

**THE EXPLICIT AND IMPLICIT INFLUENCE OF REASONABLENESS ON THE
ELEMENTS OF DELICTUAL LIABILITY**

by

RAHEEL AHMED

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SUPERVISOR: Prof JC KNOBEL

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Student number: 31448534

Name: Raheel Ahmed

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Summary

Reasonableness as a concept used in determining delictual liability or liability in tort law, is either embraced or perceived by some as frustrating. It is a normative concept which is inextricably linked with the concepts of fairness, justice, equity, public policy and the values of the community. These concepts assist in providing value judgements in determining liability.

It is apparent from this study that the influence of reasonableness is predominantly implicit on the French law of delict, but more explicit on the South African law of delict and Anglo-American tort law. Its influence varies with respect to each element of tort or delictual liability. In order to hold a person liable for a delict or tort, it is only reasonable that all the elements of a delict or tort are present. Common to all the jurisdictions studied in this thesis is the idea of striking a balance between the defendant's interests promoted, the plaintiff's interests adversely affected and the interests of society. Where liability is based on fault, the reasonableness of conduct is called into question. In respect of causation whichever test or theory is used, what must ultimately be determined is whether according to the facts of the case, it is reasonable to impute liability on the defendant for the factually caused consequences. Whether loss or harm is required, assumed or not required, the question of the appropriate remedy or compensation which is reasonable under the circumstances is called into question.

In South African and Anglo-American law, the multiple uses of the standards of the reasonable person, reasonable foreseeability of harm, reasonable preventability of harm, whether it is reasonable to impose an element of liability, or whether it is reasonable to impute liability, often cause confusion and uncertainty. At times, the role of these criteria with regard to a specific element may be valid and amplified while, at other times, their role is diminished and controversial. However, there is nothing wrong with the concept of reasonableness itself; indeed, it is a necessary and useful concept in law. Rather, it is the way that it is interpreted and applied in determining liability that is problematic.

Key terms

Implicit influence of reasonableness

Explicit influence of reasonableness

Fairness

Justice

Public policy

Equality

Values and views of the community

The reasonable person

Interests

Rights

Delictual liability

Liability in tort law

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Abbreviations

A	Appellate Division
AC	Appeal Court
AD	Appellate Division
Ala	Alabama Supreme Court
Ala App	Alabama Court of Civil Appeals
Alaska	Alaska Supreme Court
ALL ER	All England Reports
ALL SA	All South African Law Reports (LexisNexis)
ALR	Australian Law Reports
Anglo-Am L Rev	Anglo-American Law Review
Ariz	Arizona Supreme Court
Ark	Arkansas Supreme Court
Ass plén	Assemblée plénière de la Cour de Cassation
ATRA	American Tort Reform Association
Aust Bar Rev	Australian Bar Review
BCLR	Butterworths Constitutional Law Reports
BG	Bophuthatswana General Division
BGH	Bundesgerichtshof (Germany)
BK	Beslote Korporasie = Closed Corporation = CC
Buff L Rev	Buffalo Law Review
B U L Rev	Boston University Law Review
Bull ass plén	Bulletin des arrêts de la Cour de cassation, assemblée plénière
Bull civ	Bulletin des arrêts de la Cour de cassation, chambres civiles
Bull crim	Bulletin des arrêts de la Cour de cassation, chambre criminelle

C	Cape Provincial Division
CA	Court of Appeal
Cal	California Supreme Court
Cal App	California Appellate Reports
Cal L	Rev California Law Review
Camb LJ	Cambridge Law Journal
Can Bar Rev	Canadian Bar Review
CC	Closed Corporation
CC	Constitutional Court
CC	<i>French Civil Code</i>
CE	Conseil d'État
Ch	Official Law Reports (Chancery Division)
Chi Kent L Rev	Chicago-Kent Law Review
Ch mixte	Chambre mixte de la Cour de cassation
Ch réun	Chambres réunies de la Cour de cassation
CILSA	Comparative and International Law Journal of Southern Africa
Civ	Cour de cassation (chambre civile)
CJPH	Canadian Journal of Philosophy
Clev St L Rev	Cleveland State Law Review
CLJ	Cambridge Law Journal
CLP	Current Legal Problems
Colo	Colorado Supreme Court
Colo App	Colorado Court of Appeals
Colum L Rev	Columbia Law Review
Com	Chambre commerciale de la Cour de cassation
Conn	Connecticut Supreme Court

Crim	Chambre criminelle de la Cour de cassation
D	Durban and Coast Local Division
D	Recueil Dalloz et Sirey
DC	Recueil critique Dalloz
DC	District of Columbia Court of Appeals
Del	Delaware Supreme Court
Del Ch	Delaware Court of Chancery
DP	Recueil périodique et critique Dalloz
E	Eastern Cape Division
ER	English Reports
F	Federal Reporter
Fam LQ	Family Law Quarterly
Fla	Florida Supreme Court
Fla Dist Ct App	Florida District Court of Appeal
Fla L Rev	Florida Law Review
F Supp	Federal Supplement
Ga	Georgia Supreme Court
Ga App	Georgia Appellate Reports
Ga L Rev	Georgia Law Review
Gaz Pal	Gazette du Palais
GP	North Gauteng High Court, Pretoria
GNP	Gauteng North High Court, Pretoria
GSJ	Gauteng South High Court, Johannesburg
Hastings LJ	Hastings Law Journal
Harv L Rev	Harvard Law Review
Haw	Hawaii Supreme Court
Haw App	Hawaii Appellate Reports

Idaho	Idaho Supreme Court
Ill	Illinois Supreme Court
Ill App	Illinois Appellate Reports
Ind	Indiana Supreme Court
Ind App	Indiana Appellate Reports
International Rev L & Econ	International Review for Law & Economics
Iowa	Iowa Supreme Court
JA	Judge of Appeal
JCLS	Journal of Civil Law Studies
JETL	Journal of European Tort Law
J Law & Econ	Journal of Law & Economics
J Leg Studies	Journal of Legal Studies
J Marshall L Rev	John Marshall Law Review
Kan	Kansas Supreme Court
Kan App	Kansas Appellate Reports
Kan L Rev	Kansas Law Review
Ky	Kentucky Supreme Court
Ky LJ	Kentucky Law Journal
KZD	KwaZulu-Natal High Court, Durban
La	Louisiana Supreme Court
La App	Louisiana Appellate Reports
La L Rev	Louisiana Law Review
L Ed	United States Supreme Court Reports, Lawyer's Edition
Loy LA L Rev	Loyola of Los Angeles Law Review
LQR	Law Quarterly Review
LS	Legal Studies

Marq L Rev	Marquette Law Review
Mass	Massachusetts Supreme Judicial Court
Md	Maryland Supreme Court
Me	Maine Supreme Court
MEC	Member of Executive Committee
Mem L Rev	University of Memphis Law Review
Mich	Michigan Supreme Court
Mich App	Michigan Appellate Reports
Mich L Rev	Michigan Law Review
Minn	Minnesota Supreme Court
Minn Ct App	Minnesota Court of Appeals
Minn L Rev	Minnesota Law Review
Miss	Mississippi Supreme Court
MLR	Modern Law Review
Mo	Missouri Supreme Court
Mo App	Missouri Appellate Reports
Mont	Montana Supreme Court
N	Natal Provincial Division
NBR	New Brunswick Reports
NC	North Carolina Supreme Court
NC App	North Carolina Appellate Reports
NC L Rev	North Carolina Law Review
ND	North Dakota Supreme Court
NDLR	North Dakota Law Review
NE	North Eastern Reporter
Neb	Nebraska Supreme Court
Neb L Bull	Nebraska Law Bulletin

Nev	Nevada Supreme Court
NH	New Hampshire Supreme Court
NJ	New Jersey Supreme Court
NM	New Mexico Supreme Court
No Ky L Rev	Northern Kentucky Law Review
Notre Dame L Rev	Notre Dame Law Review
NY	New York Reports
NY CPLR 2012	New York Civil Practice Law & Rules section 4545 2012
NYS	New York Supplement
NY Sup Ct	New York Supreme Court Reports
NYU LR	New York University Law Review
O	Orange Free State Provincial Division
Ohio	Ohio Supreme Courts
Ohio Ct App	Ohio Court of Appeals
OJLS	Oxford Journal of Legal Studies
Okla	Oklahoma Supreme Court
Or	Oregon Supreme Court
P	Law Reports, Probate Division (UK)
Pa	Pennsylvania Supreme Court
Pa B A Q	Pennsylvania Bar Association Quarterly
Pa Super Ct	Pennsylvania Superior Court
PER	Potchefstroomse Elektroniese Regstydskrif = Potchefstroom Electronic Law Journal
Proc	Proclamation
QB	Queen's Bench
RA	Rhodesia, Appellate Division
RAF	Road Accident Fund

Rev Direito	Revista Direito (Portugal)
RI	Rhode Island Supreme Court
RIDA	Revue Internationale des Droits de l'Antiquité
RTD civ	Revue trimestrielle de droit civil
RTD pub	Revue trimestrielle de droit public
RTR	Road Traffic Reports (England)
SA	South African Law Reports
SAAMCO	South Australia Asset Management Corporation
SACR	South African Criminal Reports
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SC	Supreme Court
SC	South Carolina Supreme Court
SCA	Supreme Court of Appeal
S Ct	Supreme Court Reporter
SD	South Dakota Supreme Court
South Cal L Rev	Southern California Law Review
SE	South Eastern
SMU L Rev	Southern Methodist University Law Review
Soc	Chambre sociale de la Cour de cassation
Stan L Rev	Stanford Law Review
SWA	South West Africa (now Namibia)
T	Transvaal Provincial Division
t/a	trading as
TC	Tribunal des Conflits
Tenn	Tennessee Supreme Court
Tenn Ct App	Tennessee Appellate Reports

Tenn L Rev	Tennessee Law Review
Tex	Texas Supreme Court
Tex App	Texas Court of Appeals
Tex L Rev	Texas Law Review
TGI	Tribunal de grande instance
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TIL	Theoretical Inquiries in Law
TPD	Transvaal Provincial Division
Tk	Transkei
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UCLA L Rev	UCLA Law Review
U Chic L Rev	University of Chicago Law Review
U Ill L Rev	University of Illinois Law Review
UNSW LJ	University of New South Wales Law Journal
U Pa L Rev	University of Pennsylvania Law Review
UP	University Press
US	United States Reports
Utah	Utah Supreme Court
Va L Rev	Virginia Law Review
V and L Rev	Vanderbilt Law Review
Vt	Vermont Supreme Court
W	Witwatersrand Local Division
WALR	Western Australia Law Reports
Wash	Washington Supreme Court
Wash App	Washington Appellate Reports
Wash & Lee L Rev	Washington & Lee Law Review
WCC	Western Cape High Court, Cape Town

WGHC	Western Cape High Court, Cape Town
Wis	Wisconsin Supreme Courts
Wis L Rev	Wisconsin Law Review
WLR	Weekly Law Reports
W Va	West Virginia Supreme Court of Appeals
Wm & Mary L Rev	William & Mary Law Review
Wyo	Wyoming Supreme Court
Yale LJ	Yale Law Journal
ZS	Zimbabwe Supreme Court

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Chapter 1: Introduction

“Although torts traditionally may emphasize justice or fairness far more than policy or utility, the two goals are in harmony in many cases. It is just that the wrongdoer must pay compensation for his wrong, and it is also good policy to deter wrongdoing. When policy goals are at odds with justice to individuals, different views have been advanced, and courts have sometimes emphasized justice, sometimes policy. For lawyers arguing cases, the question is not likely to be whether judges must wholly exclude policy or wholly exclude justice. Instead, advocacy requires lawyers to show judges why one approach or the other is most appropriate for the particular case. In that respect, at least, the particular individuals before the court with their complaints and defences can be heard.”¹

1. Background

Generally, in South African law, it is reasonable to hold a person liable in delict for damage sustained only if all the elements of a delict have been established.² The elements of a delict include: conduct, in the form of an omission or commission; wrongfulness; fault;³ causation; and harm, also referred to as “loss” or “damage”. Furthermore, cognisance must be taken of the values enshrined in our Constitution,⁴ which is the supreme law in South Africa and pertinent to the law of delict.⁵ Particular attention must be given to the Bill of Rights contained in Chapter 2.

As will be shown in this thesis,⁶ the implicit influence of reasonableness in the South African law of delict is evident in establishing: conduct,⁷ fault in the form of intention,⁸ and factual causation.⁹ The concept of reasonableness influences the applicability

¹ Dobbs, Hayden and Bublick *Hornbook on torts* 19.

² Neethling and Potgieter *Delict* 4, 79.

³ There are exceptions, for example, in cases of strict liability where fault is not a requirement. This includes damage caused by animals, vicarious liability and strict liability imposed by legislation. See in general Neethling and Potgieter *Delict* 379-402; chapter 3 para 1.

⁴ The Constitution of the Republic of South Africa, 1996.

⁵ *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) 444. In *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 953-954, the Constitutional Court referred to the judiciary's duty to develop the common law in line with the spirit, purport and object of the Bill of rights. See also *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) 396-397; *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* 2000 2 SA 54 (C) 65 in respect of the *boni mores* test for wrongfulness; Neethling 2002 *SALJ* 286 who specifically refers to the indirect application of the Bill of Rights in regard to “the *boni mores* test for wrongfulness and the reasonable person test for negligence”; *K v Minister of Safety and Security* 2005 6 SA 419 (CC) 428; Neethling and Potgieter *Delict* 17; Van der Walt and Midgley *Delict* 18.

⁶ In chapter 3.

⁷ See chapter 3 para 2.

⁸ See chapter 3 para 4.2.

⁹ See chapter 3 para 5.1.

of automatism as a defence negating conduct. In respect of factual causation, the influence of reasonableness is implicit, insofar as it is reasonable to hold a wrongdoer delictually liable only if the damage sustained was factually caused by the wrongdoer's conduct. Reasonableness plays a more explicit role in determining whether the plaintiff is entitled to compensation for the damages sustained and in assessing the plaintiff's loss.

It will be shown that the explicit influence of reasonableness¹⁰ is evident in determining: wrongfulness;¹¹ fault in the form of negligence;¹² legal causation¹³ and harm¹⁴ sustained.

To some extent, there is confusion and uncertainty in general on the role of reasonableness in determining: delictual liability; the elements of delictual liability; and the tests for determining these elements. Confusion and uncertainty have occurred, in particular, where the influence of reasonableness is explicit, in respect of wrongfulness, negligence, and legal causation. The main reason for this stems from the fact that these elements involve value judgements and policy considerations, which in turn play a role in determining delictual liability. To a certain degree, the tests for determining these elements, as well as the elements themselves, have been conflated.¹⁵ The courts have used the concept of reasonableness as a safety net and as a tool to bring about fair and just outcomes.

The concept of reasonableness, although distinct, is also interrelated with the concepts of fairness, equity, justice, public policy and the *boni mores* in South African law.¹⁶ The influence of reasonableness on the law of delict is thus important, multifaceted and complex. As a result of the recent trend of the courts in determining wrongfulness; the role of reasonableness, particularly in some key elements of

¹⁰ In chapter 3.

¹¹ See chapter 3 para 3.

¹² See chapter 3 para 4.3.

¹³ See chapter 3 para 5.2.

¹⁴ See chapter 3 para 6.

¹⁵ See chapter 3 para 4.4.

¹⁶ See *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 2 SA 520 (W) 528-529; *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 1 SA 645 (A) 652 with regard to wrongfulness; *S v Mokgethi* 1990 1 SA 32 (A) 40-41 with regard to legal causation; chapter 2 paras 3.1-3.3.

delictual liability, namely, wrongfulness, fault in the form of negligence and legal causation has become rather controversial. For this reason there is a need to clarify the role of reasonableness in respect of the delictual elements, in order to bring about certainty.

2. Purpose of the study

The purpose of this study is to analyse the explicit and implicit influence of reasonableness on the elements of delictual liability. In light of the fact that reasonableness is an important concept, which influences the determination of the existence of the elements that may lead to delictual liability, it is necessary to analyse the extent to which reasonableness influences delictual or tort liability in some foreign jurisdictions. After such an analysis, recommendations can then be made on how to bring about clarity and certainty on the influence of reasonableness on the elements of delictual liability in South Africa.

3. Research methodology

The research will be based on a study of the relevant literature, including case law and legislation. The study will entail a critical analysis of the South African literature as well as a comparative study of the explicit and implicit influence of reasonableness on tort liability in the United Kingdom, tort liability in the United States of America, and delictual liability in France. The United States of America and the United Kingdom represent the common law family,¹⁷ while France represents the civil law family.¹⁸ For ease of reference, when referring to law in the United States of America and law in the United Kingdom, the terms English law and American law respectively will be used.

¹⁷ Common law is based on case law that has developed over time. Adjudicators refer to prior existing decisions. English and American law is based on common law and therefore form part of the common law family. See Zweigert and Kötz *Comparative law* 41, 69.

¹⁸ In respect of the civil law tradition, the law ruling the jurisdiction is codified. Adjudicators need not refer to prior existing decisions but refer to the codified law. In France, the adjudicators refer to the French Civil Code of 1804 and therefore French law, like German law (the *Bürgerliches Gesetzbuch* – the Civil Code of Germany) forms part of the civil law family. See Zweigert and Kötz *Comparative law* 69, 74, 143-144.

The reason for choosing English law in the study is that English law has influenced South African law.¹⁹ English law has also influenced American law. During the English colonial expansion, the common law spread throughout Africa and America. However, since the United States of America declared its independence from Britain in 1776, its law has undergone change, particularly due to the adoption of a written constitution.²⁰ Social and economic development in the United States of America has also influenced the development of law.²¹ Pound, the founder of sociological jurisprudence in America, saw the legal system as a system which interacts with society's ever changing political, economic and social circumstances. He was of the view that law teachers should be well versed in sociology, politics and economics. This tradition was been carried forward and developed further.²² For this reason many American judgments and contributions of American academic writers reflect sociological jurisprudence.²³ This is evident, particularly with regard to the aims of tort law and the determination of negligence in American tort law.²⁴ Zweigert and Kötz²⁵ point out that even though American law is based on English law, it has developed its own style and it would be a mistake not to include it in a comparative study. The mix of English and American law is commonly referred to as Anglo-American law. This term will also be used in this thesis when referring to English and American law.

Roman-Dutch law was introduced to South Africa by the Dutch during the seventeenth century.²⁶ The South African law of delict is therefore a mix of English common law and Roman-Dutch law.²⁷ The South African civil law of procedure was adopted from English law, hence the adoption of the precedent system in South Africa.²⁸ Whenever Roman-Dutch law was unclear or insufficient, the courts would

¹⁹ See Hahlo and Khan *The South African legal system* 575-578.

²⁰ U.S. Const. The constitution encompasses basic rights which generally cannot be infringed by the legislature, the executive or the judiciary. The country also has a federal structure. See Zweigert and Kötz *Comparative law* 219, 239.

²¹ Zweigert and Kötz *Comparative law* 239.

²² Zweigert and Kötz *Comparative law* 247.

²³ Zweigert and Kötz *Comparative law* 249.

²⁴ See chapter 2 paras 1-3; chapter 5 paras 1 and 3.

²⁵ *Comparative law* 41.

²⁶ Zweigert and Kötz *Comparative law* 231.

²⁷ Zweigert and Kötz *Comparative law* 231.

²⁸ Zweigert and Kötz *Comparative law* 232.

refer to English case law.²⁹ After Anglicisation came to a halt in South Africa in 1910, the courts in South Africa paid particular attention to Roman-Dutch law sources.³⁰ It is for this reason, coupled with South Africa's adoption of a written constitution³¹ and recognition of the applicability of South African customary law,³² that South African law is now referred to as a hybrid system or mixed jurisdiction.³³

French law stems from the Romanistic legal family within the greater civil law tradition.³⁴ France and the United Kingdom have produced two major legal systems of the world, both of which have influenced many other legal systems.³⁵ For this reason, French law, as one of the most influential systems in the civil law tradition, is a good choice for comparative research in addition to English and American law. This choice of jurisdictions should produce insights from a variety of perspectives in respect of the chosen field of study.

Like Roman law, the common law of torts initially developed with specific categories of liability, but on the continent, a general approach in determining liability was followed.³⁶ This general approach is followed in South African³⁷ and French law.³⁸ The Anglo-American law kept to the tradition of separate torts which was developed under the writ system.³⁹ Each separate tort is independent with its own elements, possible defences, and protects particular interests.⁴⁰

²⁹ Zweigert and Kötz *Comparative law* 233.

³⁰ Zweigert and Kötz *Comparative law* 234.

³¹ The Constitution of the Republic of South Africa, 1996.

³² Provided it is consistent with the constitutional provisions and has not been affected by legislation. See ss 211 and 13(2) of the Constitution of the Republic of South Africa, 1996; *S v Makwanyane* 1995 6 BCLR 665 (CC) [365]-[383]; Van der Walt and Midgley *Delict* 30 fn 3-5; Himonga and Nhlapo (eds) *African customary law* 45-46.

³³ Zweigert and Kötz *Comparative law* 72, 235.

³⁴ Zweigert and Kötz *Comparative law* 41, 74.

³⁵ Van Dam *European tort law* 9. The French Civil Code of 1804 was the basis for civil law in Italy, Belgium, Luxembourg, Netherlands, Poland, Spain, Portugal and some African countries. See Van Dam *European tort law* 52; Van Gerven, Lever and Larouche *Tort* 5; chapter 6 para 1.

³⁶ See Zweigert and Kötz *Comparative law* 605.

³⁷ See chapter 3.

³⁸ See chapter 6.

³⁹ Zweigert and Kötz *Comparative law* 605.

⁴⁰ Zweigert and Kötz *Comparative law* 605.

South African, English and American law follow the precedent system due to the common law influence on the law of civil procedure. Thus adjudicators⁴¹ decide on: whether a delict or tort was committed; whether a defence is applicable in limiting or excluding liability; and the amount of compensation that should be awarded to the plaintiff. Constitutions, legislation, international treaties and conventions, in conjunction with the common law may play a role in determining delictual liability or liability in tort law.⁴² The French law of delict is based primarily on the French Civil Code of 1804. The precedent system is not followed in the French law of civil procedure.⁴³ Thus French adjudicators need not refer to prior decisions.

4. Scope of study and outline of chapters

To begin with, the research is based on private law, and more specifically the law of delict or tort law. There is much to be written on the influence of reasonableness in the law of delict or tort law. In trying to limit the scope and provide reasonable parameters, the following should be noted:

(a) Parameters

The discussion of South African law will deal mainly with the five elements of delictual liability, that is: conduct; wrongfulness; fault; causation; and harm. Generally, liability for the infringement of personality interests or rights will not be discussed except for liability for the infringement of body and physical liberty. Wrongful conception, wrongful birth and wrongful life claims will also be discussed. Due to the fact that English and American tort law differentiates between many intentional torts and the tort of negligence, some intentional torts will be considered in order to compare the influence of reasonableness on intention. The torts of trespass to the person were chosen. The torts of trespass to the person include: the tort of battery; the tort of assault; and the tort of false imprisonment. For this reason, liability for the infringement of body and physical liberty will be discussed briefly

⁴¹ In the United States of America where a jury is appointed, the jury is regarded as the trier of facts. This will be discussed further in chapter 5.

⁴² See Dobbs, Hayden and Bublick *Hornbook on torts* 3 with reference to English and American law.

⁴³ See Borghetti 2012 *JETL* 180; Van Dam *European tort law* 55; chapter 6 para 1.

under South African law. In Anglo-American law, under the tort of negligence, specific categories of duties are recognised for *inter alia*: omissions; psychiatric injury or mental harm; pure economic loss; wrongful conception, wrongful birth and wrongful life.⁴⁴ American law *inter alia* also recognises the duty owed by health care providers as a specific duty category. For this reason, liability for pure economic loss, psychiatric injury, wrongful conception, wrongful birth, and wrongful life claims under South African law, as well as their equivalents in the other chosen legal systems, will be discussed.

Although the influence of reasonableness on harm will be discussed under all the jurisdictions in a general manner, the principles of assessment and the quantification of damages, which fall within the domain of the law of damages, will not be discussed in detail. Strict liability (liability without fault) will not be discussed under American, English, and South African law save to outline the ambit in which it applies and the reasons for applying strict liability. In French law, delictual liability is predominantly governed by strict liability rules and for this reason both foundations of liability will be discussed in French law.

(b) Outline of chapters

Chapter 2 will briefly refer to the historical development of the concept of reasonableness from a legal-philosophical perspective. The definition of reasonableness within the context of the law of delict or tort law will be discussed. The standard of the “reasonable person”, which is applied in all the jurisdictions discussed in this thesis, will be referred to briefly. Due to the fact that reasonableness is related to the concepts of equity, fairness, justice, public policy and the *boni mores* in South African law, it is necessary to briefly refer to their interrelatedness. This will be discussed at the end of chapter 2.

⁴⁴ Wrongful conception, wrongful birth and wrongful life claims are in general controversial. In this thesis these claims will only be referred to very briefly. The focus will be on whether the claims are allowed in delict or tort law and the types of damages that may be awarded in relation to the influence of reasonableness.

Chapter 3 will provide an analysis of the explicit and implicit influence of reasonableness on the South African law of delict. In chapter 4, the explicit and implicit influence of reasonableness on the torts of trespass to the person and the tort of negligence in English law will be analysed. Chapter 5 will provide an analysis of the explicit and implicit influence of reasonableness on the torts of trespass to the person and the tort of negligence in American law. In chapter 6, the explicit and implicit influence of reasonableness on the French law of delict will be considered. Finally, chapter 7 will provide a summary of the findings as well as recommendations, taking into account insights from legal philosophy and the comparative studies undertaken. A conclusion will be provided at the end of the thesis.

5. Gender, terminology and definitions used in this thesis

In this thesis the masculine gender is used only for the sake of simplicity and convenience. Gender discrimination is not intended.

South African civil law, like some other civil law systems found on the European continent whose civil law was influenced by Roman law, make use of the word “delict” and the “law of delict” when referring to a “civil wrong”⁴⁵ or the “law of civil wrongs” respectively. The word “tort”, an Anglo-French⁴⁶ word of Latin origin,⁴⁷ is synonymous with the word “delict” referring to a “civil wrong”.⁴⁸ It is used by certain legal systems which were influenced by English law.⁴⁹ In this thesis, the words “tort” and “delict” are essentially used as synonyms and the jurisdictional context determines which one of them is used in any given part of the text.

In this thesis, the words: “defendant”; “wrongdoer”; “offender”; and “tortfeasor” are also used interchangeably in referring to the person who allegedly committed the

⁴⁵ See Van der Walt and Midgley *Delict* 1; Burchell *Delict* 1.

⁴⁶ Lunney and Oliphant *Tort* 1.

⁴⁷ “Tort”, (derived from the Latin word “*tortum*”) and “wrong” (originating from the English word “*wrung*”) were initially synonymous, meaning conduct which is “crooked or twisted” and departing from the norm as opposed to conduct which is “straight or right (*rectum*)” – Heuston and Buckley *Salmond and Heuston on the law of torts* 13 fn 50. See also Dobbs, Hayden and Bublick *Hornbook on torts* 4.

⁴⁸ Heuston and Buckley *Salmond and Heuston on the law of torts* 12.

⁴⁹ See Loubser and Midgley (eds) *Delict* 5 fn 2; Burchell *Delict* 1.

delict or tort. The words: “plaintiff”; “claimant”;⁵⁰ “victim”, “injured person”; and “wronged person” are used interchangeably in referring to the person who has allegedly suffered harm, loss or damage, as a result of an alleged delict or tort committed against him.

The word “explicit”, according to the Oxford dictionary,⁵¹ means “[s]tated clearly and in detail, leaving no room for confusion or doubt”. The word explicit will be used in this sense in this thesis.

The word “implicit”, according to the Oxford dictionary,⁵² means “[s]uggested though not directly expressed”. The word implicit will be used in this sense in this thesis.

⁵⁰ In the English law of torts, the Civil Procedure (Amendment) Rules 1999, replaced the term “plaintiff” with the word “claimant”, so currently the term “claimant” is used instead of the term “plaintiff”.

⁵¹ See <https://en.oxforddictionaries.com/definition/explicit> (Date of use: 17 September 2017).

⁵² See <https://en.oxforddictionaries.com/definition/implicit> (Date of use: 17 September 2017).

Chapter 2: Concepts

“The law’s use of the terms ‘reasonable’ and ‘unreasonable’ are legion and notorious. Indeed, the law’s seemingly carefree attitude in throwing around these terms has often served Legal Realists and their descendants while in their effort to depict legal language as simply a shell through which actors exercise the widest sort of discretion to select their favoured outcomes or policies. Conversely, ambitious agendas from philosophers and economists have often found that ‘reasonableness’ provides a readily available anchor in the positive law for their normative theories. Work by moral and political philosophers devoted to analyzing ‘the reasonable’ and work by economists, decision theorists, and game theorists on rationality understandably turn the law’s use of ‘reasonableness’ into a magnet for legal theory. In these respects, ‘reasonableness’ might be seen as the third ‘r’ of legal theory. Like ‘rights’ and ‘responsibility,’ ‘reasonableness’ is beloved by legal theorists and equally beloved by the sceptics who spend their time skewering those theorists.”¹

1. Historical development of the concept “reasonableness”

Before considering the explicit and implicit influence of reasonableness on the elements of delictual or tort liability, it is necessary to briefly: consider the historical development of the concept;² explain the concept reasonableness; explain the concept of the “reasonable person”; and explain the concepts which are closely linked to the concept reasonableness.

Historically, the concept reasonableness developed gradually over time under the shadow of the concept of “justice”. It became a well-known, independent concept when it was propagated by the contemporary American philosopher Rawls in the 1990s. Thus, in order to trace its historical development, it is necessary to trace the development of the concept of “justice” which emerged in ancient Greece.

In ancient Greece, the poet Homer referred to the “just person”.³ Plato, the Greek philosopher and student of Socrates, believed in the four fundamental moral virtues, namely: wisdom or prudence; courage; temperance or self-control; and justice.⁴ Aristotle, the Greek philosopher and student of Plato, was of the opinion that justice

¹ Zipursky 2015 *U Pa L Rev* 2132.

² There is much to be said about the historical, philosophical and political development of the concept “reasonableness” which would require a study on its own. For the purposes of this study a few philosophers’ theories will very briefly be mentioned in order to trace its development.

³ Pomerleau <http://www.iep.utm.edu/justwest> (date of use: 18 September 2017).

⁴ See in general Tarnass *The passion of the western mind* 16-45 with regard to Plato.

required proportional equality. According to Aristotle, distributive justice involved dividing both burdens and benefits equally amongst equal members of society. On the other hand, corrective justice was aimed at restoring a fair balance between interpersonal relations of members where such balance was lost.⁵

The early Christian philosopher, Augustine, embraced Plato's view of the four fundamental moral virtues which became known as the "cardinal virtues". Justice was viewed simply as giving a person what was due to him. A just society was one where no person harmed another. Instead, a person must try to help other members of society if possible. Augustine was of the view that if man's law violates the natural law of God, it is not morally binding on a person and may even be disobeyed.⁶

Aquinas, the medieval Christian philosopher, also embraced the cardinal virtues. In respect of justice, he drew from Aristotle's idea of proportional equality. According to Aquinas, the virtue of justice meant that a person must respect the rights of others. He supported Augustine's view that man's law must not contravene the natural law.⁷ The golden rule, a principle of natural law, is to not do to others that which you would not want them to do to you.⁸ Natural law is given content by conclusions based on practical reasonableness.⁹ Thus, natural law allows a person to infringe another's right under certain circumstances which may be justified and reasonable. Looking at the example of self-defence, Aquinas was a proponent of the view that in such instances, the self-defensive action must be reasonable and in proportion to the actions of the attacker under the circumstances. Reasonable conduct is natural and in accordance with the nature of things.¹⁰ Aquinas's theory of justice is a blend of Aristotle's and Augustine's.¹¹

Hobbes, the English philosopher, believed in Socrates' social contract theory, in that a person's moral and or political obligations are dependent upon a reciprocal

⁵ Pomerleau <http://www.iep.utm.edu/justwest> (Date of use: 18 September 2017). See also Wells 1990 *Mich L Rev* 2350.

⁶ Pomerleau <http://www.iep.utm.edu/justwest> (Date of use: 18 September 2017).

⁷ Natural law could be known to man through reason and rationalism, but divine law could not. See Pomerleau <http://www.iep.utm.edu/justwest> (Date of use: 18 September 2017).

⁸ Viola 2002 *Yearbook of legal hermeneutics* 105, 109.

⁹ Viola 2002 *Yearbook of legal hermeneutics* 91

¹⁰ Viola 2002 *Yearbook of legal hermeneutics* 96.

¹¹ Pomerleau <http://www.iep.utm.edu/justwest> (Date of use: 18 September 2017).

agreement which forms the basis of society. He believed that rights were not naturally attained, but were determined and given by a sovereign ruler. He further believed that laws were required to codify rules of justice as people could not be trusted to honour their social agreements unless they were being forced to do so. According to Hobbes, the law of justice forces us to obey positive laws of the state and any deliberate violation of such law is considered a crime, subject to punishment.¹²

The early modern English philosopher, Locke, did not provide a general theory of justice. His greatest contribution lay in the idea of natural rights to property, consisting of one's estate, life and liberty.¹³ Hume, the Scottish philosopher, was of the opinion that the basic requirements of justice lead to the promotion of the welfare of society. He believed that our approval of just conduct is based on reason and reflection.¹⁴ To Hume, rules of justice include protecting one's proprietary rights, which are not absolute and subject to limitations. The individual's sense of justice stems from a combination of self-interest and sympathy towards others. Hume explained that moral sentiment varies from person to person, but there is common ground among humans with regard to moral attitudes.¹⁵ Hume is regarded as the most significant expounder of the naturalistic theory.¹⁶

Kant, the modern German philosopher, believed that the reason we should do what is right is because it's the right thing to do,¹⁷ and this has nothing to do with good consequences.¹⁸ He introduced the deontological theory; the study of duties, rights and obligations.¹⁹ He propounded the test that: a person "ought to do" what is reasonably right and must be able to distinguish between right and wrong (accountability).²⁰ This is thought to be the essence of reasonableness.²¹ Thus, a

¹² Pomerleau <http://www.iep.utm.edu/justwest> (Date of use: 18 September 2017).

¹³ Pomerleau <http://www.iep.utm.edu/justwest> (Date of use: 18 September 2017). See also Zipursky 2004 *Fordham L Rev* 1925.

¹⁴ Wells 1990 *Mich L Rev* 2400.

¹⁵ Hume *Human nature* 575-576 referred to by Wells 1990 *Mich L Rev* 2399. Cf Sibley 1953 *Philosophical Rev* 558.

¹⁶ Wells 1990 *Mich L Rev* 2396.

¹⁷ Fletcher 1985 *Harv L Rev* 961.

¹⁸ Pomerleau <http://www.iep.utm.edu/justwest> (Date of use: 18 September 2017).

¹⁹ Pomerleau <http://www.iep.utm.edu/justwest> (Date of use: 18 September 2017).

²⁰ Pomerleau <http://www.iep.utm.edu/justwest> (Date of use: 18 September 2017). The concept of "accountability" has been adopted in South African law, see chapter 3 para 4.1.

²¹ Sibley 1953 *Philosophical Rev* 558.

person has a duty to respect others, and, as moral rational beings, people should try to act in such a way that it is reasonably possible to lay down the law for a moral state.²² Kant made reference to the duties of justice and duties of merit. To him justice was entwined with obligations that one was required to comply with, thus there is a duty to punish those who are guilty.²³ Kant referred to three rules: that a person should be just in his dealing with others; a person should avoid being unjust to others, even if it meant that he should avoid associating with a disagreeable person altogether; and if he cannot avoid associating with such person he should, at the very least, try to respect them.²⁴ Fairness and corrective justice are deontological principles. An actor who commits wrongful conduct violates rights.²⁵ Rawls, Dworkin and Ripstein (discussed below) drew from Kant's theory of rights.²⁶

Mill, the modern English philosopher, was a supporter of the views of Bentham (another modern English philosopher). Bentham proposed the principle of "utility", later called the "greatest happiness principle"²⁷ and referred to five aspects of justice.²⁸ They were: that respect for others' legal rights is just, while violating them is unjust; respect for the moral right someone has to something is just, while disrespecting that right is unjust; it is just to give a person what he deserves, while it is unjust not to do so; it is just to keep trust in others, while it is unjust to lose trust in them; in certain instances it is just to be impartial, while in some instances it is unjust to be partial.²⁹ Bentham advocated deterrence and criminal sanction as a means of enhancing happiness.³⁰ According to Mill, a person could legitimately interfere with another person's freedom to act in order to protect himself. Furthermore, force could be justifiably used against another in trying to prevent such person from harming others.³¹ Mill rejected the idea of equality as being an indispensable component to

²² Pomerleau <http://www.iep.utm.edu/justwest> (Date of use: 18 September 2017). See Viola 2002 *Yearbook of legal hermeneutics* 104 who disagrees with Kant's ideas of cognitive demands.

²³ Kant *Metaphysical elements of justice* 102. See Fletcher 1985 *Harv L Rev* 963.

²⁴ Pomerleau <http://www.iep.utm.edu/justwest> (Date of use: 18 September 2017). See also Fletcher 1985 *Harv L Rev* 965-966.

