Law – Something New or a Reinvented Wheel?' (2009) 30 *Obiter* 211

Von Bonde JC 'Victims of Crime in International Law and Constitutional Law: Is the State Responsible for Establishing Restitution and State-Funded Compensation Schemes?' (2010) 23 *South African Journal of Criminal Justice* 183

## **W**

Wagener S 'K v Minister of Safety and Security and the Increasingly Blurred Line between Personal and Vicarious Liability' (2008) 125 *South African Law Journal* 673

Wagener S 'The Abandonment-Mismanagement Rule: Vicarious Liability for an Employee's Simultaneous Commission and Omission' (2015) 132 *South African Law Journal* 270

Walker C 'Elusive Equality: Women, Property Rights and Land Reform in South Africa' (2009) 25 *South African Journal on Human Rights* 467

Wessels B 'Alternatiewe Benaderings ten opsigte van Feitlike Kousaliteit in die Deliktereg' (2013) 10 *Litnet Akademies* 68

Williams D 'Law, Chess and Ideals' (1989) 23 *University of San Francisco Law Review* 399

Williams P *The Alchemy of Race and Rights* (1991) Cambridge, Massachusetts: Harvard University Press

Wilson S 'Breaking the Tie: Evictions from Private Land, Homelessness and New Normality' (2009) 126 *South African Law Journal* 270

Winks B 'A Covenant of Compassion: African Humanism and the Rights of Solidarity in the Banjul Charter on Human and Peoples' Rights' (2011) 11 *African Human Rights Law Journal* 447

Wolhuter L 'Horizontality in the Interim and Final Constitutions' (1996) 11 *SA Public Law* 512

Woolman S 'Defamation, Application and the Interim Constitution' (1996) 113 *South African Law Journal* 428

Woolman S 'Chapter 31: Application' in Woolman S & Bishop M (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Ed, OS, 2006) Cape Town: Juta

Woolman S 'Chapter 36: Dignity' in Woolman S & Bishop M *Constitutional Law of South Africa* (2<sup>nd</sup> Ed, OS, 2006) Cape Town: Juta

Woolman S 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762

Woolman S & Bishop M (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Ed, OS, 2006) Cape Town: Juta

Woolman S & Davis D 'The Last Laugh: Du Plessis v De Klerk, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and Final Constitutions' (1996) 12 *South African Journal on Human Rights* 361

Wright J *Tort Law & Human Rights* (2001) Portland: Hart Publishing

## **Z**

Zitzke E 'Stop the Illusory Nonsense! Teaching Transformative Delict' (2014) 46 *Acta Academica* 52

Zitzke E 'RH v DE 2014 (6) SA 436 (SCA): A Case of Anti-Constitutionalism in Common-Law Development:' (2015) 48 *De Jure* 467

Zitzke E 'Realist Evolutionary Functionalism and Extra-Constitutional Grounds for Developing the Common Law of Delict: A Critical Analysis of Heroldt v Wills 2013 2 SA 530 (GSJ)' (2016) 79 *Journal of Contemporary Roman-Dutch Law* 103

Zitzke E 'Avoiding Two Extremes: Constitutional Avoidance and Over-Excitement in the Common Law's Development' (2016) 7 *Constitutional Court Review* (copy on file with the author)

Žižek S *Violence: Six Sideways Reflections* (2009) London: Profile

# Table of Cases

---

## South African Cases

*ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* [2000] ZASCA 59, 2001 (1) SA 372 (SCA)

*African Guarantee & Indemnity Co Ltd v Minister of Justice* 1959 (2) SA 437(A)

*Amod v Multilateral Motor Vehicle Accidents Fund* [1998] ZACC 11, 1998 (4) SA 753 (CC), 1998 (10) BCLR 1207 (CC)

*Amod v Multilateral Motor Vehicle Accidents Fund* [1999] ZASCA 76, 1999 (4) 1319 SA (SCA) [1999] 4 All SA 421 (A)

*Amod v Multilateral Motor Vehicle Accidents Fund* 1997 (12) BCLR 1716 (D)

*August and Another v Electoral Commission and Others* [1999] ZACC 3, 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC)

*Baloro and Others v University of Bophuthatswana and Others* 1995 (4) SA 197 (B), 1995 (8) BCLR 1018 (B)

