

**Finding the perfect balance: The challenge for contemporary
Private Law**

by
Trynie Boezaart

Vice-principal, distinguished guests, colleagues and friends, at the heart of our substantive law are the legal rules categorised as “Private Law”. The legal relationships governed by the rules of Private Law entail the most intimate ones in which people involve them. While the rules of Private Law aim at harmonising these relationships on the one hand it also has to establish the boundaries of these legal relationships by carefully balancing conflicting rights or interests in countless situations.

Earlier this year the Honourable Judge Erasmus (of the Cape Provincial Division of the High Court) sent me an email in which he invited my comment on his judgment in *Brooks v The Minister of Safety and Security*,¹ which he had attached to his email. At first glance this judgment encapsulates the core function of Private Law and a critical analysis uncovered the balancing of rights and demarcating of duties until the boundaries of these rights and duties are judicially determined. I invite you to consider the role of

¹ [2007] 4 All SA 1389 (C).

our Private Law in this factual situation with me, with the view to ascertain whether our contemporary Private Law meets the challenge to find a perfect balance.

The *Brooks* case arose from the same facts that gave rise to a claim for damages in the well-known case of *Minister of Safety and Security v Van Duivenboden*.² Very briefly the facts in the latter case were the following: In October 1995 Neil Brooks, the father of the plaintiff in the *Brooks* case, opened fire on a number of people, killing three of them, including his wife and daughter, and wounding five others, including his son, the plaintiff, only fifteen years old at the time of the incident, and Van Duivenboden, the neighbour to whom the fatally wounded mother fled with her son, the plaintiff. As a result of the shooting incident, Brooks was charged and convicted of various crimes, including murder, and was sentenced to twenty years' imprisonment. Van Duivenboden's subsequent claim for damages against the Minister of Safety and Security was upheld by the Supreme Court of Appeal.³

² 2002 (6) SA 431 (SCA), [2002] 3 A11 SA 741 (SCA). Also see Neethling 2003 *TSAR* 783; Carpenter 2003 *SAPL* 257-261.

³ *Supra*.

The plaintiff in our case, Brooks junior, instituted a claim for damages against the Minister of Safety and Security. He alleged that prior to the shooting incident there were several occasions from which a number of police officers obtained direct information that his father was unfit to possess a firearm. It appeared that his father was aggressive and at times abused alcohol. He alleged that the police owed him (and others) a legal duty to initiate the procedure contemplated in section 11 of the Arms and Ammunition Act⁴ to have Brooks declared unfit to possess a firearm. However, they took no such steps. Brooks was left with more than one firearm in his possession and this resulted in his, the plaintiff's, predicament. He was prejudiced in that he was dependent for support on his father, who was legally obliged to support him, and his father was unable to support him due to his subsequent incarceration. He was also prejudiced by the death of his mother who was likewise under a legal obligation to provide him with support. It must be noted and actually, it is very significant that plaintiff's claim for loss of support due to his mother's death was never placed in dispute. Finally he was also prejudiced due to the fact that he witnessed the tragic incident and suffered severe mental trauma. The plaintiff accordingly claimed damages for emotional shock and

⁴ 75 of 1969.

trauma (R90,000); general damages for pain and suffering caused by the injuries he sustained (R40,000); loss of support from his father (R168,000); loss of support from his mother (R126,000); and finally, the loss of proper education opportunities resulting in a lesser income from a lower level of employment which constituted the bulk of his claim for damages (R2 400 000).

Our discussion will focus on the plaintiff's claim for loss of support due to the incarceration of his father. Counsel for the defendant excepted to this claim on three grounds and the court dealt with each of those separately. In our discussion we will only deal with two of the three exceptions, the first one briefly in that I shall guide you through the literature and the conclusion reached by the judiciary in that particular issue. However, the second exception poses the real challenge and it is the legal issue involved in that exception that will be decided by all of us either here in this formal setting or in the foyer and in the corridors once we have adjourned.

The first exception entails that the defendant's servants (the police) did not commit any delict against the plaintiff's breadwinner

and therefore the plaintiff's claim is not admissible under the dependant's common-law action for loss of support.

For the sake of the non-lawyers in the audience, one may briefly state that the dependants of a person killed in a wrongful and culpable manner may claim damages for loss of support from the wrongdoer with the *actio ex lege Aquilia*.⁵ In this case the defendant's exception was based on the contentious perception that the dependant's action is based on a delict committed against the breadwinner and not the dependant personally and that the dependant's action is therefore anomalous⁶ and so called *sui generis*.⁷ The plaintiff's submission was that the dependant's action arose from a breach of a legal duty owed to the dependant himself or herself and not from a wrongful act as against the breadwinner.⁸

The dependants' delictual claim has a very interesting and perhaps even unique development in that it did not originate in

⁵ For a detailed discussion see Davel *Skadevergoeding aan Afhanklikes* and in general Van der Merwe & Olivier 332 *et seq*; Burchell *Delict* 233 *et seq*; Neethling, Potgieter & Visser 256 *et seq*.

