

**THE DEVELOPMENT OF THE COMMON LAW UNDER THE  
CONSTITUTION: MAKING SENSE OF VICARIOUS LIABILITY FOR  
ACTS AND OMISSIONS OF POLICE OFFICERS**

by  
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## DECLARATION

I declare that mini dissertation hereby submitted at the University of Limpopo, for the degree of Master of laws (in Development and management) has not previously been submitted by me for a degree at this or any other university; that it is my work in design and in execution, and that all the material contained herein has been duly acknowledged.

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H.W. Chauke (Mr.)



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DATE

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## 1. Introduction

The landmark decisions of the Constitutional Court in *Carmichele v Minister of Safety & Security & another*<sup>1</sup> and *K v Minister of Safety & Security*<sup>2</sup> represent its first steps forward in the journey of modernising the law of state delictual liability to remedy the violation of fundamental rights occasioned by acts and omissions of police officers in the discharge of their duties. The Court reformulated the test for determining vicarious liability for the wrongful, negligent or intentional wrongs committed by public officers, including police officers so as to bring the concept of policy within the framework of the spirit, purport and object of the Bill of Rights. Its clarion calls to the Supreme Court of Appeal and the High Court to develop the common law in line with the mandatory dictates of section 39(2) of the Constitution has been consolidated in subsequent police liability cases.<sup>3</sup>

The purpose of this thesis is to consider the development of the common law under Constitution,<sup>4</sup> with particular attention to the government's vicarious liability for the acts and omissions of police officers. The experience of other Commonwealth countries will also be analysed and discussed.

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<sup>1</sup> 2001 (10) BCLR 995 (CC) at 1014 par 56.

<sup>2</sup> 2005 (9) BCLR 835; 2005 (6) SA 419 (CC) (hereinafter NK).

<sup>3</sup> See *Minister of Safety & Security v Van Duivenboden* 2002 (6) SA 431 (SCA); *Van Eeden v Minister of Safety & Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 (1) SA 389 (SCA).

<sup>4</sup> In *S v Thebus & another* 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) at para 28, Moseneke J noted that there were at least two instances in which the need to develop the common law under s 39(2) of the Constitution could arise:

"The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the "objective normative value system" found in the Constitution."

## 2. The legacy of *Ewels*

The factual scenario in *Minister van Polisie v Ewels*<sup>5</sup> was that Ewels had been assaulted in a café by Barnard, an off-duty police sergeant, and went to the local police station to lay a charge. Barnard followed him there and, in the presence of police officers on duty at the time, once again assaulted him. Ewels sued the Minister in delict, seeking to hold him vicariously liable for the failure by police officers in charge of the station to come to his assistance and protect him from Barnard.

Speaking for the unanimous Appellate Division, Rumpff CJ stated<sup>6</sup> that the law on omissions had developed through cases to the stage where a measure of clarity at last prevailed. The point of departure remained that, as a matter of law rather than morality, no general duty existed to take positive action to prevent harm to another, even when such action could easily be taken.<sup>7</sup> In certain circumstances, however, the law did regard an omission as wrongful and thus as capable of giving rise to delictual liability. Such circumstances were not limited to cases involving prior conduct or the control of property, though these cases were relevant factors in determining the issue of wrongfulness.

‘It appears that the stage of development has been reached wherein an omission is regarded as unlawful conduct also when the circumstances of the case are of such a nature that the omission not only excites moral indignation but also that the legal convictions of the community demand that the omission should be considered

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<sup>5</sup> 1975(3) SA 570(A) at 597 A-C.

<sup>6</sup> *Minister van Polisie v Ewels* at 596.

<sup>7</sup> Hutchison, D ‘Aquilian Liability II (Twentieth Century) in Zimmerman, R & Visser, D (eds) *Civil and Common Law in South Africa* (1996) Ch. 18, 595, 626.

wrongful and that the loss suffered should be made good by the person who neglected to take positive action.’<sup>8</sup>

As to when the legal convictions of the community so demanded, no general rule could be laid down: whether there was a legal duty to act depended on all pertinent facts. The ‘much-flogged unruly horse’<sup>9</sup> - public policy, public interest and legal policy have played a decisive role in determining the legal convictions of the community. That public policy is problematic as is axiomatic,<sup>10</sup> but its relevance and utility is not in doubt.<sup>11</sup> The formula for the application of this criteria consisted in weighing up and balancing of the conflicting interests of the parties concerned in the light of the interest of the community.<sup>12</sup>

In the case at hand the important factors were: the fact that the assault took place in the police station over which the police officers had control;

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<sup>8</sup> *Minister van Police v Ewels* at 597A-B (*Hutchison’s*, translation from the original Afrikaans, ‘*Aquilian Liability II (Twentieth Century)*’ in Zimmerman, R & Visser, D (eds) *Civil and Common Law in South Africa* (1996) Ch. 18, 595, 626)

<sup>9</sup> *Richardson v Mellish* (1824) 2 Bing. 229 252, per Burrough J; *Jansen v Driefontein Consolidated Mines Ltd* [1902] AC 484 491; *Texaco Ltd v Mulberry Filling Station Ltd* [1972] 1 WLR 814 at 827; *Geismar v Sun Alliance & London Insurance* [1978] QB 383 at 389; *Nickerson v Barraclough* [1981] Ch. 426; *Deutsche Schachbau-und Tiefbohrergesellschaft MBH v Ras Al Khaima National Oil Co.* [1990] 1 AC 295 316. See further, Sand, J ‘Unblinking the unruly horse: Public policy in the law of contract’ 1972 Cambridge LJ 144.

<sup>10</sup> Bairamian J writing for then Supreme Court of Lagos (Nigeria) in *Harry v Martins* (1949) 19 N.L.R. 42, 43, commented as follows respecting the issues of public policy: “Public policy is... very unruly horse and ‘judges are more to be trusted as interpreters of the law than expounders of what is called public policy’. I distrust that unruly horse and prefer to act on the accepted principle that a contract freely entered into should be enforced unless it is clearly shown to be illegal under some authoritative decision in the common law or to be illegal under a statute.” See also *Olsen v Standaloft* 1983 (2) SA 668 (ZS) 678-79; and *cultural groups?*” See, generally, Fleming *The Law of Torts* 4 ed 136; Lubbe & Murray *Farlam & Hathaway Contract - Cases, Materials, Commentary* 3ed (1988) 240-242.

<sup>11</sup> For more recent pronouncement: *Olitzki Property Holdings v State Tender Board* 2001 (8) BCLR 779, (3) SA 1247 (SCA) at para 30; *Media 24 Ltd & another v Grobler* (2005) 26 ILJ 1007 (SCA) para [68]; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority of SA* 2006 (1) SA 461 (SCA) at paras 13 & 14; *FNB of SA Ltd v Duvenhage* 2006 (5) SA 310 (SCA) at para 2. See, generally, Lubbe & Murray *Farlam & Hathaway Contract - Cases, Materials, Commentary* 3ed (1988) 240-242.

<sup>12</sup> Van Aswegen, A “*Policy considerations in the law of delict*” 1993(56) THRHR 171, 180 and ‘*Aquilian Liability I (Nineteenth Century)*’ in Zimmerman, R & Visser, D (eds) *Civil and Common Law in South Africa* (1996) Ch. 18, 559.

the general duty of the police to protect members of the public from crime; the ease with which the assault could have been prevented or stopped; and the fact that one of the bystanders held a rank equal to that of Barnard.<sup>13</sup>

The impact of the *Ewels*' case for the development of the South African law, not merely of omissions but of delict in general, cannot be overemphasised.<sup>14</sup> Indeed, its impact may without too much exaggeration be likened to the significance of *Donoghue v Stevenson*<sup>15</sup> for the development of the tort of negligence in English law. In the same manner that Lord Atkin's neighbour principle united the various categories of liability for negligence and opened the door to the recognition of new ones, so too Rumpff CJ's broad formula not only explained the existing instances of liability for an omission but also provided precious mechanism for judicial development of the law. The critical issues raised by *Ewels* are most cogently summed up by Corbett CJ as follows:

'Even in 1975 there was probably still two choices open to the court in the *Ewels* case. The one was to confine liability for an omission to certain stereotypes, possibly adding to them from time to time; the other was to adopt a wider, more open-ended general principle, which, while comprehending existing grounds of liability, would lay the foundation for a more flexible and all-embracing approach to the question whether a person's omission to act should be held unlawful or not. The court made the latter

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<sup>13</sup> *Minister van Police v Ewels* at 597.

<sup>14</sup> *Amicus Curiae*, 'The actionable omission: Another view of *Ewels*' case' (1976) 93 SALJ 85.

<sup>15</sup> [1932] AC 562 (HL).



choice; and, of course, in doing so cast the courts for general policy-making role in this area of the law.’<sup>16</sup>

Similarly, Hutchison has put the matter extremely well:<sup>17</sup>

‘The decision has had this profound influence because it clearly established wrongfulness as a distinct element of liability in which the courts can openly take account of policy considerations in developing the law. For this very reason an eminent judge complained that the decision in *Ewels* created legal uncertainty by substituting judicial discretion for principle, but his was a lone voice amidst the general chorus of approval. It was widely appreciated that if Aquilian liability was to be extended into these new, controversial fields without giving rise to indeterminate liability or undesirable social and economic consequences then a much greater degree of flexibility or judicial discretion, if you like) would have to be introduced into the tests for liability.’

The *Ewels* judgement did not do much to influence the courts to do away with their attitudes against the extension of the existing common law rule in delictual claims.<sup>18</sup> The courts held a strong view that the extension of the existing remedies be preserved, unless there was a need for the development of the established rules and standards in respect of liability

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<sup>16</sup> ‘Aspects on the role of policy in the evolution of our common law (1987) 104 SALJ 52, 56.