*Barkhuizen v Napier* [2007] ZACC 5, 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC)

*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15, 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC)

*Bezuidenhout NO v Eskom* [2002] ZASCA 152, 2003 (3) SA 83 (SCA), [2003] 1 All SA 411 (SCA)

*Blower v Van Noorden* 1909 TS 890

*Brisley v Drotzky* [2002] ZASCA 35, 2002 (4) SA 1 (SCA), 2002 (12) BCLR 1229 (SCA)

*Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22, 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC)

*Carmichele v Minister of Safety and Security and Another* 2003 (2) SA 656 (C), 2002 (10) BCLR 1100 (C)

*Carmichele v Minister of Safety and Security and Others* [2000] ZASCA 61, 2001 (1) SA 489 (SCA), [2000] 4 All SA 537 (A)

*Carter & Co (Pty) Ltd v McDonald* 1955 (1) SA 202 (A)

*Christian Lawyers Association of SA v Minister of Health* 1998 (4) SA 1113 (T)

*City Council of Pretoria v Walker* [1998] ZACC 1, 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC)

*Claassen v Minister of Justice and Constitutional Development* [2009] ZAWCHC 190, 2010 (6) SA 399 (WCC), [2010] 4 All SA 197 (WCC), 2010 (2) SACR 451 (WCC)

*Costa Da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy* [2003] ZASCA 7, 2003 (4) SA 34 (SCA)

*Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2014] ZACC 28, 2015 (1) SA 1 (CC), 2014 (12) BCLR 1397 (CC)

*Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2013] ZASCA 161, 2014 (2) SA 214 (SCA)

*Damba v AA Mutual Insurance Association Ltd* 1981 (3) SA 740 (E)

*Daniels v Campbell and Others* [2004] ZACC 14, 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC)

*Darson Construction (Pty) Ltd v City of Cape Town and Another* 2007 (4) SA 488 (C)

*Dawood & Another v Minister of Home Affairs & Others* [2000] ZACC 8, 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC)

*De Klerk and Another v Du Plessis and Others* 1995 (2) SA 40 (T), 1994 (6) BCLR 124 (T)

*DE v RH* [2015] ZACC 18, 2015 (5) SA 83 (CC), 2015 (9) BCLR 1003 (CC)

*Department of Health, Provincial Administration: Western Cape v Oppelt* [2014] ZASCA 135, 2014 JDR 2015 (SCA)

*Dikoko v Mokhatla* [2006] ZACC 10, 2006 (6) SA 235 (CC), 2007 (1) BCLR 1 (CC)

*Du Plessis and Others v De Klerk and Another* [1996] ZACC 10, 1996 (3) 850 (CC), 1996 (5) BCLR 658 (CC)

*Du Plessis v Road Accident Fund* [2003] ZASCA 86, 2004 (1) SA 359 (SCA), 2003 (11) BCLR 1220 (SCA)

*Du Toit v Minister of Welfare and Population Development and Others* [2002] ZACC 20, 2003 (2) SA 198 (CC), 2002 (10) BCLR 1006 (CC)

*Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11, 2016 (3) SA 580 (CC), 2016 (5) BCLR 618 (CC)

*Eskom Holdings Ltd v Hendricks* [2005] ZASCA 46, 2005 (5) SA 503 (SCA), [2005] 3 All SA 415 (SCA)

*Ess Kay Electronics Pte Ltd v First National Bank of Southern Africa Ltd* [2000] ZASCA 67, 2001 (1) SA 1214 (SCA), [2001] 1 All SA 315 (SCA)

*Estate Van der Byl v Swanepoel* 1926 AD 141

*Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30, 2012 (1) SA 256 (CC), 2012 (3) BCLR 219 (CC)

*F v Minister of Safety and Security and Another* [2009] ZAWCHC 101, 2010 (1) SA 606 (WCC), 2009 SACR (2) 639 (WCC)

*F v Minister of Safety and Security and Another* [2011] ZACC 37, 2012 (1) SA 536 (CC), 2012 (3) BCLR 244 (CC), (2012) 33 ILJ 93 (CC), 2013 (2) SACR 20 (CC)