⁶ *SANTAM v Fondo* 1960 (2) SA 467 (A) 471H.

⁷ *Jameson's Minors v CSAR* 1908 TS 575 584.

⁸ This line of reasoning has been taken by a long line of authors: Pont 1940 *THRHR* 163 170; Conradie 1943 *THRHR* 148-149; Price 1952 *THRHR* 60 80 n 95; Boberg 1971 *SALJ* 423 451-452 Van der Walt 1983 *THRHR* 437-445; Claasen 1984 *THRHR* 439 443; Van der Merwe & Olivier 342 *et seq*; Davel *Skadevergoeding aan Afhanklikes* 50.

Roman law,⁹ but developed from Germanic customary law¹⁰ and was accepted by the old writers as an *actio utilis* (or extention) in terms of the *lex Aquilia*.¹¹ This remedy underwent a continued evolution through judicial pronouncements, which concerned various aspects of this delictual claim, sometimes extending and sometimes curtailing the application of this particular remedy.¹² The question that had to be decided in this first exception thus was whether the dependant's action, in light of its very peculiar history, had developed to such an extent that we are no longer concerned with the question whether the rights of the breadwinner were infringed upon. Has the development of this delictual remedy reached a stage where we are only concerned with the dependant's rights and the protection of his or her interests with this remedy in Private Law? Have we reached the stage where this legal remedy in Private Law had outgrown its turbulent past to properly fit into the structure of our Law of Delict?

Along these lines the judiciary extended the class of dependants entitled to bring the action.¹³ In *Santam Bpk v Henery*¹⁴ the

⁹ Davel *Skadevergoeding aan Afhanklikes* 14.

¹⁰ Davel *Skadevergoeding aan Afhanklikes* 25, with extensive development in Medieval times: 37-38.

¹¹ *Jameson's Minors v CSAR* 1908 TS 575 584; Davel *Skadevergoeding aan Afhanklikes* 46-47.

¹² *Legal Insurance Co Ltd v Botes* 1963 (1) SA 608 (A) 614; Davel *Skadevergoeding aan Afhanklikes* 53 *et seq.*

remedy was extended to cover the entitlement of a divorced woman to maintenance from the deceased in terms of an order granted under section 7(2) of the Divorce Act.¹⁵ In *Amod v Multilateral Motor Vehicle Accidents Fund*¹⁶ a contractual right of support arising from a marriage in terms of Islamic law was found to be within defined parameters recognised for purposes of the dependant's action. In *Du Plessis v Road Accident Fund*¹⁷ it was held that the same-sex partner of the deceased in a permanent life relationship similar in other respects to marriage, in which the deceased had undertaken a contractual duty of support to him, was entitled to claim damages for the loss of that support.

In *Santam Bpk v Henery* the court expressly declined to embark on a jurisprudential analysis of the nature of the dependant's action because the outcome of that case did not depend on that particular issue.¹⁸ However, Judge Erasmus correctly submitted that the nature of the dependant's remedy was now raised

¹³ 1395-1396, referring to inter alia *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657; *Abbott v Bergman* 1922 AD 53.

¹⁴ 1999 (3) SA 421 (SCA), [1999] 2 All SA 312 (A). What made the *Henery* case even more remarkable was the fact that the court did not hold itself bound to the support granted in the court order. In that case the parties reconciled and resumed a husband and wife relationship and the court considered the support that the ex-wife in fact received in determining the quantum of damages.

¹⁵ 70 of 1979.

¹⁶ 1999 (4) SA 1319 (SCA), [1999] 4 All SA 421 (A).

¹⁷ 2004 (1) SA 359 (SCA), 2003 (11) BCLR 1220 (SCA).

¹⁸ 1396c.

pertinently for decision in the case before the court.