²⁵ Simons 2008 *Loy LA L Rev* 1183.

²⁶ Zipursky 2004 *Fordham L Rev* 1926

²⁷ According to the happiness principle, in order to evaluate what is right and wrong, the greatest happiness of the greatest number of people must be considered.

²⁸ Pomerleau <http://www.iep.utm.edu/justwest> (Date of use: 18 September 2017).

²⁹ Pomerleau <http://www.iep.utm.edu/justwest> (Date of use: 18 September 2017).

³⁰ Schwartz 1997 *Tex L Rev* 1832.

³¹ Pomerleau <http://www.iep.utm.edu/justwest> (Date of use: 18 September 2017).

understanding justice. To Mill, justice embodied moral requirements which were the most important social utility.³²

Hart,³³ the contemporary English philosopher and supporter of the legal positivist theory,³⁴ submits that there are primary and secondary rules of law. The primary basic duty imposes rules that demarcate what one is required to do, or refrain from doing.³⁵ The primary rules interact with the secondary rules, which are dependent on the primary rules, and confer powers whether in a public or private setting – this is, according to Hart, the essence of law.³⁶ The secondary rules may authorise: the introduction of new primary rules; the abolition or modification of existing rules; or regulation of the primary rules.³⁷ The criteria used to establish the primary rules include reference to legislation, authoritative texts, customary practices or case law.³⁸ More weight may be attached to, for example, legislation than to customary practices.³⁹ Starr⁴⁰ with reference to Hart's views explains that the secondary rule which confers power on the adjudicator, allows the adjudicator to sanction the violation of a primary rule. The interaction between the primary rules and secondary rules with the "ultimate rule of recognition" whereby one supreme rule governs validity over all rules is the essence of law. Starr⁴¹ refers to Hart's "ultimate rule of recognition" within the context of English law where "what the Queen in parliament enacts is law". The "ultimate rule of recognition" may be equated with a constitution.⁴² Starr⁴³ submits that Hart believes that law and morality are closely linked. Hart⁴⁴ refers to the words "should", "ought", "must", "right" and "wrong" when judging conduct. However, Hart is

³² Pomerleau <http://www.iep.utm.edu/justwest> (Date of use: 18 September 2017).

³³ *Concept of law* 151. See Starr 1984 *Marq L Rev* 675.

³⁴ The positive law theory insists on referring to existing law whether in terms of legislation, case Law, etcetera, not natural law or morality. See explanation by Wells 1990 *Mich L Rev* 2361; Himonga and Nhlapo (eds) *African customary law* 41. Bentham and Mill also supported legal positivism over natural law theories supported by Aquinas, Locke, Hume and Kant.

³⁵ For example, a person may not trespass or exceed the speed limit. See Hart *Concept of law* 91, 93; Starr 1984 *Marq L Rev* 676.

³⁶ Hart *Concept of law* 151. See Starr 1984 *Marq L Rev* 675.

³⁷ Hart *Concept of law* 78-79. See Starr 1984 *Marq L Rev* 676.

³⁸ Hart *Concept of law* 97. See Starr 1984 *Marq L Rev* 677.

³⁹ Hart *Concept of law* 92-93. See Starr 1984 *Marq L Rev* 677.

⁴⁰ 1984 *Marq L Rev* 678.

⁴¹ 1984 *Marq L Rev* 678.

⁴² See Himonga and Nhlapo (eds) *African customary law* 42, 47 who refer to the Constitution of the Republic of South Africa, 1996 as the rule of recognition, the supreme law of the land to which all law must conform.

⁴³ 1984 *Marq L Rev* 673, 686.

⁴⁴ *Concept of law* 56, 191-194.

of the view that morality is not a requirement for law to be valid but it does shape law *inter alia* either through legislation or the judicial process.⁴⁵ The law must develop laws prohibiting one person from harming another.⁴⁶

Rawls,⁴⁷ the contemporary American philosopher, revived the social contract theory and was of the view that two basic principles should be adopted in the hope of a just society, namely: allocating fundamental basic rights and duties equally to all; and social and economic inequalities are acceptable only if they result in benefiting the greater good.⁴⁸ He⁴⁹ submits that a Kantian view of a society of people that are rational, reasonable, morally autonomous, free and equal, is a preferable alternative to the utilitarian theory.⁵⁰ To Rawls, justice is the primary social virtue.⁵¹ Justice requires eliminating any arbitrary distinctions and establishing a practice whereby a balance is struck between competing interests and claims.⁵² Rawls⁵³ submits that discrimination and injustice may occur when an adjudicator or others holding authoritative positions fail to apply a rule or interpret it correctly due to “subtle distortions of prejudice and bias”. Where there is different treatment, it must be justified with reference to legal principles and rules. Each person is expected to decide for himself whether an action is reasonably and morally justifiable.⁵⁴ Rawls advocates a universal concept of justice and believes in the tolerance and mutual respect for incompatible views and values whether relating to religious, philosophical, or moral values, so long as they are reasonable.⁵⁵ According to Keating’s⁵⁶ account of Rawls’⁵⁷ ideas, the terms that reasonable people will suggest and adhere to are terms that all members of society, as free and equal individuals, could reasonably expect. Society’s

⁴⁵ Hart *Concept of law* 199-200. See Starr 1984 *Marq L Rev* 686-687.

⁴⁶ See Starr 1984 *Marq L Rev* 677.

⁴⁷ 1958 *Philosophical Rev* 165. See Fletcher 1972 *Harv L Rev* 550.

⁴⁸ Rawls 1958 *Philosophical Rev* 166.

⁴⁹ Rawls *Political liberalism* 302. See Keating 1996 *Stan L Rev* 318.

⁵⁰ See Rawls *Political liberalism* 164, 294-299; Zipursky 2004 *Fordham L Rev* 1925; Keating 1996 *Stan L Rev* 322.

⁵¹ Pomerleau <http://www.iep.utm.edu/justwest> (Date of use: 18 September 2017).

⁵² *Philosophical Rev* 164.

⁵³ *Justice* 235. See Moran *Reasonable person* 164-165 with reference to Rawls.

⁵⁴ Rawls *Philosophical Rev* 170-171.

⁵⁵ Rawls *Political liberalism* 36. See Pomerleau <http://www.iep.utm.edu/justwest> (Date of use: 18 September 2017); Keating 1996 *Stan L Rev* 318, 323-324.

⁵⁶ 1996 *Stan L Rev* 318.

⁵⁷ *Political liberalism* 50.

willingness to adhere to such terms is based on reciprocity. To Rawls,⁵⁸ being reasonable encompasses the idea that a person accepts that others have equal rights to pursue their goals and it is therefore necessary to find terms acceptable to all members of society. Rawls catapulted the concept of reasonableness to a separate and distinct concept distinguishing it from the concept of justice.⁵⁹

Dworkin,⁶⁰ the contemporary American philosopher, criticised Hart's⁶¹ views and propounded the theory of law as integrity. According to this theory law should be interpreted constructively taking into account a community's shared principles. In difficult cases, the adjudicator considers existing rules, principles, and precedents that fit best. If, for example, a number of earlier decisions fit, then the adjudicator must choose one, justifying the choice while taking into consideration moral principles such as fairness and justice.⁶² Dworkin⁶³ states that certain interests or rights, including fundamental rights, must be protected against the government. It would be wrong to sacrifice certain important individual interests for the collective benefit.⁶⁴ Dworkin is well known for his idea of trumping rights. However, Costa Neto,⁶⁵ with reference to Dworkin's ideas, explains that according to Dworkin, competing rights are not weighed against each other. Rights of the individual cannot be weighed against society's demands. Certain interests trump any benefit and cannot be weighed. There are however, instances where a right may be limited, which include: where the values embraced by the original right are not at stake; or where the cost to society would be "great enough to justify whatever assault on dignity or equality might be involved".⁶⁶ Costa Neto⁶⁷ convincingly argues that, in general, competing interests may be weighed against each other. Certain rights (trumps) may be assigned a greater abstract weight (a winning margin) when weighed against other constitutional values.

⁵⁸ *Political liberalism* 48-54. See Viola 2002 *Yearbook of legal hermeneutics* 99 who, like Fletcher, supports Rawls' idea of reasonableness and reciprocity.

⁵⁹ See in general Mandle 1999 *CJPH* 75 ff who summarises the use of reasonableness by Rawls.

⁶⁰ *Taking rights seriously* 82-130.

⁶¹ See in general Dworkin *Law's empire*.

⁶² See Dworkin *Law's empire* 42, 49, 227, 231, 239.

⁶³ *Taking rights seriously* 191. See Costa Neto 2015 *Rev Direito GV* 160 with reference to Dworkin.

⁶⁴ See Dworkin *Taking rights seriously* 31, 173; Costa Neto 2015 *Rev Direito GV* 161.

⁶⁵ 2015 *Rev Direito GV* 161 with reference to Dworkin *Taking rights seriously* 197-198.

⁶⁶ *Taking rights seriously* 200. See Costa Neto 2015 *Rev Direito GV* 162.

⁶⁷ 2015 *Rev Direito GV* 159 ff.

In South African customary law, the emphasis is on solidarity, group interests or rights, duties and obligations.⁶⁸ The aim of customary law is to restore justice based on healing between the parties as well as the community⁶⁹ rather than penalising the individual.⁷⁰ This is expressed in the concept of *ubuntu* which has been recognised as a constitutional principle:⁷¹

“ubuntu translates as ‘humaneness’. In its most fundamental sense it translates as personhood and ‘morality’. Metaphorically, it expresses itself in umuntu ngumuntu ngabantu, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation. In South Africa ubuntu has become a notion with particular resonance in the building of a democracy. It is part of our rainbow heritage, though it might have operated and still operates differently in diverse community settings. In the Western cultural heritage, respect and the value for life, manifested in the all-embracing concepts of ‘humanity’ and ‘menswaardigheid’, are also highly prized. It is values like these that Section 35 [of the Constitution of the Republic of South Africa, 1996] requires to be promoted. They give meaning and texture to the principles of a society based on freedom and equality”.

Historically, *ubuntu* played a part in reconciling and mending society after the apartheid era where people were separated on grounds of race and colour. In modern times, it represents solidarity which is interrelated with equality and liberty. They are regarded as three pivotal constitutional values.⁷²

Restorative justice entails: meeting to discuss the harm caused as well as the way forward from that point; concentrating on repairing the harm done instead of punishing the offender; restoring mutual respect between the parties; and participation between the parties, thereby encouraging other people close to the parties to also participate. Restorative justice in modern times is evident in mediation and dispute resolution

⁶⁸ Himonga and Nhlapo (eds) *African customary law* 197.

⁶⁹ *S v Maluleke* 2008 1 SACR 49 (T) [26], [34]. See Himonga and Nhlapo (eds) *African customary law* 213.

⁷⁰ Makgoro J in *Dikoko v Mokhatla* 2006 6 SA 235 (CC) [69] stated that the aim of traditional customary law is the “restoration of harmonious human and social relationships where they have been ruptured by an infraction of community norms”. See also Himonga and Nhlapo (eds) *African customary law* 212.

⁷¹ In *S v Makwanyane* 1995 6 BCLR 665 (CC) [307]. See also *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC) [37]; Himonga and Nhlapo (eds) *African customary law* 213.

⁷² As explained by Sachs J in *Dikoko v Mokhatla* 2006 6 SA 235 (CC) [113].

procedures.⁷³ It has been used as part of a remedy for defamation where a retraction and apology to the victim for the defamatory statements was ordered.⁷⁴

Traditionally, customary law did not formulate punishment in the form of torture, detention, imprisonment, or hard labour.⁷⁵ Punishment was formulated in the form of fines, confiscation of property and loss of social standing within the community.⁷⁶ However, for serious offences (such as witchcraft), banishment from the community and execution could be imposed by the chief or king.⁷⁷ Banishment, execution and corporal punishment have been abolished in South Africa.⁷⁸ Customary law is generally voluntarily observed by the community members out of fear of “supernatural punishment”.⁷⁹ Customary law does not make a clear distinction between criminal law and the law of delict.⁸⁰ There are set prescribed damages for delicts committed.⁸¹ Crimes under the Natal Code of Zulu Law⁸² whereby customary law was codified during the colonial, Union and apartheid era include *inter alia*: a failure by individuals who have a natural duty to care for and provide necessities for others; and failing to warn neighbours or others of contagious or infectious disease carried by one’s livestock.⁸³ In respect of damage to property, for example, where an animal is killed, the owner of the animal must be notified and the animal must be replaced. The person who killed the animal is entitled to keep the carcass of the dead animal.⁸⁴ Compensation is paid for damage to crops and where a person failed to put out a fire.⁸⁵ It is clear that customary law focus on repairing relations between parties in an amicable way keeping respect and dignity. The focus is not on monetary compensation.

⁷³ As explained by Sachs J in *Dikoko v Mokhatla* 2006 6 SA 235 (CC) [114].

⁷⁴ See *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 6 BCLR 577 (CC) [199]-[203]; *The Citizen 1978 (Pty) Ltd v McBride (Johnstone as Amici Curiae)* 2011 8 BCLR 816 (CC) [132]; Van der Walt and Midgley *Delict* 30 fn 22; chapter 3 para 6.1.

⁷⁵ Himonga and Nhlapo (eds) *African customary law* 213.

⁷⁶ Himonga and Nhlapo (eds) *African customary law* 214.

⁷⁷ Himonga and Nhlapo (eds) *African customary law* 214.

⁷⁸ See authority referred to by Himonga and Nhlapo (eds) *African customary law* 215 fn 23-25.

⁷⁹ Himonga and Nhlapo (eds) *African customary law* 214.

⁸⁰ Rautenbach and Bekker *Legal pluralism* 157-158.

⁸¹ Himonga and Nhlapo (eds) *African customary law* 198. However, the amount of damages is not set where delicts such as theft and assault are committed against the leader.

⁸² Proc R151 of 1987.

⁸³ See other offences referred to by Himonga and Nhlapo (eds) *African customary law* 221-22.

⁸⁴ Rautenbach and Bekker *Legal pluralism* 167.

⁸⁵ Rautenbach and Bekker *Legal pluralism* 167.

As shown from the philosophers' views and South African customary law, the concept of "reasonableness" developed from the concept of "justice". Justice requires: a balancing of interests; mutual respect of other's interests or rights; and treating individuals equally as advocated by Rawls, Dworkin and the South African customary law principle *ubuntu*. Under certain circumstances it is justified to infringe another's interests, and reasonable, as advocated by Aquinas. Acting reasonably is about doing what is right from a moral perspective which involves duties, rights and obligations as advocated by Kant. Moral principles shape the law as submitted by Hart. Acting reasonably depends on what the law prescribes as reasonable conduct as advocated by Hobbes, Mill and Hart. What is considered as reasonable can be gleaned from society's views. When interests or rights are infringed, there must be redress from the law to restore the balance that was lost as advocated by Aristotle. The South African customary law concept *Ubuntu*, propagates restorative justice aimed at repairing the harm done as well as the relations between the parties. It is evident that the concept of *ubuntu*, fairness, justice, equity, policy considerations, society's views and reasonableness are all intertwined. Thus acting reasonably requires: taking others' interests into consideration besides one's own interests; consideration of moral principles; and what the law sets as boundaries to reasonable conduct. Redress is called for when a person has acted unreasonably in infringing another's interests or rights unreasonably. When deciding whether it is reasonable to restore the balance under the circumstances and find one responsible or liable, fairness and equality must be applied to all parties as well as their interests and rights – then justice is served.

2. The modern use of the concept "reasonableness"

According to the Oxford dictionary,⁸⁶ the word "reasonableness" means: having "[s]ound judgement; fairness"; "[t]he quality of being based on good sense"; "[t]he quality of being as much as is appropriate or fair; moderateness". It is evident that it is a word often closely associated with other words, terms or concepts such as "fairness" and belongs to a family of general clauses.⁸⁷ Indeed, in South African law, it has been

⁸⁶ <https://www.enoxforddictionaries.com>reasonableness> (Date of use: 20 September 2017).

⁸⁷ See Artosi in Bongiovanni, Sartor and Valentini (eds) *Reasonableness and law* 69; Nivarra 2002 *Yearbook of legal hermeneutics* 321.

closely linked to the concepts of “justice”, “equity” and “fairness”.⁸⁸ Legal academic writers have not provided a precise definition of the word “reasonableness” but as will be shown they have tried to characterise or qualify it. Moran⁸⁹ explains that both reasonableness and equality have been referred to as “weasel words” because they encourage and require the use of discretion in judgments. Spadaro⁹⁰ submits that the word and concept *reasonableness* is “slippery, ambiguous”, and “polysemous”, but it is about the way rights are applied or protected – it is the middle ground between an excess of rationality and sentimentality. Zipursky⁹¹ submits that “the word ‘reasonable’ is a paradigmatic example of a *standard* in the law, and its meaning is, if nothing else, vague”. Legal, philosophical and economic theories have been used to flesh out the concept.⁹² Viola⁹³ points out that the question of reasonableness is central to political philosophy debates. In terms of determining negligence, an economic or deontic (referring to duties, obligations, rights and powers)⁹⁴ approach is used.⁹⁵ The economic approach which has been followed in American law will be discussed further in chapter 5.⁹⁶ Coleman⁹⁷ explains that generally tort law has a deontic form which is reflected in the norms and remedies. Morality, corrective justice⁹⁸ and the idea of recourse explain the deontic form. Wells⁹⁹ submits that according to the deontic approach, conduct is evaluated with an objective, rational set of moral principles. The deontic approach is one of the two types of moral theories. The second moral theory called the “consequentialist” theory determines conduct according to its consequences, in the sense that conduct is good if, on a balance, the consequences are beneficial.¹⁰⁰ Utilitarianism and the economic theory of law in determining

⁸⁸ See *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 2 SA 520 (W) 528-529; *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 1 SA 645 (A) 652; and *S v Mokgethi* 1990 1 SA 32 (A) 40-41; chapter 1 para 1.

⁸⁹ *Reasonable person* 283.

⁹⁰ 2002 *Yearbook of legal hermeneutics* 299-300.

⁹¹ 2015 *U Pa L Rev* 2134.

⁹² See in general Rawls *Justice*; Rawls *Political liberalism*; Scanlon *What we owe to each other*; Spadaro 2002 *Yearbook of legal hermeneutics* 300 points out that the concept has also been studied from a constitutional perspective in respect of its role in constitutional justice.

⁹³ 2002 *Yearbook of legal hermeneutics* 99.

⁹⁴ Coleman 2012 *Yale LJ Forum* 557.

⁹⁵ Zipursky 2015 *U Pa L Rev* 2134.

⁹⁶ See chapter 5 para 3.3.

⁹⁷ 2012 *Yale LJ Forum* 558, 565.

⁹⁸ Based on the idea that if the defendant has wronged the plaintiff “to whom he owes a duty of care” then he has a duty to repair the harm done to him. See Coleman and Kraus 1986 *Yale LJ* 1338-1339.

⁹⁹ 1990 *Mich L Rev* 2395-2396.

¹⁰⁰ Wells 1990 *Mich L Rev* 2395.

negligence form part of the consequentialist theories.¹⁰¹ It is also closely linked to the concept of “rationality”. Rationality is distinct from reasonableness¹⁰² and thought to be goal-orientated while reasonableness is thought to be value-orientated. Rationality encompasses three components: logic; end-reasoning;¹⁰³ and reliability or empirical truth. On the other hand reasonableness is thought to refer to the correct way of acting and what is moral.¹⁰⁴ In respect of decision-making in order to determine whether, for example, an action was reasonable; the action in question would need to be both rational and moral.¹⁰⁵

Nivarra¹⁰⁶ correctly submits that the concept of “reasonableness” is used as a tool to qualify conduct and as a decision-making tool. It is a normative concept whereby *inter alia* interests, values and principles are balanced.¹⁰⁷ It is generally used in the assessment of law, actions, decisions, rules, arguments and judgments.¹⁰⁸

The antonym of reasonable – “unreasonable” – is often used to differentiate between the positive and negative. For example, conduct may be reasonable in a positive way or unreasonable in a negative way. There is also an adjectival use of the word to modify a noun, as in: a reasonable inference; a reasonable belief; or reasonable reliance which is epistemic relating to justified exercise of judgment. There is an adverbial use of the word where the word “reasonably” is used to modify adjectives as in “reasonably necessary”. It is used as a verb, as in “reasonably relied” or “unreasonably interfered”.¹⁰⁹ Phrases such as “reasonable mistake” and “reasonable

¹⁰¹ Wells 1990 *Mich L Rev* 2395 fn 160.

¹⁰² See Sibley 1953 *Philosophical Rev* 554 ff; Keating 1996 *Stan L Rev* 311; Viola 2002 *Yearbook of legal hermeneutics* 104; Spadaro 2002 *Yearbook of legal hermeneutics* 300.

¹⁰³ Sibley 1953 *Philosophical Rev* 556 submits that “rationality” is an “*intellectual* virtue” but also encompasses one’s will. In acting rationally one promotes his own interests, but whether one’s conduct is reasonable is based on an objective impartial judgment taking into account others’ interests (557). Rawls *Political liberalism* 48-50 submits that reasonableness involves practical reasoning, like rationality. However, in acting reasonably, one restrains his pursuit of his own desires to accommodate for those of other people. See Keating 1996 *Stan L Rev* 311-312; Zipursky 2004 *Fordham L Rev* 1928.

¹⁰⁴ According to Von Wright *Images of science* referred to by Alexy in Bongiovanni, Sartor and Valentini (eds) *Reasonableness and law* 5.

¹⁰⁵ See Sartor in Bongiovanni, Sartor and Valentini (eds) *Reasonableness and law* 17; Alexy in Bongiovanni, Sartor and Valentini (eds) *Reasonableness and law* 5.

¹⁰⁶ 2002 *Yearbook of legal hermeneutics* 321, 330.

¹⁰⁷ Spadaro 2002 *Yearbook of legal hermeneutics* 303.

¹⁰⁸ Alexy in Bongiovanni, Sartor and Valentini (eds) *Reasonableness and law* 7.

¹⁰⁹ See Zipursky 2015 *U Pa L Rev* 2136-2141.

risk”, etcetera, are used to refer to discernment of the reasonable person.¹¹⁰ The idea of balancing or weighing, for example, competing interests, risks and benefits, is at the heart of reasonableness.¹¹¹

The various ways the concept reasonableness is used in the law is vast.¹¹² It is evident, though, that reasonableness is a normative concept linked to rationality and moral principles. It involves the exercise of judgment and the weighing of *inter alia* interests, risks and benefits. It is broadly used to judge conduct and to reach a decision. In this thesis, the aim is not to define the concept “reasonableness” with precision¹¹³ nor refer to its various literary uses. The focus in this thesis will be on the current influence of the concept “reasonableness” on the elements of delictual liability in South African and French law; and on liability on the torts of trespass to the person and the tort of negligence in Anglo-American law.

3. General concepts related to the concept “reasonableness”

The concepts: reasonableness; fairness; justice; public policy; legal policy; policy considerations; and the *boni mores* (legal convictions of the community) are ambiguous and difficult to define with precision. There is no consensus with regard to their precise meanings and the boundaries between the meanings are often somewhat blurred. Nevertheless, there is consensus that: they are closely related to one another; they involve value judgments; and they can be distinguished. In respect of the chosen field of study of this thesis, they are in the end tools used by the adjudicators to determine delictual liability or liability in tort law.

3.1 Public policy, legal policy and policy considerations

According to the Oxford dictionary,¹¹⁴ “public policy” in its ordinary use means “[t]he principles, often unwritten, on which social laws are based”. From a legal perspective

¹¹⁰ Fletcher 1985 *Harvard L Rev* 949.

¹¹¹ Alexy in Bongiovanni, Sartor and Valentini (eds) *Reasonableness and law* 8.

¹¹² Zipursky 2015 *U Pa L Rev* 2135.

¹¹³ See Keating 1996 *Stan L Rev* 312 fn 2 who also does not try to define reasonableness with “philosophical precision” but tries to explain it intuitively.

¹¹⁴ <https://www.enoxforddictionaries.com>policy> (Date of use: 21 September 2017).

it refers to “[t]he principle that injury to the public good is a basis for denying the legality of a contract or other transaction”.¹¹⁵ Public policy, legal policy and policy considerations are often used interchangeably.

Jones,¹¹⁶ in respect of determining the existence of a duty of care in the tort of negligence in English law¹¹⁷ states that justice and reasonableness is a test of “common sense” and “ordinary reason” which involves a number of considerations:

“At its narrowest, it focuses on justice and fairness as between the parties. At a broader level, it will consider the reasonableness of a duty from the perspective of legal policy, focusing on the operation of the legal system and its principles. At a still wider but more controversial level, it may take account of the social and public policy implications of imposing a duty.”

Jones,¹¹⁸ with reference to English tort law under the heading “public policy” refers to “general considerations of the ‘public good’” which may be viewed as a concept similar to the concept of the *boni mores*.¹¹⁹ Under “legal policy”, Jones¹²⁰ essentially refers to what is commonly known in the South African law of delict as “policy considerations”¹²¹ such as: the floodgates argument where the concern of imposing liability in a case may result in a high influx of claims in the future; and fear of indeterminate liability. There is no *numerus clausus* with regard to policy considerations. Other policy considerations include: vulnerability to risk, where the plaintiff is considered vulnerable to risk because he cannot protect himself adequately by other legal remedies; conservation and conservatism of the law in the sense that there is for example a reluctance to provide a delictual or tort law remedy if a contractual one exists, or the law of delict or tort law should not undermine the law of contract; allocation of loss concerning which party can afford to bear the loss and whether the parties are insured; and the practical effect of imposing liability – will the decision act as a deterrent for future behaviour or have some other adverse effect?

¹¹⁵ <https://www.enoxforddictionaries.com>policy> (Date of use: 21 September 2017). The term “policy” here relates to contracts.

¹¹⁶ In Jones (gen ed) *Clerk and Lindsell on torts* 450.

¹¹⁷ Under the criterion of whether it is fair, just and reasonable to impose a duty of care on the defendant.

¹¹⁸ In Jones (gen ed) *Clerk and Lindsell on torts* 454.

¹¹⁹ See Hawthorne 2013 *Fundamina* 319.

¹²⁰ In Jones (gen ed) *Clerk and Lindsell on torts* 452-453.

¹²¹ See in particular the policy factors considered with regard to liability for pure economic loss discussed in chapter 3 para 9.

Floyd¹²² states that in South African law, public policy manifests itself in: legislation; the common law; the *boni mores*; and what is in the public interest – all of which since 1994 have been underpinned by constitutional norms and values.

Public policy, legal policy and policy considerations, when applied to limiting or excluding liability, should be reasonable. Generally public policy, legal policy and policy considerations are used as a tool by adjudicators to justify their decisions for limiting or excluding liability. As will become apparent further on in this study, policy considerations are prevalent in excluding liability in cases of omissions, psychiatric injury, pure economic loss and wrongful life claims.¹²³

3.2 Justice, equity and fairness

Often, when dealing with delictual liability or liability in tort law, whether based on fault or strict liability, moral terms such as blameworthiness, reasonableness, fairness, justice, *inter alia*, are referred to under the theory of corrective justice.¹²⁴ Aristotle applied corrective justice to voluntary and involuntary transactions, loosely distinguishing between contracts and tort law respectively.¹²⁵ Aristotle submitted¹²⁶ that it does not matter whether a good man has defrauded a bad man and *vice versa*, nor whether a good or bad man committed adultery; “the law looks only to the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it”. Thus there is a duty to rectify the harm caused by the wrongdoing. The defendant must act wrongfully (*adikei*) and cause harm (*eblapsen*) while the plaintiff must be wronged (*adiketei*) and suffer harm (*beblaptai*).¹²⁷ The wrong must be remedied and the equilibrium restored by the adjudicator in providing a remedy.¹²⁸

¹²² In Hutchison and Pretorius 175 (with reference to the South African law of contracts) referred to by Hawthorne 2013 *Fundamina* 306.

¹²³ See, for example, under South African law, chapter 3 paras 3.1.10-3.1.11, 8, 9 and 10; English law, chapter 4 paras 3.2.2.1, 3.3.1-3.3.3; American law, chapter 5 paras 3.4.1-3.4.5; French law, chapter 6 paras 6-9; chapter 7 paras 2.9.1-2.9.4.

¹²⁴ Aristotle (Book V, chapter 4) *Nicomachean ethics*. Chapter 4 deals with corrective justice while chapter 3 deals with distributive justice. See Epstein *Torts* 86; Fischer 1999 *Tenn L Rev* 1136; Posner 1981 *J Legal Studies* 189.

¹²⁵ Aristotle *Nicomachean ethics* 111-112. See Posner 1981 *J Legal Studies* 189.

¹²⁶ See Ross *Nicomachean ethics* 114-115; Posner 1981 *J Legal Studies* 189.

¹²⁷ As explained by Posner 1981 *J Legal Studies* 190, 194.

¹²⁸ See Epstein *Torts* 86; Posner 1981 *J Legal Studies* 190.

According to the Oxford dictionary, “justice”¹²⁹ means “[t]he quality of being fair and reasonable ... [t]he administration of the law or authority in maintaining this”. Rawls¹³⁰ submits:

“The conception of justice which I want to develop may be stated in the form of two principles as follows: first, each person participating in a practice, or affected by it, has an equal right to most extensive liberty compatible with a like liberty for all; and second, inequalities are arbitrary unless it is unreasonable to expect that they will work out for everyone’s advantage, and provided the positions and offices to which they attach, or from which they may be gained, are open to all. These principles express justice as a complex of three ideas: liberty, equality, and reward for services contributing to the common good.”

According to Rawls, equality and reasonableness are required for justice. The Oxford dictionary,¹³¹ defines “fair” as: “[t]reating people equally without favouritism or discrimination ... [j]ust or appropriate in the circumstances ... [c]onsiderable though not outstanding in size or amount ... [m]oderately good”.

Equality, according to the Oxford dictionary,¹³² means “[t]he state of being equal, especially in status, rights, or opportunities”.

Van Zyl¹³³ submits that the prerequisites for justice are “reasonableness, generality, equality, certainty and fair process”. He¹³⁴ points out that the concept of “equity” is subordinate in the legal systems based on Roman law, like South African law. It is resorted to only when existing law does not prescribe a suitable solution or when the solution “causes undue hardship and inequity”. In English law, the concept constitutes a body of law that has developed beside the common law, whereas in South Africa the concept has played a role separately or with the concepts of “reasonableness”, “fairness” and “justice”. The English and South African use of the concept of “equity” is however not similar, as the South African concept was developed from Roman and Greek law. Van Zyl¹³⁵ states that closely linked to the concept of morality, in relation to justice, are the *boni mores* which “more or less, approximates to the ‘public policy’ of English and South African law”. He¹³⁶ submits that the concepts, justice and equity

¹²⁹ <https://www.enoxforddictionaries.com>>justice (Date of use: 22 September 2017).

¹³⁰ *Philosophical Rev* 165.

¹³¹ <https://www.enoxforddictionaries.com>>fair (Date of use: 22 September 2017).

¹³² <https://www.enoxforddictionaries.com>>equality (Date of use: 22 September 2017).

¹³³ 1988 *SALJ* 274.

¹³⁴ Van Zyl 1988 *SALJ* 277-278.

¹³⁵ 1988 *SALJ* 284.

¹³⁶ Van Zyl 1988 *SALJ* 289-290.

are distinct but closely linked to the *boni mores*, public policy and reasonableness. Van Zyl states:¹³⁷

“Justice’ ... may be described as the state of harmony ... which comes into existence after a conflict of interests in a particular society between particular interest-bearing persons ... has been resolved ‘Equity’, on the other hand, is indicative of those principles of law which have evolved to mitigate the harshness of the existing law Concepts such as justice, equity, good faith and *boni mores* contain strongly subjective elements when they pertain to a particular person or group of persons. It has equally strong links, however, with surrounding circumstances and with general considerations relating to these concepts Such considerations require to be assessed, alongside the relevant personal circumstances and surrounding circumstances, as objectively as possible in resolving any conflict The means to achieve this end ... is to apply the (objective) criterion of ‘right reason’ (*ratio recta*) or reasonableness”.

Just as equality plays a multifaceted and complex role in law¹³⁸ so does reasonableness and fairness. Equality plays a central role in protecting rights and ensuring equal treatment to all.¹³⁹ In terms of equity, individuals and their interests must be treated equally, that is, without bias. Justice is thus served when the parties are treated fairly and equally. In order to reach a fair judgment, the criterion of objective reasonableness is applied.

3.3 *Boni mores* (legal convictions of the community)

According to the Jurist Florentinus, *mores* in Roman law referred to the following two things: *consuetudo*, meaning “local legal customs and usages”; and *boni mores huius civitatis*, meaning “local social-moral standards of a community”.¹⁴⁰ Conduct which was *contra bonos mores*, producing delictual obligations, was actionable in a court of law.¹⁴¹ The adjudicator was the interpreter of the *boni mores* of the informed sector of the community.¹⁴² As the concept *boni mores* developed in Roman law, it became associated with the doctrine of “public policy”.¹⁴³ Ferreira¹⁴⁴ submits that public policy construes the Latin term *boni mores* which currently refers to good morals or a good moral standard.

¹³⁷ 1988 SALJ 290.

¹³⁸ Moran *Reasonable person* 169-170 fn 15 refers to the vast literature on this concept as well as the debate about its exact scope and importance.

¹³⁹ See Moran *Reasonable person* 169 fn 11 as well as the authority cited therein.

¹⁴⁰ Plescia 1987 RIDA 269.

¹⁴¹ Plescia 1987 RIDA 270, 278.

¹⁴² Plescia 1987 RIDA 285.

¹⁴³ Plescia 1987 RIDA 269. Plescia refers to *boni mores* and in brackets public policy.

¹⁴⁴ *Fundamental rights* 108.

Van Gerven, Lever and Larouche¹⁴⁵ point out with reference to the requirement of *boni mores* in the German law of delict, that the concept is flexible, ever-changing and “refers to a minimal set of legal-ethical principles (*rechtsethische Minimum*) seen as a set of legal value assessments (*rechtliche Wertungen*)”. Conduct which is *contra bonos mores* is behaviour which to a large extent offends “morally acceptable conduct towards persons with whom one is in a legal relationship”.¹⁴⁶

Currently the concept *boni mores* in the South African law of delict is influenced by constitutional norms and values,¹⁴⁷ customary law values,¹⁴⁸ social, moral, ethical, religious¹⁴⁹ and other pertinent values¹⁵⁰ which are ever-changing.¹⁵¹ It serves as a criterion in determining whether the defendant’s conduct in question is delictually wrongful.¹⁵² In determining wrongfulness, according to the *traditional approach*,¹⁵³ the question is: “whether, according to the legal convictions of the community and in light of all the circumstances of the case, the defendant infringed the interests of the plaintiff in a reasonable or unreasonable manner”.¹⁵⁴ The courts refer to the criterion of

¹⁴⁵ Tort 231.

¹⁴⁶ *Grundanschauungen loyalen Umgangs unter Rechtsgenossen*: BGH 2 June 1981, 2184-2185 quoted by Canaris and referred to in Van Gerven, Lever and Larouche Tort 231.

¹⁴⁷ The Constitution of the Republic of South Africa, 1996. See *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 962-963; *Van Eeden v Minister of Safety and Security (Women’s Legal Centre Trust, as amicus curiae)* 2003 1 SA 389 (SCA) 396-397; *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) 444-448; *Le Roux v Dey* 2011 3 SA 274 (CC) 315; *DE v RH* 2015 5 SA 83 (CC) 101; Neethling 2005 SALJ 580; chapter 3 paras 3.1.3-3.1.4.

¹⁴⁸ For example, in *Fosi v RAF* 2008 3 SA 560 (C) [17], the court stated that in terms of customary law, a child with the financial means has a duty to support a parent in need of financial assistance. It is *contra bonos mores* where a child with the financial means does not support a parent in need. See also Van der Walt and Midgley *Delict* 29.

¹⁴⁹ See, for example, *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 ALL SA 421 (SCA) [23] where the court recognised a duty of support “out of a *de facto* monogamous Islamic marriage” as a result of the change in the *boni mores*; *Osman v RAF* 2015 6 SA 74 (GP) [21], [24] where the court considered Hindu and Islamic cultures (like customary law) which recognise the duty of children to support their parents (Van der Walt and Midgley *Delict* 30-31).

¹⁵⁰ Neethling and Potgieter *Delict* 37 fn 24 refer to *Cape Town Municipality v Bakkerud* 2000 3 SA 1049 (SCA) 1053 fn 3 where Marais J questioned what a legal conviction is and stated “what the *law* ought to be”. Hefer J in *Minister of Law and Order v Kadir* 1995 1 SA 303 (A) 318-319 referred to “society’s notions of what justice demands”.

¹⁵¹ See for example in *DE v RH* 2015 5 SA 83 (CC), where the Constitutional Court confirmed that an innocent spouse may no longer be entitled to sue a third party in delict for adultery as a result of the public’s changing attitude towards adultery. See chapter 2 para 3.3; chapter 3 para 3.1.4.

¹⁵² Neethling and Potgieter *Delict* 37 fn 24.

¹⁵³ See chapter 3 para 3.1.