<sup>17</sup> Hutchison, D ‘Aquilian Liability II (Twentieth Century) in Zimmerman, R & Visser, D (eds) *Civil and Common Law in South Africa* (1996) Ch. 18, 595, 627.

<sup>18</sup> *Union Government v Ocean Accident Guarantee Corporation Ltd* 1956(1) SA 577(A) at 585E-F where the court held that “although it is true that our law recognises that in applying the *Lex Aquilia* elasticity is a valuable factor, it is equally true that growth must be controlled, not only in the interest of the systematic development of the law but also in the interest of practical convenience. Justice may sometimes be better served by denying a remedy than granting one.”

to situations to which they were not previously applied.<sup>19</sup> The courts were of the view that if the delictual actions against the police could be readily recognised this may have a crippling and adverse effects on the state *fiscus* to run a police service<sup>20</sup> as this could lead to multiplicity of actions of delictual claims based on existing police practice and procedures. In *Kadir*<sup>21</sup> it was held in this case that viewed objectively, society would take account of the fact that the functions of the police in terms of the Police Act relate to criminal matters and were not designed for the purpose of assisting civil litigants and therefore society would balk at the idea of holding policemen personally liable for damages arising from what was a relatively insignificant dereliction of duty.

It is worth noting that the English courts did not find the need for the extension of the old established rule to situations to which they were not previously applied. Public policy did not allow their courts to find liability against police authorities as they were regarded to be immune from liability when carrying out their duties. In the leading case of *Hill v Chief Constable of Yorkshire*<sup>22</sup> it was found to be undesirable to impose

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<sup>19</sup> *Minister of Law & Order v Kadir* 1995(1) SA 303 (A) at B-C where the court held that “save for stating that the extension of the principles of liability to the case under consideration would not lead to a multiplicity of actions, the court *a quo* failed to consider the effect such a decision would have on existing police practice and procedures. The functions performed by the police, such as search and rescue operations and rendering assistance in a multitude of situations, would be seriously inhibited should such action by the police expose them to civil liability.”

<sup>20</sup> *Saaiman and Others v Minister of Safety and Security & others* 2003(3) SA 496 (OFS) at para 21 where the court held that “now if such a new category of delictual liability based on omission is recognised and such a type of general benefit liberally given to indirect victims of crime as in the present case, on what logical, legal or moral basis can any of these vulnerable classes of direct victims of crime be denied similar relief? It is very clear that recognition of this type of a new delictual action as contended for in this case can have a crippling and adverse effects on the state *fiscus* to run the police service. Such an action will be too general and rangeless. Every single member of the general public will instantly become a potential claimant against the police service. It will diminish drastically the morale of the police. It will discourage young men and young women from serving the country as peace keepers...”

<sup>21</sup> *Minister of Law & Order v Kadir* 1995 (1) SA 303 (A) at 321H/I-J-322A.

<sup>22</sup> [1987] All ER 1173at 116 B-C where the court held that liability should not be extended to cover an “action... against the police for consequences of a direct physical attack on one

civil liability on the police on the ground of public policy. The need for a soft concept as flexible tools for judicial lawmaking in extending the scope of liability for negligent conduct is clearly not limited to South African law.

### **3. The constitutional context**

An early step in any constitutional rights analysis should be the identification of all relevant constitutional rights. Section 173 of the 1996 Constitution gives to all the Higher Courts, the inherent power to develop the common law, taking into account the interest of justice.<sup>23</sup> In section 7 of the Constitution, the Bill of Rights enshrines the rights of all people in South Africa, and obliges the State to respect, promote and fulfil these rights.<sup>24</sup> Section 8(1) of the Constitution makes the Bill of Rights to be binding on the judiciary as well as on the legislature and the executive.<sup>25</sup> Section 39(2) of the constitution obliges the courts to develop common law appropriately where the common law deviates from the spirit, purport and objects of the Bill of Rights. Section 39(1)(b) imposed the duty on the state to recognize its obligation under international law<sup>26</sup> to

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citizen (Miss Hill) by another (Sutcliffe) in circumstances where the attacker was not a police officer and was not in police custody or, having arrested, was allowed to escape from police custody but where reasonable care on the part of the police would have resulted in the attacker's previous arrest.' See also *Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER 294; [1970] AC 1004; [1970] 2 WLR 1140 (HL).

<sup>23</sup> Section 173 of the Constitution provides: "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>24</sup> Section 7 of the Constitution provides: "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. The state must respect, protect, promote and fulfil the rights in the Bill of Rights..."

<sup>25</sup> Section 8(1) of the Constitution provides: "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of State."

<sup>26</sup> Section 39(1)(b) provides that: "When interpreting the Bill of Rights, a court tribunal or forum may consider foreign law".

protect women<sup>27</sup> and children<sup>28</sup> against violent crime and against gender discrimination inherent in violence against women.<sup>29</sup>

The Bill of Rights also entrenches, among others, the right to the protection of the security of the person including, *inter alia*, the right to be free from all forms of violence from either public or private sources;<sup>30</sup> the right to life;<sup>31</sup> the right to human dignity;<sup>32</sup> the right to privacy;<sup>33</sup> the right to equality before the law and the prohibition against unfair discrimination based, for example, on grounds such as race, gender, sex or sexual orientation.<sup>34</sup> The final Constitution “contains a strong, positive commitment to deleting the stamp of apartheid from South African social, economic and political life.”<sup>35</sup> The achievement of a society in which all

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<sup>27</sup> See generally Maloka, TC ‘Rape shield in the wake of *S v M*’ (2004) *Speculum Juris* 264; Wood, K., & Jewekes, R ‘Violence, rape, and sexual coercion: everyday love in a South African township’ (1997) 5(2) *Gender & Development* 41-46; Armstrong, S. ‘Rape in South Africa: An invisible part of Apartheid’s legacy’ (1994) 2(2) *Focus on Gender* 35-39; Artz, L, & Combrinck, H ‘A Wall of words’ redefining the offence of rape in South African law (2003) *Acta Juridica* 72.

<sup>28</sup> See generally; Maloka, TC ‘Childhood sexual abuse narratives: Taking their place in a long line “gendered harms” and “mirrored silence” (2006) 20(1) *Speculum Juris* 78; Sloth-Nielsen, J ‘Chicken soup or chainsaws: Some Implications of the constitutionalisation of children’s rights in South Africa’ (1996) *Acta Juridica* 6; Clarke, B ‘The duty of the state to support children in need’ (2000) 117 *SALJ* 342; Bonthuys, E ‘The South African bill of rights and the development of family law’ (2002) 119 *SALJ* 748; Muller, B & Holley, K. ‘“I just want to go home”: juvenile offenders and their perceptions of the legal process’ (2003) 120 *SALJ* 71.; Britz, Vetten & Low, *Violence against Women in Metropolitan South Africa* (155 Monograph Series No. 41).

<sup>29</sup> McColgan, A ‘Common law - Relevance of sexual history evidence’ (1996) 16(2) *Oxford Journal of Legal Studies* 272, 297 notes:

“Sexual assault is a crime, which is overwhelmingly committed by men against women. The widespread failure of the criminal justice system to convict men who are guilty of rape amounts to a significant shortfall in its service to women who, after all comprise half of those whose protection justifies its very existence. This failure results, in part, from the acceptance by that system of evidence, which is irrelevant to the issue of guilt, the perceived relevance of which stems from unsupported stereotypes surrounding that sector of the population (women), which suffers from sexual victimization.”

<sup>30</sup> S 12(1) 1996 Constitution.

<sup>31</sup> S 11, 1996 Constitution.

<sup>32</sup> S 10, 1996 Constitution.

<sup>33</sup> S 14, 1996 Constitution.

<sup>34</sup> S 9, 1996 Constitution.

<sup>35</sup> “At the heart of the prohibition of unfair discrimination” the Constitutional Court has declared “lies a recognition that the purpose of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of a particular group,”

human beings will be accorded equal dignity and respect regardless of their membership of a particular group has been the abiding theme of the Chakalson Court.<sup>36</sup>

The passage of domestic violence legislation across many jurisdictions<sup>37</sup> represent belated efforts to pull back the curtain concealing gendered harms that were traditionally defined as “private,” so that they could be recognised as violations of women’s public right to equality and dignity. Encouragingly, however, Constitutional Court<sup>38</sup> and Supreme Court<sup>39</sup> decisions have made it clear that domestic and public violence pose the greatest threats to the self-determination of women, and their deprivation of equality in society while simultaneously amplifying the voices of those

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and “[t]he achievement of such a society” is “the goal of the Constitution” in *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC) at para 141. In *Harksen v Lane No* 1997 (11) BCLR 1489 (CC) at para 53 the Constitutional Court observed that “whether or not there is discrimination will depend on upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human or to affect them in a comparably serious manner.” See too *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) paras 121-122; *Brink v Kitshoff No* 1996 (6) BCLR 752 (CC).

<sup>36</sup> See following landmark holdings: *S v Makwanyane & another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC); *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC); *Government of the Republic of South Africa & others v Grootboom & others* 2001 (1) SA 46 (CC); *Hoffman v South African Airways* 2000 (11) BCLR 1211 (CC); 2001 (1) SA 1 (CC); *Minister of Health v Treatment Action Campaign* 2002 (15) SA 793 (CC).

<sup>37</sup> See, for example, the Domestic Violence Act 116 of 1998 of South Africa; the Domestic Violence Act 86 of 1995 of New Zealand; the Family Law Act 1996 of the United Kingdom; the Domestic Violence Act, 1996 of Ireland; The Domestic Violence Protection Act 2000 of Ontario, Canada; and the Domestic Violence Bill of India. The concern seemed to be worldwide: See, for instance, Senator Joseph R. Biden, ‘The civil remedy of the Violence Against women Act: A defence’ (2000) 37(1) *Harvard Journal of Legislation* 1, explains that the 1994 Violence Against Women Act was introduced “in response to the escalating problem of violence against women - a national tragedy played out every day in the lives of millions of American women at home, in the workplace, and on the streets.”