He then embarked on an analysis of the criticism on the view that the dependant's action for loss of support is in our law a *sui generis* and anomalous remedy¹⁹ and in doing so referred to the very brief and cutting remark by the late professor Boberg that it is a "jurisprudential monstrosity"²⁰ and the comprehensive exposition of the literature in one of my very first publications.²¹ However, the court indicated that both the *sui-generis* view and the view that the dependant has a separate action strangely rely on exactly the same case, namely *Evins v Shield Ins Co Ltd*.²² In order to decide whether the delict is committed against the breadwinner and via the breadwinner then indirectly actionable by the dependant, or directly committed against the dependant, the *Evins* case where the dependant was injured and suffered loss of support due to the death of the breadwinner should be considered. The court in the *Evins* case applied the *facta probanda* method to decide whether there were one or two causes of action.²³ It was crucial to decide the issue in that case, since the claim based on loss of support

¹⁹ 1396.

²⁰ *The Law of Delict* vol I 728.

²¹ *Davel Skadevergoeding aan Afhanklikes by die Dood van 'n Broodwinner* (1987) 49.

²² 1980 (2) SA 814 (A).

²³ Visser & Potgieter *Damages* par 7 5 3, 7 5 4 3 and 7 5 5.

was instituted long after the claim based on personal injuries and the court had to decide whether both the claims were based on the same cause of action, or not, and ultimately to decide whether the claim for loss of support became prescribed. The conclusion reached in the *Evins* case was that there were two causes of action and that the dependant derived his or her right of action from the fact that his (own) rights were infringed upon by the death of the breadwinner.²⁴ This conclusion that Erasmus J²⁵ accepted was endorsed by many decisions of the Supreme Court of Appeal.²⁶

Judge Erasmus also reflected on the role of the *boni mores* when considering whether the existence of a right to support is worthy of protection by the law²⁷ and reached the conclusion that it is in fact the case.²⁸

He endorsed the viewpoint that I held in 1987:²⁹

²⁴ 839E.

²⁵ 1397.

²⁶ *Santam Bpk v Henery* 1999 (3) SA 421 (SCA) 430C; *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA) 1326A-D; *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) 370A.

²⁷ 1398d.

²⁸ 1399c.

²⁹ 51.

“Waar ‘n derde dus ‘n broodwinner onregmatiglik dood, begaan hy daarmee ook ‘n onregmatige daad teenoor die afhanklikes as gevolg waarvan hulle vermoënsverlies ondervind. Hiermee word voldoen aan al die vereistes vir deliktuele aanspreeklikheid en die vermoënskade is verhaalbaar met die *actio legis Aquilae*.”³⁰

Finally Erasmus J reached the following finding:³¹

“The cause of action pleaded by the plaintiff; a negligent breach of a legal duty owed by the Police to the plaintiff (as dependant), is in accordance with the principles applicable to the dependant’s action for loss of support.”

The defendant’s first ground of exception therefore could not be sustained.

However, it is the second exception that revealed the balancing process and challenges the rules of contemporary Private Law.

³⁰ And on 1399 n 36 he referred to an article that I wrote thirteen years later: “Die ontwikkeling van die aksie van afhanklikes” 2000 *Acta Juridica* (also published in Scott and Visser (eds) *Developing Delict: Essays in Honour of Robert Feenstra*) 158 159-160 where I once more objected to the dependant’s action being described as *sui generis* and submitted that the particular remedy had already developed past that stage.

³¹ 1400b.

The second exception calls for considering the boundaries of this developed and extended remedy in our Private Law. The second exception entails that the defendant's servants did not act wrongfully towards the plaintiff'.

The court accepted³² the test determining wrongfulness as set out in *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)*:³³

“An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm. The Court determines whether it is reasonable to have expected of the defendant to have done so by making a value judgment based, *inter alia*, upon its perception of the legal convictions of the community and on considerations of policy. The question whether a legal duty exists in a particular case is

³² 1400f-1401b.

³³ 2003 (1) SA 389 (SCA) 395H-396A, also reported at [2002] 4 All SA 346 (SCA); the passage is cited with approval in *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA) 229E-H.

thus a conclusion of law depending on a consideration of all the circumstances of the case and on the interplay of the many factors which have to be considered.”

But it is the *Van Duivenboden* case,³⁴ the facts of which gave rise to the case under discussion, that emphasised that in determining whether to recognise the existence of a legal duty in any particular circumstance, the quest should be to find a balance:³⁵

“[W]hat is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms.”

The test of the legal convictions of the community must be informed by the norms and values of our society as they have been embodied in the Constitution.³⁶ “The Constitution is the supreme law, and 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

³⁴ 446F.

³⁵ Quoted 1401c.