*Faircape Property Developers (Pty) Ltd v Premier, Western Cape* 2002 (6) SA 180 (C)

*Feldman v Mall* 1945 AD 733

*First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* [2002] ZACC 5, 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC)

*Fose v Minister of Safety and Security* [1997] ZACC 6, 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC)

*Friedman v Glicksman* 1996 (1) SA 1134 (W)

*Gardener v Whitaker* [1996] ZACC 11, 1996 (4) SA 337 (CC), 1996 (6) BCLR 775 (CC)

*Gardener v Whitaker* 1995 (2) 672 (E), 1994 (5) BCLR 19 (E)



*Geldenbuys v Minister of Safety and Security and Another* [2002] ZAWCHC 2, 2002 (4) SA 719 (C), [2002] 3 All SA 82 (C)

*Green v Fitzgerald* 1914 AD 88

*H v Fetal Assessment Centre* [2014] ZACC 34, 2015 (2) SA 193 (CC), 2015 (2) BCLR 127 (CC)

*H v Kingsbury Foetal Assessment Centre* [2014] ZAWCHC 61

*Haffjee v South African Rail Ways and Harbours* 1981 (3) SA 1062 (W)

*Harksen v Lane NO* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC)

*Hassam v Jacobs NO and Others* [2009] ZACC 19, 2009 (5) SA 572 (CC), 2009 (11) BCLR 1148 (CC)

*Heroldt v Wills* 2013 ZAGPJHC 1, 2013 (2) SA 530 (GSJ), 2013 (5) BCLR 554 (GSJ), [2013] 2 All SA 218 (GSJ)

*Heyns v Venter* 2004 (3) SA 200 (T)

*Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) [1996] 1 All SA 478 (W), 1996 (6) BCLR 836 (W)

*Holomisa v Khumalo and Others* 2002 (3) SA 38 (T)

*iMvula Quality Protection (Pty) Ltd v Loureiro and Others* [2013] ZASCA 12, 2013 (3) SA 407 (SCA), [2013] 2 All SA 659 (SCA)

*Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smith NO and Others* [2000] ZACC 12, 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC)

*Islamic Unity Convention v Independent Broadcasting Authority* [2002] ZACC 3, 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC)

*Ismail v Ismail* 1983 (1) SA 1006 (A)

*J and Another v Director General, Department of Home Affairs and Others* [2003] ZACC 3, 2003 (5) SA 621 (CC), 2003 (5) 463 BCLR (CC)

*Jayiya v MEC for Welfare, Eastern Cape Provincial Government and Another* [2003] ZASCA 38, 2004 (2) SA 611 (SCA), [2003] 2 All SA 223 (SCA)

*Jones, NO v Santam Bpk* 1965 (2) SA 542 (A)

*K v Minister of Safety and Security* [2004] ZASCA 99, 2005 (3) All SA 529 (SCA)

*K v Minister of Safety and Security* [2005] ZACC 8, 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC)

*Kaunda & Others v President of the Republic of South Africa*, [2004] ZACC 5, 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC)

*Khosa and Others v Minister of Social Development and Others; Mablaule and Another v Minister Of Social Development and Others* [2004] ZACC 11, 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC)

*Khumalo v Holomisa* [2002] ZACC 12, 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC)

*Knop v Johannesburg City Council* [1994] ZASCA 159, 1995 (2) SA 1 (AD), [1995] 1 All SA 673 (A)

*Kouga Municipality v De Beer and Another* [2007] ZAECHC 118, 2008 (5) SA 503 (E)

*Kruger v Coetzee* 1966 (2) SA 428 (A)

*Le Roux and Others v Dey* [2011] ZACC 4, 2011 (3) SA 274 (CC), 2011 (6) BCLR 577 (CC)

*Lee v Minister of Correctional Services* [2011] ZAWCHC 13, 2011 (6) SA 564 (WCC), 2011 (2) SACR 603 (WCC)

*Lee v Minister of Correctional Services* [2012] ZACC 30, 2013 (2) SA 144 (CC), 2013 (2) BCLR 129 (CC), 2013 (1) SACR 213 (CC)

*Loureiro and Others v iMvula Quality Protection (Pty) Ltd* [2014] ZACC 4, 2014 (3) SA 394 (CC), 2014 (5) BCLR 511 (CC)

