

**FAILURE BY PASSENGER TO HOLD RAILROAD OPERATOR
LIABLE FOR DAMAGE OCCASIONED BY ROBBERY ON TRAIN**

Shabalala v Metrorail 2007 3 SA 167 (W)

1 Introduction

It is clearly established in modern South African law that A, whose proprietary or personality rights are infringed by the delict of B, may utilise the Aquilian action against C to recover so-called “pure economic loss”, if C owed A a duty of protection against the type of damage which he/she has suffered in consequence of B’s conduct and C failed to observe that duty. (This is the third category of liability for pure economic loss mentioned by Neethling, Potgieter and Visser *Law of delict* (2006) 268. See their reference to *Joubert v Impala Platinum Ltd* 1998 1 SA 463 (B) as a typical example.) Although A would be able to claim damages from B, it is sometimes more advantageous to rely on the delictual claim for pure economic loss against C, or against D, the employer of C who would be vicariously liable for C’s delict, simply because C (or D, as the case may be) has the deeper pocket: this can clearly be seen from recent judgments such as *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC), *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA), *Van Eeden v Minister of Safety and Security (Women’s Legal Centre Trust, as Amicus Curiae)* 2003 1 SA 389 (SCA) and *K v Minister of Safety and Security* 2005 6 SA419 (CC) where the plaintiffs were successful in claiming damages from the State, instead of from the actual perpetrators of violent acts who caused the plaintiff’s detriment in the first place. (These judgments are also milestones in the development of constitutional principles pertaining to the element of wrongfulness, as well as to the widening of the ambit of an employer’s vicarious liability for the delicts of an employee: see Carpenter “The Carmichele legacy – enhanced curial protection on the right to physical safety: a note on *Carmichele v Minister of Safety and Security*; *Minister of Safety and Security v Van Duivenboden*; and *Van Eeden v Minister of Safety and Security*” 2003 *SAPL* 251; Neethling, Potgieter and Visser 66; Van der Walt and Midgley *Principles of delict* (2005) 25; Scott case note on *K v Minister of Safety and Security* 2006 *De Jure* 471).

One may safely assume that the plaintiff in the present case was advised to rely on the final outcome of the *Rail Commuters Action Group* cases in the Constitutional Court (*Rail Commuter Action Group v Transnet t/a Metrorail (No 1)* 2003 5 SA 518 (C); *Transnet Ltd t/a Metrorail v Rail Commuters Action Group* 2003 6 SA 349 (SCA); and *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359 (CC)), in which O’Regan J overturned the judgment of the Supreme Court of Appeal by holding (403C–G) that

“Metrorail and the Commuter Corporation bear a positive obligation arising from the provisions of the SATS Act read with the provisions of the Constitution to ensure that reasonable measures are in place to provide for the security of rail commuters when they provide rail commuter services under the SATS Act . . . The duty thus identified requires Metrorail and the Commuter Corporation to ensure that reasonable measures are in place to provide for the safety of rail commuters”.

The present judgment is extremely brief in comparison with its predecessors. One could in a metaphoric sense aver that the lavish table which had been set for a five-course meal in terms of theoretical speculation touching on subjects such as wrongfulness and the effect of the Constitution, was substituted by a makeshift table, on which a simple fare consisting of a starter of negligence and a main course of factual causation seemingly stilled the guest’s hunger.

2 Facts

While travelling as a passenger on one of the defendant’s trains, the plaintiff was robbed, shot and injured by unknown assailants. On the fateful day no security officials were present at the entrance to the platforms on the station to ensure that only those with tickets boarded trains. Furthermore, no security personnel were present in the train on that day. There was no evidence to show how the robbers gained entrance to the train carriage. What did, however, emerge, was that the robbers would have appeared to be ordinary commuters; there was nothing in their demeanour to reveal that they were thugs, bent on performing criminal acts towards commuters on the train. In fact, the attack on the train came as a complete surprise.

It was argued on the plaintiff’s behalf that the defendant, as the provider of rail services, owed all rail commuters, including the plaintiff, a duty to provide security against criminal attacks. On the basis of the existence of such a duty, it was contended that the lack of security personnel at the station and on the train gave rise to a situation where the defendant should have foreseen that harm would come to the plaintiff.

This would then constitute negligent conduct on the defendant's part, which would form the basis of a claim for damages. The defendant denied liability in general, and in particular denied that it owed the plaintiff a duty of care to ensure his safety while travelling as a fare-paying passenger on its train.