¹⁵⁴ Neethling and Potgieter *Delict* 37.

reasonableness or the *boni mores* as a benchmark in determining wrongfulness.¹⁵⁵ According to the *recent approach* to determining wrongfulness,¹⁵⁶ the Constitutional Court in *DE v RH*¹⁵⁷ referred to the *boni mores* which it submitted is about public policy “informed by our constitutional values”. It tells us whether a delictual claim may be established – or put differently whether it is “reasonable to impose delictual liability?” Thus in a sense the *boni mores* is used, whether the *traditional* or *recent* approach is considered in the South African law of delict; to determine whether the defendant’s conduct is reasonable and whether it is reasonable to hold him liable in delict, provided all the other elements of a delict are present. If conduct is *contra bonos mores* in the South African law of delict, it generally has the effect of negating the element of wrongfulness.¹⁵⁸

Hawthorne¹⁵⁹ submits that Hobbes and Locke planted the “seeds of public policy”. The modern use of the concept of public policy in South African law stems from the “Roman and Roman-Dutch norm of *boni mores* – standards of good morals and the English law rule of public policy”.¹⁶⁰ Hawthorne,¹⁶¹ upon investigating the origin of the term “public policy” in South African law points out that numerous academic writers and adjudicators currently refer to the concepts *boni mores* and public policy interchangeably, at least in the context of the law of contract. When reference is made to conduct being *contra bonos mores*, it has been referred to as conduct which is contrary to public policy.¹⁶² Hawthorne¹⁶³ has considered some academic writers’ views in trying to ascertain whether there is a difference between the terms public policy and *boni mores*. She found that the general consensus of the academic writers

¹⁵⁵ See list of cases referred to by Neethling, Potgieter and Visser *Neethling’s Law of personality* 54 fn 182.

¹⁵⁶ See chapter 3 para 3.2.

¹⁵⁷ 2015 5 SA 83 (CC) 101.

¹⁵⁸ An infringement of an interest may be considered *contra bonos mores* and therefore wrongful. The *boni mores* performs an important function in establishing wrongfulness with regard to *iniuria* and the requirement that conduct must not be against the legal convictions of the community – Neethling, Potgieter and Visser *Neethling’s Law of personality* 47, 54. For example, a person may consent to the infringement of his body in respect of the risk of injury when partaking in a sporting activity or undergoing medical treatment. However, a person cannot consent to murder or serious bodily harm, as it is considered *contra bonos mores* (Neethling and Potgieter *Delict* 113).

¹⁵⁹ 2013 *Fundamina* 319.

¹⁶⁰ Hawthorne 2013 *Fundamina* 319

¹⁶¹ 2013 *Fundamina* 300ff.

¹⁶² See authority cited by Hawthorne 2013 *Fundamina* 303-304.

¹⁶³ 2013 *Fundamina* 304ff.

is that they are not easily distinguishable.¹⁶⁴ Hawthorne¹⁶⁵ refers to *Barkhuizen v Napier*¹⁶⁶ and submits that the Constitutional Court recognised the concept of “public policy” as the yardstick for the concepts of “reasonableness” and “fairness”. She¹⁶⁷ states that “combining the norms of *boni mores* and public policy is historically as well as dogmatically incorrect. It either stretches sound morals beyond recognition or risks turning public policy into moralising paternalism”. Hawthorne¹⁶⁸ submits that although the *boni mores* is closely associated with public policy, they are not the same and cannot be used synonymously.

It is evident that South African courts do not draw a clear distinction between the *boni mores*, and public policy. However in the law of delict, the *boni mores* yardstick is limited to determining wrongfulness, whereas public policy, legal policy, and policy considerations may be considered by the adjudicator in determining other elements of a delict.¹⁶⁹ The “*boni mores*” and “public policy” are both concepts used by the adjudicators in reaching and justifying their decisions. Furthermore, both concepts take into consideration the public interest, which is ever-changing and is usually associated with the concepts of “justice”, “reasonableness”, “fairness” and “equity”.

Public policy does manifest itself in the *boni mores*. For example, Van Zyl J in *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd*¹⁷⁰ stated that “public policy, in the sense of the *boni mores*, cannot be separated from concepts such as justice, equity, good faith and reasonableness, which are basic to harmonious community relations and may indeed be regarded as the purpose of applying public policy considerations”. In *Barkhuizen v Napier*,¹⁷¹ Ngcobo J stated that “[n]otions of fairness, justice and equity, and reasonableness cannot be separated from public policy. Public policy takes into account the necessity to do simple justice between individuals”.

¹⁶⁴ See authority cited by Hawthorne 2013 *Fundamina* 306.

¹⁶⁵ 2013 *Fundamina* 303.

¹⁶⁶ 2007 5 SA 323 (CC) 339.

¹⁶⁷ Hawthorne 2013 *Fundamina* 318.

¹⁶⁸ 2013 *Fundamina* 308.

¹⁶⁹ Such as negligence, legal causation and in determining damage.

¹⁷⁰ 1990 2 SA 520 (W) 529 within the context of the law of delict.

¹⁷¹ 2007 5 SA 323 (CC) 339 within the context of law of contracts.

It may be concluded that there is a difference between reasonableness and rationality, but being reasonable encompasses rationality. There is a difference between morality and reasonableness in the sense that moral principles guide what is reasonable, but what is immoral may not be illegal.

Public policy plays a more dominant role in deciding whether a particular element¹⁷² in respect of delictual liability or liability in tort law is present. Policy may also play a role in excluding liability and policy should be reasonable. In English law, the policy that the state may not be held liable for pure omissions may be regarded as unreasonable in some jurisdictions but it is considered reasonable and justified in the United Kingdom.¹⁷³ The difference between the United Kingdom, France, South Africa and the United States of America is that the latter three countries have written constitutions.¹⁷⁴ Thus fundamental rights are protected and even the state may be held liable. In English law, due to the principle of sovereignty,¹⁷⁵ the state may be immune from liability for pure omissions. In South African law, the *boni mores* does encompass moral principles and reflects the public's values, but it is subject to a written constitution which applies equally to all, including the state. A citizen's rights may be limited if it is considered reasonable in terms of section 36 of the Constitution (the "limitation clause").¹⁷⁶ Thus in South African law, the *boni mores* reflects reasonableness as it is subject to the limitation clause in the Constitution. There is a difference between public policy or policy considerations, which may apply to a number of elements of a delict; and the *boni mores* that applies specifically to the element of wrongfulness in determining delictual liability. Public policy if applied in South African law must also be

¹⁷² For example, in South African law, particularly whether wrongfulness, negligence and legal causation is present (see chapter 3 paras 3, 4.3 and 5.2). In Anglo-American law whether a duty of care is owed, in determining negligence and legal causation or scope of liability (see chapter 4 paras 3.2, 3.4 and 4.2; chapter 5 paras 3.1-3.3 and 4.2).

¹⁷³ See chapter 4 para 3.3.1; chapter 3 paras 3.1.10-3.1.11 under the discussion of *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 957-960 where the Constitutional Court alluded to the approach followed in English law of not holding the state liable for omissions, as the South African pre-constitutional approach.

¹⁷⁴ See chapter 3 para 3.1.3; chapter 5 para 1; chapter 6 paras 1 and 6.

¹⁷⁵ See Starr 1984 *Marquette L Rev* 679.

¹⁷⁶ The Constitution of the Republic of South Africa, 1996. S 36 states that: the rights "in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights".

reasonable as it is subject to the limitation clause in the Constitution. There is a difference between equity, fairness and justice. Justice is the end result, whereby in reaching the result, the criterion of reasonableness is applied as well as equity and fairness. In a strict sense, a decision or judgment may not seem reasonable, fair and just to a particular party and ideas of reasonableness, fairness and justice may change with the times. For example, previously, claims for pure economic loss and psychiatric harm were limited or excluded, even though the harm or loss was sustained. This may not have been considered fair, just and reasonable to the person that legitimately suffered the harm or loss as a result of the defendant's conduct. This was indeed the case in most jurisdictions. Liability for such claims was not recognised until recently in most jurisdictions. However, reasonableness, fairness, justice, equity, public policy and the *boni mores* are all considered in excluding or limiting liability. In this sense they are interrelated. In deciding whether an element is present for delictual liability or liability in tort law, the influence of reasonableness may be explicit or implicit, but in reaching the final decision as to whether liability should be found in delict or tort law, the influence of reasonableness is implicit.

4. The standard of the “reasonable person”

In all the jurisdictions discussed in this thesis, the standard of the reasonable person is encountered. The standard is usually used to assess conduct in determining negligence, but it has been used in determining other elements of delictual liability or liability in tort law.¹⁷⁷ The concept of the *bonus pater familias*, “the good family father”,¹⁷⁸ originated from Roman law, and is synonymous with the term, “the reasonable person” or its equivalent referred to in this thesis. The reasonable person standard is normative.¹⁷⁹

¹⁷⁷ See for example, chapter 3 para 3.4 where the standard of the reasonable person is encountered in the grounds of justification: private defence; necessity; provocation and official command. It is also encountered in determining damages (see para 6.5). In English law, the standard of the reasonable person is applied in determining a number of defences, elements in the torts of trespass to a person and in all the elements used to determine the tort of negligence (see chapter 4 paras 2, 2.4.1-2.4.3, 3.2-3.5, 4 and 5.2). In American law, the standard is also encountered in some defences such as self-defence, consent and comparative or contributory fault (see chapter 5 paras 2.5.1, 2.5.6, 3.5.1). See also chapter 6 para 2.2; chapter 7 paras 2.2-2.5, 2.7.

¹⁷⁸ Is used in the French law of delict, see chapter 6 para 2.2.3.

¹⁷⁹ Miller and Perry 2012 *NYU LR* 323.

In trying to establish what exactly the reasonable standard is, a number of academic writers' views will be referred to. Artosi¹⁸⁰ states that the reasonable person is a well-known, fictional, abstract character supposed to be endowed with morals, virtues and reasoning which society expects from its members. Hart¹⁸¹ submits that the standard of reasonableness "created space for ordinary moral reasoning". Zipursky¹⁸² submits that the reasonable person standard is used as a decision-making tool for adjudicators that allow them to make determinations of reasonableness with ease. Weinrib¹⁸³ submits that the reasonable person standard outlines the limit between the defendant's freedom to act as he wishes and "the plaintiff's interest in security by treating certain risks as unreasonable". Ripstein¹⁸⁴ states that the standard encompasses the idea of fair terms with regard to social interactions where there are dividing risks that accompany everyday acceptable human conduct. Generally, a person who fails to meet the required benchmark of acceptable behaviour may be held liable for the harm caused to others.¹⁸⁵ The standard has been criticised,¹⁸⁶ *inter alia*, for being favourable to men¹⁸⁷ and specific classes of persons. When the standard is interpreted by adjudicators, there is a tendency at times to reflect their subjective views in judgments.¹⁸⁸ Nevertheless, as a standard it is useful and illustrates the law's devotion to justice.¹⁸⁹

It is interesting to note the views of Moran¹⁹⁰ who refers to the various understandings of reasonableness in the reasonable person standard. After studying the role of the reasonable person standard in a number of common law jurisdictions, she submits that the reasonable person is regarded as the ordinary, normal, human being. His

¹⁸⁰ In Bongiovanni, Sartor and Valentini (eds) *Reasonableness and law* 69. See also Neethling and Potgieter *Delict* 141-147.

¹⁸¹ *Concept of law* 132-133. See Moran *Reasonable person* 281.

¹⁸² 2015 *U Pa L Rev* 2149.

¹⁸³ *Tort* 47. See Moran *Reasonable person* 174.

¹⁸⁴ In Bongiovanni, Sartor and Valentini (eds) *Reasonableness and law* 255, 258.

¹⁸⁵ See Zipursky 2004 *Fordham L Rev* 1929 who refers to Ripstein's concept of the reasonable person as "objective and value laden". Ripstein shares similar views with Keating 1996 *Stan L Rev* 329-332, 337-341 which draws on Rawls' idea of reasonableness.

¹⁸⁶ See in general Moran *Reasonable person*.

¹⁸⁷ See Bender 1988 *Journal of Legal Education* 3ff. Bender (20-25) traces how, initially, the concept was formulated in the masculine form, illustrating bias. See also Martin *Anglo-Am L Rev* 1994 334, 342-345; Mullender 2005 *Modern LR* 682.

¹⁸⁸ Mullender 2005 *Modern LR* 683.

¹⁸⁹ Mullender 2005 *Modern LR* 681-682.

¹⁹⁰ *Reasonable person*.

conduct must be “accepted as normal and general by other members of the community in similar circumstances”.¹⁹¹ Moran¹⁹² makes a distinction between normal and reasonable behaviour. The distinction is irrelevant in instances where normal behaviour is considered reasonable behaviour. She¹⁹³ points out that in practice; the reasonable person standard is fraught with different understandings of what is normal, natural and ordinary. Moran¹⁹⁴ submits that in practice, it is normal and thus reasonable for young boys to be inattentive with their own and other’s safety, while with young girls, it is not normal and therefore unreasonable to be imprudent. Moran¹⁹⁵ refers to Gilligan¹⁹⁶ who found substantial gender differences in moral reasoning whereby “girls use a voice of relation, of care and connection, which differs from boys’ emphasis on abstract rules and ... ethics of justice”.¹⁹⁷ A woman,¹⁹⁸ young girl,¹⁹⁹ and a mentally impaired person, are held to a harsher standard of reasonableness.²⁰⁰ Children are generally held to a more relaxed standard when compared to adults, in that, to begin with very young children in some jurisdictions cannot be held negligent.²⁰¹ It is submitted that generally, the child’s age, intellect, maturity,

¹⁹¹ Moran *Reasonable person* 133. Moran (133) quotes Fleming *Torts* 119-120 (9 ed 1998). See later edition, Sappideen and Vines (eds) *Fleming’s torts* 128-129. See further authority cited by Moran 134 fn 15 with reference to customs and the community.

¹⁹² *Reasonable person* 7.

¹⁹³ Moran *Reasonable person* 9, 17.

¹⁹⁴ *Reasonable person* 9.

¹⁹⁵ *Reasonable person* 178.

¹⁹⁶ *Psychological theory and women’s development* 1982.

¹⁹⁷ Moran *Reasonable person* 178 in reference to Gilligan’s findings.

¹⁹⁸ See extensive authority cited by Moran *Reasonable person* 199 fn 1. Moran (199-231) points out that in a criminal context with regard to provocation, self-defence, and sexual assault, the standard of reasonableness applies differently to women (see Donovan and Wildman 1981 *Loy LA L Rev* 435).

¹⁹⁹ Moran *Reasonable person* 110-111 and Welke *American liberty* 94 refer to *Michigan Central Railroad v Hassenyer* 48 Mich 205, 209-210 (SC 1882) involving the death of a thirteen year old who was killed when an engine backed up as she was crossing the railway track. Cooley J’s instructions to the jury was that however negligent the railroad company had been they must consider the standard of ordinary care that she should have had with regard to herself. To Cooley J, care referred to being more cautious than a male – “a woman would be likely to be more prudent, careful and particular in many positions and in the performance of many duties than a man would. She would, for example, be more vigilant and indefatigable in her care of a helpless child; she would be more particular to keep within the limits of absolute safety when the dangers which threatened were such as only great strength and courage could venture to encounter”. Moran (111-125), in support of the unequal treatment, refers to a number of cases highlighting that the reasonableness of conduct of girls is judged more harshly than that of boys.

²⁰⁰ Moran *Reasonable person* 14.

²⁰¹ See chapter 3 para 4.1 with regard to accountability of young children in South African law; chapter 4 para 1.1 where in English law no age is provided but naturally a child under two years of age may not have capacity; chapter 5 para 3.2 where in the United States of America, some states hold that a child from under the age of five years cannot be held liable in tort. See also chapter 7 para 2.2.

experience etcetera as subjective factors are considered when judging their conduct.²⁰² The subjective factors may be considered directly or indirectly and lend to the more relaxed treatment applied to children, which is reasonable and justifiable. In English law the reasonable child test is applied.²⁰³ In South African law, it must first be considered whether a child can be held accountable. Under accountability, subjective factors such as whether the child can tell the difference between right and wrong, the experience, maturity, intellect, and so on, are considered. Even though the age of the child may not be referred to, the other subjective factors considered, correlate with the child's age.²⁰⁴ In American law, a child's conduct is tested against the reasonable person of his own age, intelligence, maturity, and experience faced with similar circumstances.²⁰⁵ In French law, the parents are generally held strictly liable for the conduct of the children still living with them.²⁰⁶ A more relaxed standard is also recommended for the elderly members of the community.²⁰⁷

With reference to a mentally impaired person, Moran²⁰⁸ explains that the impairment is regarded as an abnormality, an "idiosyncrasy or peculiarity". Such person is not regarded as a full member of the community. The mentally impaired are judged according to the uniform standard of the reasonable person in spite of their cognitive and intellectual shortcomings.²⁰⁹ Moran refers to the following reasons supplied for applying this uniform standard to the mentally impaired: that it is in line with the idea of the general welfare of the community; it deters dangerous conduct and ensures that

²⁰² However, in France the requirement of discernment similar to the concept of accountability and capacity has been dispensed with. See chapter 6 para 2.2.2; chapter 7 para 2.2.

²⁰³ See chapter 4 paras 1.1 and 3.4.

²⁰⁴ See chapter 3 para 4.3.

²⁰⁵ See Dobbs, Hayden and Bublick *Hornbook on torts* 233; Keeton *et al Prosser and Keeton on torts* 179; chapter 5 para 3.2.; chapter 7 para 2.2.

²⁰⁶ In terms of Article 1384 of the French Civil Code of 1804. See chapter 6 paras 2.2.2-2.2.3 and 5.2; chapter 7 paras 2.2, 2.9.

²⁰⁷ Moran *Reasonable person* 24-26, 138. She refers to Barrett III 1984 *J Marshall L Rev* 873 who proposes a relaxed standard for the elderly. See also chapter 6 para 2.2.2 in respect of French law with regard to a person over the age of seventy years; chapter 5 para 3.5.1 in respect of American law where contributory negligence cannot be applied to an institutionalised elderly person; chapter 7 para 2.2.

²⁰⁸ *Reasonable person* 9, 147-154 illustrates how historically women were also not considered as full citizens. Their liberty was restrained and they were generally considered the weaker sex. Moran (183) refers to Vogel in Vogel and Moran (eds) *Citizenship* 62 where historically the following groups *inter alia* lacked legal capacity: children; women; the insane; slaves and serfs. Certain religious groups such as Jews and Catholics as well as certain ethnic groups were denied full legal rights and membership. Moran (184-197) refers to the inequality applied to people from different racial groups and people with different financial standings.

²⁰⁹ Moran *Reasonable person* 13.

the victim is compensated;²¹⁰ even though it does impose a form of strict liability it can be justified as the conduct involves heightened risk and is deemed unreasonably risky conduct;²¹¹ on grounds of equality and fairness, the victim who sustains harm as a result of the defendant's mental impairment should be compensated;²¹² and it would be burdensome for the courts to try and establish the extent of a person's mental capacity.²¹³

According to Holmes,²¹⁴ the community generally expects individuals to forgo their peculiarities to a certain extent. Prosser,²¹⁵ along the same lines, submits that one who lives within a community must conform to such standards and be responsible for the harm or loss. Moran²¹⁶ distinguishes between a person without objectively viewed mental or physical impairments and a person with physical disabilities. She refers to *Vaughan v Menlove*.²¹⁷ In this case, the defendant tried to avoid liability by alleging that he was acting to the best of his cognitive abilities. The court applied an objective standard of a man of ordinary prudence, dismissing his subjective cognitive shortcomings. Moran²¹⁸ refers to *Roberts v Ramsbottom*²¹⁹ where the driver suffered a stroke while driving and was found negligent even though the court acknowledged that he was not able to appreciate that he should have stopped. This came close to strict liability which contradicts fault liability of the tort of negligence itself.²²⁰ She²²¹ points out, however, that this was revisited by the Court of Appeal in *Mansfield v Weetabix*²²² where the court took into account the driver's hypoglycaemic state which he was unaware of and found him not to have been negligent.

²¹⁰ See the discussion by Moran *Reasonable person* 31-39 with regard to the deterrence and compensation rationale.

²¹¹ Moran *Reasonable person* 41-42, 45.

²¹² Moran *Reasonable person* 137-138 refers to Fleming *Torts* 126 (9 ed 1998, see later edition Sappideen and Vines (eds) *Fleming's torts* 132) citing *Adamson v Motor Vehicle Insurance Trust* (1957) 58 WALR 56 (SC) and Alexander and Szas 1967 *Notre Dame L Rev* 26 who state that mental illness is a deviation "from normal moral and social standards". One must however take into account the year the contribution was written by latter authors.

²¹³ Moran *Reasonable person* 28.

²¹⁴ *Common law* 86 referred to by Moran *Reasonable person* 162.

²¹⁵ *Torts* 153 referred to by Moran *Reasonable person* 163.

²¹⁶ *Reasonable person* 19.

²¹⁷ 1837 3 Bing NC 468; 132 ER 490 (CP).

²¹⁸ *Reasonable person* 20-21.

²¹⁹ 1980 1 All ER 7 (QBD).

²²⁰ Moran *Reasonable person* 39, however, refers to the idea that the reasonable person standard does in a way apply strict liability as the person's shortcomings are disregarded.

²²¹ Moran *Reasonable person* 22.

²²² 1988 1 WLR 1263 (CA).

Moran²²³ illustrates that common sense reasoning is applied in assuming what is normal, natural and reasonable. She²²⁴ submits that there is a connection between the freedom to act, blameworthiness and prevention of harm. She²²⁵ points out that Rawls, Holmes and Honoré all require that the actor has the capacity to prevent harm. Normal natural behaviour is considered as non-culpable conduct.

By applying the standard of the reasonable person, Moran²²⁶ submits that sometimes there is inequality which does not adhere to corrective justice.²²⁷ She²²⁸ does not propose a subjective approach which in her opinion would result in discrimination. She²²⁹ submits that reasonableness is interpreted as ordinariness with reference to customary norms. This is problematic as what is regarded as ordinary or customary leads to discrimination against *inter alia*: the mentally impaired; girls; and women. The result she submits is that the standard “operates as an (unjustifiable) standard of ordinariness rather than as a (justifiable) standard of reasonableness”.²³⁰ In order to ensure that the reasonableness standard lives up to its egalitarian promise, she proposes that the objective reasonableness standard be understood as “appropriate attentiveness to the interests of others” and unreasonable conduct as “culpable indifference to the interests of others”.²³¹ In short she proposes removing the person from the standard as her answer to the objective egalitarian approach.²³²

Turning to *Mansfield v Weetabix*²³³ she applies her approach stating that the defendant was not indifferent to the interests of others, his conduct was not blameworthy or negligent.²³⁴ She applies the same approach to *Roberts v Ramsbottom*²³⁵ stating that due to the sudden stroke suffered by the defendant, he

²²³ *Reasonable person* 131-135.

²²⁴ Moran *Reasonable person* 175.

²²⁵ Moran *Reasonable person* 177, 241-248.

²²⁶ *Reasonable person* 11, 52.

²²⁷ Moran *Reasonable person* 56.

²²⁸ Moran *Reasonable person* 206.

²²⁹ Moran *Reasonable person* 286.

²³⁰ Moran *Reasonable person* 13.

²³¹ Moran *Reasonable person* 304.

²³² Moran *Reasonable person* 316.

²³³ 1988 1 WLR 1263 (CA).

²³⁴ Moran *Reasonable person* 309.

²³⁵ 1980 1 All ER 7 (QBD).

was not indifferent to the interests of others. Therefore his conduct was not objectively unreasonable.²³⁶ In *Vaughan v Menlove*²³⁷ where the defendant claimed limited intelligence, his conduct showed self-preference for his own interests and indifference to others' interests which was culpable.²³⁸

Mullender²³⁹ submits that Moran underestimates the tools available in negligence law which would assist in the adaptation of the law according to her proposal. With reference to *Mansfield v Weetabix*,²⁴⁰ Mullender²⁴¹ submits that the defendant did not act; hence he was not a wrongdoer. In terms of corrective justice, the defendant should not be held liable. Mullender submits that there is no problem with the concept of reasonableness itself, but there is a failure on the part of some adjudicators in dispensing justice within the scope of reasonableness.

Martin²⁴² also calls for the abandonment of the reasonable person test. He²⁴³ proposes that liability should be "based on the scope of responsibility of each actor and each activity". The responsibilities should be imposed by parliament.

At times the adjudicator may apply the *imperitia culpa ad numeratur* rule whereby the standard is raised in instances where the defendant has expertise in a certain field.²⁴⁴ For example, the conduct of a doctor would be tested against the standard of the reasonable doctor and not against the standard of the reasonable person.

The criteria applied under the reasonable person standard will be discussed in more detail under the study of each jurisdiction. As illustrated above, the standard of reasonableness may apply differently to children, the elderly, professionals, mentally impaired, young girls and women. Nevertheless, the influence of reasonableness on the standard of the reasonable person is explicit.

²³⁶ Moran *Reasonable person* 287.

²³⁷ 1837 3 Bing NC 468.

²³⁸ Moran *Reasonable person* 310.

²³⁹ *Modern LR* 694-695.

²⁴⁰ 1988 1 WLR 1263 (CA).

²⁴¹ *Modern LR* 688.

²⁴² 1994 *Anglo-Am L Rev* 334ff.

²⁴³ Martin 1994 *Anglo-Am L Rev* 372.

²⁴⁴ Scott 2014 *De Jure* 390.

5. Conclusion

There are many different understandings of and nuances to reasonableness. Its influence in law is vast and ever changing. Its nuances are still being discovered and acknowledged from its historical development to its modern use. Even though it may not be possible to define reasonableness, or clarify its role with precision from a legal philosophical point of view, there is consensus that the concept is important and influential. There is consensus that it is a general concept which is closely linked to public policy, justice, equity, fairness, and the legal convictions of the community. It implicitly and explicitly infiltrates the law of delict and tort law. It is possible to proceed with an investigation of the explicit and implicit influence of reasonableness on delictual liability in South Africa and France; and liability in tort law in the United Kingdom and the United States of America with a general understanding of what reasonableness entails as well as the other concepts closely related to it.

Chapter 3: Law of South Africa

“Legally it will only be reasonable to hold a person liable for damage if he has committed a delict. It is therefore incorrect to equate the reasonableness of holding a person liable with wrongfulness; it is unreasonable to hold a person liable if any one of the elements of a delict, namely conduct, causation, wrongfulness, fault or damage is absent.”¹

1. Introduction

In this chapter, the focus will be on the explicit and implicit influence of reasonableness on the elements of delictual liability in South African law. To begin with, the purpose of the law of delict; the definition of a delict; the different elements which ground delictual liability; strict liability; the types of remedies available in South African law; and South African customary law, will be referred to briefly. Thereafter a more detailed discussion of the influence of reasonableness on each element of a delict will follow. The influence of reasonableness on claims for wrongful conception, wrongful birth and wrongful life; psychiatric injury; pure economic loss; and wrongful deprivation of liberty will also be referred to briefly.

In general, the law of delict recognises conflicting interests that require the protection of the law. In achieving a balance between these conflicting interests, which may have been infringed or are about to be infringed in an unlawful and blameworthy manner, causing harm to a person as a result of the wrongdoer’s conduct;² the law of delict pronounces whether a delict has been committed or not. If a delict has been committed, then such wronged person is entitled to relief. Relief may be in the form of an interdict,³ or fair and reasonable compensation in respect of the harm or loss suffered.⁴

Although academic writers have provided a number of different definitions of a delict,⁵ there can be no precise definition. Even if it were possible, it would as Burchell⁶ put it – be short-lived. It is submitted that the following definition provided by Neethling

¹ Neethling and Potgieter *Delict* 82.

² In the form of an omission or a commission.

³ In order to preventing harm or the continuation of harm.

⁴ Neethling and Potgieter *Delict* 3; Van der Walt and Midgley *Delict* 1.

⁵ See Loubser and Midgley (eds) *Delict* 7-8; Burchell *Delict* 9-10.

⁶ *Delict* 10.

and Potgieter⁷ is the simplest and most suitable in that it neatly captures all the elements of delict, even though it may be criticised for not accommodating delictual liability without fault.⁸

“A delict is an act of a person that in a wrongful and culpable way causes harm to another.”

It is generally accepted that the five elements of a delict which ground liability are: conduct, whether in the form of an omission or commission; wrongfulness; fault; causation; and harm (also referred to as “damage” or “loss”).⁹ In instances where an interdict is sought, harm and fault is not a requirement. The reason being, that the purpose of the interdict is to prevent harm, or the continuation of harm.¹⁰

Although the South African law of delict is predominantly fault-based, strict liability, where fault is not required, is applicable in certain instances.¹¹ The following actions were inherited from Roman law, whereby the defendant may be held strictly liable: the *actio de pauperie*, an action for the recovery of loss caused by domestic animals; the *actio de pastu*, an action for the recovery of loss caused by grazing animals; the *actio de feris*, an action for the recovery of loss as a result of bringing wild and dangerous animals to a public area; the *actio de effuses vel deiectis*, an action for the recovery of damage caused by objects thrown, falling or poured from a building; the *condictio furtiva*, an action for the recovery of loss of a stolen item; and the Praetorian Edict *de nautis, cauponibus et stabularis*, an action for the recovery of damage to stored goods during shipping or held by stable and inn-keepers.¹²

Vicarious liability is another form of strict liability inherited from common law where a person is held liable to third parties for the delict committed by another.¹³ For

⁷ *Delict 4*. See also *McCarthy Ltd t/a Budget Rent a Car v Sunset Beach Trading 300 t/a Harvey World Travel* 2012 6 SA 551 (GNP) 556.

⁸ Van der Walt and Midgley *Delict 1*. Cf Burchell *Delict 10*.

⁹ See *McCarthy Ltd t/a Budget Rent A Car v Sunset Beach Trading 300 t/a Harvey World Travel* 2012 6 SA 551 (GNP) 556; *Telematrix Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 1 SA 461 (SCA) 468; *Van Eeden v Minister of Safety and Security (Women’s Legal Centre Trust, as Amicus curiae)* 2003 1 SA 389 (SA) 395; Neethling and Potgieter 2014 *TSAR* 889-890; Knobel 2008 *THRHR* 651; Neethling and Potgieter *Delict 4*; Van der Walt and Midgley *Delict 2-3*; Loubser and Midgley (eds) *Delict 2*.

¹⁰ See Neethling and Potgieter *Delict 269-270*; Van der Walt and Midgley *Delict 297-299*.

¹¹ Neethling and Potgieter *Delict 379*; Van der Walt and Midgley *Delict 46*.

¹² See in general Neethling and Potgieter *Delict 381-387*; Van der Walt and Midgley *Delict 46-51*; Loubser and Midgley (eds) *Delict 375-381*.

¹³ See in general Neethling and Potgieter *Delict 389-399*; Van der Walt and Midgley *Delict 51-60*; Loubser and Midgley (eds) *Delict 383-396*.

example, this applies in the employer-employee relationship, where the employer is held strictly liable for the delict committed by an employee.

Due to industrialisation, social and economic development not only in South Africa but in the other jurisdictions discussed in this thesis, there has been an increased need for strict liability. The increased need for strict liability stems from the individual's increased exposure to high, dangerous, abnormal, or unusual risks¹⁴ which may be regarded as unreasonable risks. Linked to the increased exposure to risk, the insurance industry has grown considerably and has in turn influenced the development of the law of delict. This is due to increased litigation as a result of insurance companies trying to avoid or recover loss.¹⁵ Out of all the jurisdictions discussed in this thesis, France has experienced the most significant increase in strict liability whereby fault liability is seen as the exception.¹⁶ In South Africa, legislation has been enacted for: product liability;¹⁷ genetically modified organisms;¹⁸ damage caused by aircrafts;¹⁹ nuclear damage;²⁰ and damage caused to telecommunication lines or call box cabinets.²¹

The reasons for the need of strict liability include: the risk creator gains some kind of benefit; the risk creator with the deeper pocket has control over his activities and of the risk it carries; it is possible for the risk creator to take out insurance; the risk creator is in a better position to take out insurance and transfer the loss to the insurer which ultimately results in the distribution of loss; certain activities carry with them increased risk of harm; and with the increased risk of harm, the degree of care required increases – it provides an incentive for the risk creator to exercise greater care.²²

¹⁴ See Neethling and Potgieter *Delict* 379.

¹⁵ See chapter 4 para 1.

¹⁶ See chapter 6.

¹⁷ See the Consumer Protection Act 68 of 2008, discussed by Neethling and Potgieter *Delict* 399-400.

¹⁸ See the Genetically Modified Organisms Act 15 of 1997 discussed by Neethling and Potgieter *Delict* 402; Loubser and Midgley (eds) *Delict* 382.

¹⁹ See the Civil Aviation Act 13 of 2009, discussed by Neethling and Potgieter *Delict* 401.

²⁰ See the National Nuclear Regulator Act 47 of 1999, discussed by Neethling and Potgieter *Delict* 400-401; Loubser and Midgley (eds) *Delict* 382.

²¹ See the Post and Telecommunication-Related Matters Act 44 of 1958, discussed by Neethling and Potgieter *Delict* 379; Loubser and Midgley (eds) *Delict* 382.

²² Neethling and Potgieter *Delict* 379-380.

The two main theories advanced for strict liability are: the risk theory and the profit theory. A manufacturer's liability for defective products provides a good example for illustrating these two theories. According to the risk theory, the manufacturer of pharmaceutical drugs creates the drugs and therefore the risk of harm. Due to the fact that the manufacturer creates the potential for harm, it may be considered reasonable for him to be held strictly liable – this is the basis of the risk theory. In light of the fact that the risk was created in the pursuit of profit by the manufacturer, it is only reasonable that the manufacturer should be held strictly liable for harm caused from the use of the drugs. The manufacturer who gains a benefit must also bear any loss. This is the basis of the profit theory.²³ Thus the influence of reasonableness on strict liability is implicit.

Returning to fault-based liability, the courts in South Africa do not have a specific order in which the elements must be determined when finding delictual liability. In practice, the elements are established in any order the courts deem fit under the circumstances of the case.²⁴ Nugent JA in *First National Bank of South Africa Ltd v Duvenage*²⁵ stated that the human mind is flexible and “capable of enquiring into each element separately, in any order, with appropriate assumptions being made in relation to others, and that is often done in practice to avoid prolonging litigation, for though the elements are naturally interrelated, each involves a distinct enquiry”.²⁶ Even though the courts do not follow a specific order in determining the elements of a delict, Neethling and Potgieter²⁷ correctly submit that it can only be reasonable to hold a person liable in delict for harm suffered if all the elements of a delict have been established.

A delict may result in either patrimonial (pecuniary) loss (*damnum iniuria datum*), where damages are recovered with the *actio legis Aquiliae*;²⁸ injury to personality

²³ See Neethling and Potgieter *Delict* 379; Giliker *Tort* 322.

²⁴ Boberg *Delict* 271 fn 11.

²⁵ 2006 5 SA 319 (SCA) 320-321. See Neethling and Potgieter *Delict* 130,183 fn 4.

²⁶ See para 3 below.

²⁷ *Delict* 82.

²⁸ Patrimonial loss may occur as a result of pure economic loss, physical harm to a person, or damage to property. The requirements for the *actio legis Aquiliae* are: conduct, whether in the form of an act, omission or statement; wrongfulness; fault, whether in the form of intention or negligence; causation and harm (patrimonial loss). See Van der Walt and Midgley *Delict* 1; Loubser and Midgley (eds) *Delict* 27.

(*iniuria*), where damages are recovered with the *actio iniuriarum*;²⁹ or pain and suffering,³⁰ where damages are recovered with the action for pain and suffering.³¹ All these remedies generally³² require the presence of conduct, wrongfulness, fault, either in the form of negligence or intention, causation and harm. It is acknowledged that the South Africa law of delict follows a general approach. In comparison, the Anglo-American systems follow a “casuistic approach”³³ where separate torts were developed with specific requirements. Thus liability will ensue only when the specific requirements for the tort have been met.³⁴

Due to the influence of English common law over our law, certain forms of *iniuria*, such as wrongful deprivation of liberty, defamation, insult, invasion of privacy³⁵ and *damnum iniuria datum* (such as psychiatric or psychological injury, negligent misrepresentation or misstatement, and pure economic loss)³⁶ became known as “separate delicts”, with their own specific requirements but within the realm of the general principles of delict.³⁷ As mentioned,³⁸ in this thesis, the focus will as far as possible be on the elements of delictual liability in order to limit the scope of the study.

²⁹ The requirements for the *actio iniuriarum* are: conduct, which in practice is more commonly found in the form of either a positive act or statement; wrongfulness; fault, in the form of intention (*animus iniuriandi*); causation and harm. The harm may result in an infringement of one’s bodily integrity (*corpus*), dignity (*dignitas*) or reputation (*fama*). See Van der Walt and Midgley *Delict* 1; Loubser and Midgley (eds) *Delict* 27.

³⁰ The requirements for the action for pain and suffering are: conduct, whether in the form of an act, omission or statement; wrongfulness; fault, whether in the form of intention or negligence; causation and harm (non-patrimonial). See Van der Walt and Midgley *Delict* 1; Loubser and Midgley (eds) *Delict* 27.

³¹ Neethling and Potgieter *Delict* 5; Van der Walt and Midgley *Delict* 1; Loubser and Midgley (eds) *Delict* 14. Unlike the *actio legis Aquiliae* and the *actio iniuriarum*, which originated in Roman law, the origin of the action for pain and suffering is Germanic (Van der Walt and Midgley *Delict* 15-16).