*M and Another v Minister of Police of the Government of South Africa* [2013] ZAGPPHC 201, 2013 (5) SA 622 (GNP)

*Macala v Maokeng Town Council* [1992] ZASCA 76, 1993 (1) SA 434 (A), [1993] 1 All SA 112 (A)

*Mahambehlala v MEC for Welfare, Eastern Cape and Another* 2002 (1) SA 342 (SE)

*Mail & Guardian Media Ltd v Chipu NO* [2013] ZACC 32, 2013 (6) SA 367 (CC), 2013 (11) BCLR 1259 (CC)

*Mandela v Falati* 1995 (1) SA 251 (W), 1994 (4) BCLR 1 (W)

*Mashia Ebrahim v Mahomed Essop* 1905 TS 59

*Mashongwa v PRASA* [2015] ZACC 36, 2016 (2) BCLR 204 (CC)

*Mbanga v MEC for Welfare, Eastern Cape* 2002 (1) SA 359 (SE)

*McNally v M & G Media and Others* 1997 (4) SA 267 (W), [1997] 3 All SA 584 (W), 1997 (6) BCLR 818 (W)

*MEC for Public Works, Eastern Cape v Faltein* [2004] ZASCA 50, 2006 (5) SA 532 (SCA), [2004] 3 All SA 660 (SCA)

*MEC, Department of Welfare, Eastern Cape v Kate* [2006] ZASCA 49, 2006 (4) SA 478 (SCA), [2006] 2 All SA 455 (SCA)

*Media 24 and Others v SA Taxi Securitisation* [2011] ZASCA 117, 2011 (5) SA 329 (SCA), [2011] 4 All SA 9 (SCA)

*Mblongo and Another v Minister of Police* 1978 (2) SA 551 (A)

*Mineworkers Investment Company v Modibane* [2002] ZAGPHC 6, 2002 (6) SA 512 (W)

*Minister of Correctional Services v Lee* [2012] ZASCA 23, 2012 (3) SA 617 (SCA), [2012] 2 All SA 586 (SCA), 2012 (1) SACR 492 (SCA)

*Minister of Correctional Services v Tobani* 2003 (5) SA 126 (E)

*Minister of Defence and Others v Dunn* [2007] ZASCA 75, 2007 (6) SA 52 (SCA), [2008] 2 All SA 14 (SCA)

*Minister of Defence v Von Benecke* [2012] ZASCA 158, 2013 (2) 361 (SCA), (2013) 34 ILJ 275 (SCA)

*Minister of Finance and Others v Gore NO* [2006] ZASCA 98, 2007 (1) SA 111 (SCA), 1 All SA 309 (SCA)

*Minister of Home Affairs and Another v Fourie and Another* [2005] ZACC 19, 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC)

*Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* [2004] ZACC 10, 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC)

*Minister of Law and Order v Ngobo* [1992] ZASCA 172, 1992 (4) SA 822 (A), [1992] 2 All SA 492 (A)

*Minister of Police v Mboweni and Another* [2014] ZASCA 107, 2014 (6) SA 256 (SCA), [2014] 4 All SA 452 (SCA)

*Minister of Police v Rabie* [1985] ZASCA 105, 1986 (1) SA 117 (A)

*Minister of Safety and Security and Another v Rudman and Another* [2004] ZASCA 68, 2005 (2) SA 16 (SCA), [2004] 3 All SA 667 (SCA)

*Minister of Safety and Security v Carmichele* [2003] ZASCA 117, 2003 (3) SA 305 (SCA), 2003 (4) All SA 565 (SCA)

*Minister of Safety and Security v F* [2011] ZASCA 3, 2011 (3) SA 487 (SCA), [2011] 3 All SA 149 (SCA), 11 ILJ 32 1856 (SCA)

*Minister of Safety and Security v Hamilton* [2003] ZASCA 98, 2004 (2) SA 216 (SCA), [2003] 4 All SA 117 (SCA)

*Minister of Safety and Security v Jordaan t/a André Jordaan Transport* [2000] ZASCA 176, 2000 (4) SA 21 (SCA)