3 Judgment

Horn J concluded that the plaintiff had failed to discharge the *onus* of proving the elements of delictual liability on the defendant's part (171D). The mere failure by the defendant to provide security at a given time did not in itself provide proof of negligent conduct on its part and, even if it did, the plaintiff could not establish a factual causal link between such failure and the detriment suffered by the plaintiff as a result of his being robbed (171A–B). This caused the plaintiff's claim to be dismissed with costs.

4 Critical evaluation

4.1 *The defendant's duty to provide security to commuters*

In answer to the plaintiff's argument that an obligation rests upon the defendant to provide security to rail commuters, in view of the high incidence (the court erroneously employs the noun "*incidents*" here: 169F) of serious crimes perpetrated on trains, Horn J concluded (169F) that such duty was in fact placed on the shoulders of Metrorail by the Constitutional Court in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*. However, the court immediately sounded a stern warning against an interpretation of that judgment that would favour an almost "automatic" liability of a rail services operator where such agency failed to provide security services in any given situation (169G–I):

"Sight must not be lost of the fact that the Constitutional Court approached this aspect in the light of constitutional principles. It did not consider the question as to whether the failure on the part of the defendant in a case like this would render the defendant delictually liable should loss be incurred. Indeed I would have been surprised had the Constitutional Court held that, by virtue of the failure on the part of the defendant to provide such security, it would be liable for any damages [*sic*] that a plaintiff may incur. I say this for the reason that such a principle would hold serious implications for defendants providing such services. It would in effect produce a type of strict liability in an area of our law where it is not justified. It would mean that, where there is an obligation to provide security services and that is not done and a plaintiff suffers damages [*sic*], such as the case was here, then it would follow that the defendant would be liable. Such a proposition is untenable and would lead to serious erosion of the settled legal principles of delict."

It is suggested that the approach of Horn J in respect of the effect of the Constitutional Court's approach to the duty of Metrorail to provide for the security of rail commuters is fully justified by the judgment of O'Regan J in that case. Although she held that "[t]here is no reason why Metrorail cannot fulfil its obligations . . . by taking reasonable measures to provide for the security of rail commuter passengers, once it is clear that the SAPS is unable to do so" (406F), she pointed out that "it is not ordinarily desirable for this Court on motion proceedings to decide the elements of delictual liability" (407A) and concluded on this point that "[t]o the extent, therefore, that the second prayer for relief sought in this case is seeking this Court to determine the existence of a legal duty for the purposes of the law of delict, it cannot succeed" (407C).

Furthermore, Horn J referred (169I) to the recent judgment in *Tsogo Sun Holdings (Pty) Ltd v Quing-He Shan* 2006 6 SA 537 (SCA) (at that stage unreported) where Harms JA decided that a casino operator could not be held liable for damage suffered by a casino patron as a result of an attack by another patron who had succeeded in smuggling a firearm onto the premises, undetected by security guards, even in circumstances where armed attacks had previously taken place at the same establishment. In that case the plaintiff's claim failed primarily due to the lack of wrongfulness of the defendant's omission to protect the plaintiff, which decision was based on the court's application of the *boni mores* test, when Harms JA stated that "[p]olicy considerations must require that the plaintiff should be entitled to be recompensed by the defendant for the loss caused by a third party before liability can be imposed" (540B). In that case Harms JA emphatically rejected the occurrence of an earlier armed robbery as an indicator that such a duty rested upon the defendant, on the ground that should that have been the case, every owner or occupier of a facility to which the public has access and which has previously been the scene of an armed robbery would have the duty to have every single person entering upon such property searched; this would then have to apply to facilities such as banks, petrol service stations, small shops and even trains, buses and taxis (540E; see also the similar vein of argument by Horn J: 170I–J). The reference to trains makes the judgment of Harms JA particularly applicable to the case at hand. (It should be mentioned that in *Tsogo Sun*, the court also opted to base its decision to reject the plaintiff's case on the absence of two other elements of delict, viz negligence on the defendant's part and the lack of legal causal nexus between the defendant's omission and the harm suffered by the plaintiff. Logically speaking, there can be no delictual liability if even one of the

elements of a delict is absent – the court’s decision that wrongfulness was absent, thus made the treatment of the other two elements superfluous, if not meaningless (see my comments on that judgment in 2007 *THRHR* 501).)