³⁶ 1401c-d; *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 (1) SA 389 (SCA) 396H *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) 444E-G.

purposes”.³⁷ The court also emphasised the norm of public accountability.³⁸ However, the court reiterated that the norm of accountability need not always translate constitutional duties into private law duties enforceable by an action for damages against the state.³⁹

The norms and considerations of public policy that were applicable in this case and had to be balanced against the norm of accountability were the following:

The norm imposed by common law which requires parents and families to care for children. It is trite law that the scale upon which parents must provide for their children is determined by the standard of living of the parents, as seen against the background of the family generally, and their social and economic standing in the community.⁴⁰ In appropriate circumstances, a child may therefore be entitled to university or other post-school education.⁴¹

³⁷ Per Nugent JA in *Van Duivenboden* 444.

³⁸ As alluded to in *Van Duivenboden* 446F-G but see Neethling, Potgieter and Visser 66 n 209 for criticism of this viewpoint.

³⁹ 1401d-e.

⁴⁰ *Boberg's Law of Persons and Family* (2nd ed by Belinda van Heerden *et al*) 243-244.

⁴¹ *Mentz v Simpson* 1990 (4) SA 455 (A); and see the further authorities cited in *Boberg's Law of Persons and Family* 244 n 60; Van Schalkwyk “Maintenance for children” in Davel (ed) *Introduction to Child Law in South Africa* (2000) 41 42.

The most important constitutional values applicable to this case are the child's right to parental care embodied in section 28(1) of the Constitution⁴² and the right to education provided for in section 29(1) of the Constitution.⁴³

The right of a child to parental support at common law is beyond question.⁴⁴ It has been established in Roman⁴⁵ and Roman Dutch Law,⁴⁶ and has been affirmed in many decisions of our courts.⁴⁷ The corresponding constitutional norm embedded in section 28 of the Constitution enjoins the family and the state in the care and protection of children. Furthermore section 28(1) provides for a list of enforceable substantive rights that go well beyond anything catered for by common law and statute in the pre-democratic era.⁴⁸

⁴² "Every child has the right-
 (a) ...
 (b) to family care or parental care, or to appropriate alternative care when removed from the family environment
 (c) to basic nutrition, shelter, basic health care services and social services
 (d) to be protected from maltreatment, neglect, abuse or degradation."

⁴³ "Everyone has the right-
 (a) to a basic education, including adult basic education; and
 (b) to further education, which the State, through reasonable measures, must make progressively available and accessible."

⁴⁴ *In re Estate Visser* 1948 (3) SA 1129 (C) 1133: "Die aanspreeklikheid van 'n vader gedurende sy leeftyd om sy kinders te onderhou is natuurlik buite twyfel" Belinda van Heerden *et al Boberg's Law of Persons and Family* (1999) 243-244; Van Schalkwyk in Davel *Introduction to Child Law in South Africa* 45 *et seq.*

⁴⁵ Davel *Skadevergoeding aan Afhanklikes* 4.

⁴⁶ Davel *Skadevergoeding aan Afhanklikes* 44-46.

⁴⁷ *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657 663 and 668-669; and see Davel *Die Dood van 'n Broodwinner as Skadevergoedingsoorsaak* (1984) 448-453 and the cases referred to therein.

⁴⁸ *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC) 554 para [21].

Furthermore, section 28(2) which requires that a child's best interests have paramount importance in every matter concerning the child, creates a right which is independent of those specified in section 28(1).⁴⁹ The state must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated in section 28.⁵⁰

However, although these rights, entitlements and protection are extensive and unmistakable,⁵¹ they are not absolute and definitely capable of limitation.⁵² In *S v M*⁵³ where the Centre for Child Law entered as *amicus curiae*, Judge Sacks said that no constitutional injunction can in and of itself isolate children from the shocks and perils of harsh family and neighbourhood environments.

One of the above considerations involves everyone's constitutional

⁴⁹ *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC), 2000 (7) BCLR 713 para 17 Davel "General principles" in Davel & Skelton *Commentary on the Children's Act* (2007) 2-9.

⁵⁰ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 paras 77-78 per Yacoob J.

⁵¹ An expansive guarantee in the words of *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC), *LS v AT and Another* 2001 (2) BCLR 152 (CC) para 29. *De Reuck v Director of Public Prosecution, Witwatersrand Local Division, and Others* (2) SACR 445 (CC), 2004 (1) SA 406, 2003 (12) BCLR 1333 para 55; *S v M (Centre for Child Law as Amicus Curiae)* para [26] Davel "General principles" in Davel & Skelton *Commentary on the Children's Act* (2007) 2-10 to 2-12.