³² With the exception of remedies involving strict liability.

³³ In *Perlman v Zoutendyk* 1934 CPD 151 155, the court held that: “Roman Dutch Law approaches a new problem in the continental rather than the English way, because in general all damage caused unjustifiably (*iniuria*) is actionable, whether caused intentionally (*dolo*) or by negligence (*culpa*)”. See Gowaar 2011 *THRHR* 686; Neethling and Potgieter *Delict* 4; Van der Walt and Midgley *Delict* 9, 39; Loubser and Midgley (eds) *Delict* 16.

³⁴ Neethling and Potgieter *Delict* 4; Loubser and Midgley (eds) *Delict* 16; Van der Walt and Midgley *Delict* 39.

³⁵ Neethling and Potgieter *Delict* xi-xii refer to other specific forms of *iniuria* namely: malicious deprivation of liberty; wrongful arrest; malicious prosecution; attachment of property; abduction; enticement and harbouring; and breach of promise. Adultery is no longer regarded as a specific form of *iniuria* in South African law, see *DE v RH* 2015 5 SA 83 (CC).

³⁶ Neethling and Potgieter *Delict* xi also refer to: action of dependants and non-dependants (where patrimonial loss is suffered as a result of injury or death of another); interference with a contractual relationship; manufacturer’s liability; and unlawful competition as specific forms of *damnum iniuria datum*.

³⁷ Neethling and Potgieter *Delict* 6.

³⁸ In chapter 1 para 4.

What is known as “separate delicts” in South African law will not be discussed except for: claims for wrongful conception, wrongful birth and wrongful life; pure economic loss; psychiatric or psychological injury; and wrongful deprivation of liberty.

Customary law is “the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples”.³⁹ Some customary law provisions may be found unconstitutional, but the provisions that are not in conflict with the constitutional provisions may be recognised and applicable.⁴⁰

There is a distinction between “official customary law” and “living customary law”.⁴¹ Official customary law is found in written customary law codes,⁴² legislation,⁴³ case law and authoritative texts.⁴⁴ “Living customary law” is unwritten customary law which is constantly changing and is practised within the communities.⁴⁵

Customary law is rarely referred to by the courts in delictual cases, but there are some instances where it has been referred to.⁴⁶ Customary law generally does not make a clear distinction between criminal law and the law of delict.⁴⁷ Van der Walt and Midgley⁴⁸ refer to the consideration of customary law in the law of delict in determining

³⁹ As defined in s 1 of the Recognition of Customary Marriages Act 120 of 1998. See Van der Walt and Midgley *Delict* 29 fn1.

⁴⁰ See para 3.1.3 below.

⁴¹ Himonga and Nhlapo (eds) *African customary law* 33.

⁴² See, for example, Natal Code of Zulu Law Proc R151 of 1987; the KwaZulu Act on the Code of Zulu Law 16 of 1985; Himonga and Nhlapo (eds) *African customary law* 33 fn 55.

⁴³ See repealed Black Administration Act 38 of 1927; Himonga and Nhlapo (eds) *African customary law* 33 fn 56.

⁴⁴ Himonga and Nhlapo (eds) *African customary law* 33.

⁴⁵ See *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae)* 2005 1 BCLR 1 (CC) [87], [152] where the court acknowledged the two forms of customary law, but the court refused to develop customary law in terms of s 39(2) of the Constitution of the Republic of South Africa, 1996 [112]; *Mabena v Letsoalo* 1998 2 SA 1068 (T) 1074; *Shibi v Sithole, SA Human Rights Commission v President of RSA* 2005 1 SA 580 (CC) [87], [152]; Himonga and Nhlapo (eds) *African customary law* 25-35 and other cases cited (43 fn 12); Van der Walt and Midgley *Delict* 29-30 fn 1.

⁴⁶ See Van der Walt and Midgley *Delict* 29.

⁴⁷ Rautenbach and Bekker *Legal pluralism* 157-158.

⁴⁸ *Delict* 29.

remedies,⁴⁹ recognising a dependant's action⁵⁰ and in giving content to the *boni mores*.⁵¹ Customary law recognises vicarious liability⁵² of the head of the group or family⁵³ for delicts committed by the member of the group or family. Defamation,⁵⁴ adultery,⁵⁵ seduction,⁵⁶ defloration of an unmarried girl,⁵⁷ and damage to property⁵⁸ are instances of delictual liability that are recognised in African customary law.

Attention will now be given to the individual elements of a delict emphasising the explicit and implicit influence of reasonableness on these elements.

2. Conduct

Conduct is defined as a "voluntary human act or omission".⁵⁹ From this definition it is apparent that conduct may be in the form of an omission (a failure to act) or a

⁴⁹ Van der Walt and Midgley *Delict* 29 refer to *Mogale v Seima* 2008 5 SA 637 (SCA) [9] where the court referred to customary law which played an implicit role in reducing the award for compensation in a case of defamation; *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 6 BCLR 577 (CC) [199]-[203] where the Constitutional Court referred to the customary law concept of *ubuntu* which postulates restorative justice. In restoring justice a retraction and apology in addition to monetary compensation was ordered. See also chapter 2 para 1; para 6.1 below.

⁵⁰ A duty of support stemming from customary law relationships is recognised. For example, in *Fosi v RAF* 2008 3 SA 560 (C) [16], the court recognised the customary tradition of a child's duty to support a parent in need of such support. See further authority referred to by Van der Walt and Midgley *Delict* 29-30 with regard to the widow's entitlement to loss of support.

⁵¹ See chapter 2 para 3.3; Van der Walt and Midgley *Delict* 29.

⁵² In *K v Minister of Safety and Security* 2005 6 SA 419 (CC) [24], the Constitutional Court, in reference to vicarious liability, referred to a similar principle applied in customary law whereby the head of the kraal is also held liable for loss caused by a kraal inhabitant. See Van der Walt and Midgley *Delict* 29.

⁵³ See s 102 of the KwaZulu-Natal and Natal Codes of Zulu Law Proc R151 of 1987 where, in KwaZulu-Natal, the father, guardian or family head may be held liable depending on the circumstances for the delicts committed by the minor. See Himonga and Nhlapo (eds) *African customary law* 197-198. Cf Rautenbach and Bekker *Legal pluralism* 158-160, who refer to liability of the head as accessory, or co-liability.

⁵⁴ See s 93 of the KwaZulu-Natal Codes of Zulu Law Proc R151 of 1987 which refers to malicious statements made alleging evil conduct such as witchcraft; *Mogale v Seima* 2008 5 SA 637 (SCA) 641; Himonga and Nhlapo (eds) *African customary law* 199-200; Rautenbach and Bekker *Legal pluralism* 166.

⁵⁵ See ss 99 and 102 of the KwaZulu-Natal and Natal Codes of Zulu Law Proc R151 of 1987; Himonga and Nhlapo (eds) *African customary law* 200-203; Rautenbach and Bekker *Legal pluralism* 163-166.

⁵⁶ See in general Himonga and Nhlapo (eds) *African customary law* 203-207; Rautenbach and Bekker *Legal pluralism* 161-163.

⁵⁷ See in general Rautenbach and Bekker *Legal pluralism* 160-161.

⁵⁸ Rautenbach and Bekker *Legal pluralism* 157, 167. If an animal is killed, the dead animal must be replaced.

⁵⁹ Neethling and Potgieter *Delict* 25; Van der Walt and Midgley *Delict* 90; Loubser and Midgley (eds) *Delict* 63.

commission (a positive physical act or statement).⁶⁰ The act or omission generally must have been committed by a human⁶¹ or a juristic person such as a close corporation or company.⁶² The act must be voluntary.⁶³

Voluntariness refers to the person's mental ability to control his muscular movements.⁶⁴ A person's conduct need not be reasonable or desired in order to be voluntary.⁶⁵ There are certain recognised conditions which may result in an act being regarded as involuntary. For example: absolute compulsion,⁶⁶ unconsciousness or in a state of sleep;⁶⁷ extreme intoxication;⁶⁸ reflex muscular movements; black-outs;⁶⁹ fits;⁷⁰ severe emotional pressure;⁷¹ heart attacks;⁷² hypnosis; and mental conditions,⁷³ are all regarded as conditions which may render one's actions involuntary while in such condition.⁷⁴ Automatism is the well-known defence which

⁶⁰ Van der Walt and Midgley *Delict* 92; Loubser and Midgley (eds) *Delict* 63; Burchell *Delict* 37.
⁶¹ In instances where a human uses an animal as an instrument to commit a delict, such conduct will be considered a human act, *qui facit per alium facit per se* - he who acts through another commits the act himself (Burchell *Delict* 37). See *Jooste v Minister of Police* 1975 1 SA 349 (E) 354 where Addleson J referred to instances where the police make use of dogs just as they use "other suitable and appropriate instruments". In this case a police dog bit and injured a boy in the course of an arrest. The court found that the circumstances did not call for the use of the dog, the use of the dog was not justified. The court awarded damages to the boy's father, in his capacity as father and natural guardian, for the harm suffered by the son. See also Neethling and Potgieter *Delict* 25; Van der Walt and Midgley *Delict* 90; Loubser and Midgley (eds) *Delict* 64.
⁶² Which can be held delictually liable through the actions of its organs which are humans. See Neethling and Potgieter *Delict* 25-26; Van der Walt and Midgley *Delict* 90; Loubser and Midgley (eds) *Delict* 64.
⁶³ Neethling and Potgieter *Delict* 25; Van der Walt and Midgley *Delict* 90-91; Loubser and Midgley (eds) *Delict* 64.
⁶⁴ Neethling and Potgieter *Delict* 26; Van der Walt and Midgley *Delict* 91; Loubser and Midgley (eds) *Delict* 64.
⁶⁵ Neethling and Potgieter *Delict* 26; Loubser and Midgley (eds) *Delict* 64.
⁶⁶ See *S v Goliath* 1972 3 SA 1 (A).
⁶⁷ See *R v Dhlamini* 1955 1 SA 120 (T).
⁶⁸ See *S v Chretien* 1981 1 SA 1097 (A). If a person consumes alcohol while foreseeing that he might drive a motor vehicle later on, his conduct will still be considered voluntary even though at the time of the accident he was so inebriated that his actions were in actual fact involuntary. See Visser in Du Bois (gen ed) *Wille's Principles of South African law* 1096.
⁶⁹ See *Government v Marine and Trade Insurance Co Ltd* 1973 3 SA 797 (D); *Molefe v Mahaeng* 1999 1 SA 562 (SCA).
⁷⁰ See *R v Mkize* 1959 2 SA 260 (N).
⁷¹ See *S v Arnold* 1985 3 SA 256 (C).
⁷² See *Gabellone v Protea Assurance Ltd* 1981 4 SA 171 (O).
⁷³ See *S v Mahlinza* 1967 1 SA 408 (A). Conduct by a person living with a mental disability or an infant is generally voluntary, but such person may not be held delictually liable due to the exclusion of fault or lack of accountability. See Neethling and Potgieter *Delict* 26; Van der Walt and Midgley *Delict* 90-91; Loubser and Midgley (eds) *Delict* 64-65.
⁷⁴ See Neethling and Potgieter *Delict* 27; Loubser and Midgley (eds) *Delict* 65; Van der Walt and Midgley *Delict* 91; Burchell *Delict* 23.

refutes a voluntary act or omission.⁷⁵ The applicant relying on this defence bears the onus of proof.⁷⁶ The defence of automatism will not succeed if the defendant negligently or intentionally created the situation in which he claims to have behaved involuntarily.⁷⁷ With regard to the alleged negligent conduct of the defendant, what must be determined “is whether the reasonable person in the position of the defendant would have foreseen the possibility of the ensuing harm while in a state of automatism and would have prevented such harm”.⁷⁸ For example, if a defendant who is prone to epileptic fits forgets to take his medication one morning and it later transpires that he suffered an epileptic fit while driving, thereby causing an accident,⁷⁹ he cannot rely on automatism. The courts take into account the defendant’s conduct prior to the state of automatism.⁸⁰ A reasonable person in the position of the defendant would have taken his medication, thus preventing the occurrence of a fit which resulted in the ensuing harm.⁸¹ The courts, in trying to ascertain whether the

⁷⁵ See *Government v Marine and Trade Insurance Co Ltd* 1973 3 SA 797 (D) 799; *Molefe v Mahaeng* 1999 1 SA 562 (SCA); cf Ahmed in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 50.

⁷⁶ *Molefe v Mahaeng* 1999 1 SA 562 (SCA) 569.

⁷⁷ Neethling and Potgieter *Delict* 28-29; Ahmed in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 50.

⁷⁸ Ahmed in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 50. See Neethling and Potgieter *Delict* 28; Van der Walt and Midgley *Delict* 91; Burchell *Delict* 36-37.

⁷⁹ Which resulted in the injury of an innocent victim.

⁸⁰ *Gabellone v Protea Assurance Ltd* 1981 4 SA 171 (O) 173-174. Van der Merwe and Olivier *Delict* 26-29 submit that automatism does not exclude conduct, but rather wrongfulness or fault. Their view may be illustrated with reference to the example in the text above in that the actual conduct which led to the accident is not voluntary, but that there were prior voluntary acts (or, in the example, an omission to take medication) which caused the innocent victim’s injury. They submit that the conduct was voluntary, but that fault is absent resulting in no delictual liability. Neethling and Potgieter (*Delict* 29) admit that this view may be theoretically correct, but criticise it on the ground that it conforms to a narrow view of automatism and further that the plaintiff may have difficulty in proving negligence. The latter authors are of the view that one must look at the act which caused the harm (not the prior acts) and if it is involuntary then there is no “conduct”. If, however, the defendant knew or should have reasonably foreseen that his omission could cause harm, he will not be able to rely on automatism because his liability will be based on his prior conduct.

⁸¹ See *Molefe v Mahaeng* 1999 1 SA 562 (SCA) where the defendant suffered a blackout raising automatism as a defence and succeeded. Even though the defendant had slipped and fell earlier on the day of the accident, the court held that there was a lack of evidence in proving that the reasonable person should have been aware of the possibility of a blackout as a result of the fall earlier that day (569). In this case, the court followed a similar approach to that in English law (with regard to the tort of negligence) where the standard applied is the “reasonable person” and fault in the form of negligence is absent. English tort doctrine generally does not differentiate between the element of conduct and fault. See *Mansfield v Weetabix* 1988 1 WLR 1263 (CA). Mullender *Modern LR* 688, however, agrees that in such instances the defendant does not act (see chapter 2 para 4). In *Molefe v Mahaeng*, the court followed a similar approach to that in English law (with regard to the tort of negligence) where the criterion applied is the “reasonable person” and fault in the form of negligence is absent. In *Wessels v Hall and Pickles (Coastal) (Pty) Ltd* 1985 4 SA 153 (C) 158, the defendant suffered a hypoglycaemic attack resulting in a diabetic coma while driving and causing an accident, the court held that the defendant was negligent for failing to take

conduct was voluntary, consider the conduct, prior to the state of automatism, of the hypothetical reasonable person in a similar position as the defendant. This relates to negligence.⁸² Similarly, with reference to the example above, intentional conduct may be considered. Thus, if the defendant intentionally and deliberately does not take his medication one morning leading to him suffering an epileptic fit while driving, thereby causing an accident, it is doubtful that he will be able to rely on automatism. The doctrine, *actio libera in causa* (the wrongdoing he commits can be imputed to him for actions unfree in themselves, but free in their causes) may be applied and the defendant may be held liable for any harm or loss suffered by the plaintiff.⁸³

The influence of reasonableness on conduct is implicit.⁸⁴ It is in principle reasonable to hold a defendant liable in delict only if the element of conduct is present with all the other required elements.⁸⁵ It is reasonable to hold a person liable only if the voluntary conduct was present in the form of an act or omission and was undertaken by a human. Naturally, if the conduct was not undertaken by a human and involuntary, then it is unreasonable to hold the defendant liable as there is no conduct. In cases where an animal is used as an instrument by a human to commit a delict, then it may be deemed a human act, as the human is in control of the animal. In a similar vein, conduct by a natural person acting as an organ of a juristic person may be deemed human conduct and it may be reasonable to hold the defendant liable, provided all the other elements of a delict are present too.

Generally, in determining whether conduct is present, the adjudicator will consider the facts of the case. It is predominantly a factual enquiry. However, in the

precautions by eating a mid-morning snack in his insulin-dependent diabetic condition. The reasonable person would have foreseen the possibility that if he missed his mid-morning snack, his blood sugar level might have dropped unexpectedly, thereby causing him to lose control of the vehicle. But see *Gabellone v Protea Assurance Ltd* 1981 4 SA 171 (O) 173-174 where the driver suffered from coronary thrombosis prior to his death and subsequently suffered a cardiac disturbance which affected his ability to control the vehicle he was driving shortly before the accident. The court held that what happened thereafter was “not due to any voluntary action or inaction on his part”. Edeling AJ found that on the balance of probabilities the (deceased) driver, at the time of the accident, suffered a heart attack which was not due to his negligence (174). See also Neethling and Potgieter *Delict* 28-29; Van der Walt and Midgley *Delict* 91; Loubser and Midgley (eds) *Delict* 66.

⁸² Loubser and Midgley (eds) *Delict* 66-67; Ahmed in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 50.

⁸³ Neethling and Potgieter *Delict* 28; Van der Walt and Midgley *Delict* 91; Loubser and Midgley (eds) *Delict* 65.

⁸⁴ Ahmed in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 50.

⁸⁵ Ahmed in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 50.

requirement that the conduct must be voluntary, normative elements become more prominent. In principle, if the conduct is voluntary, then conduct may be present and it is reasonable to hold the defendant liable in delict, providing all the other elements are proved. In respect of the defence of automatism – it may be argued that it is reasonable for the defence to apply if the person was mentally unable to control his muscular movements. Thus if the defendant was mentally able to control his muscular movements then in principle: his conduct may be considered voluntary; the defence of automatism will not be applicable; and it is reasonable to hold the defendant delictually liable. As mentioned, automatism will not succeed if the defendant's prior intentional or negligent conduct led to the involuntary bodily movements which resulted in harm to the plaintiff. The influence of reasonableness is apparent in both forms of fault, negligence and intention, discussed further on.⁸⁶ It would thus be unreasonable for automatism to succeed as a defence to the element of conduct, if the defendant's prior negligent or intentional conduct led to the subsequent involuntary bodily movements which resulted in harm to the plaintiff.

3. Wrongfulness

Wrongfulness is an essential and individual element required in respect of determining delictual liability.⁸⁷ It has been argued that wrongfulness should preferably be determined before fault⁸⁸ since it seems logical to find fault on the part of a person only when it has been found that such person has acted wrongfully.⁸⁹

⁸⁶ See paras 4.2-4.3 below.

⁸⁷ *Herschel v Mrupe* 1954 3 SA 464 (A) 490; *Smit v Suid-Afrikaanse Vervoerdienstse* 1984 1 SA 246 (C) 249; *Lillicrap, Wassenaar and Partners v Pilkington Bros (SA) (Pty) Ltd* 1985 1 SA 475 (A) 496-497; *Cape Town Municipality v Bakkerud* 2000 3 SA 1049 (SCA) 1060-1061; *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 SA (SCA) [19]; *Gouda Boerdery BK v Transnet* 2005 5 SA 490 (SCA) 498; Van der Walt and Midgley *Delict* 96; Neethling and Potgieter *Delict* 33; Loubser and Midgley (eds) *Delict* 140.

⁸⁸ *Cape Town Municipality v Bakkerud* 2000 3 SA 1049 (SCA) 1054-1055; *Administrateur, Transvaal v Van der Merwe* 1994 4 SA 347 (A) 364; *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) 442. See Neethling and Potgieter *Delict* 130 fn 7; Van der Walt and Midgley *Delict* 225; Boberg *Delict* 268, 271; Knobel 2010 *THRHR* 115 ff. Cf Fagan 2005 *SALJ* 139-141.

⁸⁹ In respect of determining intent, what must be established is direction of the will and awareness of the wrongfulness of his conduct. Seen in this sense it is not logical to establish fault without first establishing wrongfulness (see Neethling and Potgieter *Delict* 129 fn 4; Van der Walt and Midgley *Delict* 225; Knobel 2010 *THRHR* 115ff). However, Knobel in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 236, convincingly submits that in line with wrongfulness being an independent element, in determining intent, the wrongdoer must be aware of the unreasonableness of his conduct rather than aware of the wrongfulness of his conduct.

However, according to case law, it no longer matters if fault is determined before wrongfulness⁹⁰ and *vice versa*. The courts consider what is more convenient depending on the circumstances of the case.⁹¹ The enquiry into wrongfulness is separate from the enquiry into fault⁹² and when the one element is established it does not necessarily mean that the other element is also automatically established.⁹³ In instances where certain factors may be relevant to both the question of fault and wrongfulness, the factors are still viewed from different angles and with a different focus.⁹⁴ Boberg⁹⁵ points out that in respect of wrongfulness, the question is whether the defendant brought about the consequences in an objectively unreasonable manner determined *ex post facto* in light of surrounding circumstances. This includes all consequences not foreseen by the defendant, or consequences that resulted beyond the defendant's control. The focus is on the effect of the conduct. If wrongfulness is found, it illustrates the law's disapproval of the consequences. With negligence, the question is whether the actor behaved in an unreasonable manner judged *ex ante* by the standard of the reasonable person, in view of his actual circumstances. If negligence is found, it illustrates the law's disapproval of the actor's part in producing the consequences.⁹⁶ The focus of reasonableness under fault and wrongfulness is thus different.⁹⁷ The wrongfulness of an act is determined with

⁹⁰ See *Mkhatswa v Minister of Defence* 2000 1 SA 1104 (SCA) 1111; *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 SA 827 (SCA) 838; *Hawekwa Youth Camp v Byrne* 2010 6 SA 83 (SCA) 91; Fagan 2005 SALJ 139-14; Ahmed 2012 *Obiter* 416-417; Loubser and Midgley (eds) *Delict* 157; cases referred to by Neethling and Potgieter *Delict* 130 fn 7.

⁹¹ *Local Transitional Council of Delmas v Boshoff* 2005 5 SA 514 (SCA) 522; *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) 442; *Gouda Boerdery Bpk v Transnet* 2005 5 SA 490 (SCA) 499; *Hawekwa Youth Camp v Byrne* 2010 6 SA 83 (SCA) 91. See Loubser and Midgley (eds) *Delict* 156-157; Neethling and Potgieter *Delict* 129-130.

⁹² *McNally v M & G Media (Pty) Ltd* 1997 4 SA 267 (W) 273; *Cape Town Municipality v Bakkerud* 2000 3 SA 1049 (SCA) 1060-1061; *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) 441; *McCarthy Ltd t/a Budget Rent A Car v Sunset Beach Trading 300 t/a Harvey World Travel* 2012 6 SA 551 (GNP) 560; Van der Walt and Midgley *Delict* 93.

⁹³ *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) 441.

⁹⁴ *Cape Town Municipality v Bakkerud* 2000 3 SA 1049 (SCA) 1060-1061; *Moses v Minister of Safety and Security* 2000 3 SA 106 (C) 113; *Simon's Town Municipality v Dews* 1993 1 SA 191 (A) 196.

⁹⁵ *Delict* 269-270. Boberg submits that the reasonable person test is objective-subjective. It is objective in the sense that the standard applies to all but subjective when the particular circumstances are taken into account. However, with regard to wrongfulness the test is more objective when compared with the reasonable person test for negligence which is more subjective.

⁹⁶ Boberg *Delict* 270.

⁹⁷ Du Bois 2000 *Acta Juridica* 12.

reference to its consequence.⁹⁸ The term, “wrongfulness” and “unlawfulness” are often used synonymously in the law of delict.⁹⁹ Unlawfulness is the more accepted term for a more or less equivalent concept in criminal law, but unlawful conduct in criminal law does not necessarily mean that conduct is wrongful in terms of delictual liability.¹⁰⁰

There are two approaches to determining wrongfulness according to case law and academic writers.¹⁰¹ The approach emanating from the decision of *Minister van Polisie v Ewels*¹⁰² (which will be referred to as the “traditional approach” in this thesis) is that in order for conduct to be deemed wrongful, the harm suffered must be caused in a legally reprehensible or unreasonable manner, *contra bonos mores* in light of all surrounding circumstances.¹⁰³ The other approach recently applied (referred to as the “recent approach” in this thesis) or the “new test”¹⁰⁴ or “variation” of the traditional

⁹⁸ The act and its resulting consequence are separated in time and space and only when the consequence has occurred may the act be found wrongful. For example, in the case of a foetus being injured while in the mother’s womb as a result of a motor vehicle accident – only when the child is born with the injuries may the act be considered wrongful. See *RAF v Mtati* 2005 6 SA 215 (SCA); Neethling and Potgieter *Delict* 34-35; Loubser and Midgley (eds) *Delict* 143.

⁹⁹ *Viv’s Tippers (Edms) Bpk v Pha Phama Staff Services (Edms) Bpk h/a Pha Phama Security* 2010 4 SA 455 (SCA) 458. See Loubser and Midgley (eds) *Delict* 140.

¹⁰⁰ Van der Walt and Midgley *Delict* 93 fn 11 refer to *Bophuthatswana Transport Holdings (Edms) Bpk v Matthysen Busvervoer (Edms) Bpk* 1996 2 SA 166 (A) in that where a person does not stop at an intersection, he may be behaving in a negligent manner, but no delictual liability will follow unless some harm occurred.

¹⁰¹ Ahmed in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 51-52.
¹⁰² 1975 3 SA 590 (A) 597.

¹⁰³ See *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 596-597; *Minister of Law and Order v Kadir* 1995 1 SA 303 (A) 317-318; *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 27; *Administrateur, Transvaal v Van der Merwe* 1994 4 SA 347 (A) 361; *Government of the Republic of South Africa v Basdeo* 1996 1 SA 355 (A) 367; *Carmichele v Minister of Safety and Security* 2001 1 SA 489 (SCA) 494; cases referred to Neethling and Potgieter *Delict* 36 fn 19-21. The authors Neethling and Potgieter in the earlier edition of their textbook on *Delict* used the words “legally reprehensible” and “unreasonable” interchangeably. For example, to quote directly from the text (6 ed 33), the authors, in the earlier edition stated that “[f]or liability to follow, prejudice must be caused in a *wrongful*, i.e., a *legally reprehensible or unreasonable* manner. ... [I]f it is clear that an individual interest has been prejudiced, legal norms must be used to determine whether such prejudice occurred in a *legally reprehensible or unreasonable* manner”. The authors in the later edition (*Delict* 7 ed 33-34) have removed the words “unreasonable” from the text on these pages and state that “[i]n essence, wrongfulness lies in the infringement of a *legally protected interest* (or an interest worthy of protection) in a *legally reprehensible way*. ... If it is clear that a legally protected interest has been prejudiced, legal norms must be used to determine whether such prejudice occurred in a *legally reprehensible manner*”. The authors in the later edition (*Delict* 37) associate or refer to the *reasonableness* of the defendant’s conduct with regard to the *boni mores* test.

¹⁰⁴ Scott in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 433 refers to the recent approach as the “new test”; Scott 2014 *De Jure* 388.

approach¹⁰⁵ by our courts,¹⁰⁶ stemming from *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*¹⁰⁷ is that according to policy considerations or public policy, it would be reasonable to hold a person liable, or that wrongfulness turns on “the reasonableness of imposing liability for conduct that has been shown, or is assumed to be, negligent”.¹⁰⁸ These two approaches will now be discussed in more detail.

3.1 The traditional approach: the harm suffered must be caused in an unreasonable manner

In determining wrongfulness, the basic question is whether a legally recognised interest was infringed and if so whether it was infringed in a legally reprehensible or unreasonable manner.¹⁰⁹ The criterion used to determine whether a legally recognised interest was infringed in a legally reprehensible or unreasonable manner is the *boni mores* yardstick.¹¹⁰ The *boni mores* yardstick is an objective test based on the criterion of reasonableness.¹¹¹ It is referred to as the fundamental test for

¹⁰⁵ Nugent JA in *Crown Chickens (Pty) Ltd v Rocklands Poultry Rieck* 2007 2 SA 118 (SCA) 122 referred to the current approach as a variation of the test for wrongfulness (see Neethling and Potgieter *Delict* 78).

¹⁰⁶ See *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 1 SA 461 (SCA) 468; *Le Roux v Dey* 2011 3 SA 274 (CC) 315; *Hawekwa Youth Camp v Byrne* 2010 6 SA 83 (SCA) 90-91; cases referred to by Neethling and Potgieter *Delict* 80 fn 303.

¹⁰⁷ 2006 1 SA 461 (SCA) 468.

¹⁰⁸ See Fagan 2005 *SALJ* 93; Fagan 2007 *SALJ* 292; Loubser and Midgley (eds) *Delict* 140 who state that “wrongfulness is closely linked to the central idea of the law of delict, which is that liability is imposed when a person unreasonably causes harm to another”. Cf Van der Walt and Midgley *Delict* 99.

¹⁰⁹ *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) 498-499; *Premier Western Cape v Faircape Property Developers (Pty) Ltd* 2003 6 SA 13 (SCA) 31-32; *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 27; *eBotswana (Pty) Ltd v Sentech (Pty) Ltd* 2013 6 SA 327 (GSJ) 340; *Oosthuizen v Van Heerden* 2014 6 SA 423 (GP) 433; Neethling 2006 *SALJ* 209; Neethling and Potgieter *Delict* 33; Neethling and Potgieter 2014 *TSAR* 890; Loubser and Midgley (eds) *Delict* 142 146.

¹¹⁰ In other words the question asked is, does the community find the conduct in question wrongful for the purposes of a delict? See *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 596-597; *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 27; *Carmichele v Minister of Safety and Security* 2001 1 SA 489 (SCA) 494; *Moses v Minister of Safety and Security* 2000 3 SA 106 (C) 113; *Van Eeden v Minister of Safety and Security (Women’s Legal Centre Trust, as Amicus Curiae)* 2003 1 SA 389 (SCA) 395; *Minister of Law and Order v Kadir* 1995 1 SA 303 (A) 317-318; *Hattingh v Roux* 2011 5 SA 135 (WCC) 140; *F v Minister of Safety and Security* 2012 1 SA 536 (CC) 566; *Paixão v Road Accident Fund* 2012 6 SA 377 (SCA) 381; *Lee v Minister of Correctional Services* 2013 2 BCLR 129 (CC) 149 167; *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2014 2 SA 214 (SCA) 222; *Oosthuizen v Van Heerden* 2014 6 SA 423 (GP) 433; Neethling and Potgieter 2014 *TSAR* 890; Neethling and Potgieter *Delict* 36 (see cases referred to in fn 21-22); Loubser and Midgley (eds) *Delict* 142 144; Van der Walt and Midgley *Delict* 113-114; *Boberg Delict* 33; *Burchell Delict* 39.

¹¹¹ See cases referred to by Neethling and Potgieter *Delict* 36 fn 20.

wrongfulness¹¹² and is a value-based judgment¹¹³ generally taking into consideration all the surrounding circumstances, *inter alia* ever changing¹¹⁴ good morals (*boni mores*) of the South Africa community,¹¹⁵ thereby referring to what is “reasonable and proper”.¹¹⁶ Case law has also reiterated that:

“in a mixed country like South Africa, with its variety of races, cultures, languages and religions, and its wide social and economic differences. No single group has a monopoly of such a society’s ‘right thinking’ members, and the ‘mythical consensus’ must encompass them all”.¹¹⁷

3.1.1 Objective *ex post facto* approach to determining wrongfulness¹¹⁸

The *boni mores* test is in essence an objective test.¹¹⁹ All the surrounding circumstances are taken into account.¹²⁰ It is based on the yardstick of reasonableness.¹²¹

The courts may be faced with two or more competing interests which the plaintiff and defendant rely on and which require protection of the law.¹²² In such instances the

¹¹² See list of cases referred to by Neethling and Potgieter *Delict* 36 fn 21; Van der Walt and Midgley *Delict* 100; Loubser and Midgley (eds) *Delict* 144.

¹¹³ See *Hattingh v Roux* 2011 5 SA 135 (WCC) 140; Loubser and Midgley (eds) *Delict* 24-25, 144.

¹¹⁴ See *Silva’s Fishing Corporation (Pty) Ltd v Maweza* 1957 2 SA 256 (A) 265; *Cape Town Municipality v Bakkerud* 2000 3 SA 1049 (SCA) 1056; *Ries v Boland Bank PKS Ltd* 2000 4 SA 955 (C) 968; *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 4 SA 1319 (SCA) 1329; *DE v RH* 2015 5 SA 83 (CC); Van der Walt and Midgley *Delict* 100.

¹¹⁵ *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) 442; *Deneys Reitz v SA Commercial, Catering and Allied Workers Union* 1991 2 SA 685 (W) 693; *Marais v Richard* 1981 1 SA 1157 (A) 1168; *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 3 SA 579 (A) 593; *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA) 1212; but see *Clarke v Hurst* 1992 4 SA 630 (D) 653 where English and American cases were referred to with regard to society’s attitudes (Neethling and Potgieter *Delict* 40 fn 41).

¹¹⁶ Boberg *Delict* 33. See Neethling and Potgieter *Delict* 37 fn 24.

¹¹⁷ *Demmers v Wyllie* 1978 4 SA 619 (D) 629. See Du Bois 2000 *Acta Juridica* 11.

¹¹⁸ See Van der Walt and Midgley *Delict* 96; Ahmed in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 51.

¹¹⁹ *Moses v Minister of Safety and Security* 2000 3 SA 106 (C) 113; *Oosthuizen v Van Heerden* 2014 6 SA 423 (GP) 433.

¹²⁰ *Government of the Republic of South Africa v Basdeo* 1996 1 SA 355 (A) 367; *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) 396.

¹²¹ *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) 395; *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 3 SA 579 (A) 588; *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 27; *S M Goldstein & Co (Pty) Ltd v Cathkin Park Hotel (Pty) Ltd* 2000 4 SA 1019 (SCA); *Kadir v Minister of Law and Order* 1992 3 SA 737 (C) 742; *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597; *Borgin v De Villiers* 1980 3 SA 556 (A) 577; *Ramsay v Minister van Polisie* 1981 4 SA 802 (A) 811; *Moses v Minister of Safety and Security* 2000 3 SA 106 (C) 113; *Hattingh v Roux* 2011 5 SA 135 (WCC) 140; Neethling and Potgieter *Delict* 37; Van der Walt and Midgley *Delict* 99; Burchell *Delict* 38.

¹²² Such as freedom of expression, dignity and reputation. See *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 3 SA 579 (A) 585; *National Media Ltd v Bogoshi* 1998 4 SA

courts must weigh the different interests¹²³ and decide according to the particular circumstances of the case whether the infringement of the plaintiff's interests was reasonable or not.¹²⁴

There are different opinions¹²⁵ on whether wrongfulness should be determined objectively and *ex post facto*, that is, after the fact – taking into account what actually transpired including the resultant consequences.¹²⁶ However, the courts sometimes use an *ex ante* (before the event) approach to determine wrongfulness and this is evident when they determine the conduct of the defendant in respect of certain grounds of justification¹²⁷ from the perspective of a reasonable person in the position of the defendant. Knobel¹²⁸ makes the following distinction between wrongfulness, where an *ex post facto* approach is applied, and negligence, where an *ex ante* approach is generally applied:

“wrongfulness is the objective unreasonableness of conduct, based on the *facts known to the court after a full factual investigation*. Fault, on the other hand, is the subjective awareness of the unreasonableness of conduct, which the wrongdoer either had (intention) or should have

1196 (SCA); *H v W* 2013 5 BCLR 554 (GSJ). See other examples listed by Loubser and Midgley (eds) *Delict* 141, 145.

¹²³ Van der Walt and Midgley *Delict* 110; Burchell *Delict* 38.

¹²⁴ See *Oosthuizen v Van Heerden* 2014 6 SA 423 (GP) 434, where it was alleged that cattle carrying an infectious disease had wandered onto a neighbour's land infecting the neighbour's cattle. The court held that in “balancing the respective interests of the parties it must be recognised that both have the right to the reasonable use of their properties”. Taking all the factors into account, the court in respect of wrongfulness concluded that it was not reasonable to expect the owner of one property to take sole responsibility and bear the cost of erecting a fence in order to ensure that the risk of infection is allayed, while the other owner is expected to do nothing. Thus, the court held that to “place this responsibility on the [one landowner] would be contrary to the underlying principles governing the reasonable use of property between neighbours” (435). See also *Natal Fresh Produce Growers' Association v Agroserve (Pty) Ltd* 1990 4 SA 749 (N) 753-754; *Hattingh v Roux* 2011 5 SA 135 (WCC) 140; as well as other cases referred to by Neethling and Potgieter *Delict* 38 fn 27. Cf Loubser and Midgley (eds) *Delict* 145; Van der Walt & Midgley *Delict* 187-189.

¹²⁵ See para 3.3 below.

¹²⁶ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) 139; *NM v Smith (Freedom of Expression Institute as Amicus Curiae)* 2007 5 SA 250 (CC) 274; *Alley Cat Clothing v De Lisle Weare Racing* 2002 1 All SA 123 (D) 134; Knobel 2008 *THRHR* 7; Neethling and Potgieter *Delict* 33 38; Loubser and Midgley (eds) *Delict* 156; Van der Walt and Midgley *Delict* 67; Burchell *Delict* 38; Boberg *Delict* 33. See *contra* Fagan 2005 *SALJ* 92, 95 who states that wrongfulness should be determined from an *ex ante* point of view instead. Brand JA in *Roux v Hattingh* 2012 6 SA 428 (SCA) 440-441 submitted that an *ex post facto* approach to establishing wrongfulness renders the defendant's subjective mental disposition irrelevant, this is criticised by Neethling and Potgieter who state that subjective factors are considered (2014 *THRHR* 122-123; 2014 *SALJ* 252-253).