*Minister of Safety and Security v Luiters* [2006] ZACC 21, 2007 (2) SA 106 (CC) [2007] 3 BCLR 287 (CC)

*Minister of Safety and Security v Luiters* [2006] ZASCA 11, 2006 (4) SA 160 (SCA)

*Minister of Safety and Security v Sekhoto and Another* [2010] ZASCA 141, 2011 (5) SA 367 (SCA), 2011 (5) SA 367 (SCA), 2011 (1) SACR 315 (SCA), [2011] 2 All SA 157 (SCA)

*Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79, 2002 (6) SA 431 (SCA), [2002] 3 All SA 741 (SCA)

*Minister van Polisie en 'n Ander v Gamble en 'n Ander* 1979 (4) SA 759 (A)

*Minister van Polisie v Ewels* [1975] ZASCA 2, 1975 (3) SA 590 (A)

*Minister van Veiligheid en Sekuriteit en 'n Ander v Geldenbuys* [2003] ZASCA 90, 2004 (1) SA 515 (SCA), [2003] 4 All SA 330 (SCA)

*Minister van Veiligheid en Sekuriteit v Japmoco BK h/a Status Motors* [2001] ZASCA 96, 2002 (5) SA 649 (SCA)

*Minister van Veiligheid en Sekuriteit v Phoebus Apollo Aviation Bk* [2002] ZASCA 60, 2002 (5) SA 475 (SCA)

*Minister van Wet en Orde v Wilson en 'n Ander* [1992] ZASCA 81, 1992 (3) SA 920 (A), [1992] 2 All SA 238 (A)

*Mkize v Martens* 1914 AD 382

*Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika en Andere* [2003] 1 All SA 465 (T)

*Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (W)

*Modderklip East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic and Others v Modderklip Boerdery (Pty) Ltd* [2004] ZASCA 47, [2004] 3 All SA 169 (SCA)

*Motala and Another v University of Natal* 1995 (3) BCLR 374 (D)

*National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15, 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC)

*National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17, 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC)

*National Media Ltd and Others v Bogoshi* [1998] ZASCA 94, 1998 (4) SA 1196 (SCA), [1998] 4 All SA 347 (A)

*Neubaus, NO v Bastion Insurance Co Ltd* 1968 (1) SA 398 (A)

*Ngubetole v Administrator, Cape and Another* 1975 (3) SA 1 (A)

*Nkala and Others v Harmony Gold Mining Company Limited and Others* [2016] ZAGPJHC 97, 2016 JDR 0881 (GJ), [2016] 3 All SA 233 (GJ), 2016 (7) BCLR 881 (GJ)

*NM and Others v Smith and Others* [2005] 3 All SA 457 (W)

*NM and Others v Smith and Others* [2007] ZACC 6, 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC)

*Nourse v Van Heerden NO and Others* 1999 (2) SACR 198 (W)

*Olitzki Property Holdings v State Tender Board* [2001] ZASCA 51, 2001 (3) SA 1247 (SCA)

*Oppelt v Head: Department of Health Provincial Administration, Western Cape* [2015] ZACC 33, 2016 (1) SA 325 (CC), 2015 (12) BCLR 1471 (CC)

*Paixão and Another v Road Accident Fund* [2012] ZASCA 130, 2012 (6) SA 377 (SCA), [2012] 4 All SA 262 (SCA)

*Pakendorf en Andere v De Flamingh* [1982] ZASCA 2, 1982 (3) SA 146 (A)

*Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1, 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC)

*Phoebus Apollo Aviation CC v Minister of Safety and Security* [2002] ZACC 26, 2003 (2) SA 34 (CC), 2003 (1) BCLR 14 (CC)

*Potgieter en 'n Ander v Kilian* 1995 (11) BCLR 1498 (N) 1996 (2) SA 276 (N)

*Premier, Western Cape v Faircape Property Developers (Pty) Ltd* [2003] ZASCA 42, 2003 (6) SA 13 (SCA), [2003] 2 All SA 465 (SCA)

*President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5, 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC)

*Pretoria City Council v Walker* [1998] ZACC 1, 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC)

*Ramakatsa and Others v Magashule and Others* [2012] ZACC 31, 2013 (2) BCLR 202 (CC)