⁵³ *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC) 553-554 per Sacks J.

right to basic education and to further education under certain conditions.⁵⁴ This fundamental human right is of extreme importance because it is a precondition for the exercise and understanding of other rights.⁵⁵ This constitutional norm should be read with section 3(1) of the South African Schools Act⁵⁶ in terms of which a parent must cause every child for whom he or she is responsible to attend school from age seven to fifteen years, or the ninth grade, whichever occurs first. *In casu*, the plaintiff is an apprentice motor mechanic who has passed the tenth grade at school. In the balancing process that will follow the fact that the plaintiff is seeking damages for the loss of an education opportunity beyond that which parents are statutorily obliged to provide will also have to be discounted.

These considerations, and the child's right to parental care and education, are on the one side of the scales. The plaintiff's right to support as against his father (Brooks) is the legal interest in issue. The right of a dependant to such support is obviously worthy of

⁵⁴ The right to education is regarded as a social and economic right guaranteed in the Constitution.

⁵⁵ Variava & Coomans "The right to education" in Brand & Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 57. In line with the argument raised by the plaintiff in the case under discussion, several other fundamental rights can only be exercised meaningfully once a minimum level of education has been achieved.

⁵⁶ 84 of 1996.

protection and infringement of the right is actionable if that infringement was wrongful.

On the other side of the scales is the accountability of the state and the question whether there was in this case a legal duty on the defendant/police. In *Minister of Safety and Security v Van Duivenboden*⁵⁷ the question was posed whether police officers, who in the exercise of their duties on behalf of the State are in possession of information that reflects upon the fitness of a person to possess firearms, are under an actionable duty to members of the public to take reasonable steps to act on information to avoid harm occurring.⁵⁸ Van Duivenboden was a member of the public, and indeed a member of a class of people whom the State would have foreseen as being potential victims if Brooks were to go on a shooting spree.⁵⁹

However, we are *in casu* concerned with a different factual context, being whether in the circumstances of this case, the

⁵⁷ *Supra.*

⁵⁸ 447F-448D.

⁵⁹ See *Minister of Safety and Security and another v Carmichele* 2004 (3) SA 305 (SCA) 324E-H, [2003] 4 All SA 565 (SCA.)

failure on the part of the police to take action infringed on the dependant's right to support where the breadwinner had by his own intentional and criminal act rendered himself unable to support his dependant. A court has never been asked to extend delictual liability under such circumstances and it had to be asked whether "any considerations of public or legal policy ... require that extension".⁶⁰ But this is not the only consideration in issue. The present claim is also distinguishable from the *Van Duivenboden* claim in that at present, where the dependant's action is at stake, it is based on pure economic loss. The *Van Duivenboden* case on the other hand dealt with physical injury to the person. In those cases infringement of the right renders the act *prima facie* unlawful, which is not the case with a claim based on pure economic loss.⁶¹ One of the factors to be taken into consideration in determining the legal duty in regard to pure economic loss is whether the defendant knew or subjectively foresaw that his negligent conduct would cause damage to the plaintiff.⁶² Such foreseeability is often an important, even a decisive factor in deciding whether wrongfulness had been established, but it is not

⁶⁰ Per *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) 145C; *Brooks v The Minister of Safety & Security* 1404c-d.

⁶¹ *BOE Bank Ltd v Ries* 2002 (2) SA 39 (SCA) 46F-G; *Telimatrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority of SA* 2006 (1) SA 461 (SCA) 468; *Brooks v The Minister of Safety & Security* 1404e.

⁶² Neethling, Potgieter & Visser *Law of Delict* (5ed) 270 n 162.

in itself enough.⁶³ It was clearly foreseeable that Brooks, if left in possession of his firearms, might embark on a shooting spree. In *Minister of Safety and Security v Van Duivenboden*⁶⁴ it was accordingly held that the police were under an actionable duty to members of the public to take reasonable steps in order to avoid harm occurring. The question in this case is whether that duty is to be extended to a duty to ensure that Brooks did not act in a manner in which he rendered himself unable to fulfil his obligations towards his own dependants. Would such a supervisory duty⁶⁵ amount to the imposition on the police of a legal duty going beyond their primary, constitutional functions to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the country and their property and to uphold and enforce the law.⁶⁶ Counsel for the defendant submitted that allowing the claim in the present case would, for example, open the door to claims for loss of support by the dependants of breadwinners who by their own criminal acts render themselves unable to support their dependants.⁶⁷ Brooks by his own criminal

⁶³ *BOE Bank Ltd v Ries* 2002 (2) SA 39 (SCA) 49C; *Brooks v Minister of Safety & Security* 1404e-f.

⁶⁴ 448B.

⁶⁵ See Du Bois "Getting wrongfulness right: A Ciceronian attempt" 2000 *Acta Juridica* 1 42-43.

⁶⁶ S 205(3) of the Constitution; *Brooks v Minister of Safety & Security* 1404g-1405a.