¹²⁷ For example, in respect of self-defence (discussed below in para 3.4.2), necessity (discussed below in para 3.4.3), provocation (discussed below in para 3.4.4) and official command (discussed below in para 3.4.7).

¹²⁸ In Potgieter, Knobel and Jansen (eds) *Essays in Honour of Johann Neethling* 236.

had (negligence), based on the *facts that were known to the wrongdoer and/or the facts that should have been known to the wrongdoer*".¹²⁹

3.1.2 General factors considered in determining whether or not conduct is reasonable

There are a number of factors which have an influence in determining whether or not conduct is unreasonable and there is no *numerus clausus*. Neethling and Potgieter¹³⁰ provide the following comprehensive list of factors that may be taken into account: the nature of the relationship between the parties;¹³¹ the nature and extent of the harm suffered by the plaintiff;¹³² motive of the defendant (a subjective factor); foreseen harm and reasonable foreseeability of the harm;¹³³ the possible value to society or the defendant of the harmful conduct; the costs and effort of steps which could have been taken to prevent the harm; the probability of success of the preventative measures (these latter four factors are also considered in determining negligence);¹³⁴ economic concerns; comparative legal positions;¹³⁵ ethical and moral

¹²⁹ Italicised for emphasis.

¹³⁰ *Delict* 38. See also Boberg *Delict* 33.

¹³¹ *Hamilton v Minister of Safety and Security* 2003 1 All SA 678 (C) 694-695. In *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) 400, the court stated that a special relationship between the parties is one of several factors which may be considered with regard to a legal duty. See Loubser and Midgley (eds) *Delict* 146.

¹³² See *Mpongwanav Minister of Safety and Security* 1999 2 SA 794 (C) 803-804; Van der Walt and Midgley *Delict* 100.

¹³³ *S M Goldstein & Co (Pty) Ltd v Cathkin Park Hotel (Pty) Ltd* para 7; *Government of the Republic of South Africa v Basdeo* 1996 1 SA 355 (A) 367-368; *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* para 42; Van der Walt and Midgley *Delict* 107-110.

¹³⁴ Foreseeability of harm and the other fault related factors in determining the reasonableness of the defendant's conduct (in respect of wrongfulness) has been held to be relevant even though it may not be suitable as it leads to the conflation of wrongfulness, negligence and causation. See *Country Cloud Trading v Mec, Department of Infrastructure Development* 2015 1 SA 1 (CC) 14-16.

¹³⁵ S 39(1) of the Constitution of the Republic of South Africa, 1996 states that when interpreting the Bill of Rights, a court must consider international law and may consider foreign law. See *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA) 1212 where the court stated that the solution to the problem could be found in the law of England, Australia and the Netherlands in considering whether numerous defamatory articles were published lawfully. In *DE v RH* (2015 5 SA 83 (CC) 91-93), the Constitutional Court considered the changing attitudes of society towards delictual liability stemming from adultery in numerous foreign jurisdictions. The court finally concluded that according to the changing attitudes and public policy, adultery is no longer wrongful and it is no longer reasonable to impose delictual liability for adultery. In *H v Fetal Assessment Centre* 2015 2 SA 193 (CC), the Constitutional Court was called upon to consider whether South African law could recognise a child's delictual claim for "wrongful life". The court considered international and foreign law, concluding that such a delictual claim could be developed and recognised. The Constitutional Court stated that the rights of a child and other constitutional rights did not bar a claim and referred the matter back to the High Court to determine whether such a claim existed.

concerns; public policy;¹³⁶ the values and norms underpinning the Constitution of the Republic of South Africa¹³⁷ and the Bill of Rights¹³⁸ (Chapter 2 of the Constitution).¹³⁹

The influence of the Constitution of the Republic of South Africa;¹⁴⁰ the *boni mores* as interpreted by the adjudicators; public policy and policy considerations which are considered by the adjudicators are important in determining wrongfulness and whether conduct is reasonable or not, requiring further discussion.

3.1.3 The influence of the Constitution of the Republic of South Africa¹⁴¹

The Bill of Rights entrenched in the Constitution of the Republic of South Africa (hereinafter referred to as the “Constitution”),¹⁴² which *inter alia* provides for the rights to privacy,¹⁴³ equality,¹⁴⁴ human dignity,¹⁴⁵ freedom of expression,¹⁴⁶ freedom and security of a person,¹⁴⁷ must infiltrate the law of delict.¹⁴⁸ Numerous fundamental rights, relevant to the law of delict were already acknowledged and the fact that they are also now acknowledged as constitutional rights just catapults the status of these rights to the highest protection in terms of the law.¹⁴⁹ Where there is a conflict between the fundamental rights, for example, in a case of defamation, between the right to freedom of expression and the right to human dignity, a weighing or balancing of the interests will have to transpire in exercising a value judgment.¹⁵⁰ Even the fundamental rights entrenched in the Constitution are not absolute and may be

¹³⁶ See *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 3 SA 579 (A) 588; *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA) 1204; Van der Walt and Midgley *Delict* 99-101; Loubser and Midgley (eds) *Delict* 146.

¹³⁷ 1996. See *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 953-954; *DE v RH* 2015 5 SA 83 (CC), 89-90; Loubser and Midgley (eds) *Delict* 39.

¹³⁸ According to s 39(2) of the Constitution of the Republic of South Africa, 1996, in developing the common law, the courts “must promote the spirit, purport and objects of the Bill of Rights”.

¹³⁹ Neethling and Potgieter *Delict* 38-39; Loubser and Midgley (eds) *Delict* 146; Van der Walt and Midgley *Delict* 110-112.

¹⁴⁰ 1996.

¹⁴¹ 1996.

¹⁴² 1996.

¹⁴³ S 14 of the Constitution.

¹⁴⁴ S 9 of the Constitution.

¹⁴⁵ S 10 of the Constitution.

¹⁴⁶ S 16 of the Constitution.

¹⁴⁷ S 12 of the Constitution.

¹⁴⁸ *Du Plessis v De Klerk* 1996 3 SA 850 (CC) 885; *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA) 1216.

¹⁴⁹ See *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) 211; Neethling and Potgieter *Delict* 20; Loubser and Midgley (eds) *Delict* 33.

¹⁵⁰ Neethling and Potgieter *Delict* 19-20.

restricted and limited in terms of section 36¹⁵¹ (hereinafter referred to as the “limitation clause”) to the extent that the limitation is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.

There is direct¹⁵² and indirect¹⁵³ application of the Constitution. In terms of direct application, the Bill of Rights is applied directly to all law, superseding any conflicting law and providing a constitutional remedy¹⁵⁴ as well as any other remedy if necessary.¹⁵⁵ A direct application of the Constitution may take place where there is either a duty imposed on the state to not perform any act that infringes a fundamental right; or to provide “appropriate protection to everyone through laws and structures designed to afford such protection”¹⁵⁶ as long as it is reasonable and justifiable according to the limitation clause.¹⁵⁷ In terms of indirect application, private law for example, the common law, the law of delict remains, but is either adapted or developed to bring it in harmony with the Constitution.¹⁵⁸ The Bill of Rights will have an indirect effect on the law of delict affecting all the delictual elements as it is only reasonable to hold a wrongdoer liable in delict if all the elements of a delict are present; in particular, the elements of wrongfulness, fault, causation¹⁵⁹ and harm where policy and concepts such as reasonableness, justice and fairness are prevalent.¹⁶⁰ The Constitution is the supreme law in South Africa and if there is a conflict between public policy, the common law and the constitutional values,¹⁶¹ the

¹⁵¹ Of the Constitution.

¹⁵² See ss 8(1), 8(2), 8(3) of the Constitution.

¹⁵³ See ss 39(2), 39(3) of the Constitution.

¹⁵⁴ A constitutional wrong may occur where a fundamental right has been violated, but it is not the same as a delict. In respect of a delict, it is not necessary for a fundamental right to be violated, such as in the case of pure economic loss. The aim of a constitutional remedy is to protect, vindicate and protect the fundamental rights entrenched in Chapter 2 (Bill of Rights), whereas the main aim of a delictual remedy is to generally provide compensation. Damages may also be awarded for a constitutional wrong. Even though there is an overlap between a constitutional wrong and a delict, a constitutional wrong and a delict have different requirements with different aims. See Neethling and Potgieter *Delict* 20-21.

¹⁵⁵ See Van der Walt and Midgley *Delict* 19-20, 110-112.

¹⁵⁶ *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) 957. See Neethling and Potgieter *Delict* 17.

¹⁵⁷ See s 36 of the Constitution.

¹⁵⁸ Van der Walt and Midgley *Delict* 18; Loubser and Midgley (eds) *Delict* 32.

¹⁵⁹ See Van Aswegen 1995 *SAJHR* 59-60; Neethling and Potgieter *Delict* 22; Van der Walt and Midgley *Delict* 20-22.

¹⁶⁰ See *Du Plessis v De Klerk* 905-906; *O v O* 1995 4 SA 482 (W). The court took additional notice of constitutional rights and weighed the plaintiff's dignity with the defendant's privacy when considering the unlawfulness of the defendant's conduct (Van der Walt and Midgley *Delict* 112 fn 18). Neethling and Potgieter *Delict* 22.

¹⁶¹ See *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) 448; Van der Walt and Midgley *Delict* 111-112.

constitutional values must prevail.¹⁶² The Constitution acknowledges *inter alia* the following sources of law: the common law; South African customary law;¹⁶³ legislation; international law; and religious or other beliefs.¹⁶⁴ All sources of law must however, not be in conflict with the provisions of the Constitution.¹⁶⁵ If a delictual principle is in conflict with a provision of the Constitution, the common law (law of delict) must be adapted to resolve the conflict. If a delictual principle falls short of the spirit, purport and objects of the Bill of Rights, then the law of delict must be developed to remedy the short fall.¹⁶⁶ Any adaptation or development must be done within the common law's paradigm to bring harmony between the law of delict and the Constitution.¹⁶⁷ In promoting the spirit, purport and object of the Bill of Rights, there may be a direct and/or indirect application of the Constitution which will provide the same results.¹⁶⁸ The courts however, when developing the common law must bear in mind that law reform should be undertaken by the legislature.¹⁶⁹

¹⁶² S 2 of the Constitution; *Carmichele v Minister of Safety and Security* (CC) 2001 4 SA 938 (CC) 953; *Ryland v Edros* 1997 2 SA 690 (C) 707; Van der Walt and Midgley *Delict* 111-112.

¹⁶³ S 211 and s 13(2) of the Constitution of the Republic of South Africa, 1996, provides that customary law must now form part of the law, provided that it is consistent with constitutional norms and values and has not been affected by customary law legislation. SS 30-31 of Constitution protects cultural rights as long as they are compatible with constitutional values. See Van der Walt and Midgley *Delict* 30 fn 5; Rautenbach and Bekker *Legal pluralism* 157; s 39(3) of the Constitution provides that "[t]he Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill".

¹⁶⁴ Himonga and Nhlapo (eds) *African customary law* 47.

¹⁶⁵ Himonga and Nhlapo (eds) *African customary law* 47.

¹⁶⁶ See *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 953-954; *S v Thebus* 2003 6 SA 505 (CC) 531; *K v Minister of Safety and Security* 2005 6 SA 419 (CC) 429; *Le Roux v Dey* 2011 3 SA 274 (CC) 508; *DE v RH* 2015 5 SA 83 (CC) 89-90; Loubser and Midgley (eds) *Delict* 32 35; *Loureiro v iMvula Quality Protection (Pty) Ltd* 2014 5 BCLR 511 (CC) 520 where Van der Westhuizen J stated that it "is well-established that the law of contract and the law of delict give effect to, and provide remedies for violations of, constitutional rights"; *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) 200 where the common law was developed to recognise a wrongful life claim; Neethling and Potgieter *Delict* 17; Scott 2006 *De Jure* 478 who refers to *K v Minister of Safety and Security* 2005 6 SA 419 (CC) where the common law was developed in line with constitutional imperatives in respect of vicarious liability.

¹⁶⁷ *Dendy v University of Witwatersrand* 2007 5 SA 382 (SCA); *S v Thebus* 2003 6 SA 505 (CC) 531. In *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA), the SCA developed defamation without having regard to the then Interim Constitution of 1993 itself, but the court did in any event consider whether its decision in respect of the common law was in conformity with the values enshrined in the Interim Constitution (1216 ff). In *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC), the Constitutional Court found that the applicable common law rule did not give sufficient weight to the constitutional values and held that its application to the facts of the case did not give effect to the value of women's safety and security (Van der Walt and Midgley *Delict* 20-22).

¹⁶⁸ See Neethling and Potgieter *Delict* 22.

¹⁶⁹ *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 954.

There is a strong link between the Constitution and the influence of reasonableness, in that all rights are protected but may be limited where it is reasonable and justifiable. Section 36 of the Constitution provides that the rights in the Bill of Rights may only be limited to the extent that such “limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors”.¹⁷⁰ Thus if a person’s right is violated then it may only be violated to the extent of this limitation clause. Froneman J in *H v Fetal Assessment Centre*¹⁷¹ stated that many interests and rights that were protected under common law “quite easily translate into what we now recognise as fundamental rights under the Constitution”. Thus most rights or interests in terms of the law of delict are protected right to the extent of the limitation clause. Neethling and Potgieter¹⁷² convincingly submit that in the process of balancing the interests and exercising a value judgment “the general principles which have already crystallised in our law with regard to the reasonableness or *boni mores* (legal convictions of the community) criterion for delictual wrongfulness may serve as *prima facie* indications of the reasonableness of a limitation in terms of the Bill of Rights”. Where there are competing interests they must both be weighed and tested against the limitation clause, they are in fact limited and tested against the criterion of reasonableness. For example, in *Carmichele v Minister of Safety and Security*,¹⁷³ *K v Minister of Safety and Security*,¹⁷⁴ and *F v Minister of Safety and Security*,¹⁷⁵ where the state was held liable for the omissions of the state; the court, in protecting the fundamental rights and providing a remedy for the violation of the rights, developed the common law in applying constitutional imperatives. There was an unreasonable violation of the interests of the victims and, in the circumstances, the courts found it reasonable and justifiable to hold the Minister of Safety and Security liable.¹⁷⁶

¹⁷⁰ See chapter 2 para 3.2-3.3.

¹⁷¹ 2015 2 SA 193 (CC) 211.

¹⁷² *Delict* 20.

¹⁷³ 2001 4 SA 938 (CC).

¹⁷⁴ 2005 6 SA 419 (CC).

¹⁷⁵ 2012 3 BCLR 244 (CC).

¹⁷⁶ See para 3.1.10-3.1.11 below.

3.1.4 The *boni mores* yardstick

As stated,¹⁷⁷ the *boni mores* must also include and give effect to the values outlined in the Constitution. The courts therefore have an obligation to develop the *boni mores* in order to ensure that it is in line with the spirit, purport and objects of the Bill of Rights.¹⁷⁸ The *boni mores* is thus a flexible, open-ended,¹⁷⁹ juridical yardstick that gives expression to the evolving convictions of the community¹⁸⁰ allowing the courts to continuously adapt the law and provide value judgements.¹⁸¹ For example, in the recent decision of *DE v RH*,¹⁸² the Constitutional Court in dealing with delictual liability stemming from adultery, took note of the changing *mores* and the softening attitudes towards adultery in South Africa. The court at length also referred to foreign comparative law¹⁸³ and in the end concluded that, in South Africa,¹⁸⁴ delictual liability stemming from adultery will no longer be permissible.

When the courts consider the conduct of the defendant with regard to wrongfulness, they do not literally and actually test what the legal convictions of the community are, but rather in making their decision, take note of the “*boni mores*” (good morals) with respect to legal and public policy, rules, prior decisions, circumstances of the case and so forth.¹⁸⁵ When a court takes cognisance of the legal convictions of the community in the law of delict,¹⁸⁶ the question asked is – whether the community

¹⁷⁷ See chapter 2 para 3.2-3.3.

¹⁷⁸ Neethling and Potgieter *Delict* 39-40.

¹⁷⁹ *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) 396, 400.

¹⁸⁰ See *Paixão v Road Accident Fund* 2012 6 SA 377 (SCA) 381, 388-389 where the common law was extended to allow an action of a heterosexual life partner (as a dependant), which shows the changing views of the *boni mores*. In *DE v RH* 2015 5 SA 83 (CC), the Constitutional Court confirmed that in respect of the *actio iniuriarum* based on adultery, an innocent spouse is no longer entitled to a claim for *contumelia* (injury to one’s self-esteem) and loss of consortium (deprivation of the wife’s company). Adultery is no longer wrongful attracting delictual liability as a result of the changing *mores*.

¹⁸¹ See *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) 396; Neethling and Potgieter *Delict* 40; Van der Walt and Midgley *Delict* 99-101; Loubser and Midgley (eds) *Delict* 144, 146.

¹⁸² 2015 5 SA 83 (CC) 91-93.

¹⁸³ *DE v RH* 2015 5 SA 83 (CC) 94-101.

¹⁸⁴ Except for the possibility of patrimonial loss, which was left open.

¹⁸⁵ See *Schultz v Butt* 1986 3 SA 667 (A) 679; Visser in Du Bois (gen ed) *Wille’s Principles of South African law* 1100; Neethling and Potgieter *Delict* 42-43.

¹⁸⁶ *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA) 1204; *Silva’s Fishing Corporation (Pty) Ltd v Maweza* 1957 2 SA 256 (A) 265; *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597.

regards the defendant's conduct as delictually wrongful and not with what the community regards as "socially, morally, ethically or religiously right or wrong".¹⁸⁷

3.1.5 Public policy and policy considerations

The investigation into the role of public policy in delict requires a study on its own, but for the purposes of this study, it will be sufficient at this point to just briefly refer to its role in determining wrongfulness and delictual liability.

As mentioned,¹⁸⁸ public policy is not clearly defined and, in the law of delict, it manifests itself in the *boni mores*. Furthermore, there is a close relationship between public policy, constitutional values and norms, as well as the concepts of reasonableness, justice, equity and fairness.

Van Zyl J in *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd*¹⁸⁹ stated that the:

"community's perception of *boni mores* is closely linked to the concept of good faith in community relations. These concepts ... are similarly associated with the community's perception of justice, equity and reasonableness. ... This association may be traced back to natural law theories, which are contained in expressions such as 'natural justice' and 'the fundamental principles of justice' or 'fairness'. ... From this it appears that public policy, in the sense of *boni mores*, cannot be separated from concepts such as justice, equity, good faith and reasonableness, which are basic to harmonious community relations and may indeed be regarded as the purpose of applying public policy considerations".¹⁹⁰

Hefer JA in *National Media Ltd v Bogoshi*¹⁹¹ stated:

"In our law the lawfulness of a harmful act or omission is determined by the application of a general criterion of reasonableness based on considerations of fairness, morality, policy and the Court's perception of the legal convictions of the community".

¹⁸⁷ See *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 1 SA 389 (SCA) 395-396; Neethling and Potgieter *Delict* 41; Van der Walt and Midgley *Delict* 100; Loubser and Midgley (eds) *Delict* 144.

¹⁸⁸ See chapter 2 para 3.1.

¹⁸⁹ 1990 2 SA 520 (W) 528-529.

¹⁹⁰ Referred to in Neethling and Potgieter *Delict* 37 fn 25. See also Van der Walt and Midgley *Delict* 100 fn 25.

¹⁹¹ 1998 4 SA 1196 (SCA) 1204. See also *SM Goldstein & Co (Pty) Ltd v Cathkin Park Hotel (Pty) Ltd* 2000 4 All SA 407 (A) [7]; *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T) 188 referred to by Loubser and Midgley (eds) *Delict* 146.

In *DE v RH*,¹⁹² Madlanga J with respect to determining wrongfulness referred with approval to the role of public policy as enunciated in *Barkhuizen v Napier* (within the context of contracts):¹⁹³

“Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values which underlie it. ... What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights”.

Madlanga J¹⁹⁴ further stated that the *boni mores*:

“are about public policy ... a notion that is now informed by our constitutional values ... [t]he constitutional norms and changing attitudes are not necessarily separate notions: constitutional norms also inform present-day attitudes.”

Van der Walt and Midgley¹⁹⁵ also submit that the:

“general criterion of reasonableness, based upon public policy, the legal convictions of the community, or *boni mores*, now plays a dominant role in fixing and limiting liability, and has replaced the focus on foreseeability of harm. The test for wrongfulness and legal causation, in particular, having a strong policy base, but these are not the only instances where policy decisions are made. Policy also dictates whether a delictual action is available, whether liability should be strict or based upon fault, whether someone has title to sue, what form intention should take, what constitutes negligent conduct, what constitutes actionable harm, who should bear the onus of proof and the extent of such onus”.

Public policy and policy considerations play a role in extending,¹⁹⁶ limiting¹⁹⁷ or

¹⁹² 2015 5 SA 83 (CC) 90.

¹⁹³ 2007 5 SA 323 (CC) 339.

¹⁹⁴ *DE v RH* 2015 5 SA 83 (CC) 101.

¹⁹⁵ *Delict* 40.

¹⁹⁶ See Van Aswegen 1993 *THRHR* 182-186. She refers to examples where delictual liability was extended in our law in instances of pure economic loss and unlawful competition. She refers to *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 2 SA 520 (W) 528-529, where Van Zyl J specifically referred to the *boni mores*, policy and the concepts of “justice, equity, good faith and reasonableness”, in determining wrongfulness and extending delictual liability to hold a security company liable for the theft of the plaintiff’s vehicle which was stolen while they were the very company contracted to look after the vehicle.

¹⁹⁷ Where for example, the damage is apportioned based on how far each party strayed from the conduct of the reasonable person reflected as a percentage (in determining negligence on the part of the defendant and contributory negligence on the part of the plaintiff). Thus depending on the plaintiff’s degree of fault, his award may be limited (reduced). It is trite that public policy plays a role in determining negligence. See Van Aswegen 1995 *SAJHR* 59-60; Neethling and Potgieter *Delict* 22.

excluding delictual liability.¹⁹⁸ Van Aswegen¹⁹⁹ points out that when adjudicators refer to policy considerations, it is rather ambiguous and unspecific, in that no exact or full explanation is given for the policy consideration used in justifying their decision. She²⁰⁰ refers to *Union Government v Ocean Accident and Guarantee Corporation Ltd*²⁰¹ where the criterion of reasonable foreseeability was acknowledged as a device created “to avoid the impression of delivering an unreasoned moral judgment *ex cathedra* as to how the injurer should have behaved”. Van Aswegen refers to the policy consideration of indefinite or limitless liability. On the one hand there is the view that the administration of justice could be hampered if courts were flooded with claims (the opening of the floodgates argument) which is relevant whether conduct leading to indefinite liability should be regarded as impermissible (wrongfulness) and, on the other hand, whether the defendant should be burdened with the unlimited or indeterminate liability (legal causation) to keep liability within reasonable parameters.²⁰²

For example, in both *Union Government v Ocean Accident and Guarantee Corporation Ltd*²⁰³ and *Minister of Safety and Security v Scott*,²⁰⁴ where it was alleged that negligent interference with a contractual relationship caused pure economic loss, the courts referred to the fear of indeterminate liability. In *Union Government v Ocean Accident and Guarantee Corporation Ltd*,²⁰⁵ the court also stated that the law must be conservative in extending remedies under the *lex Aquilia*: “growth must be controlled, not only in the interests of systematic development of the law but also in the interests of practical convenience. Justice may sometimes be better served by denying a remedy rather than by granting one”.²⁰⁶ In the end, the court did not find the defendant liable due to “considerations of justice or convenience”.²⁰⁷ The court

¹⁹⁸ See for example, *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) and *Country Cloud Trading v MEC, Department of Infrastructure Development* 2015 1 SA 1 (CC) where the courts were not prepared to allow delictual claims for pure economic loss as there were other (contractual) remedies available.

¹⁹⁹ 1993 *THRHR* 191.

²⁰⁰ Van Aswegen 1993 *THRHR* 191.

²⁰¹ 1956 1 SA 577 (A) 585.

²⁰² Van Aswegen 1993 *THRHR* 191.

²⁰³ 1956 1 SA 577 (A) 535-536.

²⁰⁴ 2014 6 SA 1 (SCA) 11, 13-15.

²⁰⁵ 1956 1 SA 577 (A) 584, 587.

²⁰⁶ See also *Herschel v Mrupe* 1954 3 SA 464 (A) 478; *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) 500; *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) 831, 832-833.

²⁰⁷ *Union Government v Ocean Accident and Guarantee Corporation Ltd* 1956 1 SA 577 (A) 587.

was influenced by a policy consideration. This approach is similar to the English approach of developing the law incrementally in recognising a duty of care category.²⁰⁸

The policy consideration of conservatism of the law, where a delictual remedy need not be applied where another remedy such as in contract exists, were relied on by the court to reach a decision in *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd*²⁰⁹ and *Country Cloud Trading CC v MEC, Department of Infrastructure Development*.²¹⁰ Both these cases dealt with claims for pure economic loss.²¹¹

In *Minister of Safety and Security v Scott*,²¹² the court stated that both wrongfulness and causation “serve as a brake on indeterminate liability”. With respect to wrongfulness, the court held that “[p]olicy considerations militate strongly against the imposition of liability upon the minister”,²¹³ and that it would be “untenable to right minded people” to hold the minister liable in the circumstances of the case.²¹⁴ In respect of legal causation, the court held that the damages relating to pure economic loss²¹⁵ claimed were “too remote to be recoverable”²¹⁶ and in the end did not hold the defendant liable either.

The *boni mores* test for wrongfulness,²¹⁷ the imputability test for legal causation, the reasonable person test for negligence,²¹⁸ and the fair and reasonable approaches in determining damage, all involve public policy and concepts such as reasonableness, justice and fairness.²¹⁹ Thus it is evident that public policy and policy considerations are used as tools in determining not only whether the defendant’s conduct is wrongful

²⁰⁸ See chapter 4 para 3.2.2.2.

²⁰⁹ 1985 1 SA 475 (A).

²¹⁰ 2015 1 SA 1 (CC).

²¹¹ See para 9 below.

²¹² 2014 6 SA 1 (SCA) 12.

²¹³ *Minister of Safety and Security v Scott* 2014 6 SA 1 (SCA) 13.

²¹⁴ *Minister of Safety and Security v Scott* 2014 6 SA 1 (SCA) 15.

²¹⁵ R49 million in respect of loss of contractual income and loss of profits.

²¹⁶ *Minister of Safety and Security v Scott* 2014 6 SA 1 (SCA) 14.

²¹⁷ See *Du Plessis v De Klerk* 905-906; *O v O* 1995 4 SA 482 (W). The court took additional notice of constitutional rights and weighed the plaintiff’s dignity with the defendant’s privacy when considering the unlawfulness of the defendants conduct (*Van der Walt and Midgley Delict* 112 fn 18). *Neethling and Potgieter Delict* 22.

²¹⁸ *Van Aswegen* 1995 *SAJHR* 59-60; *Neethling and Potgieter Delict* 22.

²¹⁹ Cf *Van Aswegen* 1993 *THRHR* 192.

but other elements, and in turn whether delictual liability will ensue. Van Aswegen²²⁰ convincingly also argues that policy considerations should be viewed as an integral part of the legal materials available in law making, but warns that such function must be applied with constraint and in a principled manner, aligning it with existing rules.

3.1.6 The role of the adjudicator

Boberg²²¹ describes the criterion of wrongfulness as a formula for “expressing an intuitively-reached policy conclusion, a cloak of respectability for judicial gut-reaction”. It is undoubtedly true that the adjudicator plays a vital role in: developing the law of delict in general; pronouncing on the function of each element; the use of concepts such as justice, fairness, and reasonableness in support of an outcome; and interpreting the legal convictions of the community in light of the surrounding circumstances.²²² Adjudicators must guard against postulating a subjective view point²²³ which might not necessarily encompass the prevailing convictions of the community.²²⁴ There is also the valid argument that the judiciary comprising a small minority of society cannot interpret the needs of the community or serve it.²²⁵ Nevertheless, the courts after weighing the different interests and considering all the facts will form an “intuitive opinion” as to whether the defendant acted unreasonably and justify such opinion by “invoking the legal convictions of the community as interpreted by itself”.²²⁶ The courts²²⁷ should have regard to prevailing public policy,

²²⁰ 1993 *THRHR* 194-195.

²²¹ *Delict* 146.

²²² *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) 832-833; *Bayer South Africa (Pty) Ltd v Frost* 1991 4 SA 559 (A) 570; *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A) 797; *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 27; *Minister of Law and Order v Kadir* 1995 1 SA 303 (A) 318.

²²³ S 165(2) of the Constitution of the Republic of South Africa, 1996, states that the courts must apply the law “impartially and without fear, favour or prejudice.” An adjudicator must ignore his personal feelings – see Van Aswegen 1993 *THRHR* 190-191; *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 3 SA 579 (A) 591.

²²⁴ *Schultz v Butt* 1986 3 SA 667 (A) 679; Neethling and Potgieter *Delict* 42-43; Loubser and Midgley (eds) *Delict* 145.

²²⁵ Van Aswegen 1993 *THRHR* 194; Motala 1991 *CILSA* 299-314.

²²⁶ Boberg *Delict* 214 fn 11. See Du Bois 2000 *Acta Juridica* 18.

²²⁷ See *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) 158; Neethling and Potgieter *Delict* 43.

previous decisions,²²⁸ foreign law²²⁹ and views of academic writers.²³⁰ Marais JA in *Cape Town Municipality v Bakkerud*²³¹ stated that it:

“has to be recognised that in applying the test of what the legal convictions of the community demand and reaching a particular conclusion, the courts are not laying down principles of law intended to be generally applicable. They are making value judgments *ad hoc*”.²³²

3.1.7 Subjective factors

It is important to note that subjective beliefs of the parties usually play a role in determining fault²³³ but may also play a role in determining wrongfulness.²³⁴ Under certain circumstances subjective factors such as the defendant’s improper motive,²³⁵ intention,²³⁶ or subjective knowledge of the impending harm to the plaintiff such as in

²²⁸ The law of delict (common law) is developed by judicial decisions which are in a sense binding, but may be altered by later decisions. See Du Bois in Du Bois (gen ed) *Wille’s Principles of South African law* 36.

²²⁹ S 39 of the Constitution of the Republic of South Africa, 1996, states that in interpreting the Bill of Rights the courts must consider international law and may consider foreign law. See *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) 203-210 where foreign law was considered in recognising a wrongful life claim.

²³⁰ Which are often considered and incorporated in decisions; see Du Bois in Du Bois (gen ed) *Wille’s Principles of South African law* 112-113.

²³¹ 2000 3 SA 1049 (SCA) 1056-1060.

²³² See Du Bois 2000 *Acta Juridica* 10-11.

²³³ For example, where a person subjectively and incorrectly believes that he is wrongfully arrested, cannot resist arrest. His subjective belief and mistake will not exclude wrongfulness, but may have a bearing on fault. See Neethling and Potgieter *Delict* 43.

²³⁴ Van der Walt and Midgley *Delict* 109.

²³⁵ A few examples may be referred to. In *Gien v Gien* 1979 2 SA 1113 (T) 1121 the court found a brother’s motive wrongful and his actions unreasonable when he erected an apparatus which caused loud explosive noises meant to disturb the peace on his brother’s (neighbour’s) farm. The noise adversely affected the animals, the farming activities and occupants on the farm. In *Kirsch v Pincus* 1927 TPD 199, the court found that the planting of deciduous trees along the border of a neighbour’s wall where leaves fell on the neighbour’s property, unreasonable and wrongful. In *Bress Designs (Pty) Ltd v GY Lounge Suite Manufacturers (Pty) Ltd* 1991 2 SA 455 (W) 475, the court found the defendant’s motive to harm his competitor’s good will in an unreasonable manner, wrongful. The examples above illustrate the so-called “abuse of rights” which relates to the determination of whether the defendant exceeded his powers of ownership thereby acting in a wrongful manner in relation to his neighbour. The test is objective taking into consideration the principles of “reasonableness” by considering various factors and by weighing the benefit to the defendant in him exercising his interests against the prejudice to the plaintiff. “Fairness” is also considered whereby the prejudice or potential prejudice is distributed equally between the parties (*Rand Waterraad v Bothma* 1997 3 SA 120 (O) 136). See chapter 6 para 2.2.4. See also *Mediterranean Shipping Co (Pty) Ltd v Tebe Trading* 2007 All SA 489 (SCA) 494; *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 386-387; *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 694; *Aetiology Today CC t/a Somerset Schools v Van Aswegen* 1992 1 SA 807 (W) 820; Van der Walt and Midgley *Delict* 108-109; Neethling and Potgieter *Delict* 44-45, 123-128; Loubser and Midgley (eds) *Delict* 158; *Boberg Delict* 32-34, 206-210.

²³⁶ See *Minister of Finance v Gore NO* 2007 1 SA 111 (SCA) 139-140 where the court held that intentional fraudulent conduct in processing a public tender that caused pure economic loss was wrongful. See Loubser and Midgley (eds) *Delict* 157; *Boberg Delict* 33.

the case of omissions or pure economic loss,²³⁷ may be relevant in determining the wrongfulness of the defendant's conduct.²³⁸ In this sense, the blameworthiness of the wrongdoer which is an aspect of fault is brought into the determination of wrongfulness.²³⁹ This, in a sense, leads to an overlap between wrongfulness and fault. Du Bois²⁴⁰ points out that, according to the orthodox view, the distinction between fault and wrongfulness lies in the former being concerned with subjective reasonableness and the latter with objective reasonableness, but this distinction is not made in instances when the courts look at subjective factors in determining wrongfulness. Knobel²⁴¹ points out that both "intention and carelessness are states of mind", which relate to a subjective inquiry. Yet there is consensus that the "reasonable person" test for negligence is objective, hence the subjective-objective dichotomy. The test is objective in that it is imposed uniformly. Knobel,²⁴² like Brand JA,²⁴³ is not in favour of the fault-related subjective factors used in determining wrongfulness as they lead to the conflation between wrongfulness and fault. However, Khampepe J in *Country Cloud Trading CC v MEC, Department of Infrastructure Development*²⁴⁴ pointed out that:

"The relevance of the nature of fault and fault-related considerations in the wrongfulness enquiry has been recognised on a number of occasions by the Supreme Court of Appeal This is not to conflate the elements of fault and wrongfulness, or to suggest that the establishment of fault is necessarily a prerequisite for establishment of wrongfulness. Fault, like all other delictual elements, must still be separately established. It is merely recognition of the fact that where fault rises to the level of intention, and where other fault-related elements (such as motive to cause harm) are present, this may be relevant in establishing wrongfulness."

3.1.8 The practical approach to determining wrongfulness

²³⁷ See *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 1 SA 1 (CC) 15-16.

²³⁸ For example, in *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) 400, the court took cognisance of the police's knowledge that the prisoner was dangerous and would probably commit further crimes if released. The police had a legal duty to prevent the prisoner's escape as the prisoner subsequently assaulted and raped a young woman after escaping. See Neethling and Potgieter *Delict* 45; Loubser and Midgley (eds) *Delict* 141.

²³⁹ See Loubser and Midgley (eds) *Delict* 158.

²⁴⁰ Du Bois 2000 *Acta Juridica* 15.

²⁴¹ In Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 237.

²⁴² In Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 239.

²⁴³ In *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* 2013 5 SA 183 (SCA) 198 Brand JA stated that "foreseeability" should not be used as a factor in determining wrongfulness. See Knobel in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 241.

²⁴⁴ 2015 1 SA 1 (CC) 15-16.

In practice, wrongfulness can be determined more precisely by making use of either of the two well-known practical applications of the basic test for wrongfulness, that is, by either establishing: whether there was an infringement of a right,²⁴⁵ or breach of a legal duty to prevent harm.²⁴⁶ In this sense the *boni mores* test is seen as a supplementary test²⁴⁷ and is used in three types of scenarios:

(1) In unique situations where there is no distinct violation of a legal standard²⁴⁸ or ground of justification applicable²⁴⁹ (such as in instances of omissions,²⁵⁰ or pure economic loss),²⁵¹ the question asked is – whether there was a legal duty on the defendant to prevent the harm or loss; that is, taking all surrounding circumstances into account, *would the community regard the omission as wrongful?*²⁵²

(2) In establishing wrongfulness in borderline and novel cases,²⁵³ for example, where there is uncertainty whether the defendant's conduct exceeded the bounds of a ground of justification.²⁵⁴

(3) The application of a ground of justification. The *boni mores* would condone the *prima facie* infringement of interests²⁵⁵ or breach of a legal duty based on the criterion of reasonableness.²⁵⁶ In actual fact, the defendant exercises his own lawful rights and

²⁴⁵ See *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T); *Hattingh v Roux* 2011 5 SA 135 (WCC) 140-141; Neethling and Potgieter *Delict* 45-58; Van der Walt and Midgley *Delict* 105, 113-114; Loubser and Midgley (eds) *Delict* 146.