If one were to construe *Tsogo Sun* correctly and regard it as authority for the proposition that wrongfulness had not been established in the case at hand, as in that judgment, on the ground that such would militate against public policy as reflected by the legal convictions of the community, the value of the previous decision by the Constitutional Court that Metrorail owes all commuters a duty to supply security services for their protection against criminals calls for further scrutiny. On the one hand, it could be argued that judgments like that of the Supreme Court of Appeal in *Tsogo Sun* and of the court in the case under discussion relegate the duty referred to by the Constitutional Court in *Rail Commuters Action Group* to nothing more than a hollow slogan, by which mere lip service is paid to the interests of commuters who brave the dangers of everyday travel by Metrorail trains. This perception is boosted by the following *dictum* of Horn J (169G):

“Sight must not be lost of the fact that the Constitutional Court approached this aspect in the light of constitutional principles. It did not consider the question as to whether the failure on the part of the defendant in a case like this would render the defendant *delictually liable* should loss be incurred” (italics supplied).

The judge was doubtlessly influenced by the words of O’Regan J referred to above (see *Rail Commuters Action Group* 406F 407C), and quite justifiably so. One is rather perplexed by the judge’s distinguishing between *delictual* principles, on the one, and *constitutional* principles on the other hand, seeing that it was authoritatively stated by Chaskalson P in *Pharmaceutical Manufacturers Association of SA: In re: ex parte President of the Republic of South Africa* 2000 2 SA 674 (CC) 696B–C that the common law cannot be treated as a body of law separate and distinct from the constitution: we have only one system of law, shaped by and subject to the Constitution (see eg Currie and De Waal *The Bill of Rights handbook* (2005) 34). Without delving further into this aspect, it is suggested that the true reason why O’Regan J denied a delictual claim in *Rail Commuters Action Group*, is to be found in the practical consideration which she spelt out in so many words (407A), namely that it was undesirable for the Constitutional Court to decide the elements of delictual liability on motion proceedings.

On the other hand, one could also argue that it is clear from the judgment under consideration that Metrorail has heeded the instruction of the Constitutional Court to supply security services: mention was made of security personnel who had been present when the plaintiff alighted, in a wounded state, from the train on which he had been shot and robbed (168G); there was a reference to the fact that there are usually security staff on duty on trains (168H); and it was described how security officials usually take up positions at the gates to platforms (168J). To my mind this provides tangible proof that the defendant had indeed taken steps to live up to the obligation imposed on it by the Constitutional Court to provide safety services to commuters. It is inconceivable that the Constitutional Court could have intended to place a duty upon the shoulders of Metrorail to guarantee the safety of rail travellers by instituting a security system consisting of trained security officials and therefore the following statement of Horn J (although made more in the context of the element of negligence) merits full approval (170H):

“In my view the employment of security officials is not a guarantee against criminality or violent attack. The way I see it, the defendant employs security officials in order to curb attacks of that nature. It does not employ security officials as a guarantee against such attacks. Even the police cannot warrant absolute safety. The fact that there were no security officials *present or visible on the day in question* cannot for that reason alone mean that the defendant is liable” (italics supplied).

4 2 *Application by the court of the principles of negligence and factual causation*

4 2 1 Preliminary observations

It is suggested that the facts emerging from this case show that the omission on the defendant’s part to protect the plaintiff from harm on the day in question did not constitute a breach of its general duty to supply security personnel. In itself this lack of wrongfulness would have sufficed to render the defendant not answerable in delict towards the plaintiff.

Horn J, however, opted to take the matter further by assuming, for argument’s sake (170B), that “there was a breach of a duty of care” by the defendant, which was his way of expressing the idea that the defendant’s omission had been wrongful. This assumption was immediately preceded by the judge’s assertion that, in order for the plaintiff to succeed, he had to prove the “usual” elements of delict on the defendant’s part which, according to him, are “a breach of a duty of care, that there was negligence and that the negligence was causally linked to the harm suffered by the plaintiff” (170B). Although this formulation is roughly in conformity with the standard academic approach to the definition of the concept of delict and