<sup>38</sup> See *S v Baloyi* 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC); *Omar v Government of the Republic of South Africa (Commission of Gender Equality, Amicus Curiae)* 2006 (2) SA 284 (CC).

<sup>39</sup> See *Carmichele v Minister of Safety & Security & another* [2000] 4 All SA 537 (SCA), 2001 (1) SA 489 (SCA); *Minister of Safety & Security v Van Duivenboden* [2002] 3 All SA 741 (SAC), 2002 (6) SA 431 (SCA); *Van Eeden v Minister of Safety & Security (Women’s Legal Centre Trust, as Amicus Curiae)* [2002] 4 All SA 346 (SCA); 2003 (1) SA 389 (SCA); *Minister of Safety & Security & another v Hamilton* [2004] 4 All SA 117 (SCA), 2004 (2) SA 216 (SCA); *Van v Hoogenhout* 2005 (2) SA 93 (SCA).

who experience intersecting inequalities, such as women and children.<sup>40</sup> The observations of the Supreme Court of Appeal in *S v Chapman*<sup>41</sup> are worth quoting:

‘Rape is a very serious offence constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The right to dignity to privacy and the integrity of every person are basic to the other of the constitution to any defensible civilization. Women in this country are entitled to the protection of these rights.’<sup>42</sup>

MacFarland J put it this way:<sup>43</sup>

‘Rape is unlike any other sort of injury incurred by accident or neglect. Survivors of rape must bear social stigmatisation which accident victims do not, Rape is not about sex; it is about anger, it is about power and it is about control. It is ... ‘an overwhelming life event.’

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<sup>40</sup> See generally, Boyle, C & McCrimmon, M. ‘The constitutionality of Bill C-49: Analysing sexual assault law as if equality really mattered’ (1998) 41(2) *Criminal Law Quarterly* 198; Boyle, C. ‘The role of equality in criminal law’ (1994) 54 *Saskatchewan LR* 203; Nightingale, M.L. ‘Judicial attitudes and differential treatment: Native women in sexual cases’ (1991) 23 *Ottawa LR* 71; McInnes, J & Boyle, C. ‘Judging sexual assault law against a standard of equality’ (1995) 29 *University of British Columbia LR* 341.

<sup>41</sup> 1977(3) SA 34(A).

<sup>42</sup> *S v Chapman* at 344J-345B. The views expressed by Justice Sabharwal in *State of Rajasthan v Om Prakash* 2002 (8) *Criminal Law Journal* 29 (SC) at para 9, concerning the importance of safeguarding childhood and youth against exploitation and against sexual abuse are reflective of this enlightened approach:

“Child rapes cases are cases of perverse lust for sex where even innocent children are not spared in pursuit of the sexual pleasure. There cannot be anything more obscene than this. *It is a crime against humanity*. Many such cases are not even brought to light because of social stigma attached thereto. According to some surveys, there has been steep rise in the child rape cases. *Children need special care and protection. In such cases, responsibility on the shoulders of the courts is more onerous so as to provide proper legal protection to these children. Their physical and mental immobility call for such protection. Children are the natural resource of our country. They are our country’s future. Hope of tomorrow rests on them. In our country, a girl child is in very vulnerable position and one of the modes of her exploitation is rape besides other mode of sexual abuse.* These factors point towards a different approach required to be adopted.” (Emphasis added).

<sup>43</sup> *Jane Doe v Metro Toronto (Municipality Commissioner of Police)* (1998) 160 DLR 697 at 746.

The police services are obliged to combat and investigate crime, to maintain public order, to protect and to secure the inhabitants of South Africa and their property.<sup>44</sup> In light of these obligations, the Constitutional Court said in *Carmichele*:<sup>45</sup>

‘In addressing these obligations in relation to dignity and the freedom and security of the person, few things can be more important to women than freedom from the threat of sexual violence. As it was put by counsel on behalf of *amicus curiae*:

“Sexual violence and the threat of sexual violence goes to the core of women’s subordination in society. It is the single greatest threat to the self-determination of South African women.”

South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights. The police is one of the primary agencies of the State responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime.’

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<sup>44</sup> Section 205(3) of the constitution provides that: “The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.”

<sup>45</sup> *Carmichele v Minister of Safety & Security & another* at para 62. See Convention on the Elimination of Discrimination against Women (CEDAW) 1979. For further reading: Dugan, J ‘International Human Rights’ in Van Wyk *et al* (eds) *Rights and Constitutionalism: The South African Legal Order* (1994) 171, 178-180; Greenberg ‘Race, sex and religious discrimination in international law’ in Meron (ed) *Human Rights in International Law: Legal and Policy Issues* (1984) 307; Evatt, ‘Eliminating discrimination against women’ (1991) 18 *Melbourne University LR* 435.

The constitution makes provision for all spheres of government and all organs of state within such sphere to provide effective, transparent, accountable and coherent government for the Republic as a whole.<sup>46</sup> This commitment is confirmed by section 1(d) of the Constitution which requires government to be accountable, responsive and open.<sup>47</sup>

The Bill of Rights requires that when an entrenched right is limited, the limitation should be constitutionally permissible, reasonable and justifiable in an open and democratic society based upon human dignity, equality and freedom.<sup>48</sup> In terms of section 12(1)(C) of the constitution, everyone has the right to freedom and security of the person, which includes the rights to be free from all forms of violence either from public or private sources. The state is required to protect individuals, both by refraining from such invasions itself and by taking active steps to prevent the violation of the rights.<sup>49</sup> Section 2 read with section 7(2) of the

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<sup>46</sup> Section 41(1)(C) of the Constitution provides: "All spheres of government and all organs of state within each sphere must provide effective, transparent, accountable and coherent government for the Republic as a whole."

<sup>47</sup> S 1 of the Constitution of Republic of South Africa Act 108 of 1996 immediately provides: "The Republic of South Africa is one sovereign democratic state founded on the following values;

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the Constitution and the rule of law.

(d) Universal suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness".

See generally *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC) at para 133; *Rail commuters Action Group & Others v Transnet Ltd t/a Metrorail & others* 2005(2) SA 359(CC), BCLR 301(CC) at paras 74 and 78.

<sup>48</sup> Section 36(1) of the Constitution.

<sup>49</sup> The subsection places a positive duty on the state to protect everyone from violent crime. See also De Waal, Currie and Erasmus, *The Bill of Rights Handbook* 4ed (2001) 258; Combrinck, H : "Positive state duties to protect women from violence: Recent South African developments" (1998) 20. *Human Rights Quarterly* 666, 683; Carpenter: "The right to physical safety as a constitutionally protected human right" in *Suprema Lex Essays on the Constitution Presented to Marius Wiechers* (1998) 139, 144; Pieterse 'The right to be free from public or private violence after *Carmichele* (2002) 119 *SALJ* 27, 29.



constitution imposes a duty on the state to “respect, protect, promote and to fulfil the rights in the Bill of Rights.

#### **4. The birth of transformative jurisprudence:<sup>50</sup> *Carmichele***

The decision in *Carmichele* was unanimously hailed by academic commentators,<sup>51</sup> and is undoubtedly one of the milestones in the development of our law of delict. Here the plaintiff, a victim of violent sexual assault, had claimed that the police investigators and prosecutors who did not oppose her assailant’s bail application, although they were aware of his criminal propensity especially towards sexual offences, were negligent in not doing so; that they owed her and the public the legal duty of protecting them from dangerous criminals and that they had negligently failed in that duty. The trial judge, Chetty J and the Supreme Court of Appeal dismissed the action and held that no liability accrued as the police and prosecutors did not act wrongly; there was no legal duty owed by the police to the complainant to prevent the type of harm alleged. In doing so, both Courts adopted the existing common law attitude implanted in earlier precedents to the effect that the existence of a legal duty to avoid or prevent loss was a conclusion of law that depended upon a consideration of all the circumstances of each particular case and on the interplay of many factors.<sup>52</sup> That the issue was one of

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<sup>50</sup> For excellent exposition on transformative jurisprudence: Liebenberg, S “The value of human dignity in interpreting socio-economic rights” (2005) 21 *SAJHR* 1.

<sup>51</sup> Okpaluba, C ‘The law of bureaucratic negligence ins South Africa: A comparative Commonwealth perspective’ in Hugh Corder (ed) *Comparing Administrative Justice Across the Commonwealth* (2005) 117; Carpenter: “The Carmichele legacy - enhanced curial protection of the right to physical safety: a note on *Carmichele v Minister of Safety & Security*; *Minister of Safety & Security v Van Duivenboden*; and *Van Eeden v Minister of Safety & Security* (2003) 18 *SAPR/PL* 252; Neethling, “Delictual protection of the right to bodily integrity and security of the person against omissions by the state” (2005) 122 (3) *SALJ* 572.

<sup>52</sup> In *Moses v Minister of Safety & Security* 2000 (3) SA 106 (CPD) at 114B-D Van Reenen J expatiated on these factors when he held that whether a failure to act positively in particular circumstances was wrongful had to be judged with reference to the different

reasonableness, determined with reference to the legal convictions of the community as assessed by the Court.<sup>53</sup> In effect, both Courts assumed that the pre-constitutional test for determining the wrongfulness of omissions in Aquillan liability was applicable, and to this extent, the Constitutional Court held that they were wrong. The Constitutional Court reasoned that courts of first instance failed to take into account the mandatory dictates of section 39(2).<sup>54</sup> The court stressed that the obligation of courts to develop the common law, in the interest of the section 39(2) objective was imperative.<sup>55</sup> It was shown that they did not have regard to section 39(2) of the Constitution, which requires all our courts to develop the common law with due regard to the “spirit, purport and objects” of the Bill of Rights.