²⁴⁶ See Van der Walt and Midgley *Delict* 105, 115-116; Neethling and Potgieter *Delict* 47-50; Loubser and Midgley (eds) *Delict* 145, 147-148; Burchell *Delict* 39.

²⁴⁷ The *boni mores* test is used as a supplementary test in instances where no ground of justification is applicable or in borderline cases. See *McMurray v H L & H (Pty) Ltd* 2000 4 SA 887 (N) 904-905 where the court referred to the *boni mores* test as supplementary. See Neethling and Potgieter *Delict* 47-50.

²⁴⁸ *Jowell v Bramwell-Jones* 1998 1 SA 836 (W) 878. See Loubser and Midgley (eds) *Delict* 147; Neethling and Potgieter *Delict* 48-49.

²⁴⁹ Van der Walt and Midgley *Delict* 70.

²⁵⁰ See *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) 441-442; Neethling and Potgieter *Delict* 48-49; Van der Walt and Midgley *Delict* 70-71.

²⁵¹ See *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 26; *Zimbabwe Banking Corporation Ltd v Pyramid Motor Corporation (Pvt) Ltd* 1985 4 SA 553 (ZS) 563.

²⁵² See *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) 138.

²⁵³ See *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1979 1 SA 441 (A) 383; Van der Walt and Midgley *Delict* 71.

²⁵⁴ See Neethling and Potgieter *Delict* 50 and the example referred to of *S v Goliath* 1972 3 SA 1 (A) with reference to the ground of justification, necessity.

²⁵⁵ Van der Walt and Midgley *Delict* 190.

²⁵⁶ Loubser and Midgley (eds) *Delict* 162-163.

the plaintiff's rights are thereby limited by the defendant's exercise of his rights.²⁵⁷ Proof of a ground of justification illustrates reasonableness of conduct and the defendant's conduct may not be found wrongful.²⁵⁸ Grounds of justification are discussed in more detail further on.²⁵⁹

The option of which route to take in determining wrongfulness, will depend on the facts of the case. In some instances it may be easier to identify the right infringed²⁶⁰ while in others, a legal duty to prevent harm or loss may be more easily established.²⁶¹ Causing of physical harm by a commission or infringement of an interest may be considered *prima facie* wrongful.²⁶² However, not all factual infringements of interests are *prima facie* wrongful²⁶³ and it is possible that a ground of justification may still be applicable.²⁶⁴

3.1.9 Categories of protected subjective rights

Different categories of protected subjective rights have been identified and there is no *numerus clauses* of such rights.²⁶⁵ Different categories of rights may still evolve or new categories may be given recognition (for example, such as the right to goodwill or trade secrets).²⁶⁶ The following categories of rights have been identified:²⁶⁷

²⁵⁷ Neethling and Potgieter *Delict* 88.

²⁵⁸ Van der Walt and Midgley *Delict* 101.

²⁵⁹ See para 3.4 below.

²⁶⁰ The doctrine of subjective rights is established in our law since the decision of *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T) 387.

²⁶¹ Loubser and Midgley (eds) *Delict* 146.

²⁶² *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) 497; See cases referred to by Neethling and Potgieter *Delict* 45 fn 69; Loubser and Midgley (eds) *Delict* 146.

²⁶³ See Neethling and Potgieter *Delict* 46 who refer to instances of omission, pure economic loss, defamation and infringements of privacy, dignity, goodwill and so on. In such instances wrongfulness must be determined with reference to the *boni mores*, applied in the sense of the views and thoughts of the reasonable person.

²⁶⁴ Neethling and Potgieter *Delict* 46.

²⁶⁵ Neethling and Potgieter *Delict* 52; Loubser and Midgley (eds) *Delict* 146.

²⁶⁶ See Loubser and Midgley (eds) *Delict* 146-147; Van der Walt and Midgley *Delict* 114; Neethling and Potgieter *Delict* 53.

²⁶⁷ See Neethling and Potgieter *Delict* 52; Loubser and Midgley (eds) *Delict* 20 146-147.

personal rights; real rights; personality rights;²⁶⁸ immaterial property rights;²⁶⁹ and personal immaterial property rights.²⁷⁰

A person (the legal subject) is the holder of subjective rights which entitle him to the use, enjoyment and disposal of such rights (legal objects). The rights may be protected and enforced against others as permitted by our law.²⁷¹ There is a dual relationship that exists between firstly the legal subject and legal object, and secondly between the legal subject and other legal subjects.²⁷² With every subjective right exists a simultaneous duty on others not to infringe “the holder’s relation to the object”.²⁷³

The actual infringement may be in the form of disturbing or limiting the holder of the right against his use, enjoyment, or destruction of such right. Such infringement must also take place in a legally reprehensible or unreasonable manner (without there being an applicable ground of justification) in order for the conduct to be regarded as wrongful.²⁷⁴ Where it is difficult to establish a factual interference with the object of a protected right, that is, where the harm is not *prima facie* wrongful, the focus of the enquiry may then rest on whether there was a breach of a legal duty.²⁷⁵ In some instances where an applicable right has not yet been identified, it may be more suitable to establish wrongfulness in questioning whether there was a breach of a legal duty.²⁷⁶

²⁶⁸ For example, the right to *corpus* or body, physical liberty, identity, dignity, feelings, privacy and to one’s good name – see, in general, Neethling, Potgieter and Visser *Neethling’s law of personality* 24-38; Neethling and Potgieter *Delict* 52; Loubser and Midgley (eds) *Delict* 146.

²⁶⁹ For example, one’s invention of the mind or creation such as a book or painting – see Neethling, Potgieter and Visser *Neethling’s law of personality* 20-23; Neethling and Potgieter *Delict* 52; Loubser and Midgley (eds) *Delict* 146.

²⁷⁰ For example, one’s credit worthiness or capacity to earn - see Neethling and Potgieter *Delict* 52 and Neethling, Potgieter and Visser *Neethling’s law of personality* 17-20; Loubser and Midgley (eds) *Delict* 146.

²⁷¹ Neethling and Potgieter *Delict* 51; Loubser and Midgley (eds) *Delict* 147.

²⁷² Neethling and Potgieter *Delict* 51-52; Van der Walt and Midgley *Delict* 113.

²⁷³ Van der Walt and Midgley *Delict* 113. See Loubser and Midgley (eds) *Delict* 147.

²⁷⁴ Loubser and Midgley (eds) *Delict* 147; Neethling and Potgieter *Delict* 55-56.

²⁷⁵ Loubser and Midgley (eds) *Delict* 147.

²⁷⁶ For example, in cases of omission or pure economic loss, except in cases of unlawful competition when dealing with the right to good will – see Neethling and Potgieter *Delict* 55; Loubser and Midgley (eds) *Delict* 147.

3.1.10 Determining wrongfulness in cases of omissions

In cases of liability for an omission or pure economic loss, wrongfulness is determined according to the *boni mores* or general criterion of reasonableness and dependant on whether the defendant had a legal duty to prevent harm or loss and failed to prevent such ensuing harm or loss.²⁷⁷ The question is – was it reasonable according to the *boni mores* to expect the defendant to have taken some positive steps in preventing the ensuing harm or avoid the pure economic loss?²⁷⁸ For the sake of convenience pure economic loss will be discussed further on.²⁷⁹

Generally a person is not held liable for his omission, unless such omission was found to be wrongful.²⁸⁰ In *Van Eeden v Minister of Safety and Security*,²⁸¹ the court stated:

“An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm”.

3.1.11 Factors in establishing the presence of a legal duty to prevent harm or loss

There are a number of factors²⁸² which could be taken into account in establishing the presence of a legal duty to prevent harm or loss, and there is no *numerus clausus* in respect of these factors. It is possible that an interplay of a number of factors including constitutional imperatives and public policy may be present simultaneously

²⁷⁷ *Minister of Law and Order v Kadir* 1995 1 SA 303 (A) 320; *Van Eeden v Minister of Safety and Security (Women’s Legal Centre Trust, as Amicus Curiae)* 2003 1 SA 389 (SCA) 389; Van der Walt and Midgley *Delict* 122-123.

²⁷⁸ *Van Eeden v Minister of Safety and Security (Women’s Legal Centre Trust, as Amicus Curiae)* 2003 1 SA 389 (SCA) 389 395; *Deacon v Planet Fitness* 2016 2 SA 236 (GP) 241; Neethling and Potgieter *Delict* 56; Van der Walt and Midgley *Delict* 123; Loubser and Midgley (eds) *Delict* 147; Burchell *Delict* 39.

²⁷⁹ See para 9 below.

²⁸⁰ *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 596; *Cape Town Municipality v Bakkerud* 2000 3 A 1049 (SCA) 1054; Neethling and Potgieter *Delict* 58; Van der Walt and Midgley *Delict* 124; Burchell *Delict* 39; Loubser and Midgley (eds) *Delict* 219.

²⁸¹ 2003 1 SA 389 (SCA) 395. See also *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597; *Lee v Minister for Correctional Services* 2013 2 SA 144 (CC) 167; *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA) 229; *Swinburne v Newbee Investments (Pty) Ltd* 2010 5 SA 296 (KZD) 302-303; Neethling and Potgieter *Delict* 54-55.

²⁸² See in general *Deacon v Planet Fitness* 2016 2 SA 236 (GP) 242; Neethling and Potgieter *Delict* 60-78; Van der Walt and Midgley *Delict* 116; Burchell *Delict* 40-45; McKerron *Delict* 15-25.

which can assist in establishing whether the omission is wrongful.²⁸³ There are certain factors which have over time been identified as indicators leading to the establishment of whether there was legal duty to act positively. Where such a factor is present, it usually indicates the presence of a legal duty and the application of the general criterion of reasonableness is not necessary.²⁸⁴ It should be noted that similar factors are considered in the English tort of negligence in determining whether a duty of care is owed (to a foreseeable type of claimant) in instances of omissions. These factors are considered as exceptions to the general rule of no liability in cases of omissions.²⁸⁵ These factors are: prior conduct;²⁸⁶ a particular office assumed;²⁸⁷ control over a dangerous object;²⁸⁸ rules of law;²⁸⁹ foreseeability of harm (also

²⁸³ See *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) 396; Neethling and Potgieter *Delict* 73 refer to *Minister van Polisie v Ewels* 1975 3 SA 590 (A) where the following factors: statutory duty to prevent harm to the prisoner; special relationship between the police officer and prisoner; and the public office assumed by the policeman could have been considered in establishing a legal duty to prevent harm.

²⁸⁴ Neethling and Potgieter *Delict* 61.

²⁸⁵ See chapter 4 para 3.3.1.

²⁸⁶ Prior conduct in the form of a positive act which subsequently creates a new source of danger may be an indication of a legal duty to take steps in order to prevent the harm ensuing. For example, where a person through his own conduct creates a potentially dangerous situation (starts a fire), he has a legal duty (because of the prior conduct) to prevent harm to another (the fire spreading to a neighbour's property which could result in damage to crops and harm to animals). Originally prior conduct was a prerequisite in determining the presence of a legal duty. This viewpoint changed with the decision of *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 596-597 where Rumpff CJ held that "prior conduct" is not an essential prerequisite for wrongfulness but one of the indicators which may lead to establishing wrongfulness. See also *Silva's Fishing Corporation v Maweza* 1957 2 SA 256 (A) 265; *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A) 116-117; *Minister of Forestry v Quathlamba (Pty) Ltd* 1973 3 SA 69 (A) 82; *Cape Town Municipality v Bakkerud* 2000 3 SA 1049 (SCA) 1059-1060. See Neethling and Potgieter *Delict* 60-62; Van der Walt and Midgley *Delict* 124; Loubser and Midgley (eds) *Delict* (eds) *Delict* 154 221; Burchell *Delict* 40-42.

²⁸⁷ For example, a policeman (as a result of the position he holds) is under a legal duty to prevent a member of the public from being harmed (*Minister van Polisie v Ewels* 1975 3 SA 590 (A)). See Neethling and Potgieter *Delict* 71; Loubser and Midgley (eds) *Delict* 154 223; Burchell *Delict* 44.

²⁸⁸ For example control over a dangerous object (firearm or animal) or a person may be an indicator in determining whether the person in control of the dangerous object or person had a legal duty to prevent harm. Neethling and Potgieter *Delict* 62-63 state that what must be established first is whether control over the dangerous object or person was present and secondly whether there was a legal duty on the defendant to prevent harm while actually having control over the dangerous object or person. Wrongfulness will be deemed to be present if it is found that there was a legal duty to prevent harm as a result of the omission to control the dangerous object or person. Usually under these circumstances, the courts tend to disregard the question of wrongfulness and refer to the test for negligence, that is, whether the defendant foresaw the possibility of harm and took reasonable steps to prevent harm. See *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) 400; *Swinburne v Newbee Investments (Pty) Ltd* 2010 5 SA 296 (KZD) 303-304; *Minister of Forestry v Quathlamba (Pty) Ltd* 1973 3 SA 69 (A) 82. See also Boberg *Delict* 212; Burchell *Delict* 43; Van der Walt and Midgley *Delict* 125; Loubser and Midgley (eds) *Delict* 221-222.

²⁸⁹ The law, whether in the form of a statute or the common law, may require a person to perform specific acts, such as a policeman, who has an obligation to protect citizens. See for example *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA) 320-323, but see *Kadir v*

relevant in determining negligence and legal causation);²⁹⁰ a special relationship between the parties;²⁹¹ social and economic concerns;²⁹² contractual undertaking for the safety of a third party;²⁹³ and creation of an impression that the interests of a third party will be protected.²⁹⁴ A breach of a statutory duty²⁹⁵ may also be an indication that the violation of the plaintiff's interests took place in a wrongful manner. Although these factors may be indicative in instances of omissions of the legal duty upon the defendant to act positively in preventing harm, the question ultimately remains – was the defendant's omission reasonable in light of all surrounding circumstances?²⁹⁶

It is submitted that these factors, if present, may be indicative of the need to act positively and reasonably in order to prevent harm, in light of all surrounding

Minister of Law and Order 1992 3 SA 737 (C) 739-740 where the court found that there was no legal duty upon the police to record details relating to a motor vehicle accident. Cf Neethling and Potgieter *Delict* 66-69. In *Woji v Minister of Police* 2015 1 All SA 68 (SCA) 77, the court held that the investigating officer had a public law duty not to violate the suspect's right to freedom, either by not opposing the bail application or by ensuring that all the relevant information for consideration was placed before the court. Furthermore, the state was liable for the failure of the policeman to perform the duties imposed on the state by the Constitution. The policeman's omission to perform his public duty was found to be wrongful. In this case, the court found an infringement of a right and considered a number of factors in finding wrongful conduct.

²⁹⁰ When the defendant foresees the possibility of harm ensuing, such foresight or awareness may be a factor in establishing whether the defendant had a duty to prevent such harm. See *McCarthy Ltd t/a Budget Rent a Car v Sunset Beach Trading 300 t/a Harvey World Travel* 2012 6 SA 551 (GNP) 566 as well as other cases referred to by Neethling and Potgieter *Delict* 65-66. Cf Loubser and Midgley (eds) *Delict* 223.

²⁹¹ The existence of a special relationship between parties such as: parent-child; an employer-employee (e.g. in *Silva's Fishing Corporation v Maweza* 1957 2 SA 256 (A)); policeman and citizen or prisoner (e.g. *Minister van Polisie v Ewels* 1975 3 SA 590 (A)); and doctor-patient. The legal duty does not arise automatically merely as a result of the relationship. The facts and circumstances surrounding the case must be tested against the *bonis mores*. See Neethling and Potgieter *Delict* 69-71; Loubser and Midgley (eds) *Delict* 222; Van der Walt and Midgley *Delict* 125; Burchell *Delict* 43.

²⁹² Loubser and Midgley (eds) *Delict* 223 refer to the social, economic and legal effect of imposing liability in respect of omissions. Van Aswegen 1993 *THRHR* 185 refers to the policy consideration influencing the issue of loss spreading aimed at protecting economic interests.

²⁹³ Where the defendant fails to take steps, for example, in ensuring the safety of another as provided for in terms of a contractual undertaking, the legal duty is breached and wrongfulness is present. See cases referred to by Neethling and Potgieter *Delict* 71-72. Cf Burchell *Delict* 44-45.

²⁹⁴ For example, where a security company creates the impression that property left in their care by third parties will be protected. See *Compass Motors v Callguard (Pty) Ltd* 1990 2 SA 520 (W); *Viv's Tippers (Edms) Bpk v Pha Phama Services (Edms) Bpk h/a Pha Phama Security* 2010 4 SA 455 (SCA); Neethling and Potgieter *Delict* 72-73; Loubser and Midgley (eds) *Delict* 222.

²⁹⁵ For example, where a particular provision of a statute enforces a legal duty on a person to prevent a crime from being committed as in the case of *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 963. The courts took into account the provisions of the previous Police Act 7 of 1958. See in general Neethling and Potgieter *Delict* 78-79; Burchell *Delict* 44.

²⁹⁶ Neethling and Potgieter *Delict* 77.

circumstances. To illustrate this, the first two factors mentioned above will be referred to briefly as examples.

If a fire is started on a property (prior conduct), it is reasonable that the owner of the property should be expected to control it and extinguish it so that it does not spread onto the neighbour's land. But, if for the sake of argument, the owner was not aware of the fire and was out of the country then, of course, he would not be expected to control and extinguish the fire. From here on we will assume that he was aware of the fire and was physically present on his property. If the fire should spread, there is a probability that the neighbour could sustain harm or loss. If the harm or loss materialises, then it may be established that there was a legal duty upon the owner to take positive steps to prevent the fire from spreading as a result of the prior conduct and also as a result of being in control over a dangerous object or situation. In not taking reasonable positive steps to prevent the harm from occurring, his omission may be regarded as unreasonable, *contra bonos mores* and wrongful, according to the traditional approach. Also, providing all the other elements are present, according to the recent approach to determining wrongfulness – it is reasonable that the owner should be held liable for the harm or loss as a result of his subsequent failure to prevent the harm or loss according to public policy. His failure to act positively is unreasonable and therefore it is reasonable to impose liability.²⁹⁷ This is indeed what transpired in *Minister of Water Affairs v Durr*.²⁹⁸ In this case, the City of Cape Town (as the owner of the property where the fire started) and the Minister of Water Affairs and Forestry (whose employees had felled and stacked trees on property where the fire subsequently spread) were held liable for the loss to the neighbour's properties as a result of not preventing the spread of fire there.

If a person holds a particular office, such as a policeman, it is reasonable due to the office he assumes in society, that he should be expected to act reasonably in protecting and preventing harm to a citizen. Thus there may be a legal duty, a statutory duty²⁹⁹ and a constitutional duty³⁰⁰ upon the policeman to protect the citizen and ensure that harm does not come to him. In instances where a policeman assaults

²⁹⁷ If all the other elements of a delict are present.

²⁹⁸ 2006 6 SA 587 (SCA).

²⁹⁹ S 13 of the Police Service Act 68 of 1995.

³⁰⁰ S 2 and s 7(2) of the Constitution.

and rapes a woman, he fails to protect and prevent harm towards her. In fact he causes the harm and breaches his legal duty, statutory duty and violates fundamental rights. There is no doubt that his conduct is therefore unreasonable, *contra bonos mores* and wrongful (according to the traditional approach) in terms of common law, the relevant statute, and the Constitution. In both *K v Minister of Safety and Security*³⁰¹ and *F v Minister of Safety and Security*³⁰² where policemen had assaulted and raped young women, the Minister was held vicariously liable for *inter alia*, the failure of the policemen to act positively in protecting and preventing harm to the women.

The landmark decision of *Carmichele v Minister of Safety and Security*³⁰³ (hereinafter referred to as “*Carmichele*”) serves as a good example of the approach to determining wrongfulness in cases of omissions and will now be discussed further.

According to the facts, Coetzee was convicted and sentenced on a number of offences. He was also facing a charge of rape and attempted murder but had been subsequently released by the state. The investigating officer was aware of the previous convictions and charges, but still made a recommendation to the prosecutor to release Coetzee on bail. The prosecutor did not oppose bail and failed to provide the magistrate, presiding over the bail hearing, with crucial evidence relating to Coetzee’s previous convictions and history of violent behaviour. The police on three different occasions were requested to detain Coetzee until the date of trial in respect of the charges for rape and attempted murder. A few days after the last request was made to the police, a young woman, Carmichele, was brutally assaulted by Coetzee. Coetzee was then convicted of *inter alia* attempted murder and sentenced to imprisonment.

The state had omitted to place crucial evidence before the court and oppose bail. Their omissions were found to be unreasonable, *contra bonos mores* and wrongful.³⁰⁴ Had this evidence been available, the magistrate might have refused bail, preventing

³⁰¹ 2005 6 SA 419 (CC).

³⁰² 2012 3 BCLR 244 (CC).

³⁰³ (*Centre for Applied Legal Studies Intervening*) 2001 4 SA 938 (CC).

³⁰⁴ See *Carmichel ev Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 965-968 where the court highlighted the omissions by the state according to the facts of the case.

harm to Carmichele.³⁰⁵ Carmichele subsequently instituted a claim in delict against the state on the premise that the state had a legal duty to protect her from harm. She alleged that the state had breached that duty wrongfully and negligently resulting in harm to her. The court *a quo* found that “there was no evidence upon which a court could reasonably find that the police or prosecutors had acted wrongfully”.³⁰⁶ Carmichele appealed to the Supreme Court of Appeal³⁰⁷ but the appeal was dismissed. On appeal to the Constitutional Court, the Constitutional Court found that the Supreme Court of Appeal had not considered the Constitution and referred the matter back to the court *a quo*. The Constitutional Court³⁰⁸ held that in principle, a prosecutor aware of the assailant’s history of violence could be held liable for the harm suffered by the victim as a result of the failure to bring pertinent information to the court. In the end the *court a quo* found in favour of Carmichele, but the matter went on appeal again to the Supreme Court of Appeal³⁰⁹ where that court finally held that the police and prosecutors did indeed have a duty to either oppose bail or place all relevant information before the court.³¹⁰ The state had breached that duty.³¹¹

The Constitutional Court in this case provided much guidance in finding that there is a general obligation³¹² upon the courts to develop the common law³¹³ where it deviates from the spirit, purport and objects of the Bill of Rights.³¹⁴ Both lower courts followed the pre-constitutional common law test in respect of determining wrongfulness for omissions without considering the Constitution.³¹⁵ What must be determined is whether the defendant could have reasonably (according to the legal

³⁰⁵ *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 969.

³⁰⁶ *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 945.

³⁰⁷ *Carmichele v Minister of Safety and Security* 2000 1 SA 489 (SCA).

³⁰⁸ *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 968.

³⁰⁹ *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA).

³¹⁰ *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA) 321. See Loubser and Midgley (eds) *Delict* 41.

³¹¹ *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA) 321.

³¹² *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 955.

³¹³ In terms of s 39(2) of the Constitution.

³¹⁴ *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 954.

³¹⁵ *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 955.

convictions of the community) been expected to act to prevent the harm.³¹⁶ There is a duty on the state not to perform any act that violates a person's constitutional rights and in some instances there may be a legal duty on the state to take positive action to protect fundamental rights.³¹⁷ In determining whether there is a legal duty on the state to act, a "proportionality exercise" must take place where the interests of the parties are weighed against the conflicting interests of the community. This exercise depends on the interplay of different factors which must "now be carried out in accordance with the 'spirit, purport and objects of the Bill of Rights'".³¹⁸ The court³¹⁹ further stated that under the Constitution "concepts such as 'policy decisions and value judgments' reflecting 'the wishes . . . and the perceptions . . . of the people' and 'society's notions of what justice demands' might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution". The net of unlawfulness may need to be cast wider as constitutional obligations are now placed on the state to "respect, protect, promote and fulfil the rights in the Bill of Rights".³²⁰ The element of wrongfulness in particular with regard to omissions must be developed and shaped in line with the Constitution.³²¹

Knobel³²² points out that in this case, at the centre of the wrongfulness test was the duty to protect Carmichele's fundamental rights, which is an indirect way of stating that Carmichele's fundamental rights were infringed. Thus the state's conduct was unreasonable. In essence he submits "at the heart of any wrongfulness inquiry is a rights issue. Infringing a right is wrongful and amounts to the unreasonableness of conduct after all".³²³ Knobel's idea also touches on the difficulty between

³¹⁶ See *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 956-957 and the cases referred to by the court.

³¹⁷ Such as the right to life, human dignity, freedom of security of a person and so forth. See *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 957. See also *Minister of Justice and Constitutional Development v X* 2015 1 SA 25 (SCA) 29.

³¹⁸ *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 957.

³¹⁹ *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 962.

³²⁰ *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 962.

³²¹ *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 963.

³²² In Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 238.

³²³ Knobel in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 238.

differentiating between an omission and a commission. Our courts have stated that in instances there may be an omission and a commission in a particular case. For example, in *K v Minister of Safety and Security*,³²⁴ O'Regan J held that the conduct of the policeman in committing rape is considered a commission, in them violating her fundamental right, while at the same time an omission, in them failing in their legal duty to protect the woman from harm.³²⁵ Thus wrongfulness is determined in the infringement of a right and breach of a legal duty to prevent harm.

It should also be noted that the decision of *Carmichele* was important in that the Constitutional Court made it possible for the extension of delictual liability in holding the state vicariously liable for wrongful conduct in the form of omissions. For example, after the decision of *Carmichele*, in *Van Eeden v Minister of Safety and Security*,³²⁶ the Minister was held liable for allowing a prisoner to escape. The prisoner subsequently assaulted and raped a young woman after escaping. In *K v Minister of Safety and Security*,³²⁷ the state was held liable in delict where three policemen in uniform and on duty raped a young woman. The court³²⁸ held that the protection of the woman's fundamental rights was of "profound constitutional importance" and that it was part of the police's constitutional obligations to ensure public safety and prevent crime. In another landmark decision, *F v Minister of Safety and Security*,³²⁹ the Constitutional Court upon similar facts as that in *K v Minister of Safety and Security* found the state vicariously liable for the delict committed by its employee. The difference in this case was that the policeman who committed the rape was not in uniform and on standby duty. In the recent decision of *Minister of Justice and Constitutional Development v X*,³³⁰ the state was held delictually liable where once again the prosecutor failed to provide the court with all relevant information before a bail hearing in respect of an accused who had previously committed a number of offences, including rape. In this case, once the accused was released on bail, he went on to abduct and rape a five year old child. The court,³³¹ following *Carmichele* did not

³²⁴ 2005 6 SA 419 (CC) 443.

³²⁵ See also para 2 above.

³²⁶ 2003 1 SA 389 (SCA) 400.

³²⁷ 2005 6 SA 419 (CC). In this case, the court held that the existing common law principles relating to vicarious liability had to be developed within the normative framework of the Constitution.

³²⁸ *K v Minister of Safety and Security* 2005 6 SA 419 (CC) 420, 430.

³²⁹ 2012 3 BCLR 244 (CC).

³³⁰ 2015 1 SA 25 (SCA).

³³¹ *Minister of Justice and Constitutional Development v X* 2015 1 SA 25 (SCA) 33.

hesitate in finding that according to the circumstances of the case, “the legal convictions of the community would certainly demand the imposition of a legal duty requiring the prosecutor to do everything in his power to prevent [the accused’s] release, by placing all the information” required by the magistrate in order to make an informed decision with regard to granting or refusing bail.

The Constitutional Court in *Carmichele*³³² considered English tort law (in respect of the tort of negligence) and stated that in giving effect to the Constitutional values, the approach in South African law to holding the state liable is opposite to that of the approach generally followed in English tort law where policy considerations dictate that it would generally not be fair, just and reasonable to impose liability on local authorities. One of the reasons advanced for not imposing a duty of care is that the police might not be able to perform their functions and duties if they had to be concerned about liability being imposed on them. Thus the influence of the Constitution changes the pre-constitutional approach which is in a sense the approach followed in the United Kingdom. The Constitution is the supreme law of the land which holds the highest regard for fundamental rights.³³³ The court,³³⁴ in reference to the approach in English law stated that with respect to the argument that the police in terms of policy considerations should not be held liable – “the chilling effect such delictual liability might have on the proper exercise of duties by public servants are sufficiently met by the proportionality exercise which must be carried out and also by the [English law requirements relating to the tort of negligence] of foreseeability and proximity” which will establish limits to liability. This aspect of the decision in *Carmichele* will be discussed further in the next chapter on English law.³³⁵

Although the examples of omissions provided above referred mainly to the state (policeman³³⁶ and other state officials) in failing to provide protection or failing in their

³³² See *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 957-960. Cf *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) 443ff.

³³³ Such as the right to life, human dignity, freedom of security of a person and so forth.

³³⁴ See *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 959-960.

³³⁵ See chapter 4 para 3.3.1.

³³⁶ See *Minister van Polisie v Ewels* 1975 3 SA 590 (A), where policemen failed to take steps to prevent the plaintiff from being harmed while in their presence; *Carmichele v Minister of Safety and Security* 2004 3 SA 305 (SCA) where the prosecutor and police failed to oppose the release of a criminal (with a prior conviction) while awaiting trial on another charge; *Van Eeden v Minister of Safety and Security (Women’s Legal Centre Trust, as Amicus Curiae)* 2003 1 SA

duties towards members of the public; omissions may occur in a number of instances. What must be determined is whether the failure to act positively in preventing the harm to the plaintiff may be considered unreasonable, *contra bonos mores* and without there being a ground of justification applicable.³³⁷

In cases where it is not easy to determine an infringement of a subjective right or breach of a legal duty, then the courts must use the general test for wrongfulness.³³⁸ Whichever approach is used the conclusion “often involves public policy and a value judgment”.³³⁹

3.2 The recent approach: it must be reasonable to hold the wrongdoer liable³⁴⁰

According to this recent approach, wrongfulness is present if according to the adjudicator’s perception of “public and legal policy”, it would be reasonable to hold the wrongdoer liable, assuming that all the other elements are present.³⁴¹ As mentioned,³⁴² this recent approach made its debut in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*³⁴³ dealing with a claim for pure economic loss. Harms JA³⁴⁴ stated that “conduct is wrongful if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission of the defendant. It is then that it can be said that the legal convictions of society regard the conduct as wrongful”.³⁴⁵

389 (SCA) where the police failed to detain a dangerous criminal from escaping from their custody resulting in a further assault on the plaintiff; *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) where the police failed to take reasonable steps in order to deprive a person from his firearm and license knowing that he was unfit to possess such firearm due to the fact that he was prone to violence when intoxicated; *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA) where the court held that a policeman failed to investigate a person’s psychological fitness in obtaining a firearm licence. See also Loubser and Midgley (eds) *Delict* 145; Neethling 2005 *SALJ* 572ff.

³³⁷ Neethling and Potgieter *Delict* 56.

³³⁸ Neethling and Potgieter *Delict* 48.

³³⁹ Loubser and Midgley (eds) *Delict* 160.

³⁴⁰ See Ahmed in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 52.

³⁴¹ See *Le Roux v Dey* 2011 3 SA 274 (CC) 315. Cf *Lee v Minister for Correctional Services* 2013 2 BCLR 129 (CC) 155; Loubser and Midgley (eds) *Delict* 141.

³⁴² In para 3 above.

³⁴³ 2006 1 SA 461 (SCA).

³⁴⁴ *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 1 SA 461 (SCA) 468.

³⁴⁵ Harms JA referred to the academic writing of Fagan 2005 *SALJ* 107-108 in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 1 SA 461 (SCA) 468 fn 15. See Ahmed in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 52.

It is submitted that this recent approach was borrowed from English law. In order to ground liability in the English tort of negligence, it must be established that: the defendant owed the claimant a duty of care; the defendant failed to adhere to the required standard of care,³⁴⁶ that is he breached the duty of care; and the claimant sustained damage caused by the defendant's conduct.³⁴⁷ In general, the three criteria considered in order to determine whether the defendant owes the claimant a "duty of care" is: foreseeability of harm; proximity; and whether it is fair, just and reasonable to impose a duty of care.³⁴⁸ The last and third criterion has in a sense been adopted and adapted in our law as the recent approach, "new test" or variation to determining wrongfulness. The difference is that in our law, the third criterion is used to establish wrongfulness instead of a duty of care. The third criterion in English law was enunciated in *Caparo Industries plc v Dickman*³⁴⁹ which coincidentally also dealt with a claim for pure economic loss in respect of alleged negligent misstatements. It has, with respect to English law, been described as a normative question relating to *inter alia*: public policy; legal policy; ordinary reason; common sense; the concepts of reasonableness, fairness and justice; and involves the "exercise of judicial pragmatism".³⁵⁰ This will become more apparent when English law is considered in the next chapter. At this stage it is necessary to point out the connection in order to validate the submission made above. It is also submitted that it was unlikely that Harms JA intended to adopt the third criterion in establishing a duty of care into our law, as he made it clear in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*³⁵¹ that our law should not adopt the English tort of negligence. He was faced with a case where it was not appropriate to use the breach of a legal duty to prevent harm approach in determining wrongfulness. He instead referred to policy considerations which would justify awarding compensation

³⁴⁶ Where the reasonableness of the defendant's conduct is generally tested against the reasonable person.

³⁴⁷ See chapter 4 para 3.1.

³⁴⁸ See chapter 4 para 3.2.2.1. Cf See case law referred to by Neethling and Potgieter *Delict* 292 fn 160.

³⁴⁹ 1990 2 AC 605.

³⁵⁰ See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 450.

³⁵¹ 2006 1 SA 461 (SCA) 468.

to the plaintiff.³⁵² Nevertheless, the Constitutional Court³⁵³ has endorsed the recent approach.

For example, Van der Westhuizen J in the Constitutional Court decision of *Loureiro v iMvula Quality Protection (Pty) Ltd*,³⁵⁴ referred to the *boni mores* as the test for wrongfulness enunciated in *Minister van Polisie v Ewels*³⁵⁵ but stated that now the *boni mores* takes on “constitutional contours” and are “by necessity underpinned and informed by the norms and values of our society, embodied in the Constitution”. Thus in essence the *boni mores* must consider and conform to the constitutional values. Van der Westhuizen J³⁵⁶ further stated that the wrongfulness enquiry:

“focuses on the conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability”.

With these words, Van der Westhuizen J effectively reconciled the traditional and the recent approaches. The recent approach is used in the end to justify the imposition of wrongfulness. In this case, a private security company was held liable in contract and vicariously liable in delict for harm or loss suffered as a result of the conduct of a security guard, employed by the security company. The security guard opened the pedestrian gate to a person who posed as a policeman without verifying that the person was indeed a policeman and without trying to communicate with the imposter before opening the gate. As soon as the security guard opened the gate, armed robbers gained access to the premises whereafter they committed theft and held the family and house staff at gunpoint. Van der Westhuizen J³⁵⁷ reasoned that there were sufficient public policy reasons for imposing liability and finding the security guard’s conduct wrongful.

“The constitutional rights to personal safety and protection from theft of or damage to one’s property are compelling normative considerations. There is a great public interest in making

³⁵² Neethling, Potgieter and Scott *Casebook on the law of delict* 100.

³⁵³ See *Le Roux v Dey* 2011 3 SA 274 (CC) 315; *Lee v Minister of Correctional Services* 2013 2 BCLR 129 (CC) 150; *Country Cloud Trading v MEC, Department of Infrastructure Development* 2015 1 SA 1 (CC) 8; *Loureiro v iMvula Quality Protection (Pty) Ltd* 2014 5 BCLR 511 (CC) 525; *DE v RH* 2015 5 SA 83 (CC) 101; *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) 216.

³⁵⁴ 2014 5 BCLR 511 (CC) 521.

³⁵⁵ 1975 3 SA 590 (A).

³⁵⁶ In *Loureiro v iMvula Quality Protection (Pty) Ltd* 2014 5 BCLR 511 (CC) 525.

³⁵⁷ *Loureiro v iMvula Quality Protection (Pty) Ltd* 2014 5 BCLR 511 (CC) 526.

sure that private security companies and their guards, in assuming the role of crime prevention for remuneration, succeed in thwarting avoidable harm. If they are too easily insulated from claims for these harms because of mistakes on their side, they would have little incentive to conduct themselves in a way that avoids causing harm. And policy objectives (such as the deterrent effect of liability) underpin one of the purposes of imposing delictual liability. The convictions of the community as to policy and law clearly motivate for liability to be imposed.”

It is evident that according to the recent approach, the courts do still consider the *boni mores*, constitutional values, policy considerations and the parties competing interests in deciding whether to impose liability upon the defendant.³⁵⁸ It is also evident that the recent approach seems to attach more weight to policy considerations. The recent approach to establishing wrongfulness was initially applied in instances of omissions and pure economic loss.³⁵⁹ However, it is no longer limited to instances of omissions and pure economic loss. In the recent decision of *DE v RH*,³⁶⁰ the Constitutional Court in answering the question of whether our law still recognises adultery as a specific form of *iniuria*, concluded that public policy dictates that it is not reasonable to attach delictual liability to adultery. Thus adultery is no longer considered wrongful.³⁶¹ The court’s decision was however influenced by the changing *mores* or softening of the attitude towards adultery.

In *H v Fetal Assessment Centre*³⁶² where the court was called upon to determine whether our law recognises a wrongful life claim, Froneman J stated that:

“our law has developed an explicitly normative approach to determining the wrongfulness element in our law of delict. It allows courts to question the reasonableness of imposing liability ... on grounds rooted in the Constitution, policy and legal convictions of the community. ... Part of the established wrongfulness enquiry is to determine whether there has been a breach of a legal duty not to harm the claimant, or whether there has been a breach of the claimant’s rights or interests”.