⁶⁷ Examples referred to by counsel were claims by the dependants of the rapist, housebreaker and thief in *Minister of Safety and Security and another v Carmichele* 2004 (3) SA 305 (SCA) 312C-313J; of the known dangerous criminal, armed robber and serial rapist in *Van*

act rendered himself unable to support the plaintiff. Do we expect the police to get involved in securing the safety of family members - not only the member in possession of the firearms posing a threat to the others, but also viz-à-viz him/her? One may pose the question whether the dependants of Brooks would have a claim for loss of support against the defendant if Brooks had not committed a crime, but used the firearms the police had negligently left in his possession to commit suicide?⁶⁸

And in yet another way Erasmus J was called upon to extend the dependant's claims for loss of support. It is settled law that the dependants' of a person killed in a wrongful and culpable manner may claim damages for loss of support.⁶⁹ However, in this case the breadwinner was neither killed nor injured and whether the dependants of a breadwinner merely injured in a wrongful and culpable manner may claim damages for loss of support is still being debated.⁷⁰ In this case the plaintiff asked the court to extend

Eeden v Minister of Safety and Security 2003 (1) SA 389 (SCA) 394E; of the person suffering from paranoid personality disorder and paranoid psychosis in *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA) 226G-228C, and of the murderer in *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) 437B-G. *Brooks v The Minister of Safety & Security* 1405b). See Davel *Die Dood van 'n Broodwinner as Skadevergoedingssoorsaak* (1984) 164 n 35 that this question would have been answered in the negative in English law.

⁶⁹ In *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) 839C-D it is stated the "proof of the death of the breadwinner is basic" to the dependant's claim for loss of support.

⁷⁰ Van der Merwe & Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (6th ed) 336-

the dependant's claim for loss of support beyond that which is as yet unsettled and controversial in our law.⁷¹

Judge Erasmus concluded that in the circumstances of this case there was no legal duty on the members of the police to protect a dependant whose breadwinner infringes his right to support by his own acts and then renders himself unable to fulfil his legal obligations in this regard.⁷² In so doing he held that the remedy available at Private Law could not be applied in the present case. The boundaries of the dependant's action were limited by other values and public policy in this specific situation.

From the foregoing it follows that the exception to the plaintiff's claim for loss of support and for loss of education opportunities arising from the incarceration of the father was upheld. The dependants' action – however developed it might be – has not expanded to such an extent where it is able to realise the child's rights upon the incarceration of his father. Note once more, that

339, Neethling, Potgieter & Visser *Law of Delict* (5th ed) 262.

⁷¹ 1405d.

⁷² 1405e.

the same is not said of the claim based on the death of the mother. The outcome of the *Brooks* case might not find favour with all of us, but I am in agreement with Judge Erasmus. In my view it balances the scales of justice in a broader sense and lives up to the challenge that confronts contemporary Private Law.

Soos die *Brooks*-gewysde pas geïllustreer het, is die Privaatreg in wese dinamies, derhalwe kan daar met reg van die Departement Privaatreg verwag word om plaaslik as 'n leier op hierdie terrein te funksioneer en internasionale erkenning te geniet. Die personeel van hierdie departement is nasionale leiers en hulle kundigheid word internasionaal erken. My rol as departementshoof in hierdie baie besondere departement is daarom eerstens koördinerend van aard. U kan aanvaar dat ek my kollegas in die departement grondig respekteer en elke dag in die bevoorregte posisie verkeer om van hulle te kan leer – iets waaroor ek uiteraard baie dankbaar is. Tweedens is die rol van die departementshoof om op administratiewe vlak die kerntake van die universiteit te bestuur. In hierdie verband moes die Dekaan ook al vir my ruimte maak om uiting aan 'n diepgewortelde strewe na regverdigheid en billikheid te gee en het ek die inisiatief geneem om 'n regverdige

lesingbedeling op departementele vlak en in fakulteitsverband te implementeer. Van 'n departementshoof kan egter ook met reg verwag word om strategies leiding te gee. In hierdie verband is dit my standpunt dat departemente eerstens bestuurseenhede is. Die huidige bestuursmodel van die Fakulteit is gebaseer is op 'n breë indeling van die objektiewe reg en tweedens dien die departemente as trustees van daardie besondere vakgebied. Die reg is egter nie vatbaar vir verdeling in waterdigte kompartemente nie. Daar moet myns insiens gewaak word teen die oorbeklemtoning van departementele belange omdat daardie ingesteldheid ten koste van die groter belang en die kollektiewe eenheid nagestreef kan word. Onder my leiding sal nouer samewerking op departementele vlak plaasvind. Ek is 'n voorstander van 'n geïntegreerde leermodel en hierdie ingesteldheid noodsaak ook beter samewerking tussen verskillende departemente. In hierdie verband het die Departement Privaatreg en die Departement Handelsreg in die verlede meerdere modules en programme saam aangebied en daar sal in die toekoms in belang van die Fakulteit op hierdie samewerking voortgebou word.