The Constitutional Court observed that both the High Court and the Supreme Court of Appeal overlooked the demands of section 39(2) by assuming that the pre-constitutional test for determining the wrongfulness of omissions in delictual actions for this kind of action should be applied. The Court confirmed that in determining whether there was a legal duty on the police officers to act, there must be a weighing and the striking of a balance between the interests of the parties and the

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interests of the parties, their relationship with one another and the social consequences of imposing liability in the kind of case in question. The learned judge gave examples of such factors that must be balanced as the possible extent of harm; the degree of risk of the harm materialising; the interests of the defendant and the community; the availability of reasonably practicable preventative measures and the chances of their being successful; and whether the cost involved in obviating it was reasonably proportional to the harm.

<sup>53</sup> 2001 (1) SA 489 (SCA) at 494C/D-E para 7.

<sup>54</sup> 2001 (4) SA 938 (CC) 938 at 955 para 37.

<sup>55</sup> *Charmichele v Minister of Safety & Security & another (Centre for Applied Legal Studies Intervening)* at para 40, where it was held that: “it needs to be stressed that the obligation of courts to develop the common law, in the context of section 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in promoting the section 39(2) objectives, the courts are under a general obligation to develop it appropriately.

conflicting interest of the community which must be carried out in accordance with the section 39(2) requirement.<sup>56</sup>

The Constitutional Court firmly stressed that under both the interim constitution and the constitution, the Bill of Rights entrenches the rights to life, human dignity and freedom and security of the person and that the Bill of Rights bind the State and all its organs<sup>57</sup>. The Constitutional Court addressed the question of fear of delictual liability that may be brought about to the public servants in the proper exercise of their duties. It indicated that those fears will be taken care of by the “proportionality exercise” that must be carried out.

In upholding the appeal the Constitutional Court refrained from itself deciding whether the law of delict should be developed on the basis contended for on behalf of the applicant. The Constitutional Court only remarked that “where the common law deviates from the spirit, purport and objects of the Bill or Rights, the courts have an obligation to develop it by removing that deviation”.<sup>58</sup> The matter was then referred back to the High Court for it to continue with the trial.

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<sup>56</sup> *Charmichele v Minister of Safety & Security & another (Centre for Applied Legal Studies Intervening)* at para 43, where the court held that:

“As pointed out in the quotation above, in determining whether there was a legal duty on the police officers to act, Hefer J A in *Minister of Law & Order v Kadir* referred to weighing and striking of a balance between the interests of parties and the conflicting interests of the community. This is a proportionality exercise with various factors. Proportionality is consistent with the Bill of Rights, but that exercise must now be carried out in accordance with the “spirit, purport and objects of the Bill of Rights” and the relevant factors must be weighed in the context of a constitutional state founded on dignity, equality and freedom and in which government has positive duties to promote and uphold such values.”

<sup>57</sup> Section 7(1) of the interim constitution provided: “This chapter shall bind all legislature and executive organs of state at all levels of government.”

<sup>58</sup> *Charmichele v Minister of Safety & Security & another (Centre for Applied Legal Studies Intervening)* at para 33.

On considering the facts and the guidelines set out by the Constitutional Court, the High Court found that the plaintiff had discharged the onus of establishing a causal link between the omission and the assault on her. The defendants were therefore jointly and severally liable to the plaintiff in delict for the damage she suffered as a result of the assailant's attack on her.

## 5. The problem of vicarious liability

The South African law of delict recognises liability without fault, which is generally known as vicarious liability.<sup>59</sup> It is traditionally known that if a servant who was acting within the scope of his or her employment commits a delict, the employer<sup>60</sup> will be fully liable for the damages.<sup>61</sup> It is not required that the employer himself or herself must be at fault.<sup>62</sup> In order for vicarious liability to qualify, there must be employer - employee relationship at the time when the delict is committed.<sup>63</sup> The test for vicarious liability is whether the delict was committed by an employee while acting in the scope of his or her employment.<sup>64</sup> To determine whether or not the employee acted within the scope of his or her

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<sup>59</sup> Neethling, Potgieter & Visser, *Law of Delict* (5ed 2006) 338: Vicarious liability may in general terms be described as the strict liability of one person for the delict of another. The former is indirectly or vicariously liable for the damage caused by the latter. It implies that this liability applies where there is a particular relationship between two persons.

<sup>60</sup> See *Minister Van Polisie v Rabie* 1986(1) SA 117(A) at 132; *Masuku v Mdlalose* 1998(1) SA 1(A) at 14-16. Juristic persons and natural persons also fall into one category in this respect. It must be noted, however, that companies are directly and not vicariously liable for delicts committed by persons in contract with the company who are called "directing mind" or *alter ego* of the company.

<sup>61</sup> See Wicke, *Vicarious Liability* 39; Burchell, JM *Delict* 215-221; Van der Walt & Midgely, *Delict* 36-38. Note must be taken that the employee does not cease to be delictually liable because of his employer's vicarious liability (*Harnischfeger Corporations v Appleton* 1993(4) SA 21 (SCA) at 241-245 )

<sup>62</sup> *Stein v Rising tide Productions CC* 2002(5) SA 199(C) at 205

<sup>63</sup> See McKerron *Delict* 94; Boberg *Delict* 220. See also *Gibbins v Williams, Muller, Wright en Mosteat Ingelyf* 1987(2) SA 82(T) at 90.

<sup>64</sup> *Minister of Safety & Security v Jordaan Transport* 2000(4) SA 21(SCA) at 241-245 where it was held that, the standard test for vicarious liability is whether the delict in question was committed by an employee while acting in the course or scope of his or her employment.

employment the court must apply the so-called standard test as explained in *Minister of Police v Rabie*.<sup>65</sup>

The affair or business or work of the employer in question must relate to what the employee was generally employed or specifically instructed to do. The general approach for vicarious liability is not easy to formulate because problems always arises in its application, particularly in the so-called “deviation” cases. Not every act of an employee committed during the course of his or her employment which is in the advancement of his or her personal interest or for the achievement of his or her own goals necessarily falls outside the scope of his employment.<sup>66</sup>

The nature and character of vicarious liability have been described as follows:<sup>67</sup>

‘Vicarious liability exists where one is liable, not for a delict committed by oneself, but for a delict committed by another person. It is strict liability, or liability without fault, on the part of the defendant and is additional to that of the other person. The decision to treat a class of cases differently and to impose vicarious liability is based on social policy regarding what is fair and reasonable and amounts to an expression of a society’s legal

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<sup>65</sup> 1986(1) SA 117(A) at 134134E where the court held “It seems clear that an act done by a servant solemnly for his own interest and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, that in deciding whether an act by the servant does so fall, some reference is to be made to the servants intention... The test in this regard is subjective. On the other hand, reference is to be made to the servants intention... The test in this regard is subjective. On other hand, if there is nevertheless a sufficiently close link between the servant’s acts for his own interests and the purposes and the business of his master, the master may yet be liable. This is an objective test. And it may be useful to add that “... a master...is liable even for acts which he has not authorized provided that they are so connected with acts which he has authorized that they may rightly be regarded as modes - although improper modes - of doing them.”

<sup>66</sup> *Viljoen v Smith* 1997 SA 309 (A) at 345F-G.

<sup>67</sup> Van der Walt & Midgley *Principles of Delict* 3ed (200%) para 29. See too Burchell *Principles of Delict* (1993) 215-21.

convictions that victims of delictual conduct should be able to recover damages from someone who has the ability to pay. Factors that play a role include the interests being served, control over another's conduct, the creation of risk, who benefits from the activity, and who can afford to pay.

It is usual to approach the question of vicarious liability first by enquiring whether the relationship exists between the person who commits the delict and the person who is purportedly liable, and secondly, by establishing a link between the delict and either the latter's instruction or his or her work. In other words, liability is based upon a relationship which is capable of founding liability and an activity which can be linked to the person who is sought to be held liable.'

Whether the employer is to be liable or not must be dependent on the nature and the extent of the deviation. Once the deviation is such that it cannot be reasonably held that the employee is still exercising the functions to which he was appointed or carrying out some instruction of his employer, the latter will cease to be liable.<sup>68</sup>

The other way in which the employer may be held vicarious liable is when the employee, viewed subjectively has not only exclusively promoted his own interest, but, viewed objectively, has completely disengaged himself or herself from the duties of his contract of employment.<sup>69</sup> On the other hand, the master may still be held

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<sup>68</sup> *Union Government v Hawkings* 1944 AD 556 at 563. See also *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 756-757.

<sup>69</sup> *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 742 where a driver of the applicant's vehicle had, after delivering the parcels he was instructed to deliver, drove to attend to some

vicariously liable if there is a close link between the servant's acts for his own interest and the purpose and the business of his master. It should be noted that an intentional deviation from duty does not mean that an employer will not be liable.<sup>70</sup>

The legal principles underlying vicarious responsibility are well settled. Even a Minister of the State may be vicariously liable for the delict of an employee if the delict is committed by the employee in the course or scope of his or her employment. The courts have consistently applied the standard test in the adjudication of the so-called "deviation cases."<sup>71</sup>

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personal matters of his own during which time he consumed enough liquor to render him unable to drive the vehicle safely. On his way back to the employer's garage he negligently collided with and killed the father of two minor children and the court held the employer to be vicariously liable. In *African Guarantee and Indemnity Co. Ltd v Minister of Justice* 1959(2) SA 437(A) a policeman permitted his colleague, who had been prohibited from driving as a result of previous driving contraventions, to drive a police vehicle on patrol. While he was driving they got involved in a race with a sports car and negligently caused damage to another car. The employer was held liable because the employee's deviation did not amount to a total dereliction of his duties in terms of the contract of service. Another case was that of *Viljoen v Smith* where an employee, while busy with his work in his employer's vineyard, climbed through a fence contrary to the instructions of his employer, and relieved himself in the bushes on a neighboring farm. There he attempted to light a cigarette but the head of the match broke off and caused a fire which resulted in damage to the neighboring farm. The court indicated that the degree of digression of the employer from his work was not sufficiently material that it could be rightly said that he temporarily abandoned his work and therefore did not act in the scope of his employment during his excursion. The employer was accordingly liable. See also *Maxalanga v Mphela* 1998(3) SA 970 (TK) *Roux v Eskom* 2002(2) SA 199(T).