Clearly the Constitutional Court has not done away with the traditional approach to determining wrongfulness but has actually just added another dimension or approach to determining wrongfulness.

Brand JA too, still refers to principles of the traditional approach to determining wrongfulness in order to reach the conclusion as to whether it is reasonable to impose

³⁵⁸ Assuming all the other delictual elements are present.

³⁵⁹ See Scott 2014 *De Jure* 388-389.

³⁶⁰ 2015 5 SA 83 (CC) 101.

³⁶¹ *H v Fetal Assessment Centre* 2015 5 SA 83 (CC) 105.

³⁶² 2015 2 SA 193 (CC) 216.

liability based on policy considerations. In *ZA v Smith*,³⁶³ the deceased had slipped on ice and fell over the edge of a gorge in a private game reserve resulting in his death. The deceased's wife sued the owner and corporation that carried on business on the farm for loss of support as a result of her husband's death. She alleged *inter alia* that they omitted to warn the public of the danger of slipping on ice, of not fencing off areas and ensuring that the areas were safe for visitors. Brand JA³⁶⁴ referred to one of the factors, namely "control of dangerous property" that may indicate the presence of a legal duty in cases of omissions as a "stereotype" and stated that these stereotypes:

"still afford guidance in answering the question whether or not policy considerations dictate that it would be reasonable to impose delictual liability on the defendant in a particular case Hence the enquiry is whether – on the assumption (a) that the respondents in this case could have prevented the deceased from slipping and falling to his death; and (b) that he had died because of their negligent failure to do so – it would be reasonable to impose delictual liability upon them for the loss that his dependants had suffered through their negligence. ... Apart from the fact that both respondents were in control of a property, which held a risk of danger for visitors, the second respondent, with the knowledge and consent of the first respondent, as owner of the property, allowed members of the public, for a fee, to make use of a four-wheel drive route, designed to lead directly to the area which proved to be extremely dangerous".

It should be noted that these "stereotypes" or rather factors indicating a presence of a legal duty to act are referred to as exceptional circumstances in the English tort of negligence where a duty of care in cases of omissions is recognised. Thus there is no need to refer to the criteria of whether it is fair, just and reasonable to impose a duty of care. Naturally though, it may be argued that the presence of the factor indicates the need to act positively which may be reasonably expected of the defendant in order to prevent harm. Thus it may still be concluded that it is fair, just and reasonable to impose a duty of care.³⁶⁵ Our courts have reiterated on many occasions that the requirement of a "duty of care" in establishing liability in the English tort of negligence straddles both wrongfulness and negligence and should be avoided.³⁶⁶ It is submitted that this is correct. First of all, the third criterion has already in a sense been adopted and adapted in our law. Fault co-determines wrongfulness

³⁶³ 2015 4 SA 574 (SCA).

³⁶⁴ *ZA v Smith* 2015 4 SA 574 (SCA) 585-586.

³⁶⁵ See chapter 4 para 3.3.1.

³⁶⁶ *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 3 SA 138 (SCA) 144; *Hawekwa Youth Camp v Byrne* 2010 6 SA 83 (SCA) 90; *Local Transitional Council of Delmas v Boshoff* 2005 5 SA 514 (SCA) 522; *Telematrix(Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 1 SA 461 (SCA) 468; *Country Cloud CC v MEC, Department of Infrastructure Development* 2014 2 SA 214 (SCA) 222; *Neethling and Potgieter* 2014 TSAR 895.

in that the question often asked is whether it is reasonable to impose liability for negligent conduct. The other two criteria in establishing a duty of care: reasonable foreseeability of harm; and proximity (referring to the relationship between the parties) are factors considered by our courts in determining wrongfulness (the unreasonableness of the defendant's conduct and the presence of a legal duty to prevent harm) and fault in the form of negligence. To complicate matters further, reasonable foreseeability of harm is also a criterion applied in determining legal causation in both English and South African law.³⁶⁷

It is submitted that even though we may have in a sense adopted and adapted the third criterion of the duty of care, it is applied differently in our law. Of importance, the recent approach is still influenced by the *boni mores*, as public policy is reflected in the *boni mores* and in the Constitution. For example, in determining wrongfulness, and especially where the defendant's conduct is considered unreasonable, our Constitution has had a ground breaking impact in finding wrongfulness for omission by the state. Whereas, in English law, the state is not easily held liable for omissions due to policy considerations as will be shown in the next chapter.³⁶⁸ However, English law is developing too and even though in many instances the courts are reluctant to impose liability in negligence for omissions by the state, there are instances where it occurs.³⁶⁹ According to the Human Rights Act 1988 which came into effect on 2 October 2000 in the United Kingdom, the English courts have an obligation to consider a number of rights contained in the European Convention on Human Rights and Fundamental Freedoms which is similar to a number of our fundamental rights.³⁷⁰ The impact of these Convention rights may have the same effect in developing English law as our Constitution did in holding the state liable for omissions. It should be noted that at the time of writing this chapter, the United Kingdom has voted to no longer be part of the European Union (Brexit) which in effect means that the United Kingdom is entitled to withdraw from the Convention. The United Kingdom may also repeal the Human Rights Act and adopt a new Bill of Rights (this will be discussed further in the next chapter). We have yet to see what will happen.

³⁶⁷ See para 5.2 below; chapter 4 para 4.

³⁶⁸ See chapter 4 para 3.3.1.

³⁶⁹ See chapter 4 para 3.3.1.

³⁷⁰ See chapter 4 para 1; Lunney and Oliphant *Tort* 30.

The recent approach, to my mind, as far as can be ascertained, began with the views of Du Bois,³⁷¹ was adapted by Fagan,³⁷² supported by Harms JA³⁷³ and Brand JA,³⁷⁴ and then recently endorsed by the courts.³⁷⁵ This recent approach enunciated by Harms JA³⁷⁶ in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* was endorsed by the courts just as the traditional approach

³⁷¹ Du Bois 2000 *Acta Juridica* 1 ff. See also para 3.3.1 below.

³⁷² 2005 SALJ 106-115; Brand 2013 *THRHR* 57ff. See Neethling and Potgieter *Delict* 80; Ahmed in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 52. See also para 3.3.2 below.

³⁷³ In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 1 SA 461 (SCA) 468.

³⁷⁴ 2007 SALJ 79. See Ahmed in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 52. See some of the following decisions in which Brand AJ presided over: *Le Roux v Dey* 2011 3 SA 274 (CC) 315; *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2014 2 SA 214 (SCA) 223; *Cape Empowerment Trust Limited v Fisher Hoffman Sithole* 2013 5 SA 183 (SCA) 193; *Roux v Hattingh* 2012 6 SA 428 (SCA) 439; *RH v DE* 2015 5 SA 83 (CC) [18]; *iMvula Quality Protection (Pty) Ltd v Loureiro* 2013 3 SA 407 (SCA) 424-425; *Lee v Minister of Correctional Services* 2013 2 SA 144 (CC) 173; *F v Minister of Safety and Security* 2012 1 SA 536 (CC) 567-568; *Nashua Mobile (Pty) Ltd v GC Pale t/a Invasive Plant Solutions* 2012 1 SA 615(GSJ) 622; *Jacobs v Chairman, Governing Body, Rhodes High School* 2011 1 SA 160 (WCC) 165. See also Neethling and Potgieter *Delict* 80 fn 308; para 3.3.3 below.

³⁷⁵ See *Mthembi-Mahanyele v Mail & Guardian* 2004 11 BCLR 1182 (SCA); *Local Transitional Council of Delmas v Boshoff* 2005 5 SA 514 (SCA); *Gouda Boerdery BK v Transnet* 2005 5 SA 490 (SCA) 499; *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 3 SA 138 (SCA) 143-145; *Tsogo Sun Holdings (Pty) Ltd v Qing-He Shan* 2006 6 SA 537 (SCA) 540; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 1 SA 461 (SCA) 468; *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 3 SA 138 (SCA) 143; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA) 160; *First National Bank of South Africa Ltd v Duvenage* 2006 5 SA 319 (SCA) 321; *Hirschowitz Flionis v Bartlett* 2006 3 SA 575 (SCA) 588; *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 2 SA 118 (SCA) 122 where Nugent JA referred to it as a variation of the test for wrongfulness; *Mediterranean Shipping Co (Pty) Ltd v Tebe Trading (Pty) Ltd* 2007 2 All SA 489 (SCA) 494-495; *Shabalala v Metrorail* 2008 3 SA 142 (SCA) 145; *McIntosh v Premier KwaZulu-Natal* 2008 6 SA 1 (SCA) 8; *Stewart v Botha* 2008 6 SA 310 (SCA) 314; *Brooks v Minister of Safety and Security* 2009 2 SA 94 (SCA) 97; *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) 156; *Delphisure Group Insurance Brokers Cape (Pty) Ltd v Dippenaar* 2010 5 SA 499 (SCA) 508; *Hawekwa Youth Camp v Byrne* 2010 6 SA 83 (SCA) 90-91; *Holm v Sonland Ontwikkeling (Mpumalanga) (Edms) Bpk* 2010 6 SA 342 (GNP) 348; *AB Ventures Ltd v Siemens Ltd* 2011 4 SA 614 (SCA) 618-619; *Stols v Garlicke & Bousfield Inc* 2012 4 SA 415 (KZP) 425; *Jaffit v Garlicke & Bousfield Inc* 2012 2 SA 562 (KZP) 569; *Le Roux v Dey* 2011 3 SA 274 (CC) 315; *Roux v Hattingh* 2012 6 SA 428 (SCA) 439; *Minister of Correctional Services v Lee* 2012 3 SA 617 (SCA) 624; *F v Minister of Safety and Security* 2012 1 SA 536 (CC) 274-275; *Lee v Minister of Correctional Services* 2013 2 BCLR 129 (CC) 150; *iMvula Quality Protection v Loureiro* 2013 3 SA 407 (SCA) 418 424-425; *McCarthy Ltd t/a Budget Rent A Car v Sunset Beach Trading 300 t/a Harvey World Travel* 2012 6 SA 551 (GNP) 564; *Living Hands (Pty) Ltd v Ditz* 2013 2 SA 368 (GSJ) 375; *Cape Empowerment Trust v Fisher Hoffman Sithole* 2013 5 SA 183 (GSJ) 193; *Loureiro v iMvula Quality Protection (Pty) Ltd* 2014 3 SA 394 (CC) 410; *Country Cloud Trading v MEC, Department of Infrastructure Development* 2015 1 SA (CC) 8; *DE v RH* 2015 5 SA 83 (CC) 101; *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) 216. See cases referred to by Neethling and Potgieter *Delict* 78 fn 276-280; Ahmed in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 52; Ahmed 2012 *Obiter* 417. Cf Fagan 2007 SALJ 287.

³⁷⁶ In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 1 SA 461 (SCA) 468.

pronounced in *Minister van Polisie v Ewels*³⁷⁷ was subsequently endorsed by the courts. According to this recent approach, wrongfulness attains superiority as the central element in determining delictual liability and is linked with legal causation which also involves considerations of public policy in that they “both serve as safety valves preventing the imposition of liability”.³⁷⁸

3.3 Dogmatic views on the recent approach to determining wrongfulness

3.3.1 Du Bois

Du Bois is of the view that the law of delict involves “the creation and enforcement of obligations”³⁷⁹ and that the purpose is to provide a means for people to obtain judgment and ensure enforcement of such obligations. It encompasses a “system of rules and principles of personal responsibility” that control conflicting interests.³⁸⁰ The victims are at liberty to decide whether they want to institute legal proceedings, and whether they do indeed obtain compensation depends on the wrongdoer’s resources.³⁸¹ The purpose of the law of delict can only be accomplished if it is justifiable to impose internal³⁸² and external³⁸³ “juridification costs”.³⁸⁴ In other words, from a financial point of view, is it worth bringing the dispute before the court, taking into account *inter alia* the social and economic costs in obtaining relief in terms of the law of delict?³⁸⁵ Whether the costs can be justified depends on either *jurisdictional or protective concerns*. With regard to *jurisdictional concerns*, for example, “the costs are held to be too high because it is unlikely that a ‘right answer’ exists in respect of the issue in question,” and with *protective concerns*, “the costs are held to be too high because ‘recourse to adjudication would unjustifiably harm practices and institutions which serve other valuable ends as well, so as to protect the ability of the latter to do

³⁷⁷ 1975 3 SA 590 (A).

³⁷⁸ *Cape Empowerment Trust v Fisher Hoffman Sithole* 2013 5 SA 183 (GSJ) 197.

³⁷⁹ Du Bois 2000 *Acta Juridica* 25.

³⁸⁰ Du Bois 2000 *Acta Juridica* 27.

³⁸¹ 2000 *Acta Juridica* 27.

³⁸² Costs involved in “creating and maintaining the law of delict and the institutional prerequisites for its effective operation” (Du Bois 2000 *Acta Juridica* 28).

³⁸³ Relating to the “impact that the provision of this facility has on other aspects of society” (Du Bois 2000 *Acta Juridica* 28).

³⁸⁴ Du Bois 2000 *Acta Juridica* 28.

³⁸⁵ Visser’s take on Du Bois views in Du Bois (gen ed) *Wille’s Principles of South African law* 1098.

so”³⁸⁶ Du Bois’s approach was acknowledged by the Constitutional Court in *Country Cloud Trading v MEC, Department of Infrastructure Development*³⁸⁷ where Khampepe J stated:

“Wrongfulness ... functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether ‘the social, economic and other costs are just too high to justify the use of the law of delict for the resolution of the particular issue’. Wrongfulness typically acts as a brake on liability ... where it is overly burdensome to impose liability.”

Du Bois is not keen on the traditional test for wrongfulness as enunciated in *Minister van Polisie v Ewels*³⁸⁸ and instead provides his own view of the test and function of wrongfulness, inspired by Cicero.³⁸⁹ He submits that wrongfulness must reconcile:

“the judicial development of the law with a frank recognition that there exists a plurality of competing community convictions, also with regard to where the line is to be drawn between what is ‘merely’ immoral and what legal. It must do so in a manner that affords both a plausible justification, and guidance, for the exercise of judicial discretion concerning the boundaries of liability in delict, and that sheds light on what the courts actually do”.³⁹⁰

According to Du Bois, wrongfulness turns on “when it is proper for the law of delict to step in”.³⁹¹ He³⁹² submits that it is essential for the court to consider whether the law of delict “‘can lay its strong arms on’ a dispute”. He³⁹³ submits that wrongfulness is a separate element, not part of fault, “but is to play the distinctive role of directing the courts’ attention to the factors that bear on whether the law of delict ‘can lay its strong arm’ on a dispute”.

Visser³⁹⁴ points out that Du Bois’s approach makes it clear that unreasonable conduct does not equate to wrongfulness and that the determining factors considered in establishing wrongfulness are public utility and economic efficiency. Visser,³⁹⁵ however, admits that although wrongfulness is not primarily concerned with whether conduct is reasonable or not, it sometimes is. He provides the example that our law regards physical security highly and “almost never considers the juridification costs

³⁸⁶ Visser on Du Bois views in Du Bois (gen ed) *Wille’s Principles of South African law* 1098.

³⁸⁷ 2015 1 SA 1 (CC) 8. See also *ZA v Smith* 2015 4 SA 574 (SCA) 583.

³⁸⁸ 1975 3 SA 590 (A).

³⁸⁹ See Du Bois 2000 *Acta Juridica* 18 ff.

³⁹⁰ Du Bois 2000 *Acta Juridica* 18.

³⁹¹ Du Bois 2000 *Acta Juridica* 20.

³⁹² Du Bois 2000 *Acta Juridica* 20.

³⁹³ Du Bois 2000 *Acta Juridica* 48.

³⁹⁴ In Du Bois (gen ed) *Wille’s Principles of South African law* 1099.

³⁹⁵ In Du Bois (gen ed) *Wille’s Principles of South African law* 1099.

of adjudicating consequences of physical harm too high”. If a defendant causes harm to another and raises the defence of necessity, the reasonableness of his conduct is considered in determining wrongfulness.

It is submitted that the similarity between Du Bois’s approach and the recent approach is rather close. Du Bois’s approach is also similar to Fagan’s³⁹⁶ approach (supported by Brand JA)³⁹⁷ and this may be illustrated by juxtaposing the two approaches:³⁹⁸ directing the courts’ attention to the factors that bear on whether the law of delict “can lay its strong arm” on a dispute/wrongfulness is concerned with the reasonableness of imposing liability.³⁹⁹

Du Bois’s approach is predominantly focused on whether it is feasible in a financial sense to bring a dispute in delict before the court and that is in reality not always the case. For example, sometimes matters are brought to the court for the purpose of: developing the law, which includes aligning the law of delict with the evolving *boni mores*;⁴⁰⁰ confirming principles; adapting it to conform to constitutional imperatives; extending delictual liability,⁴⁰¹ and so on. The purpose of the law of delict, as Neethling and Potgieter⁴⁰² put it, is “to indicate which interests are recognised by law, under which circumstances they are protected against infringement ... and how such a disturbance in the harmonious balance of interests may be restored”. Furthermore, if it is not feasible to litigate because the harm or loss is slight, it is trite law that the maxim *de minimus non curat lex* will apply whereby the adjudicator will not preside over a case if the transgression is slight or minor. It sometimes transpires in practice that the defendant does not have sufficient funds to satisfy a judgment award at the time, and sometimes this only comes to light after judgment. In any case such judgment remains valid for some time, which covers instances when the defendant may at a later stage acquire funds. It also happens in practice, in instances of vicarious liability, that it is more feasible to sue the employer with the deeper pocket.

³⁹⁶ See para 3.3.2 below.

³⁹⁷ See para 3.3.3 below.

³⁹⁸ See Fagan 2007 *SALJ* 285 ff.

³⁹⁹ Fagan 2005 *SALJ* 116 ff.

⁴⁰⁰ See *RH v DE* 2014 6 SA 436 (SCA) where the court held that in respect of the *actio iniuriarum* based on adultery entitling an innocent spouse to a claim for *contumelia* (injury to one’s self-esteem) and loss of consortium (deprivation of the wife’s company) is no longer wrongful attracting delictual liability.

⁴⁰¹ For example in cases of pure economic loss which were previously not actionable in delict.

⁴⁰² *Delict* 3.

Economic and social concerns are therefore only some of the factors that may be considered when determining whether the defendant's conduct is reasonable or not in respect of wrongfulness.

3.3.2 Fagan

Fagan⁴⁰³ submits that the similarity between the English duty of care requirement in determining the tort of negligence and the South African legal duty to prevent harm involves policy considerations.

“By the policy aspect of the duty of care is presumably meant all those further conditions that determine the moral reasonableness of imposing liability for the careless performance of an activity ... these further conditions are of two kinds. Some affect the moral reasonableness of imposing liability for carelessness by affecting the moral reasonableness of carelessness itself. Examples given were the nature of the foreseeable harm, of the conduct and of the relationship between parties. Others, such as the floodgates argument, have no impact on the moral reasonableness of carelessly performing an activity. But they do provide reasons against imposing liability on conduct that is morally unreasonable because it is careless.”⁴⁰⁴

As already submitted,⁴⁰⁵ the recent approach to determining wrongfulness in respect of whether it is reasonable to impose liability on the defendant is similar to the third criterion in establishing a duty of care. Fagan was instrumental in the recent approach being adopted and adapted into our law.

He⁴⁰⁶ continues that with the English duty of care, the “basic condition ... of the moral reasonableness of imposing liability on an act is the fact that it is careless”. It will be unreasonable to impose liability for an act innocently performed and reasonable to impose liability for intentional or negligent acts. Fagan⁴⁰⁷ states that the question in South African law is – would it be wrongful for the act to be performed culpably? This is another way of saying, as in English law, is a duty of care owed by the defendant, or is it reasonable to impose a duty of care? The South African legal duty to prevent harm, according to Fagan, is almost identical to the English duty of care;⁴⁰⁸ it is a duty to act without negligence.⁴⁰⁹ This submission is incorrect. As will be explained in the

⁴⁰³ 2000 *Acta Juridica* 49, 61 ff.

⁴⁰⁴ Fagan 2000 *Acta Juridica* 61.

⁴⁰⁵ In para 3.2 above.

⁴⁰⁶ Fagan 2000 *Acta Juridica* 63.

⁴⁰⁷ 2000 *Acta Juridica* 64.

⁴⁰⁸ Fagan 2000 *Acta Juridica* 65.

⁴⁰⁹ Fagan 2005 *SALJ* 110-115.

next chapter on English law,⁴¹⁰ a duty of care usually exists if: there is reasonable foreseeability of harm to the claimant or claimants within a specific class; there is a relationship of proximity between the claimant and defendant; and if it is fair, just and reasonable to impose a duty of care on the defendant in light of policy considerations. It is submitted that both the traditional and recent approaches to determining wrongfulness do not depend on there being reasonable foreseeability of harm and a relationship of proximity in *all instances*. Although these are factors in determining whether the defendant's conduct was reasonable and whether a legal duty to prevent harm exists; other factors are considered too, such as constitutional imperatives. Wrongfulness still lies in the infringement of a right or breach of a legal duty to prevent harm. The *boni mores* or reasonableness criterion, in addition to the influence of the constitutional norms and values, as well as public policy which is reflected in the *boni mores* criterion, still forms part of the wrongfulness enquiry. The influence of the Constitution on our law should not be underestimated as, in essence, when applied in our law; it brings about different results as compared to establishing a duty of care. This is evident with the different outcomes reached by the South African and English courts with respect to determining liability for omissions, in particular by the state.⁴¹¹ In English law there may be no duty of care owed to the claimant in respect of an omission by a state, but in South African law, as held in *Carmichele*,⁴¹² there is a duty on the state not to perform any act that infringes a person's Constitutional rights. In some instances there may be a legal duty on the state to take positive action to protect fundamental rights.⁴¹³ Furthermore, in *Carmichele*,⁴¹⁴ the Constitutional Court stated that under the Constitution, policy decisions and value judgments reflecting the *boni mores* might have to be supplemented and enriched by the norms of the Constitution. Indeed, the net of unlawfulness is thus cast wider when constitutional obligations are placed on the state.⁴¹⁵

⁴¹⁰ In chapter 4 para 3.2.2.1.

⁴¹¹ See chapter 4 para 3.3.1.

⁴¹² *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 957. See para 3.1.11 above.

⁴¹³ *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 957. See para 3.1.11 above.

⁴¹⁴ *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 962. See para 3.1.11 above.

⁴¹⁵ *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 962. See para 3.1.11 above.

Neethling and Potgieter⁴¹⁶ convincingly submit that the duty of care concept with which Fagan equates to the legal duty in respect of determining wrongfulness; “creates the impression that the legal duty deals with the question of whether the defendant acted negligently ... [and] can lead to the essence of the wrongfulness inquiry, i.e. whether a legal duty existed according to the *boni mores* to act positively to prevent an infringement of a legally protected interest, being negated”. Our courts have also clearly stated that they will not equate a legal duty to prevent harm or loss with the English duty of care.⁴¹⁷ Furthermore, the fact that Fagan refers to negligent conduct begs the question as to what happens in respect of a legal duty to prevent harm where there is intentional conduct. For example, in *Country Cloud Trading CC v MEC, Department of Infrastructure Development*,⁴¹⁸ dealing with a case involving pure economic loss, the court found intention on the part of the wrongdoer but still found it unreasonable to impose liability based on policy considerations. The duty of care concept in English law refers to the tort of negligence, requiring negligent conduct. In English law,⁴¹⁹ the purpose of a remedy in intentional torts is the protection of the claimant’s legally recognised interest and the lawfulness of the wrongdoer’s conduct is assessed. For example, if we look at an intentional tort of false imprisonment: intentional; unlawful (unjustified); complete restriction of the claimant’s movement is required. The duty of care concept in the tort of negligence does not feature in the intentional tort of false imprisonment. Thus, for the above reasons, the requirement of duty of care cannot be equated with the legal duty to prevent harm.

The similarity between the breach of a legal duty in South African law in respect of omissions and the establishing of a duty of care in the English tort of negligence for omissions is: the factors which may indicate the presence of a legal duty in the South African law of delict; and the factors which indicate that there is a duty of care owed by the defendant to take reasonable steps to prevent harm according to the English tort of negligence. These factors include: a special relationship of care; assumption of responsibility; control over a dangerous person or thing; creation of danger; and

⁴¹⁶ *Delict 57.*

⁴¹⁷ See para 9 below.

⁴¹⁸ 2015 1 SA 1 (CC).

⁴¹⁹ See chapter 4 para 2.3.

prior conduct. In the English tort of negligence they are referred to as exceptional circumstances where a duty of care will be recognised in instances of omission.⁴²⁰

Fagan⁴²¹ submits that:

“where harm has been caused intentionally, it makes good sense that wrongfulness should turn on the *ex ante* rather than *ex post facto* reasonableness of the harm-causing conduct. ... [W]here harm has been caused negligently, it would make no sense that liability should, in addition depend on wrongfulness, if wrongfulness were to turn on the *ex post facto* reasonableness of conduct. It would make no sense, because it would have the result that liability would on occasion, be avoided when it should be imposed. However, it does make sense that liability should, in addition depend on wrongfulness, if wrongfulness turns on the reasonableness of imposing liability for conduct that has been shown, or is assumed to be negligent. Then wrongfulness would have the important function, namely to avoid the allocation of accidental loss by judicial application of the negligence standard when the cost of so doing outweighs the benefit”.

Fagan’s approach in actual fact telescopes the reasonableness of the defendant’s conduct into one single inquiry based on an *ex ante* approach to determining both wrongfulness and fault. This approach conflates wrongfulness and negligence. This is illustrated where the courts, in determining the presence of some of the grounds of justification, used an *ex ante* approach to determine wrongfulness as explained further on.⁴²²

Fagan’s⁴²³ support for the *ex ante* reasonableness approach to determining wrongfulness of negligent conduct requires fault to be determined before wrongfulness and consciousness of wrongfulness should not be a necessary element of intent. This approach conflates wrongfulness and fault.⁴²⁴ This approach is opposite to the view that wrongfulness should be determined *ex post facto* before fault and that consciousness of wrongfulness is a requirement for intent.

It is submitted that our courts in South Africa stand in unison and solidarity on three very important points:

⁴²⁰ See chapter 4 para 3.3.1.

⁴²¹ 2005 *SALJ* 93. See also Fagan 2007 *SALJ* 292.

⁴²² See para 3.4 below.

⁴²³ 2005 *SALJ* 116ff.

⁴²⁴ See Fagan 2005 *SALJ* 117-125. Fagan basis this on cases where consciousness of wrongfulness was dispensed with in respect of wrongful attachment of goods, wrongful arrest, wrongful imprisonment and defamation.

1. That they do not want to incorporate the English tort of negligence into our law, no doubt because our law follows a generalising approach as compared to the English law which is made up of specific torts with specific requirements relating to those torts. Furthermore intentional torts requiring intention are separate from the tort of negligence requiring negligence (the English law of torts will be discussed in the next chapter).
2. That they want both wrongfulness and fault to remain as two separate and distinct elements in our law.
3. Our law of delict must be shaped to incorporate the values and norms enshrined in our Constitution which is the supreme law of the land.

To this end at least there is hope to redeem our law from any confusion or uncertainty. Our courts have reiterated these three points time and time again⁴²⁵ and it is clear that they do not intend to conflate the elements even though at times they do.⁴²⁶ The role of academic writers is to assist our adjudicators who are tasked with the important function of dispensing law. The goal of academic writers, when law is developed and principles are applied incorrectly, should be aimed at, pointing out, in a constructive manner, where the courts are applying the theoretical principles of our law incorrectly to practical situations.

It is submitted that the approach should not be to research a number of cases that were to some extent theoretically incorrectly decided, although justice was served, and then sanction it as the correct approach. In effect, Fagan has justified incorrect approaches to determining a delict under the guise of developing the law – “rethinking wrongfulness”. The main criticism against Fagan’s ideas is that he is clearly encouraging the adoption of the English tort of negligence which does not distinguish between our delictual elements of conduct, wrongfulness and fault.⁴²⁷ The recent test to determining wrongfulness is vague and incomplete when it stands alone as the

⁴²⁵ See Van der Walt and Midgley *Delict* 100.

⁴²⁶ As illustrated with some grounds of justification, see para 3.4 below.

⁴²⁷ See chapter 4 para 3.

“reasonableness of imposing liability”.⁴²⁸ The traditional approach is quite developed and flexible to accommodate any practical situation. It is understandable that our adjudicators would prefer the recent approach because it appeals to their sense of justice (reasonableness of imposing liability), but at the same time it encourages the conflation of wrongfulness, fault and legal causation due to the influence of policy considerations and reasonableness.⁴²⁹ Furthermore the approach which is meant to determine wrongfulness only is almost equated with the idea of whether the defendant should be held liable for a delict as a whole, taking into account all the elements of a delict.⁴³⁰ The elements are being confused and blurred. It may lead to the redundancy of some elements as the recent approach is being tested and developed in our courts. The recent test is usurping the other elements of a delict placing wrongfulness on the throne of supremacy.⁴³¹

3.3.3 Brand (in his capacity as an academic writer and as a judge)

Brand⁴³² acknowledges the decision of Rumpff CJ in *Minister van Polisie v Ewels*,⁴³³ where in respect of omissions it was stated that conduct will be deemed wrongful where the omission is not only morally indignant, but where the *boni mores* requires that the omission be regarded as wrongful. However, he⁴³⁴ states that Rumpff CJ did not acknowledge that a legal duty to prevent harm, leading to the imposition of liability, as a result of an omission, or due to pure economic loss, depends on policy considerations. Brand does not endorse the *boni mores* criterion in so many words, but emphasises public and legal policy considerations in determining wrongfulness. Brand⁴³⁵ submits that “references to concepts such as ‘legal duty’ or ‘the *boni mores*’ or ‘the legal convictions of the community’ are no more than attempts at formulating some kind of practical yardstick as to when policy considerations will require the imposition of legal liability”. He adds that the general criterion of reasonableness is

⁴²⁸ See Loubser in Boezaart and De Kock (eds) *Vita perit, labor non moritur: Liber memorialis: PJ Visser* 122; Knobel in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 231 fn 15; Neethling and Potgieter *Delict* 82.

⁴²⁹ Ahmed in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 52.

⁴³⁰ Knobel in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 231-232. See Ahmed in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 52.

⁴³¹ See Neethling and Potgieter *Delict* 78-82 who in detail criticise the recent approach.

⁴³² 2013 *THRHR* 61-62.

⁴³³ 1975 3 SA 590 (A) 597.

⁴³⁴ Brand 2013 *THRHR* 61-62.

⁴³⁵ 2013 *THRHR* 63.

also one of these yardsticks.⁴³⁶ Brand⁴³⁷ prefers not to associate reasonableness with wrongfulness but states:

“it would have been better to avoid the reference to ‘reasonableness’ entirely, because it is easily confused with the reasonableness of the defendant’s conduct, which is an element of negligence. The same happened with the yardstick of a ‘legal duty’ which in turn led to confusion with the concept of a duty of care in English law which is more commonly associated with negligence”.

It is submitted that Brand’s view to determining wrongfulness is very close to the third criterion of the requirement of duty of care in the tort of negligence. The effect of this approach as mentioned above in English law is that policy considerations are used to keep the state immune from liability even if their conduct is negligent. Due to the effect of the Constitution on our law and the protection of fundamental rights, the state may be held liable for negligent and unreasonable conduct. Thus, even policy considerations applied in determining the limiting of the fundamental rights must be reasonable according to section 36 of the Constitution. An organ of the state in South Africa is also subject to the constitutional provisions.⁴³⁸

As mentioned,⁴³⁹ the *boni mores* concept was adopted in our law from Roman law while the concept of public policy appears to have been adopted in our law from English law. As mentioned above with reference to English law,⁴⁴⁰ public policy takes into consideration the “public good” which is similar to the concept of the *boni mores* and public policy is also reflected in the *boni mores*. In terms of the development of the recent approach thus far, our Constitutional Court in reference to the *boni mores* and public policy expects these concepts to incorporate constitutional values and norms. If we look once again⁴⁴¹ at *DE v RH*,⁴⁴² the Constitutional Court held that the *boni mores* is about “public policy” “informed by our constitutional values” which tell us whether a delictual claim may be established – or, put differently, whether it is “reasonable to impose delictual liability”. Other Constitutional Court decisions following similar approaches include *inter alia H v Fetal Assessment Centre*,⁴⁴³ and

⁴³⁶ Brand 2013 *THRHR* 63.

⁴³⁷ 2013 *THRHR* 63-64.

⁴³⁸ See *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) 396-397; *Van der Walt and Midgley Delict* 18.

⁴³⁹ See chapter 2 para 3.

⁴⁴⁰ See chapter 2 para 3.

⁴⁴¹ See chapter 2 para 3.3.

⁴⁴² 2015 5 SA 83 (CC) 101.

⁴⁴³ 2015 2 SA 193 (CC) 216.

*Loureiro v iMvula Quality Protection (Pty) Ltd.*⁴⁴⁴ What is also noticeable about the application of the recent approach is that the courts do not refer to the recent approach of reasonableness of imposing liability on its own but also refer to: the *boni mores*; public and legal policy; the constitutional norms and values; and further state that the test for wrongfulness is still determined by breach of a legal duty or in the infringement of a right. To reiterate⁴⁴⁵ in *H v Fetal Assessment Centre*⁴⁴⁶ the court held:

“our law has developed an explicitly normative approach to determining the wrongfulness element ... it allows courts to question the reasonableness of imposing liability ... on grounds rooted in the Constitution, policy and legal convictions of the community. ... Part of the ... enquiry is to determine whether there has been a breach of a legal duty ... or whether there has been a breach of the claimant’s rights or interests”.

In respect of Brand’s distaste for the reasonableness criterion in determining wrongfulness as a result of the possible confusion between the test for negligence and wrongfulness; it may be argued that the influence of reasonableness is actually evident, whether implicitly or explicitly, in every element. It varies in respect of the different elements just as the influence of public policy varies in respect of the different elements of wrongfulness, fault, legal causation and in determining damage.⁴⁴⁷ It is ingrained in our law. It is unacceptable to determine wrongfulness solely on considerations of policy. Brand’s ideas with respect to the recent approach to determining wrongfulness are similar to those found in English tort law which is similar to the pre-constitutional test to determining wrongfulness. Relying solely on policy considerations detracts from established basic principles of the law of delict backed by scientific and empirical evidence. Relying solely on policy considerations is the easy way out for an adjudicator to dispense justice and justify a decision, but can also equally lead to injustice. Thus the recent approach may be used to reach a final conclusion but should only be used once wrongfulness is determined according to the established traditional approach.

Brand,⁴⁴⁸ like Fagan, submits that in respect of intent, “consciousness of wrongfulness” should not be an element.⁴⁴⁹ He prefers the *ex ante* approach to

⁴⁴⁴ 2014 5 BCLR 511 (CC) 521.

⁴⁴⁵ See para 3.2 above.

⁴⁴⁶ 2015 2 SA 193 (CC) 216.

⁴⁴⁷ See Neethling and Potgieter *Delict* 22.

⁴⁴⁸ 2013 *THRHR* 63-64.

⁴⁴⁹ See para 4.2 below.

determining wrongfulness because he believes that the “*ex post facto* test ... renders the defendant’s mental disposition entirely irrelevant”.⁴⁵⁰ This is incorrect, as subjective factors as stated above⁴⁵¹ are considered in the determination of wrongfulness. Brand⁴⁵² has further, in a sense, equated the test for legal causation (imputability of liability) with the recent test for wrongfulness (imposition of liability).

Brand JA in *Le Roux v Dey*⁴⁵³ held:

“our courts have come to recognise, however, that in the context of the law of delict: (a) the criterion of wrongfulness ultimately depends on a judicial determination of whether – assuming all the other elements of delictual liability to be present – it would be reasonable to impose liability on a defendant for damages flowing from specific conduct; and (b) that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of imposing liability on the defendant for the harm resulting from that conduct”.

Brand JA repeated this passage verbatim in later judgments⁴⁵⁴ he presided over. In this same decision Brand JA at least agreed that the test for wrongfulness and negligence should remain separate instead of being combined into one test when the courts determine the reasonableness of the defendant’s conduct.⁴⁵⁵ Brand JA⁴⁵⁶ submits that wrongfulness introduces a measure of control and serves as a “‘long-stop’ to exclude liability in situations where most right minded people, including judges, will regard the imposition of liability as untenable, despite the presence of all other elements of Aquilian action. ... If the test for negligence and wrongfulness is telescoped into one, the function of the later element as a measure of control is lost completely”. This aspect of limiting liability argued by Brand JA is discussed further on with respect to legal causation.⁴⁵⁷

⁴⁵⁰ Brand 2013 *THRHR* 66-67.

⁴⁵¹ See para 3.1.7 above.

⁴⁵² See para 9 below.

⁴⁵³ 2011 3 SA 274 (CC) 315.

⁴⁵⁴ See for example *Roux v Hattingh* 2012 6 SA 428 (SCA) 439; *Cape Empowerment Trust v Fisher Hoffman Sithole* 2013 5 SA 183 (SCA) 193.

⁴⁵⁵ See *Hattingh v Roux* 2011 5 SA 135 (WCC) 142; *Roux v Hattingh* 2012 6 SA 428 (SCA) 439-440.