Die grootste bate van hierdie departement is die menslike hulpbronne waaroor ons beskik. Dit is egter so dat die departement op hierdie vlak in die onlangse verlede gevoelige verliese gely het. Prof JMT Labuschagne, Lappies of prof Lappies soos almal hom geken het, is in Mei 2004 na 'n kort siekbed aan kanker oorlede. Tydens sy afsterwe het daar 'n onvergelyklike 556 publikasies uit sy pen verskyn - byna almal in geakkrediteerde vaktydskrifte. In sy lewe het hy tien doktorsale kandidate afgelewer en sy innoverende en skeppende denke het 'n wesenlike bydrae gelewer in die instelling en aanbieding van ten minste drie nuwe modules aan die Universiteit van Pretoria. Dit is daarom geen wonder nie dat hy onlangs nog as een van die Universiteit van Pretoria se Denkleiers (1908-2008) van die afgelope eeu aangewys is. So onlangs as 14 Junie 2007 is nog 'n vriend en kollega skielik van ons weggeneem. Prof Hans Visser, wat sy ganse professionele lewe aan die akademie gewy het, het tragies in die mees produktiewe tyd van sy lewe as navorser en akademikus ontslaap. Prof Piet de Kock het 'n bibliografie van al Hans Visser se publikasies opgestel en tot op datum word 206 van sy bydraes daarin verantwoord. Hierdie briljante regsgeleerde het 'n leidende rol gespeel in die stigting van die Inter-Universitêre

Sentrum vir Onderwysreg- en Beleid (SORB), hy was 'n trustee en regsadviseur van die Pestalozzi Trust wat gestig is om die reg op tuisonderrig te beskerm en te bevorder en sedert die oprigting van die Sentrum vir Kinderreg in 1998 ook 'n lid van die Beherende Raad daarvan. Hy het fenomenale bydraes gelewer in veral die Onderwysreg, Skadevergoedingsreg en die Deliktereg en sy pos in hierdie departement is tot vandag toe nie gevul nie - en die leemte wat sy afsterwe gelaat het, nog minder. Die Huldigingsbundel waarmee ons op beskeie wyse sy lewe en werk wil eer, sal later vanjaar verskyn, onder die titel wat ons departementele visie verwoord, naamlik *vita perit, labor non moritur*. Ons is naamlik almal aan die sterflikheid onderworpe, maar laat ons dan met soveel toegewydheid en ywer ons dagtaak verrig dat ons daarin iets nalaat wat onsterflik is. Ons het voorbeelde in die departement van sielsgenote wat presies dit reggekry het. Ons hoef maar net in hulle voetspore te volg.

Ten spyte van hierdie verliese word daar van die Departement Privaatreg verwag om op navorsingsvlak die uitsette te lewer wat van 'n toonaangewende departement verwag kan word. Die Departement Privaatreg is die enigste departement in die Fakulteit

wat reeds vier Uitnemende Akademiese Presteerders opgelewer het. En, meneer die Viserektor, as vanaand 'n geleentheid is om toekoms musiek te speel, dan kan ek onomwonde verklaar dat daar in hierdie ampstermyn as departementshoof nog 'n naam of twee op hierdie lysie sal verskyn. Daar is reeds melding gemaak van die Huldigingsbundel wat binnekort die lig sal sien waarin vier bydraes uit die departement afkomstig is. Verder is daar weinig vakgebiede binne die Privaatreg waarin die standaardhandboeke daarvoor nie deur die personeel van hierdie departement geskryf is nie. Ten minste een van Privaatreg se personeel sal binne die volgende maand haar proefskrif inhandig en nog 'n kollega sal nie later as volgende jaar nie, dieselfde pad loop. Dit sal van die Departement Privaatreg een van die bes-gekwalfiseerde departemente – indien nie die bes-gekwalfiseerde departement - in die Fakulteit Regsgeleerdheid maak.