<sup>70</sup> For example in *Wait v Minister of Defence* [2002] 3 All SA 414 (E) it was found that a military policeman who shot a person with his personal firearm, while in uniform, had abandoned his duties completely and was thus not acting within the course and scope of his duties at the time. See *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* 2001 (1) SA 372 (SCA) at para 5; *Rieck v Crown Chickens (Pty) Ltd t/a Rocklands Poultry* (2005) 26 ILJ 1240 (SE) at para 44.

<sup>71</sup> The standard test provides that, "where there is a deviation the enquiry should be whether the deviation was of such a degree that it could 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 instructions of his or her employer." If the answer is yes, the employer will be liable no matter how badly or dishonestly or negligently those functions or instructions were exercised by the employee.

See also *Viljoen v Smith* 1997(1) SA 309(A) at 315D-317A; *Minister of Safety and Security v Jordaan* 2000(4) SA 21(SCA) at para 5; *Minister van Verligheid en Sekuriteit v Japmoc BK h/a Statas Motors* 2002(5) SA 649(SCA) at paras 11-16.

Many cases of vicarious liability are straightforward. The difficulties arise when the delict is committed in the course of a deviation from the normal performance of an employee's duties. When this situation occurs, the question the courts have to answer is, whether the employee is still acting within the course or scope of his or her duty or is still engaged with the affairs of the employer. The most difficult situation is where the deviation itself is intentional and even more difficult where the deviation constitutes an intentional wrong. It must be noted that the intentional deviation does not exonerate the employer from becoming liable as clearly indicated in *Feldman (Pty) Ltd v Mall*.<sup>72</sup>

The case of *Minister of Police v Rabie*<sup>73</sup> concerned itself with the clear deviation of an employee from the ordinary tasks of his employment. The question was whether the employer, the Minister of Police, was

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<sup>72</sup>*Feldman (Pty) Ltd v Mall* at 733 where Watermeyer CJ captured the test for vicarious liability in deviation cases as follows:

"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 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 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."

<sup>73</sup> 1986(1) SA 117(A) at 134 where Jansen JA formulated and applied the test 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 Bye v Swanepoel* 1927AD 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 interest and purposes and the business of his master, the master may yet be liable. This is an objective test."



vicariously liable for the damages suffered by the plaintiff. Jansen JA laid down his formulated test for determining vicarious liability in the so-called “deviation cases” and held the Minister liable.

The problem of vicarious liability of employers for wrongful acts committed by employees is still a thorny issue in other Commonwealth jurisdictions. For examples in *Lister v Hesley Hall*<sup>74</sup> the test established by Lord Steyn was whether the torts “where so closely connected with employment that it would be fair and just to hold the employers vicariously liable.” The employer was held liable.

In Canada the Supreme Court in *Bazley v Curry*<sup>75</sup> held a non-profit foundation vicariously liable for the conduct of one of its employees who had sexually abused the children in his care. McLachlin J said amongst other things the following:<sup>76</sup>

‘The fundamental question is whether the wrongful act is sufficiently related conduct authorised by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues there from, even if unrelated to the employer’s desires. Where this is so

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<sup>74</sup> [2002] 1 AC 215(H1): The plaintiffs who had been boarders at a private school for boys, were sexually abused by the warden in charge of the school hostel. The school was held vicariously liable for the conduct of the warden even though it was clear that it constituted a gross deviation from his duties. Lord Millet said the following:

“The school was responsible for the care and welfare of the boys. It entrusted that responsibility to the warden. He was employed to discharge the school’s responsibility to the boys. For this purpose the school entrusted them to his care. He did not merely take advantage of the opportunity which employment at a residential school gave him. He abused the special position in which the school had placed him to enable it to discharge its own responsibilities, with the result that the assaults were committed by the very employee to whom the school had entrusted the care of the boy... I would hold the school liable.”

<sup>75</sup> [1999] 2 SCR 534.

<sup>76</sup> *Bazley v Curry* at para 41.

vicarious liability will serve the policy consideration of provisions of an adequate and just remedy and deterrence...’

In its footsteps followed *Jacobi v Griffiths*,<sup>77</sup> where the controversy revolved around vicarious liability of an employer for sexual abuse of children by an employee. The majority of the court held that the activities of the employer were not sufficiently connected to the wrong performed by the employee to result in the vicarious liability of the employer. As a result the employer was not liable on the facts of that case.

### **5.1 Vicarious liability in the aftermath of *Carmichele***

An opportunity to apply the transformative jurisprudence of *Carmichele* to a concrete case of governmental liability arose in 2003 in the well-known case of *Phoebus Apollo Aviation CC v Minister of Safety & Security*,<sup>78</sup> in which the Constitutional Court was obliged to determine the Minister’s vicarious liability for the conduct of three deceitful police officers. The background was as follows: an armed gang robbed the appellant of a large sum of money. Part of the money was traced to the father of two of the robbers. The investigating officer went to the father of the robbers and found that he was forestalled by the three dishonest policemen who had taken the money the previous day. The three dishonest policemen pretended to be on police business when they induced the father to hand over his son’s cache. The appellant was successful before the High Court. However, the Supreme Court of Appeal reversed the order of the High Court for delictual action for damages in favour of the respondent, the Minister of Safety and Security.

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<sup>77</sup> [1999] 2 SCR 570 at para 58.

<sup>78</sup> 2003(2) SA 34 (CC).

The Appellant appealed to the Constitutional Court. The grounds for the appeal were the alleged infringement of the appellant's right to be protected in its property, as well as developing the common law relating to the vicarious liability of the state for delicts committed by police officers. The appellant also raised the special obligations imposed on the South African Police Service by the Constitution.

Upon closer examination the Court found that the appellant's constitutional right to be protected in the enjoyment of its property was not in issue. The court indicated that the constitutional foundation for the appellant's property claim were to be sought in the provisions of section 25(1) of the Constitution<sup>79</sup>. The Court showed that the provisions of section 25(1) of the Constitution were inappropriate in this case. This is so because section 25(1) of the Constitution is aimed at protecting private property rights against governmental action and were said to be irrelevant in this case where the appellant was originally deprived of its property by robbers and recovery of part of it was later frustrated by the three thieves.<sup>80</sup>

The Court went on to find that no convincing evidence was advanced to sustain the submission that the respondent should be held liable for the wrongful acts of the policemen. There was also no evidence to show why common law should be developed so as to impose an absolute liability on

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<sup>79</sup> Section 25(1) and (2) of the Constitution reads as follows:

- (1) No one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of a law of general application-
  - (a) for a public purpose or in the public interest; and
  - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court."

<sup>80</sup> *Phoebus Apollo Aviation CC v Minister of Safety* at para 4.

the state for the conduct of its employees committed dishonestly and in pursuit of their own selfish interest.<sup>81</sup>

The court acknowledged that the police service was under constitutional duty “to protect and secure the inhabitants of the Republic and their property,” but it was clear that when the rogue policemen went to the father of two of the robbers and stole the appellant money, they were not acting as policemen other than pursuing their own interest.

The Constitutional Court further found that the rogues were at no stage officially involved in the investigation of the robbing or the recovery of the proceeds. They were said to be never about the business of the South African Police Service. The court further said that they were engaged in their own nefarious scheme and that their ostensible exercise of police powers and performance of police duties were intended solely as camouflage.<sup>82</sup>

## **5.2 The case of the three rapist police officers in *NK***

The Constitutional Court in *NK* reversed the earlier decision of the Supreme Court of Appeal in *K v Minister of Safety & Security*,<sup>83</sup> holding the Minister to be vicariously liable in delict for the actions of three police officers who, while on duty, raped a member of the public. Dismissing the appeal, the Supreme Court of Appeal had held that, on the existing principles of vicarious liability respondent was not liable for the damages suffered by the appellant. It further held that on an application of the standard test for vicarious liability of an employee in “deviation”

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<sup>81</sup> *Phoebus Apollo Aviation CC v Minister of Safety* at para 6.

<sup>82</sup> *Phoebus Apollo Aviation CC v Minister of Safety* at para 8.

<sup>83</sup> 2005(3) SA 179 (SCA).

cases, it could not be said that the policemen were, while raping the appellant, still exercising the functions to which they were appointed or carrying out an instruction of their employer.<sup>84</sup>

The Supreme Court of Appeal concluded that the three policemen acting together, they had deviated from their functions and duties as policemen to such a degree that it could not be said that in committing the crime of rape they were in any way exercising those functions or performing those duties.<sup>85</sup> It also rejected the arguments that the common law rule relating to the test for vicarious liability of an employer in “deviation” cases should be developed in the light of the spirit, purport and objects of the Constitution.<sup>86</sup> The Court also rejected an argument that the Minister of Safety and Security was liable because at the time of the rape, the policemen were simultaneously failing to perform their duty to protect the appellant.