the isolated “elements” thereof – essentially human conduct, wrongfulness, fault, causation and damage (see Neethling, Potgieter and Visser 3–4 and Van der Merwe and Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 1 24 mentioning all five elements; Van der Walt and Midgley 1–2 and Boberg *The law of delict – Vol I: Aquilian liability* (1984) 1 24–25 mentioning only four elements, but combining conduct and wrongfulness as a single element; Burchell *Principles of delict* (1993) 10 23 mentioning six elements by adding “capacity” to the other five in cases of Aquilian liability; and McKerron *The law of delict* (1971) 5 13 isolating only three “essentials of liability”, by combining conduct and wrongfulness, as well as damage and causation) – it is open to criticism for three reasons in particular. Firstly, it is to be lamented that the element of wrongfulness (which Horn J combines with conduct, like Van der Walt and Midgley and Boberg) is couched in the English tort law terminology of “a breach of a duty of care”. It is not far-fetched to say that academics and judges have in recent times *ad nauseam* stressed the inaccuracy of expressing wrongfulness as such, the main reason being that this formula contains the possibility to confuse the delictual elements of wrongfulness and negligence (see eg Neethling, Potgieter and Visser 137; Van der Walt and Midgley 78–79; *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 27B–G; *Local Transitional Council of Delmas v Boshoff* 2005 5 SA 515 (SCA) 522E; *Road Accident Fund v Mtati* 2005 6 SA 215 (SCA) 227I; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 1 SA 461 (SCA) 469B–F). Secondly, the reference to negligence is too narrow. It is generally accepted that the applicable element is fault, which can manifest itself as either intent or negligence. (In the context of the facts of this case one can understand why negligence came to the fore in particular, but that does not warrant the use of such to refer to the requirements for delictual liability in general.) Thirdly, one can raise a logical objection against the statement that the defendant’s “negligence was causally linked to the harm suffered by the plaintiff”. Negligence refers to the blameworthiness of the defendant’s conduct and cannot be the cause of detriment in itself: a more accurate way of expressing the same idea would be to state that the defendant’s blameworthy *conduct* (act or omission, as the case may be) must have been causally linked to the plaintiff’s harm. What does, however, clearly emerge from this formulation, is that Horn J follows the concrete (relative) approach to foreseeability in testing for negligence on the defendant’s part – as opposed to the abstract (absolute) approach (for which distinction, see Neethling, Potgieter and Visser 126–129) – in terms of which a wrongdoer can only be negligent in respect of a consequence if that specific consequence (and not merely damage in general) was reasonably foreseeable by the *diligens paterfamilias*. This is in conformity with the modern trend in our case law and is thus to be welcomed as such.

4 2 2 Testing for negligence and factual causation

It is abundantly clear from the way in which counsel presented the plaintiff’s case, that it was made to rest upon the defendant’s compliance with the two stages of the well-known negligence test, namely that the damage in question must have been reasonably foreseeable and preventable by the *diligens paterfamilias* in the defendant’s shoes where the defendant failed to prevent such damage (*Kruger v Coetzee* 1966 2 SA 428 (A) 430E–F). Horn J sketches this approach as follows (169D–E):

“Mr Kriel [on the plaintiff’s behalf] argued that the lack of security personnel at the station and on the train created a situation where the defendant should have foreseen that harm would come to the plaintiff.”

This plainly refers to the first tier of the negligence test. In respect of the second tier, counsel for the plaintiff inexplicably endeavoured to reverse the *onus* which ordinarily would rest on the *plaintiff* to prove that the defendant could have taken reasonable measures to prevent the foreseeable damage, by arguing that the *defendant* failed to produce any evidence to show what steps it had taken to prevent harm to the plaintiff (170C). This interesting strategy would not, however, be evaluated by the court, for Horn J swept under the table any consideration of the presence or absence of the element of negligence by making the following comment in respect of counsel’s submission (170C–E):

“However, he lost sight of the fact that before one indulges in that kind of enquiry, the plaintiff has to cross the hurdle of causality. On Mr Kriel’s argument it would mean that one would have to presuppose on the facts that the absence of security officials on duty on the day in question necessarily gave rise to the harm suffered by the plaintiff. Stated differently, had there been a security official or officials on duty at the time, the robbery and shooting of the plaintiff would not have occurred. In my judgment, any liability on the part of the defendant in these circumstances would have to be judged having regard to the general principles governing liability in delict, otherwise we have negligence in a vacuum.”