Net soos toonaangewende navorsing, is kwaliteit onderrig ook ononderhandelbaar. Ek het reeds melding daarvan gemaak dat ons trustees vir die beoefening van die Privaatreg is. Daar is egter tergende vrae wat tot meer as 'n akademiese debat tuishoort, naamlik hoe verantwoord ons die feit dat

Verrykingsaanspreeklikheid by ons buuruniversiteit, as 'n kernmodule in die LLB-program aangebied word terwyl nie een finalejaarstudent aan hierdie universiteit daardie vak bestudeer het nie? Meneer die Dekaan, wat u dus kan verwag is dat daar op 'n kritiese wyse innoverend oor die Departement Privaatreg se bydrae in die LLB-kurrikulum besin sal word. Daar is reeds bewys dat ons nie skroom om dooie hout onder die keusemodules te verwyder nie. Sodoende is daar plek gemaak vir Kinderreg as 'n keusevak in die finale LLB-jaar en daar kan verwag word dat dit en die bestaande module in Onderwysreg 'n gedugte paar sal wees. Maar net soos die breë terreine van die objektiewe reg nie in waterdigte kompartemente verdeel kan word nie, meen ek ook dat die verskillende komponente van die Privaatreg op 'n geïntegreerde wyse aangebied moet word. Dit het dalk te veel in die verlede gebeur dat 'n gesoute akademikus jaar na jaar presies dieselfde afdeling van die Privaatreg aanbied. Ons eksperiment met Sakereg hierdie jaar was myns insiens uiters geslaag en die feit dat die jaarlikse Sakeregseminaar in Oktober vanjaar deur hierdie departement aangebied word en waarskynlik ook nie meer in 'n enkele dag sal inpas nie, kan dalk alles teruggevoer word na die nuwe bloed in hierdie vakgebied. Daar is verder ook

daadwerklike stappe geneem om nagraadse onderrig in die departement te verruim ten einde die behoeftes van die regspraktyk aan te spreek. Twee nuwe LLM-rigtings is pas deur die Fakulteitsraad goedgekeur. Holisties beskou, is dienslewering in die departement uiters belangrik en dit en al die prosesse wat in die departement gevoer word, sal getuig van ons intieme kennis van die tersaaklike administratiefregtelike beginsels en van integriteit.

Die Sentrum vir Kinderreg, wat in hierdie departement setel, en die werk wat daar gedoen word, bewys dat ons glo dat ons arbeid bestem is om voort te leef. Daarmee demonstreer ons op praktiese vlak dat ons ons sosiale verantwoordelikheid deur die beoefening en/of bestudering van die reg nakom. Die Sentrum vir Kinderreg vier hierdie jaar sy tiende bestaansjaar. Net 'n enkele terugblik sal die suksesverhaal onthul. Die Sentrum vir Kinderreg het van 'n vakgerigte sentrum wat hoofsaaklik navorsing doen en die versamelde kennis op die bepaalde vakgebied uitbou, gevorder tot 'n rewolusionêre eenheid – enig in sy soort in hierdie land - wat die regte van kinders in al die verskillende howe verdedig, uitbou en beskerm.

Wat u op 'n persoonlike vlak van my as mens kan verwag, behoef seker weinig betoog aangesien ek net die eerste sewentien jaar van my lewe nie op een of ander manier by ons Alma Mater betrokke was nie. Ek erken dat elke mens oor grenslose potensiaal beskik wat met die nodige motivering en/of leiding gekanaliseer moet word om duidelik gedefinieerde mylpale te bereik. Die mens wat daarom op hierdie aarde die meeste vermag, is waarskynlik nie die een wat ywerig voor loop nie, maar wel die een wat ander aanspoor en ondersteun terwyl die pad saam geloop word. 'n Dinamiese leier is iemand wat genoeg mense bemagtig sodat veel meer bereik kan word as wat hy of sy alleen kan vermag. Ek glo dat elke individu 'n onvervangbare kwaliteit bydra sodat die eenheid veel waardevoller is as die totaal van die onderskeie dele daarvan.

Mag ek ten slotte, wetende dat die Dekaan ook nog die woord sal voer, maar net omdat ek getrou aan myself moet wees, 'n paar opmerkings maak:

Ek moet eerstens bely dat dit uit die krag en deur die genade van 'n liefdevolle Hemelse Vader is dat ek my dagtaak verrig. My werk as departementshoof doen ek met dank teenoor Hoofbestuur vir die vertrouwe wat daar in die verband in my gestel word. Ek erken die hulp en liefde van familie en kollegas wat deur die jare heen rigtinggewend op my lewe en ideale ingewerk het. Dit sal gepas wees om Carin en Jannet uit te sonder, aangesien hulle, van almal hier, die meeste persoonlike opofferings gemaak het sodat ek my passie vir my werk daaglik kon uitleef. Baie dankie ook vir my man, wie se aansporing en liefde elke dag nuut maak.