The Constitutional Court found that the common law test for vicarious liability in cases where employees deviated from their authorised functions required further development in the light of the spirit, purport and objects of the Constitution. The court explained what constituted the “development” of the common law for the purpose of section 39(2) as follows:

‘In considering this, we need to bear in mind that the common law develops incrementally through the rules of precedent. The rules of precedent enshrine a fundamental principle of justice: that like cases should be determined alike. From time to time, a common

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<sup>84</sup> *K v Minister of Safety & Security* 2005(3) SA 179 (SCA) at paras 4 and 5.

<sup>85</sup> *K v Minister of Safety & Security* 2005(3) SA 179 (SCA) at para 7.

<sup>86</sup> *K v Minister of Safety & Security* 2005(3) SA 179 (SCA) at para 8.

law rule is changed altogether or a new rule is introduced, and this clearly constitutes the development of common law.’<sup>87</sup>

O’Regan J clarified the purpose of development of common law in terms of section 39(2) which was to ensure that our common law is infused with the values of the constitution, and that the normative influence of the constitution be felt throughout the common law.<sup>88</sup> The court indicated that the question of the protection of the applicant’s rights to security of the person, dignity, privacy and substantive equality were of profound constitutional importance. It was further indicated that, the fact that the court was concerned with the aspect pertaining to vicarious liability did not mean that the questions of constitutional rights cannot arise. Furthermore it was indicated that the normative influence of the constitution had to be considered when considering the question whether the law needs to be developed or not.<sup>89</sup>

In answering the question whether, even though an employee’s acts were committed solely for his or her own purposes, there was a ‘sufficiently close link between the employee’s acts and purposes and business of the employer’ the courts must give effect to the spirit and objects of the Bill of Rights. Applying these norms to the facts of the case the court found

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<sup>87</sup> *K v Minister of Safety & Security* 2005 (9) BCLR 835; 2005 (6) SA 419 (CC) at para 16.

<sup>88</sup> O’Regan J concluded at para 17:

“The overall purpose of section 39[2] is to ensure that our common law is infused with the values of the constitution. It is not only in cases where existing rules are clearly inconsistent with the constitution that such an infusion is required. The normative influence of the constitution must be felt throughout the common law. Courts making decisions which involve the incremental development of the rules of the common law in cases where the values of the constitution are relevant are therefore also bound by the terms of section 39(2). The objection imposed upon the courts by section 39(2) of the constitution is thus extensive, requiring courts to be alert to the normative framework of the constitution not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue.”

<sup>89</sup> *K v Minister of Safety & Security* 2005 (9) BCLR 835; 2005 (6) SA 419 (CC) at para 16.

that there was a close connection between the policemen's actions and their duties as employees of the minister. Whilst raping the complainant they were simultaneously failing in their duty to protect her from harm and to prevent crime,<sup>90</sup> and for this the minister must be held vicariously liable. Having decided the matter on the issue of vicarious liability the court did not consider it necessary to decide whether there was any direct liability on the part of the minister.

## **6. Consolidation of transformative jurisprudence**

The plaintiff in *Van Eeden v Minister of Safety & Security (Women's Legal Centre Trust, as Amicus Curiae)*, a 19 year-old girl was a victim of vicious sexual assault, rape and robbery by a known dangerous criminal and serial rapist who had escaped from police custody through an unlocked gate. She claimed that the police owed her a legal duty to take reasonable steps to prevent the dangerous prisoner from escaping and harming her and they negligently failed in that duty. The respondent conceded vicarious liability, negligence and causation. The only issue for the Court to determine was whether the police had owed the appellant the legal duty she claimed. This was further narrowed down by the respondent's admission that at the time of the prisoner's escape, the police had realised that he was a dangerous criminal who was likely to commit further sexual offences; that his continued detention was necessary for the protection of the general public and their personal rights and property; that his escape could easily have been prevented; and that

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<sup>90</sup> *K v Minister of Safety & Security* 2005 (9) BCLR 835; 2005 (6) SA 419 (CC) at para 53, where the court explained that the omission laid in the policemen's brutal rape of the applicant and that their simultaneous omission laid in their failing while on duty to protect her from harm, something which they bore a general duty to do, and a special duty on the facts of this case.

the police regarded escapes from police custody and sexual attacks on women as ‘policing priorities’.

The *Van Eeden* court indicated that perceptions of legal convictions dictates that a defendant can be under a legal duty to act positively to prevent harm to the plaintiff if it was reasonably expected of him to have taken positive measures to prevent the harm.<sup>91</sup> In other words in order to be delictually liable, defendant must be reasonably expected to have taken positive measures to prevent harm. Therefore the perception of legal convictions of the community dictates that a defendant can be under a legal duty to act positively to prevent harm to the plaintiff if it was reasonable to expect of him to have taken positive measures to prevent the harm.

The legal convictions of the community are not what the court is concerned about, but it is concerned about whether a particular conduct is delictually wrongful.<sup>92</sup> Because of the imperatives of section 39(2) in the Bill of Rights, the court indicated that the concept of the legal convictions of the community must at present necessarily incorporate the norms, values and principles contained in the Constitution. This had to be done so because the constitution is the supreme law of this country, and no law, conduct, 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>93</sup> As regards the rights of the appellant, the court held that the fundamental values enshrined in the

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<sup>91</sup> *Van Eeden* 92 at para 9.

<sup>92</sup> *Van Eeden* at para 10 the court held that:

“In applying the concept of the legal convictions of the community the court is not concerned with what the community regards as socially, morally, ethically or religiously right or wrong, but whether or not the community regards a particular act or form of conduct as delictually wrongful.”

<sup>93</sup> *Van Eeden* at para 12.



Constitution include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism. It was further said that section 12(c) makes everyone to have the rights to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources.<sup>94</sup> It was also sternly indicated that freedom from violence is recognised as fundamental to the equal enjoyment of human rights and fundamental freedom.<sup>95</sup>

Section 12(1)(c) further required the state to protect individuals, both by refraining from such invasions itself and by taking active steps to prevent violation of the rights. The subsection also said to place a positive duty on the State to protect everyone from violent crimes.<sup>96</sup> As regards the rights of the appellant, the court held that the fundamental values enshrined in the Constitution include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism. It was further said that section 12(c) makes everyone to have the rights to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources.<sup>97</sup> It was also sternly indicated that freedom from violence is recognised as fundamental to the equal enjoyment of human rights and fundamental freedom.<sup>98</sup>

Section 12(1)(c) further required the state to protect individuals, both by refraining from such invasions itself and by taking active steps to prevent

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<sup>94</sup> *Van Eeden* at para 13.

<sup>95</sup> *S v Baloyi* at para 13.

<sup>96</sup> See *S v Baloyi* at para 11.

<sup>97</sup> *Van Eeden* at para 13.

<sup>98</sup> *S v Baloyi* at para 13.

violation of the rights. The subsection is also said to place a positive duty on the State to protect everyone from violent crimes.<sup>99</sup>

The question of the requirement of a special relationship between a plaintiff and defendant for imposing a legal duty also emerged in this judgment. In reply to this question the court indicated that, because of the state's constitutional imperatives, the requirement of the special relationship could no longer be supported because to do so would mean that the common law does not adequately reflect the spirit, purport and objects of the Bill of Rights.<sup>100</sup> This requirement was also described as "altogether out of step with our present constitutional system"<sup>101</sup> which should not be regarded as anything more than one of several factors to be considered<sup>102</sup> in deciding the reasonableness of an omission to prevent violent conduct.

In conclusion the court held that the police owed the appellant a legal duty to act positively to prevent Mohamed's escape. It was further held that the existence of such a duty accords with what is perceived to be the legal convictions of the community and that there was no consideration of public policy militating against the imposition of such a duty.<sup>103</sup>

The plaintiffs in *Saaiman v Minister of Safety and Security*<sup>104</sup> were travelling in a motor vehicle on a national road when they stumbled onto an armed robbery. During the robbery several shots were fired by the

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<sup>99</sup> See *S v Baloyi* at para 11. See also J De Waal, Currie and Erasmus *The Bill of Rights Hand Book* 4<sup>th</sup> ed (2001) 258.

<sup>100</sup> *Van Eeden* at para 23.

<sup>101</sup> Carpenter "The Rights to physical Safety as a Constitutionally Protected Human Right" *Suprema Lex: Essays on the constitution Presented to Marinus Wiechers* [1998] 139, 151.

<sup>102</sup> Pieterse "The Right to be Free from Public or Private Violence after *Carmichele*" [2002] 119 *SALJ* 27, 37.

<sup>103</sup> *Van Eeden* at para 24.

<sup>104</sup> 2003(3) SA 496(OFS).

robbers at the vehicle, as a result of which the plaintiff sustained body injuries, as well as traumatic and emotional shock. The plaintiff alleged that the police failed to implement certain safety measures in breach of a legal duty owed to them. They grounded their claim on the fact that the police were aware of the many cash in transit robberies taking place in South Africa endangering innocent road users and that the police were responsible to protect the public from violence, and therefore the police had a duty to accompany vehicles transporting money and further that road signs and/or warnings should be displayed warning the public about the routes used by cash carriers.

The court expressed a view that, in determining whether there was wrongfulness in the case of an omission, the question was whether according to all the facts, that had been a legal duty to act reasonably. The court then said that, to determine legal duty entails a careful and analytical judicial assessment of many factors which include a delicate balancing of competing interests of an individual claimant and those of the society<sup>105</sup>. The court further said that in order to succeed in an action for damages based on negligence, the victim had to show that the perpetrator owed him a duty of care and that the damages suffered as a result of the alleged conduct were not too remote.<sup>106</sup>

The court also spoke about the recognised relationship that must exist between the duty of care and the remoteness of the damages. The court indicated that the relationship of the parties must also be considered. It was further indicated that if the relationship between the victim and

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<sup>105</sup> *Saaiman v Minister of Safety & Security* at para 9.