*RH v DE* [2014] ZASCA 133, 2014 (6) SA 436 (SCA)

*Rivett-Carnac v Wiggins* 1997 (3) SA 80 (C)

*Rosenbaum v Margolis* 1944 WLD 147

*Roxa v Mtsbhai* 1975 (3) SA 761 (A)

*SANDU v Minister of Defence and Others* [2007] ZACC 10, 2007 (5) SA 400 (CC), 2007 (8) BCLR 863 (CC), [2007] 9 BLLR 785 (CC), (2007) 28 ILJ 1909 (CC)

*S v Makwanyane* [1995] ZACC 3, 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), [1996] 2 CHRDL 164 (CC), 1995 (2) SACR 1 (CC)

*S v Mblungu and Others* [1995] ZACC 4, 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC)

*S v Mokegethi* [1989] ZASCA 105, 1990 (1) SA 32 (A), [1990] 1 All SA 320 (A)

*S v Mokoena* [2008] ZAGPHC 148, 2008 (5) SA 578 (T), 2008 (2) SACR 216 (T)

*S v Signabla* 1967 (4) SA 566 (A)

*S v Thebus and Another* [2003] ZACC 12, 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC)

*S v Zuma and Others* [1995] ZACC 1, 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC), 1995 (1) SACR 568 (CC), 1996 (2) CHRLD 244 (CC)

*Satchwell v President of the Republic of South Africa and Another* [2002] ZACC 18, 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC)

*Seedat's Executors v The Master (Natal)* 1917 AD 302

*Setlogelo v Setlogelo* 1914 AD 221

*Shabalala and Others v Attorney-General of the Transvaal and Another* [1995] ZACC 12, 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC)

*South African Police Services v Solidarity obo Barnard* [2014] ZACC 23, 2014 (6) SA 123 (CC), 2014 (10) BCLR 1195, [2014] 11 BLLR 1025 (CC), (2014) 35 ILJ 2981 (CC)

*South African Railways and Harbours v Marais* 1950 (4) SA 610 (A)

*Steenkamp NO v Provincial Tender Board, Eastern Cape* [2006] ZACC 16, 2007 (3) SA 121 (CC), 2007 (3) BCLR 300 (CC)

*Stewart & Another v Botha & Another* [2008] ZASCA 84, 2008 (6) SA 301 (SCA), [2009] 4 All SA 487 (SCA)

*Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* [2005] ZASCA 73, 2006 (1) SA 461 (SCA), [2006] 1 All SA 6 (SCA)

*The Citizen 1978 (Pty) Ltd v McBride* [2011] ZACC 11, 2011 (4) SA 191 (CC), 2011 (8) BCLR 816 (CC)

*Trustees of the Simcha Trust v De Jongh and Others* [2015] ZASCA 45, 2015 (4) SA 229 (SCA), [2015] 3 All SA 161 (SCA)

*Tshabalala v Lekoa City Council* [1992] ZASCA 54, 1992 (3) SA 21 (A), [1992] 2 All SA 105 (A)

*Union Government v Hawkins* 1944 AD 556

*Van Breda v Jacobs* 1921 AD 330

*Van Der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others* [2000] ZASCA 73, 2001 (2) SA 242 (SCA), [2001] 1 All SA 425 (SCA)

*Van Eeden v Minister of Safety and Security* [2002] ZASCA 132, 2003 (1) SA 389 (SCA), [2002] 4 All SA 346 (SCA)

*Van Erk v Holmer* 1992 (2) SA 636 (W)

*Van Vuuren v Minister of Correctional Services* [2010] ZACC 17, 2012 (1) SACR 103 (CC), 2010 (12) BCLR 1233 (CC)

*Venter v Bophuthatswana Transport Holdings (Edms) Bpk* [1997] ZASCA 16, 1997 (3) SA 374 (SCA), [1997] 2 All SA 257 (A)

*Verbeem v Road Accident Fund* [2010] ZAGPPHC 282, 2012 (2) SA 409 (GNP)

*Viljoen v Smith* [1996] ZASCA 105, 1997 (1) SA 309 (A)

*Volks NO v Robinson and Others* [2005] ZACC 2, 2005 (5) BCLR 446 (CC)

*Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A)