The gist of these words is that negligence can only be judged in respect of a certain consequence of the plaintiff’s culpable conduct. By applying pure logic, one cannot depict any damage as such consequence, without establishing a factual causal nexus between the plaintiff’s conduct and the damage in question. These words demonstrate quite clearly that Horn J subscribes to the concrete approach to foreseeability, which would seem to be the main cornerstone of what is sometimes termed “causal negligence”. The final sentence of the quotation which, on face value, is somewhat obscure, essentially supports my interpretation

of the judge's understanding of the operation of the negligence element, in that his reference to negligence "in a vacuum" is a reference to the well-established adage of the English law of torts that "negligence in the air will not do" (ie liability only arises "where there is a duty to take care and where failure in that duty has caused damage": per Lord Macmillan in *Donoghue v Stevenson* [1932] AC 562 618; see also McKerron 26; in South African context this simply means that negligence must have a bearing on a specific consequence – a wrongful act in itself cannot establish negligence, even when the wrongdoer acts carelessly).

The next step taken by the court was to establish whether a causal nexus had existed between the omission of the defendant to have security personnel visibly posted at the station and on the train, and the robbery and shooting of the plaintiff. It is trite law that the *conditio sine qua non* approach is followed by our courts in establishing a factual causal link. In the event of an omission as possible cause of damage, the established method to determine the causal link is to "insert" positive conduct in the place of the omission and then to ask whether the damage would still have occurred. If this question produces a positive answer, no causal link has been established; a negative answer will, however, confirm such link (Neethling, Potgieter and Visser 167–168; Van der Walt and Midgley 130–131). Although Horn J nowhere utilised the terminology of *conditio sine qua non*, he in fact applied that test as it has become established in the case of an omission, as described above. This conclusion is unavoidable in light of the following *dicta* (170F–G):

"In this matter we have the situation where the plaintiff was waiting for the train at Dunswart station. There were according to him approximately 11 other people waiting for the same train. Once the train arrived they all boarded. None of the people he saw waiting for the train created the impression that they were would-be robbers. Once the train pulled off, the attack occurred. The plaintiff could not say for sure whether the attackers were part of the group of 11 people waiting for the train earlier on. *Therefore, it would be pure speculation to conclude that, had there been security presence, the attack would not have taken place.* The probabilities, likewise, do not favour the plaintiff. *It does not necessarily follow that, had there been a security presence on the day in question, the plaintiff would not have been injured*" (italics supplied).

Both italicised sentences (the second being almost a repeat of the first) are textbook examples of the application of the *conditio sine qua non* test in the case of an omission, yielding that no causal link had been established. Failure by the plaintiff in this regard effectively scuppered his claim.

5 Conclusion

It is suggested that the court came to the correct conclusion on the facts, as well as on the basis of how the case for the plaintiff was argued. This judgment should under no circumstances be interpreted as either thwarting the obligation of Metrorail to supply security officials for the protection of commuters, as established by the Constitutional Court in *Rail Commuters Action Group*, or demonstrating that it will in future be practically impossible for a commuter to succeed with a claim against Metrorail. It must be borne in mind that the main reason why the Constitutional Court failed to find that Metrorail had breached its duty of protection towards passengers on its trains for purposes of establishing possible delictual liability, lay in the fact that the process before it had been presented by way of motion proceedings; had the plaintiff in the case under discussion been able to present better evidence as to the impact of the absence of security officers on the station and the train, he may have been in a position to establish a factual causal link between the defendant's omission and his damage suffered in consequence of the robbery and shooting. That may then have enabled him to establish causal negligence on the defendant's part, which would have made him the victor.

A final observation in favour of the judgment of Horn J is that he applied the "elementological" method of establishing delictual liability correctly, ever keeping in mind that the absence of but one of the elements of delict would be fatal to the plaintiff's case. He thus proceeded from his discussion of wrongfulness, in which he in reality concluded that there had not been a "breach of a duty of care", to that of negligence by making an assumption that the defendant's omission had in fact been wrongful (170B). Furthermore, although he correctly argued that no finding could be made regarding negligence, before a causal link between the defendant's omission and the plaintiff's detriment had been established (see para 4 2 above), he finally concluded, obviously *ex abundante cautela* (but in fact not on logical grounds, taking his arguments as to the preventability tier of negligence into account), that no causal link could be proved by the plaintiff, even if the defendant's conduct would have been negligent (171B). This approach is to be preferred to that followed by Harms JA in *Tsogo Sun*, where the court held that the three delictual elements of wrongfulness, negligence and legal causation had been lacking at the same time (as pointed out in para 4 1 above).