<sup>106</sup> *Saaiman v Minister of Safety & Security* at para 13.

passive defendant was a general relationship, then an ordinary duty of care comes into existence but no binding legal duty.<sup>107</sup>

On the question of police powers, functions and duties in terms of the statute read with the Constitution, the court held that failure to perform any of these statutory duties did not necessary give rise to civil liability against the police. That was held to be so because the legislative organ did not consider it appropriate to hold members of the police service delictually liable to every member of the public who suffered damages on account of any omission on the part of any member of the police service who neglected a public duty.<sup>108</sup> The court further held that, our society recognises that our police service was an agency with limited financial and human resources expected to perform their policing duties with reasonable diligence and not with absolute perfection<sup>109</sup>. It was further held that there was nothing extraordinary that emerged from the circumstances of the case to evoke the legal convictions of the community to demand that in the circumstances of the case the first defendant owed a duty of care to the victims of crime and that nothing could be suggested that the community was convinced that the police could and should have prevented the crime.<sup>110</sup>

After the court has made all the necessary and appropriate assessment of this case, Rampai J came to the following conclusion:

- (a) that the circumstances of the present case did not call for the extension of the omission rule;

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<sup>107</sup> *Saaiman v Minister of Safety & Security* at para 14.

<sup>108</sup> *Saaiman v Minister of Safety & Security* at para 17.

<sup>109</sup> *Saaiman v Minister of Safety & Security* at para 18.

<sup>110</sup> *Saaiman v Minister of Safety & Security* at para 20.

- (b) there were no significant shifts and changes in the community's ideas of morality, fairness, reasonableness and justice; and,
- (c) on the assessment of all the circumstances of the case, the conclusion was that the social ideas of the community were that the loss of the plaintiffs had to fall on the criminals involved where it delictually belongs not on the defendant.<sup>111</sup>

In similar vein the Supreme Court of Appeal overturned the Cape High Court judgment in *Geldenhuys v Minister of Safety & Security*.<sup>112</sup> The Cape High Court had found that had the police acted in good time when they arrested the plaintiff for drunken and disorderly behaviour by investigating the nature and extent of the plaintiff's injuries or his physical condition they would have called for medical assistance. The plaintiff's health deteriorated as a result of this omission and they were held liable in damages for their negligence. The conclusion reached by Davis J was that:

'as a member of the South African community plaintiff was deserving of the utmost concern and respect from a critical custodian of our constitutional order, the police in whose care he had been placed. The internal rules of the police mandate an hourly cell inspection. It is not too much to expect that the police officer mandated with this task should spend but few seconds longer to ascertain the health and welfare of her captives. This in itself is a complete answer to any suggestion that such a delictual obligation will impose excessive burdens upon the police or may result in a

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<sup>111</sup> *Saaiman v Minister of Safety & Security* at para 21.

<sup>112</sup> 2002 (4) SA 719 (C).

flood of litigation whose benefits would then be far exceeded by the costs of unnecessary litigation.”<sup>113</sup>

On appeal it was held<sup>114</sup> that the police would have been under an obligation to summon medical assistance for the plaintiff if they were aware that it had been required. Thus, they would have been negligent if a reasonable policeman would have realised that the conditions of the plaintiff were not merely attributable to intoxication. The element of negligence was therefore lacking to justify the findings of the trial judge. Even though the element of negligence was lacking, the issue of causation ought also to have been considered. The question was whether the claimants had been able to prove that, had the police summoned medical assistance at an earlier stage, the intoxicated man would not have suffered the mental and physical incapacity that had resulted from brain injuries.<sup>115</sup> This question would have to be answered by reference to the medical evidence.

The next important decision in the consolidation of transformative jurisprudence is *Minister of Safety & Security v Van Duivenboden*.<sup>116</sup> There the Supreme Court of Appeal indicated that negligence is not inherently unlawful. It went on to state that negligence is regarded as

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<sup>113</sup> *Geldenhuis v Minister of Safety & Security* at 729 C-D.

<sup>114</sup> *Minister of Safety & Security v Geldenhuis*, 2004 (1) SA 515 (SCA).

<sup>115</sup> Van Reenen J held to similar effect in *Moses v Minister of Safety & Security* 2002 (3) SA 106 (CPD) where a person arrested for intoxication and violent behaviour was assaulted by cell-mates and died of injuries sustained from the assault. The trial judge had no doubt that the police were under an obligation to perform their duties and functions in a manner reasonable in the circumstances and with due regard to the fundamental rights of the person in police cell. In this instance, however, the deceased, in his state of inebriation, had been placed in a cell set aside for the detention of persons arrested for drunkenness and disorderly behaviour but there was no evidence that the police were aware of the violent nature or tendencies of his cell-mates. There was also no evidence that the 25-minute periodic inspection of the cells by the police was inadequate to prevent such occurrences. In the circumstances, the police were held not liable for the injuries suffered by the deceased and the *sequelae* thereof.

<sup>116</sup> 2002 [6] SA 431 (SCA).

unlawful, and thus actionable, only if it occurs in circumstances that the law recognises as making it unlawful. The court showed that, unlike the case of a positive act causing physical harm, which is presumed to be negligent, a negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. The court also said that, where a legal duty is recognised by the law, an omission will attract liability if the omission was also culpable according to the separate test of whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it.<sup>117</sup> The court further explained that a negligent omission is regarded as unlawful when the circumstances of the case are such that the omission not only evokes moral indignation but the “legal convictions of the community” require that it should be regarded as unlawful.<sup>118</sup> When it comes to the legal policy, the court held that the question to be determined is that which must of necessity be answered against the background of the norms and values of the particular society in which the principle is sought to be applied.<sup>119</sup>

The court indicated the role of the state *vis-à-vis* that of private citizens. It showed that private citizens might be entitled to remain passive when the constitutional rights of other citizens are threatened but the state has a positive constitutional duty, imposed by section 7 of the constitution, to act in protection of the rights in the Bill of Rights. It was further indicated that, the existence of the legal duty necessarily implies accountability. Again it showed that where the state, as represented by the persons who perform functions on its behalf, acts in conflict with its

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<sup>117</sup> *Minister of Safety and Security v Van Duivenboden* at para 12.

<sup>118</sup> *Minister of Safety and Security v Van Duivenboden* at para 13.

<sup>119</sup> *Minister of Safety and Security v Van Duivenboden* at para 10.

constitutional duty to protect the rights in the Bill of Rights, the norm of accountability must of necessity assume an important role in determining whether a legal duty ought to be recognised in a particular case.<sup>120</sup>

The court further held that the police officers who, in the exercise of their duties on behalf of the state, were in possession of the information which reflected upon the fitness of a person to possess firearms were under an actionable duty to members of the public to take reasonable steps to act on that information to avoid harm occurring.<sup>121</sup> The court went on to hold that there was no effective way of holding the state accountable other than by way of actions for damages and that in the absence of any norm or consideration of public policy outweighing it, the constitutional norm of accountability required that a legal duty be recognised. In conclusion the court held that the negligent conduct of police officers in these circumstances was accordingly actionable and the state was vicariously liable for the consequences of any such negligence.<sup>122</sup>

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<sup>120</sup> *Minister of Safety and Security v Van Duivenboden* at para 20.

<sup>121</sup> *Minister of Safety and Security v Van Duivenboden* at para 21.

<sup>122</sup> *Minister of Safety and Security v Van Duivenboden* at para 22.



## 7. The accountability aspect of transformative jurisprudence<sup>123</sup>

The reference to democracy in the constitution is often followed by references to values of openness, responsiveness and accountability.<sup>124</sup>

The Constitutional Court has held as follows in *President of the Republic of South Africa & others v South African Rugby Football Union & others*:<sup>125</sup>

‘The Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated. In the past, the lives of the majority of South Africans were almost entirely governed by labyrinthine administrative regulations which, amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs and which were implemented by a bureaucracy hostile to fundamental rights or accountability. The new Constitution envisages the role and obligations of government differently.’

In that way government officials are required to be responsive to the people they govern. Accountability means that government through its officials must explain its laws and action if required to do so and may be required to justify them. Mureinik<sup>126</sup> discusses the notion of

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<sup>123</sup> For excellent exposition: Okpaluba, C ‘The law of bureaucratic negligence in South Africa: A comparative Commonwealth perspective’ in Hugh Corder (ed) *Comparing Administrative Justice Across the Commonwealth* (2005) 117.

<sup>124</sup> Section 1(d) of the Constitution requires a multiparty system of democratic government, to ensure accountability, responsiveness and openness.

<sup>125</sup> 2000 (1) SA 1 (CC) at para 133.

<sup>126</sup> Mureinik, E ‘A Bridge to where: Introduction to the interim Bill of Rights’ (1994) 10 *SALJ* 31, 32.

accountability to include the idea of justification which requires even more. Accountability requires a willingness to make amends for any fault or error and the taking of steps to prevent recurrence in future.

Section 41(1)(c) of the constitution provides expressly that all spheres of government and all organs of state within each sphere must provide effective, transparent, accountable and coherent government for the Republic as a whole. The principle of public accountability is central to our constitutional culture and there can be no doubt that the accord of civil remedies securing observance will often play a central part in realizing our constitutional vision of open, incorrupt and responsive government.<sup>127</sup>

However, it remains an ugly fact that administrative bungling in the processing of social grants in the Eastern Cape Welfare Department<sup>128</sup>

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<sup>127</sup> *Olitzki Property Holdings v State Tender Board and Another* 2001(3) SA 1247 (SCA) at para 31.