*Wiese v Moolman* [2008] ZAGPHC 246, 2009 (3) SA 122 (I)

*Young v Shaikh* [2003] ZAWCHC 50, 2004 (3) SA 46 (C), 2003 JDR 0628 (C), [2003] JOL 12113 (C)

*Zealand v Minister of Justice and Constitutional Development and Another* [2008] ZACC 3, 2008 (4) SA 458 (CC), 2008 (6) BCLR 601, 2008 (2) SACR 1 (CC)

## **International Cases**

*Osman v United Kingdom* (23452/94) [1998] ECHR 101

*Z and Others v United Kingdom* (29392/95) [2001] ECHR 329



## Foreign Cases

*Bazley v Curry* [1999] 2 SCR 534

*Jacobi v Griffiths* [1999] 2 SCR 570

*Lister and Others v Hesley Hall Ltd* [2001] UKHL 22, [2001] 2 All ER 769

*Primeaux v United States* 181 F 3d 876 (8<sup>th</sup> Cir 1999)

*Campbell v Hall* (1774) 1 Cowp 204, 98 ER 1045

*Pritchard v Pritchard and Sims* [1966] 3 All ER 601 (CA)

*R v Salituro* (1992) 8 CRR (2d) 173 ([1991] 3 SCR 654)

*Barrett v Enfield London Borough Council* [1999] 3 All ER 193 (HL)

*Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53 (HL)

*X and Others (minors) v Bedfordshire County Council; A Minor and Another v Newham London Borough Council and Others; A Minor v Dorset County Council and Other Appeals* [1995] 2 AC 633 (HL), [1995] 3 All ER 353 (HL)

## **South African Legislation**

Arms and Ammunition Act 75 of 1969

Child Justice Act 75 of 2008

Civil Union Act 17 of 2006

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Constitution of the Republic of South Africa Act 200 of 1993

Constitution of the Republic of South Africa, 1996

Correctional Services Act 111 of 1998

Correctional Services Act 8 of 1958

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

Criminal Procedure Act 51 of 1977

Divorce Act 70 of 1979

Firearms Control Act 60 of 2000

Intestate Succession Act 81 of 1987

Law of Evidence Amendment Act 45 of 1988

Maintenance of Surviving Spouses Act 27 of 1990

National Health Act 61 of 2003

Police Act 7 of 1958

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998

Promotion of Administrative Justice Act 3 of 2000

Recognition of Customary Marriages Act 120 of 1998

Road Accident Fund Act 56 of 1996

South African Police Service Act 68 of 1995

State Liability Act 20 of 1957

State Tender Board Act 68 of 1986

The Republic of South Africa Constitution Act 110 of 1983

The Republic of South Africa Constitution Act 32 of 1961

### **South African Bills**

Domestic Partnership Bill, 2008 (Notice 36 of 2008)

### **International Instruments**

African Charter on Human and Peoples' Rights (Banjul Charter) (1981)

Convention on the Elimination of All Forms of Discrimination against Women (1979)

Convention on the Rights of Persons with Disabilities (2007)

Declaration on the Elimination of Violence against Women (1993)

European Convention on Human Rights (1950)

Rome Statute of the International Criminal Court (2002)

Statute of the International Court of Justice (1946)

United Nations Guidelines on the Role of Prosecutors (1990)

Universal Declaration of Human Rights (1948)

## **Foreign Legislation**

### **United Kingdom**

Human Rights Act 1998 (c42)

South Africa Act 9 Edw. VII c. 9 of 1909

## Internet Sources

---

### **Authored Internet Sources**

Ramose MB 'An African Perspective on Justice and Race' (2001) *polylog* (available at <http://them.polylog.org/3/frm-en.htm>)

UNAIDS, World Health Organisation & Office of the High Commissioner for Human Rights entitled 'Disability and HIV Policy Brief' (2009), 1 (available at [http://www.who.int/disabilities/jc1632\\_policy\\_brief\\_disability\\_en.pdf](http://www.who.int/disabilities/jc1632_policy_brief_disability_en.pdf))

### **Internet Sources with No Particular Author**

<http://www.iamwomanseries.com/our-stories/episodes-19-24/alix-carmichele/>

<http://www.constitutionalcourtreview.co.za/>

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