<sup>128</sup> See generally *Mbanga v MEC for Welfare* 2001 8 BCLR 821 (SE); *Mahambehala v MEC for Welfare, Eastern Cape Provincial Government* 2001 9 BCLR 899 (SE); *Kate v MEC for the Department of Welfare Eastern Cape* 2005 (1) SA 141 (SECLD); *MEC, Department of Welfare, Eastern Cape v Kate* [2006] 2 All SA 455 (SCA); *Nomala v Permanent Secretary, Department of Welfare* 2001 8 BCLR 844 (E). See further Liebenberg, S "The value of human dignity in interpreting socio-economic rights" (2005) 21 *SAJHR* 1. Plasket, C 'Standing, welfare rights and administrative justice: *Maluleke v MEC, Health & Welfare, Northern Province*' (2000) 117 *SALJ* 647

compounded by non-compliance with courts orders<sup>129</sup> have undermined the norm of accountability. Plasket has made this point clear:<sup>130</sup>

‘Despite the fact that South Africa is a democratic state that respects human rights there are immense problems of social assistance, resulting in hardship and deprivation for many of the most vulnerable and marginalized members of society. One of the major causes of these problems is the fact that the system of social assistance was fragmented by apartheid, so that after 27 April 1994 the new national and provincial systems into one system for each of the nine provinces. The hardships that this process has visited on many poor people, as well as corruption, gross inefficiency and an often appallingly callous attitude on the part of the officials to

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<sup>129</sup> In *Jayiya v MEC for Welfare, Eastern Cape & another* 2004 (2) SA 611 (SCA) at para 17, Conradie JA stated:

‘Wholesale non-compliance with court orders is a distressing phenomenon in the Eastern Cape to try to devise ways of coming to the assistance of social welfare applicants whom the provincial government has failed.’ Another deleterious example of contempt of court in the Eastern Cape<sup>129</sup> was that in, which the Superintendent-General of the Department of Education was committed to prison for 15 days by Landman J. The committal was suspended for a period to enable the respondent to focus his mind on complying with the court’s order expeditiously. The order rescinded after he purged his contempt.’

See also Plasket, C ‘Enforcing judgments against the state’ 2003 17 *Speculum Juris* 1 and ‘Protecting the public purse: Appropriate relief and cost orders against officials’ (2000) 117 *SALJ* 151.

<sup>130</sup> Plasket, C ‘Administrative law and social assistance’ (2003) *SALJ* 494, 495. Cameron JA (as he then was) in *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government & another v Ngxuzo & others* 2001 (10) BCLR 1039 (SCA) at para 15 states: <sup>130</sup>

‘All this speaks of a contempt for people and process that does not befit an organ of government under our constitutional dispensation. It is not the function of the courts to criticize government’s decisions in the area of social policy. But when an organ of government invokes legal processes to impede the rightful claims of its citizens, it not only defies the Constitution, which commands all organs of state to be loyal to the Constitution, and requires that public administration be conducted on the basis that “people’s need must be responded to”. It also misuses the mechanisms of the law, which it is the responsibility of the courts to safeguard. The province’s approach to these proceedings was contradictory, cynical, expedient and obstructionist. It conducted the case as though it was combating were in terms of secular hierarchies and affluence and power the least in its sphere. We were told, in extenuation, that unentitled claimants were costing the province 65 million per month. That misses the point, which is the cost the province’s remedy exacted in human suffering on those who were entitled to benefits. What is more, the extravagant cost of “ghost” claimants would seem to justify the expense of imperative administrative measures to remedy the problem by singling out the bogus - something the province has failed to do. It cannot warrant unlawful action against the entitled.’

those who require social assistance, has meant that lawyers and human rights activists who are interested in seeing that proper effect is given to the socio-economic rights that form an important part of the Bill of Rights.’

The question involving accountability was brought before court in *Fair Cape Property Developers (Pty) Ltd v Premier Western Cape*.<sup>131</sup> In this judgment the court was of the view that the determination of the legal conviction of the community on which the test for wrongfulness is based must take account of the spirit, purport and objects of the Constitution. Therefore the principle of justification include the concept of accountability, namely that a public authority is accountable to the public it serves when it acts negligently and without due care. The accountability includes the recognition of legal responsibility for the consequences of certain actions<sup>132</sup>. As the judgment progressed the court held that the legal convictions of the community demanded that public authorities be held accountable for their actions. The court also mentioned that the principle of accountability was intrinsic to the legal convictions of the community, and hence to our transformed legal culture.<sup>133</sup>

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<sup>131</sup> 2000(2) SA 54 (CPD). *Faircape* was an action based on delict. The Minister’s decision on a planning scheme was nullified on review on ground of some administrative bungling. This claim was for loss incurred as a result of the Minister’s negligent performance of that duty. The trial judge had held [2000 (2) SA 44 (CPD)] that the spirit of the Constitution which envisaged open and government, could not conceive of an aggrieved citizen who could prove that a public authority’s negligence had caused him or her financial loss being left without legal recourse. But, the Supreme Court of Appeal could not find the infringement of a legal right to constitute wrongfulness and hence leading to breach of that duty and the other necessary elements that go with a finding of liability in negligence. It is true that the present system demands accountability but in determining whether the accountability of an official or member of government towards a plaintiff, it was necessary to have regard to his or her specific statutory duties, and the nature of the function involved. It would seldom be that the merely incorrect exercise of discretion would be considered to be wrongful. The enquiry into wrongfulness included a consideration of whether the legislation in question, expressly or by implication, precluded an action for damages against an official or member of government.

<sup>132</sup> *Fair Cape Property Developers (Pty) Ltd v Premier Western Cape* at 65E/F.

<sup>133</sup> *Fair Cape Property Developers (Pty) Ltd v Premier Western Cape* at 65G/I.

The question of accountability also emerged in *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail & others*. In this judgment, the first thing that the court had to consider was the relevant provisions of the constitution, in particular sections 10, 11 and 12 of the Bill of Rights read with section 7(2) and 8(1). After such considerations the court found that the rights contained in the Bill of Rights ordinarily imposed an obligation on those bound by the constitution not to act in a manner that would infringe or restrict the rights.

On the question of the right to dignity, life and security of the person the court indicated that since the judgment of *Carmichele*, the Supreme Court of Appeal has developed the principles governing the state's delictual liability in a series of cases.<sup>134</sup> In developing that approach the Supreme Court of Appeal has explicitly acknowledged that one of the considerations relevant to the question of whether a legal duty for the purpose of the law of delict exists was the constitutional value of accountability, in terms of which government and those exercising public power should be held accountable to the broader community for the exercise of their powers.<sup>135</sup>

The value of accountability was held to be asserted not only for the State, but also for all organs of state and public enterprises which would include all the respondents in this judgment. The principle that government, and organs of state, are accountable for their conduct was held as an important principle that bears on the construction of the constitutional and

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<sup>134</sup> See also *Minister of Safety & Security v Hamilton* 2004 (2) SA 216 (SCA); *Minister of Safety & Security v De Lima* 2005 (5) SA 575 (SCA); *Minister of Safety & Security v Rudman* 2005 (2) SA 680 (SCA).

<sup>135</sup> *Rail Commuters Action Group & others v Transnet Ltd t/a Metrorail & others* at para 76.

statutory obligations, as well as on the question of delictual liability.<sup>136</sup> Accordingly all respondents were found to be bearers of obligations in respect of the rights conferred by the Bill of Rights.

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<sup>136</sup>*Rail Commuters Action Group & others v Transnet Ltd t/a Metrorail & others* at para 82.

## 8. CONCLUSION

Although the utility of allowing public authorities the freedom to conduct their affairs without the threat of actions for negligence in the interest of enhancing effective government ought not to be overlooked, it must also be kept in mind that in the constitutional dispensation of this country, the state, acting through its appointed officials, is not always free to remain passive when the constitutional rights of citizens are threatened. The state is not only obliged to respect, but also to “protect, promote and fulfil the rights in the Bill of Rights”. Before the dawn of our constitution public policy played a serious role in the determination of whether liability should or should not attach.

The Constitutional Court’s pronouncements in *Carmichele* and *K* were of great assistance in ringing the bells calling the Supreme Court of Appeal and the High Court to rethink the concept of “policy” in the light of the constitutional imperative in section 39(2) of the constitution. From the decisions mentioned above it is quite apparent that the courts are leaning towards the protection of human rights against the wrongs committed by the state agencies. The question of the vicarious liability of employers for the intentional wrongs of their employees was always hampered by policy considerations in the so-called “deviation cases.” To this end, the emergence of the Constitution has brought about the opportunity to erase the obstacles of the common law considerations of public policy and imposed on the State the duty to recognise its obligations to protect its citizens against violent crimes and against gender discrimination inherent in violence against women.

It is interesting to note that the courts in South Africa differs from those in England as the English courts has on occasion declined to impose liability in delict on public authorities for the negligent performance of their functions on the ground that it would not be in the public interest as it would inhibit the proper performance of their primary functions of providing public service in the interest of the community as a whole which would result in some cases to opening the “floodgates” of litigations and resultant in limitless liability for public authorities.<sup>137</sup> The approach of our Supreme Court of Appeal in developing the legal principles governing the state’s delictual liability in respect of the constitutional obligations, particularly, relating to the right to dignity, life and freedom and security of the person should be applauded. This approach is in line with the question whether the legal duty for the purpose of the law of delict exists as the constitutional value of accountability. We must be mindful of the fact that the object of the Bill of Rights requires that those limiting the rights in the Bill of Rights should account for the limitations.

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<sup>137</sup> *Hill v Chief Constable of West Yorkshire* at 243 H-J. See also *Brooks v Commissioner of Police of the Metropolis & Others* [2005] 1 WLR 1495 (HL).



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