⁴⁵⁶ *Roux v Hattingh* 2012 6 SA 428 (SCA) 439-440.

⁴⁵⁷ See para 5.2 below.

3.3.4 Gowar

Gowar upholds the traditional test for determining wrongfulness⁴⁵⁸ and endorses the approach set out in *Minister of Police v Ewels*⁴⁵⁹ in respect of omissions but also recognises the courts' recent approach.⁴⁶⁰ Her⁴⁶¹ main concern, like Nugent,⁴⁶² is that wrongfulness should remain a separate and distinct element. The courts should, when dealing with delictual liability, ensure that they find both wrongfulness and fault (assuming that both elements are in dispute during the litigation process) and not only investigate the question of negligence, thereby omitting to find wrongfulness or assume that wrongfulness is present.⁴⁶³

3.3.5 Loubser and Midgley

Loubser and Midgley⁴⁶⁴ point out that, according to the recent approach, two questions arise:

- “● Should a court, as a matter of policy, impose liability on the defendant in these circumstances?
- Is it reasonable to compensate the plaintiff for the loss, and for the defendant to bear the loss?”

They⁴⁶⁵ submit that:

“[u]nderlying delict is a sense of morality and fairness. The law of delict should give substance to these concepts, and sometimes it requires judges to decide which conflicting moral principles should be given practical effect when regulating behaviour in society”.⁴⁶⁶

Loubser and Midgley⁴⁶⁷ submit that wrongfulness is linked to the general idea of delictual liability in that liability is imposed on the defendant when he unreasonably

⁴⁵⁸ 2011 *Obiter* 522-523; 2011 *THRHR* 686.

⁴⁵⁹ 1975 3 SA 590 (A).

⁴⁶⁰ See Gowar 2011 *THRHR* 686-687.

⁴⁶¹ Gowar 2011 *THRHR* 687.

⁴⁶² See Nugent 2006 *SALJ* 557ff.

⁴⁶³ Gowar 2011 *THRHR* 686ff.

⁴⁶⁴ (Eds) *Delict* 142.

⁴⁶⁵ (Eds) *Delict* 5.

⁴⁶⁶ (Eds) *Delict* 8-12 provide the following list of functions of the law of delict: compensation for harm or loss suffered; protection of interests; encouraging social order and cohesion; providing guidelines for socially acceptable behaviour and reinforcing of values; loss spreading; providing socially acceptable compromises between conflicting moral views; and discouraging individuals from socially unacceptable behaviour.

⁴⁶⁷ (Eds) *Delict* 140.

causes harm to the plaintiff. They criticise the view that wrongfulness is concerned with the infringement of a right or interest worthy of protection by the law, in that the description is so wide it may refer to the idea of delictual liability.⁴⁶⁸ However, it is submitted that it is the opposite. Finding wrongfulness based on the infringement of a right according to the *boni mores* is narrower and more specified than the wide notion of the reasonableness of imposing liability on the defendant for harm suffered by the plaintiff.

Loubser and Midgley submit⁴⁶⁹ that public policy determines whether a legal duty to prevent harm or loss exists:

“In some cases this involves considering the broad social and economic impact of imposing liability, and in others, a more limited focus on legal and factual aspects of the relationship between the parties. In each case, the question is whether it is reasonable for the law of delict to shift the burden of harm from the plaintiff to the defendant.”

They state that the policy considerations the courts consider include: the economic and social consequences of imposing delictual liability; whether there are other remedies available, such as a contractual remedy; the demand for accountability of the state while on the other hand taking into consideration that the proposed liability may hinder such state bodies or officials in exercising their functions in the interests of the public; constitutional rights which may imply a legal duty to prevent harm; certain factual circumstances which may indicate a duty to prevent harm;⁴⁷⁰ the nature of the defendant’s conduct (whether there was a positive act or omission); the nature of the protected interest;⁴⁷¹ the nature of the defendant’s fault and subjective factors such as motive.

Loubser and Midgley⁴⁷² submit that:

“wrongfulness supplements the other elements of delict, adding a further value, or a policy-based dimension to the enquiry into liability, and requires judicial discretion. With all the other elements of liability (conduct, causation, harm and fault) proved or assumed to be present, wrongfulness involves a value judgment on whether the affected interest of the plaintiff should prevail over a conflicting interest of the defendant, or deserves protection from the defendant’s

⁴⁶⁸ Loubser and Midgley (eds) *Delict* 140.

⁴⁶⁹ (Eds) *Delict* 152-156.

⁴⁷⁰ Control over a dangerous object, prior conduct, knowledge of danger, “professional knowledge”, and a “relationship imposing responsibility”.

⁴⁷¹ As courts more easily acknowledge a duty to prevent harm in instances of physical injury and damage to property than a duty to prevent loss in terms of pure economic loss.

⁴⁷² (Eds) *Delict* 161.

action or lack of it, so that the burden of damage should be shifted from plaintiff to defendant. Wrongfulness is thus essentially concerned with the scope of protection afforded to various rights and interests, the scope of responsibility to act, and overall policy considerations that relate to the question of whether the law of delict should intervene”.

Loubser and Midgley emphasise that out of all the elements, wrongfulness is the most clearly policy-based element, much more so than the others. The policy-based criterion of wrongfulness is much more vague and pliable and seems to emphasise different policy considerations in different cases. The elements of wrongfulness, fault, conduct, causation and harm – add up to confirm whether a delict is committed, and whether a defendant is thus liable. Loubser and Midgley acknowledge the dominance of the element of wrongfulness in determining delictual liability. Nevertheless, Loubser and Midgley⁴⁷³ conclude that it is generally accepted that the *boni mores* yardstick in the end involves policy considerations and a value judgment.

Loubser and Midgley⁴⁷⁴ submit that both fault and wrongfulness are determined *ex post facto*, since the defendant’s conduct is judged in hindsight but with a different focus. According to them, the focus of wrongfulness infiltrates all the remaining elements of a delict but in the end involves value judgments and public policy. Thus the courts make a decision based on whether the plaintiff’s interests require protection from the defendant’s omission or commission generally from an *ex post facto* point of view. With respect to fault in the form of intention, the focus is on whether the defendant intended to cause harm knowing that it was wrong to cause such harm. With regard to fault in the form of negligence they submit that the question is whether the defendant behaved reasonably and whether the harm was reasonably foreseeable and preventable at the time of the delict. This enquiry involves an *ex ante* approach.⁴⁷⁵ The authors refer here to the dichotomy between the objective-subjective enquiries in respect of determining negligence, to which Knobel⁴⁷⁶ also refers.

⁴⁷³ (Eds) *Delict* 159.

⁴⁷⁴ (Eds) *Delict* 156-157.

⁴⁷⁵ (Eds) *Delict* 156-157.

⁴⁷⁶ In Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 236-237.

3.3.6 Van der Walt and Midgley

Van der Walt and Midgley⁴⁷⁷ submit that the current test for wrongfulness depends on the adjudicators' determination on the reasonableness of imposing liability on the defendant, assuming all the other elements of delictual liability are present. However, they explain that it will be socially desirable, acceptable and reasonable to impose liability if the following factors are taken into account: the *boni mores*; the infringement of the plaintiff's interests or rights; breach of a legal duty; legal policy; public policy which is linked to justice, equity, reasonableness and good faith; constitutional values and norms; the interest of the parties weighed against that of the community; the consequences of the defendant's conduct; and surrounding circumstances of the case.⁴⁷⁸ The adjudicator's decision is a conclusion of a value judgment as to whether it is acceptable to impose liability and therefore reasonable. If it is legally reprehensible to impose liability, then it is unreasonable.⁴⁷⁹ They⁴⁸⁰ submit that the test is objective based on the reasonableness of conduct with regard to the consequences. It is directional in that wrongfulness "must be established in relation to a particular consequence, and a particular person or class of persons. It cannot exist 'in the air'".

The academic writers on the one hand agree that the test for wrongfulness is *inter alia* objective, based on reasonableness of conduct tested against the *boni mores* and constitutional values, but then submit that it is established in relation to a person or class of persons. This almost appears to equate wrongfulness with the English concept of duty of care in the tort of negligence insofar as a duty of care is owed to a foreseeable person or class of persons.⁴⁸¹

3.3.7 Knobel

Knobel⁴⁸² points out that, in terms of the recent approach, wrongfulness usurps the functions of the other elements of delict, in particular fault and legal causation which

⁴⁷⁷ *Delict* 93.

⁴⁷⁸ Van der Walt and Midgley *Delict* 99-100.

⁴⁷⁹ Van der Walt and Midgley *Delict* 99.

⁴⁸⁰ Van der Walt and Midgley *Delict* 99.

⁴⁸¹ See chapter 4 para 3.2.

⁴⁸² *THRHR* 652-653.

propagates confusion. Furthermore whether it is reasonable to hold the defendant liable entails an investigation into all the elements of a delict.⁴⁸³ Knobel⁴⁸⁴ points out that the recent approach is criticised mainly for being incomplete rather than incorrect. Knobel⁴⁸⁵ acknowledges that the problematic cases dealing with wrongfulness involve instances of omissions and pure economic loss. Wrongfulness in these instances is usually determined if there is a breach of a legal duty. However, whether there is an infringement of a right or breach of a legal duty, the conduct on the part of the defendant must be unreasonable. Therefore he regards as incorrect the statement that wrongfulness does not have anything “to do with the reasonableness of the defendant’s conduct”.

With respect to wrongfulness, Knobel supports the *ex post facto* approach, taking into account all the facts and consequences of the conduct whereafter a proper weighing of interests can take place based on the *boni mores*. Such investigation should “not be unduly influenced by the subjective views of the parties to the litigation”. Knobel⁴⁸⁶ refers to the idea with respect to the legal duty to prevent harm “that the damage must be of a kind prompting the law, as a matter of policy, to intervene rather than to let the damage rest where it falls”. Thus wrongfulness is judged with respect to conflicting interests and whether an interest should be protected against infringement.

Knobel⁴⁸⁷ points out that the “common denominator” in the functions of wrongfulness, fault and legal causation is that they all aid in establishing whether the harm factually caused by the defendant’s conduct was reasonable or not and the “difference in their functions is associated with the level at which reasonableness is determined in each instance”. Knobel⁴⁸⁸ convincingly submits that with respect to wrongfulness, the “question is whether the defendant’s act was reasonable with particular reference to the interests adversely affected thereby, balanced against the interests promoted thereby”. In respect of fault, the “personal blameworthiness of the alleged wrongdoer for the objectively unreasonable (therefore wrongful) act must be established, taking into account the subjective views and mindset of the alleged wrongdoer”. In the case

483 Knobel in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 232.

484 In Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 231 fn 15.

485 In Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 233-234.

486 2008 *THRHR* 653.

487 2008 *THRHR* 652.

488 2008 *THRHR* 652-655.

of legal causation, the reasonableness of the defendant's conduct is established with "reference to the proximity or remoteness of the act to its consequence".

3.3.8 Scott

Scott⁴⁸⁹ submits that Fagan with his views on wrongfulness and fault stands in "academic" isolation" but refers to the views of Brand JA as well as Visser⁴⁹⁰ who stand in conformity with Fagan's views. Scott⁴⁹¹ does not approve of the recent approach to determining wrongfulness and his views with regard to the traditional test to determining wrongfulness generally conform to that of Neethling and Potgieter. Scott⁴⁹² also agrees that Harms JA in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Standards Authority*⁴⁹³ was misguided by Fagan's⁴⁹⁴ incorrect interpretation of the extract from *Minister of Polisie v Ewels*⁴⁹⁵ with respect to the recent approach to determining wrongfulness. Scott is concerned that the English law of negligence, with respect to pure economic loss, has influenced our law and his concerns are certainly valid. Scott⁴⁹⁶ refers to the recent approach as the new test or "new criterion for wrongfulness" which is more appropriate with the system of torts found in the Anglo-American system. He⁴⁹⁷ emphasises that in our law wrongfulness may be easily established where there is an infringement of an interest which is unreasonable in terms of the *boni mores* and there is no need to refer to the recent approach for wrongfulness. He⁴⁹⁸ correctly submits that our law follows a generalising approach where it is usual to consider whether conduct in the form of a commission or an omission adheres to the requirements of a delict of which wrongfulness is one of the elements. He⁴⁹⁹ states:

"It is suggested that the new test for wrongfulness, seemingly firmly established after its conception in the *Telematrix* case in 2006, and which has grown into a general wrongfulness test for all human conduct (and not only for omissions and causing pure economic loss), is

489 2009 *THRHR* 159.

490 In Du Bois (gen ed) *Wille's Principles of South African Law* 1096-1102, 1123-1129.

491 2009 *THRHR* 158-163.

492 2009 *THRHR* 162.

493 2006 1 SA 461 (SCA).

494 2000 *Acta Juridica* 62.

495 1975 3 SA 590 (A) 597.

496 In Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 433.

497 Scott in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 434.

498 Scott in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 433.

499 Scott in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 433.

running out of control and is now threatening the fabric of our law of delict which has been so carefully developed with the help of academics over many decades.”

3.3.9 Neethling and Potgieter

Much of the views of Neethling and Potgieter have already been referred to in the discussion of wrongfulness thus far, but Neethling and Potgieter sum up their criticism of our courts’ recent approach to determining wrongfulness on the following four grounds:⁵⁰⁰

1. The test which was formulated in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*⁵⁰¹ was based on Fagan’s incorrect interpretation of Rumpff CJ’s *dictum* in *Minister of Police v Ewels*⁵⁰² (as a result of reading it out of context and distorting the meaning):⁵⁰³

“It appears that the stage of development has been reached in which an omission is regarded as wrongful conduct also when the circumstances of the case are of such a nature that the omission not only incites moral indignation but also that the *legal convictions of the community demand that the omission ought to be regarded as wrongful and that the damage suffered by the plaintiff ought to be made good by the person who failed to act positively.*”⁵⁰⁴

2. Compensation for harm suffered is dependent upon the existence of a delict which requires the existence of all the elements of a delict and does not depend solely on the determination of wrongfulness.⁵⁰⁵

3. It is not a suitable approach when an interdict is sought. The aim of an interdict is to prevent wrongful conduct causing harm. However, the recent approach deals with holding the defendant liable for harm or damages already sustained and caused in a negligent manner.⁵⁰⁶

⁵⁰⁰ *Delict* 81-87; Neethling and Potgieter 2014 *SALJ* 250.

⁵⁰¹ 2006 1 SA 461 (SCA) 468.

⁵⁰² 1975 3 SA 590 (A) 597.

⁵⁰³ See Knobel 2008 *THRHR* 9; Scott 2009 *THRHR* 162; Botha 2013 *SALJ* 154; Neethling and Potgieter *Delict* 81.

⁵⁰⁴ Neethling and Potgieter *Delict* 81 fn 312. Translated by Neethling and Potgieter (but italicised for emphasis).

⁵⁰⁵ See Brand 2007 *SALJ* 79 where he admits that both wrongfulness and fault which includes negligence are required for delictual liability.

⁵⁰⁶ See for example, *H v W* 2013 5 BCLR 554 (GSJ) where the court held that an interdict was an appropriate remedy requiring the respondent to remove a defamatory posting on Facebook.

4. The approach “is vague and under-developed in respect of concrete guidelines enabling its application”.⁵⁰⁷

As mentioned, in respect of the traditional approach, what must be determined is whether the defendant infringed the interests of the plaintiff in an unreasonable manner according to the *boni mores* which must take into account constitutional imperatives and all surrounding circumstances of the case. In respect of *inter alia* omissions and claims for pure economic loss, many factors which include constitutional imperatives and policy considerations may have a bearing on whether there was a legal duty upon the defendant to (act positively in cases of omissions and) prevent the harm or loss. The criterion of reasonableness or *boni mores* yardstick is applied.⁵⁰⁸ The question is whether it is reasonable to expect the defendant to take positive steps or prevent the harm or loss. Thus, as pointed out by Knobel,⁵⁰⁹ at the heart of the wrongfulness enquiry is an issue of rights.

According to the traditional approach, the focus is much more specific and narrow as compared to the recent approach where the focus is wide (it depends on whether it is reasonable to impose delictual liability on the defendant). The traditional approach is much more developed, based on established legal principles backed by scientific and empirical evidence. The *boni mores* test is also flexible, capable of being applied to reasonable policy considerations.

In respect of the recent approach, all the elements must be present and fault must be determined before wrongfulness, thereby encouraging the *ex ante* approach to determining both wrongfulness and fault. This encourages the conflation of wrongfulness, fault, and even legal causation. The reasonableness of the wrongdoer’s conduct is only indirectly considered in reaching a conclusion as to whether liability is imposed. Fault is also seen to co-determine wrongfulness.⁵¹⁰

According to the traditional approach, wrongfulness deals directly with the reasonableness of the wrongdoer’s conduct and even the plaintiff’s conduct (in

⁵⁰⁷ Neethling and Potgieter *Delict* 80.

⁵⁰⁸ Neethling and Potgieter *Delict* 308.

⁵⁰⁹ In Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 238.

⁵¹⁰ See Van der Walt and Midgley *Delict* 225.

respect of certain grounds of justification which will be discussed in the next paragraph) when judged according to the *boni mores*. In respect of the traditional approach, wrongfulness is determined *ex post facto* while negligence is generally determined *ex ante*. Wrongfulness should preferably be determined before fault and consciousness of wrongfulness should remain an element of intent.

In respect of both approaches there is a balancing of conflicting interests but, in respect of the traditional approach when the balancing takes place, a number of factors are considered under the criterion of reasonableness which includes public policy, constitutional imperatives, social and economic concerns and so forth. In respect of the recent approach, the reasonableness of imposing liability on the defendant is based on public policy and policy considerations. According to Brand JA, whose judgments on delict have been influential in recent times, the *boni mores*, legal duty and the concept of reasonableness are mere attempts to formulate the yardstick of the recent approach.

Nevertheless, according to both approaches, the influence of reasonableness is apparent. It is still linked to the *boni mores* criterion, as the courts state that the *boni mores* is about public policy. In both approaches common denominators are: the influence of reasonableness; constitutional imperatives; and a policy-based inquiry. Even though our courts have in a sense adopted the third criterion of the test to establish the duty of care in determining the tort of negligence in English law, our Constitutional Court still refers to the traditional approach alongside the recent approach. At the heart of our Constitution are the Bill of Rights and the protection of fundamental rights. At the heart of the wrongfulness enquiry is still the balancing of interests and rights.

3.4 Grounds of justification

According to the recent approach, the courts⁵¹¹ have reiterated that what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct. This is unfounded, as will be shown

⁵¹¹ *Le Roux v Dey* 2011 3 SA 274 (CC) 315. See *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 701; *Lee v Minister for Correctional Services* 2013 2 BCLR 129 (CC) 155.

below in dealing with grounds of justification.⁵¹² In order to reach a conclusion as to whether the defendant's infringement of the plaintiff's interests are justified; the reasonableness of the defendant's conduct, in light of the *boni mores*, constitutional imperatives, and all surrounding circumstances of the particular case, are taken into account. Even if the recent approach to determining wrongfulness is considered, it is submitted that in order to reach the conclusion as to whether liability should be imposed based on public policy or policy considerations; the reasonableness of the defendant's conduct in infringing the plaintiff's interests must still be considered in light of the circumstances of the case and constitutional imperatives.

As mentioned, conduct that may seem wrongful and unreasonable can be regarded as reasonable if there is an applicable ground of justification. A ground of justification negates the element of wrongfulness, thereby rendering the defendant's conduct lawful.⁵¹³ However, at times, our courts have incorrectly found certain grounds of justification excluding the element of fault.⁵¹⁴ There must be a distinction between defences that exclude wrongfulness and those that exclude fault.⁵¹⁵

There are numerous grounds of justification identified in our law which are really just practical expressions of the legal convictions of the community, the *boni mores* occurring in everyday practical situations.⁵¹⁶ There is no *numerus clausus* in respect of the grounds of justification.⁵¹⁷ New grounds of justification may be developed in future: in line with the Constitution;⁵¹⁸ the evolving *boni mores* based on the criterion

⁵¹² See Ahmed in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 52. Neethling and Potgieter *Delict* 87; Van der Walt and Midgley *Delict* 190.

⁵¹³ See the discussion in respect of private defence, necessity, provocation and official command where the courts conflate the elements of wrongfulness and fault when considering the reasonable conduct of the person relying on the defence. An *ex ante* approach is followed by the courts. Unfortunately, the courts do not follow the correct approach in establishing the wrongfulness of the defender's conduct (in certain grounds of justification) by questioning whether there was an infringement of a subjective right according to the *boni mores* and, thereafter, if there was fault.

⁵¹⁴ Van der Walt and Midgley *Delict* 190. See the discussion of the defences excluding wrongfulness below. An example of a defence excluding fault is "contributory intent" – see Ahmed *Contributory intent* 55-89.

⁵¹⁵ *Hattingh v Roux* 2011 5 SA 135 (WCC) 141; Neethling and Potgieter *Delict* 87; Van der Walt and Midgley *Delict* 125; Loubser and Midgley (eds) *Delict* 162-163; Burchell *Delict* 67; Boberg *Delict* 645; Visser in Du Bois (gen ed) *Wille's Principles of South African law* 1137.

⁵¹⁶ Neethling and Potgieter *Delict* 87-88; Van der Walt and Midgley *Delict* 190; Loubser and Midgley (eds) *Delict* 163; Burchell *Delict* 67; Boberg *Delict* 645; Visser in Du Bois (gen ed) *Wille's Principles of South African law* 1137. See also *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA) 1204; *Roux v Hattingh* 2012 6 SA 428 (SCA) 440; *Clarke v Hurst* 1992 4 SA 630 (D) 650.

⁵¹⁷ See Van der Walt and Midgley *Delict* 190.

of reasonableness;⁵¹⁹ and legal or public policy.⁵²⁰ In practice, the defendant must prove the ground of justification on which he relies.⁵²¹

The influence of reasonableness is apparent in determining whether a ground of justification is applicable or not. The following most common grounds of justification within the general framework of the criterion of reasonableness⁵²² are:⁵²³ consent; private defence (or self-defence); necessity; provocation; statutory authority; official capacity; official command; and the power to discipline. Fair comment, privileged occasion, truth and public benefit⁵²⁴ are additional categories under the *actio iniuriarum*. Van der Walt and Midgley⁵²⁵ submit that “in every instance the overarching defence available to a person is the defence of “reasonableness”⁵²⁶ which has already been recognised in instances of *actio iniuriarum* and could in future be recognised in other claims. For the purpose of this research study, the most common grounds of justification under the *actio legis Aquiliae* will be discussed briefly in order to illustrate the influence of reasonableness.

3.4.1 Consent to injury or to the risk of injury⁵²⁷

Consent to the injury or to the risk of injury (epitomised in the maxim *volenti non fit iniuria*)⁵²⁸ is recognised as a ground of justification and is employed in instances

⁵¹⁹ Neethling and Potgieter *Delict* 87.

⁵²⁰ *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 3 SA 579 588; *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA) 1204; Van der Walt and Midgley *Delict* 190.

⁵²¹ *Santam Insurance Co Ltd v Vorster* 1973 4 SA 764 (A) 780; *Mabaso v Felix* 1981 3 SA 865 (A) 872; *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA) 1215; *Kgaleng v Minister of Safety and Security* 2001 4 SA 854 (W) 856; Neethling and Potgieter *Delict* 88; Van der Walt and Midgley *Delict* 190; Loubser and Midgley (eds) *Delict* 163; Burchell *Delict* 67; Boberg *Delict* 644, 789-790, 792, 799, 823-824.

⁵²² Neethling and Potgieter *Delict* 88; Loubser and Midgley (eds) *Delict* 163.

⁵²³ Neethling and Potgieter *Delict* 88; Loubser and Midgley (eds) *Delict* 163; Van der Walt and Midgley *Delict* 190. See in general the grounds of justification referred to by Neethling and Potgieter *Delict* 88-123; Loubser and Midgley (eds) *Delict* 175-179; Van der Walt and Midgley *Delict* 192-225; Burchell *Delict* 68-82.

⁵²⁴ See *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 3 SA 579 (A) 588.

⁵²⁵ *Delict* 190.

⁵²⁶ Van der Walt and Midgley *Delict* 190, 221-222 rely on *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA) 1212 where the court stated that the publication of the defamatory and false allegations of fact will not be wrongful if it was reasonable to publish such facts in a particular manner and time. With regard to the reasonableness of the publication, the extent, nature and tone of the allegations must be considered.

⁵²⁷ See in general Neethling and Potgieter *Delict* 108-114; Loubser and Midgley (eds) *Delict* 167-170; Van der Walt and Midgley *Delict* 207-214; Burchell *Delict* 69-73.

⁵²⁸ The well-known Roman and Roman-Dutch law maxim meaning: he who consents cannot be injured. See Neethling and Potgieter *Delict* 108; Van der Walt and Midgley *Delict* 207.

where a plaintiff⁵²⁹ allows the defendant to cause specific harm or consents to the risk of harm.⁵³⁰

According to the accepted requirements:⁵³¹ consent must be given freely and voluntarily by a person capable of volition; the plaintiff must have full knowledge, and realise the nature and extent, of the harm;⁵³² he must actually consent to the harm or risk thereof; and of importance such consent must not be unreasonable or *contra bonos mores*.⁵³³

Turning to the influence of reasonableness on the requirements: naturally, if the consent is given involuntarily, under duress,⁵³⁴ as a result of misrepresentation or fraud, then the consent is invalid and the defendant's conduct, based on the infringement of the plaintiff's body will be considered unreasonable. The plaintiff's freedom of choice is tainted and restricted.⁵³⁵ It would be different though if, for example, a surgeon performed a medical procedure upon a person incapable of volition (such as a person in a coma or a mentally impaired person) in order to save his life. The surgeon's conduct would not be unreasonable and may still be justified on the ground of necessity.⁵³⁶

Visser⁵³⁷ points out that section 12(2) of the Constitution relating to "freedom and security of the person" is applicable in determining whether consent is *contra bonos mores* and reasonable. Section 12(2) states that:

⁵²⁹ Unilaterally, express or implied.

⁵³⁰ For example, a patient can consent to specific harm such as the removal of a kidney or consent to the risk of harm that he may die while undergoing an operation to remove his kidney. See Van der Walt and Midgley *Delict* 207-208; Loubser and Midgley (eds) *Delict* 163-164.

⁵³¹ *Hattingh v Roux* 2011 5 SA 135 (WCC) 141; Neethling and Potgieter *Delict* 111-114; Neethling and Potgieter 2012 *THRHR* 675 ff; Ahmed 2012 *Obiter* 415-416; Ahmed *Contributory intent* 18-21; Ahmed 2014 *SALJ* 91. Cf Van der Walt and Midgley *Delict* 209-211; Loubser and Midgley (eds) *Delict* 164-167.

⁵³² See *Oldwage v Louwrens* 2004 1 All SA 532 (C) where voluntary assumption of risk as a ground of justification failed because informed consent was lacking. See also Ahmed *Contributory intent* 32-33.

⁵³³ See the *locus classicus* case *Boshoff v Boshoff* 1987 2 SA 694 (O) where the voluntary assumption of risk by the plaintiff was found reasonable and not *contra bonos mores*. See also Neethling and Potgieter *Delict* 113; Van der Walt and Midgley *Delict* 213; Loubser and Midgley (eds) *Delict* 163.

⁵³⁴ See Neethling and Potgieter *Delict* 111 fn 562; Van der Walt and Midgley *Delict* 211.

⁵³⁵ Van der Walt and Midgley *Delict* 211.

⁵³⁶ See *Stoffberg v Elliot* 1923 CPD 148, 150; Strauss 1964 *SALJ* 186 fn 53; Ahmed *Contributory intent* 22 fn 139.

⁵³⁷ In Du Bois (gen ed) *Wille's Principles of South African law* 1143.

“Everyone has the right to bodily and psychological integrity, which includes the right–
(a) to make decisions concerning reproduction;
(b) to security in and control over their body; and
(c) not be subjected to medical or scientific experiments without their informed consent.”

In establishing the limits of consent, the *boni mores* yardstick, or criterion of reasonableness, is employed in respect of which conduct is lawful or unlawful.⁵³⁸

Factors which may be considered are:

“the motives of the perpetrator and the injured party, the nature and seriousness of the injury as well as the nature of the object infringed. Thus the more valuable the object infringed, for example, life, liberty, bodily integrity, etcetera, the more likely it is that the transgression will be deemed to be *contra bonos mores*”.⁵³⁹

Therefore consent to severe bodily injury such as undertaking a hazardous activity⁵⁴⁰ and murder may be considered unreasonable and *contra bonos mores*,⁵⁴¹ but consent to bodily injury (or to the risk of injury thereof) may not be *contra bonos mores* in cases of participation in lawful sport,⁵⁴² undergoing medical treatment⁵⁴³ or where the injury is negligible.⁵⁴⁴ Strauss⁵⁴⁵ submits that whether or not consent should be applied as a defence must be judged by public policy. Public policy in this sense refers to the economic, social and moral concerns of the community.

In terms of the *boni mores*, medical treatment should be conducted within the framework of accepted medical science and rules of hygiene.⁵⁴⁶ Consent to reasonable treatment with curative benefits will not be considered *contra bonos*

⁵³⁸ See Strauss 1964 SALJ 183-184; Ahmed *Contributory intent* 21-22; Ahmed 2014 SALJ 91; Visser in Du Bois (gen ed) *Wille's Principles of South African law* 1142.

⁵³⁹ Ahmed *Contributory intent* 21 in reference to Strauss 1964 SALJ 183-184. See also Van der Walt and Midgley *Delict* 213.

⁵⁴⁰ See *Santam Insurance Co Ltd v Vorster* 1973 4 SA 764 (A). Van der Walt and Midgley *Delict* 213 and Burchell *Delict* 72 submit that the real reason for the failure of the defence of *volenti non fit iniuria* was due to the fact that dicing on a public road is contrary to public policy. See also Ahmed 2014 SALJ 97-99; Ahmed *Contributory intent* 34-39. In *Mandelbaum v Bekker* 1927 CPD 375, the court held that voluntary assumption of risk does not cover the risk of being shot with gun with a blank cartridge (see Ahmed *Contributory intent* 39; Visser in Du Bois (gen ed) *Wille's Principles of South African law* 1142).

⁵⁴¹ Ahmed 2014 SALJ 91; Van der Walt and Midgley *Delict* 213.

⁵⁴² See *Hattingh v Roux* 2011 5 SA 135 (WCC) 141; *Roux v Hattingh* 2012 6 SA 428 (SCA); *Boshoff v Boshoff* 1987 2SA 694 (O); *Clark v Welsh* 1976 3 SA 484 (A); Ahmed 2014 SALJ 97; Ahmed *Contributory intent* 23-24; Ahmed 2012 *Obiter* 420 ff.

⁵⁴³ Ahmed *Contributory intent* 22-23; Ahmed 2014 SALJ 91.

⁵⁴⁴ Neethling and Potgieter *Delict* 113; Ahmed 2014 SALJ 97.

⁵⁴⁵ 1964 SALJ 181.

⁵⁴⁶ Strauss 1964 SALJ 187-188; Ahmed *Contributory intent* 22.

mores.⁵⁴⁷ Even consent involving reasonable cosmetic procedures which will not harm a person's health or life will not be considered *contra bonos mores*.⁵⁴⁸ Consent for the purpose of, for example, donating blood or bone marrow in order to help save another's life (where the donor is healthy) will not be considered unreasonable or *contra bonos mores*. The interests of the parties are thus weighed. Consent to unreasonable experimentation on one's body would however be *contra bonos mores*.⁵⁴⁹

Informed consent is based on the idea that a person, who may be held accountable, has a right to determine what shall be done to his own body. A medical practitioner who performs an operation without the consent of the patient may be held liable.⁵⁵⁰ This refers to the patient's autonomy⁵⁵¹ which gives him the right to decide and agree under what circumstances his body may be handled and his interests infringed, thereby making such infringement reasonable and lawful. He must be informed of the general nature of the consequences beforehand.

This relates to the requirements that the plaintiff must have knowledge of the risk of injury, appreciate the nature and extent of such risk,⁵⁵² and reasonably foresee such risk, subjectively.⁵⁵³ Before a patient undergoes a medical procedure, he must be informed of any material risks.⁵⁵⁴ It is unreasonable to expect a medical practitioner to explain in detail every risk of harm or complication which may arise, but the medical practitioner must at least refer to material risks and provide a general idea of the treatment and consequences.⁵⁵⁵ Thus, when the patient consents to medical treatment and is aware of the risk of injury, his rights are in fact reasonably limited by the defendant's reasonable exercise of his own rights.

⁵⁴⁷ Ahmed *Contributory intent* 22.

⁵⁴⁸ Ahmed *Contributory intent* 22.

⁵⁴⁹ Strauss 1964 SALJ 187-188; Ahmed *Contributory intent* 22.

⁵⁵⁰ Richart 1979 NDLR 244; cf *Esterhuizen v Administrator, Transvaal* 1957 3 SA 710 (T) 722,726; *Oldwage v Louwrens* 2004 1 All SA 532 (C).

⁵⁵¹ See *Castell v De Greef* 1994 4 SA 408 (C) 426.

⁵⁵² See *Esterhuizen v Administrator, Transvaal* 1957 3 SA 710 (T); *Lampert v Hefer* 1955 2 SA 507 (A) 508; Neethling and Potgieter *Delict* 107; Van der Walt and Midgley *Delict* 210.

⁵⁵³ *Santam Insurance Co Ltd v Vorster* 1973 4 SA 764 (A).

⁵⁵⁴ See *Castell v De Greef* 1994 4 SA 408 (C) 426.

⁵⁵⁵ See *Lymbery v Jefferies* 1925 AD 236, 240; *Richter v Estate Hamman* 1976 3 SA 226 (C) 232, 235.

With respect to the risk of injury during sporting activities, it follows that a participant only consents to the risk of injury, if an injury occurs while in the normal course of the sporting activity. In other words, consent to the risk of injury is implied if the activity was conducted according to the normal rules of the game.⁵⁵⁶ Consent is valid where the sporting injuries resulted from reasonable sports conduct.⁵⁵⁷ The criterion of unlawfulness involves the reasonableness of the conduct in the particular circumstances". The conduct of all the players must be reasonable.⁵⁵⁸ If a player does not play according to the rules of the game, for example, by deliberately or recklessly disregarding the rules of the game – then his conduct will be considered unreasonable.⁵⁵⁹

The courts have often overlooked the important requirement that consent must not be unreasonable or *contra bonos mores*. If it is determined that the consent to the risk of injury in the form of voluntary assumption of risk is unreasonable and *contra bonos mores*, then it cannot apply as a ground of justification but it may, depending on the circumstances, apply as a ground excluding fault. Thus, contributory intent may be applicable.⁵⁶⁰

This defence of *volenti non fit iniuria* has been applied with caution⁵⁶¹ and has only been successfully invoked⁵⁶² in *Card v Sparg*,⁵⁶³ *Boshoff v Boshoff*⁵⁶⁴ and *Maartens v Pope*.⁵⁶⁵

⁵⁵⁶ See Prinsloo 1991 TSAR 43; Ahmed *Contributory intent* 24.

⁵⁵⁷ See *Boshoff v Boshoff* 1987 2 SA 694 (O) 695; *Hattingh v Roux* 2011 5 SA 135 (WCC) 141, 142-143; Ahmed *Contributory Intent* 24.

⁵⁵⁸ *Boshoff v Boshoff* 1987 2 SA 694 (O) 695.

⁵⁵⁹ *Boshoff v Boshoff* 1987 2 SA 694 (O) 702.

⁵⁶⁰ See Burchell *Delict* 72; Van der Walt and Midgley *Delict* 214-215; Neethling and Potgieter *Delict* 171; Ahmed 2012 *Obiter* 416, 426; Ahmed 2010 *THRHR* 700-701; Ahmed *Contributory intent* 55-90.

⁵⁶¹ *Waring and Gillow Ltd v Sherborne* 1904 TS 340, 344; *Santam Insurance Co Ltd v Vorster* 1973 4 SA 764 (A) 764; cf *Van Wyk v Thrills Incorporated (Pty) Ltd* 1978 2 SA 614 (A) 616; *Clark v Welsh* 1975 4 SA 469 (W); Van der Walt and Midgley *Delict* 207.

⁵⁶² See Ahmed 2012 *Obiter* 419; Van der Walt and Midgley *Delict* 208 fn 4.

⁵⁶³ 1984 4 SA 667 (E).

⁵⁶⁴ 1987 2 SA 694 (O).

⁵⁶⁵ 1992 4 SA 883 (N). However, see *Castell v De Greef* 1994 4 SA 408 (C) where, by implication, *volenti non fit iniuria* succeeded in respect of certain claims. Van der Walt and Midgley *Delict* 208 fn 4 also refer to *Lampert v Hefer* 1955 2 SA 507 (A), as a case where the defence of *volenti non fit iniuria* has been successful. However, as submitted, the latter case was concerned with contributory intent (see Ahmed 2010 *THRHR* 700; Ahmed 2014 *SALJ* 91-95; Ahmed *Contributory intent* 17, 24-29; Ahmed 2012 *Obiter* 419).

The influence of reasonableness on the requirements of consent is partly implicit and partly explicit in establishing whether the plaintiff's interests have been reasonably infringed (presuming the consent is valid) and whether the defendant acted reasonably in exercising his own interests, within the limits of such consent. The influence of reasonableness is explicit on the requirement that the consent must not be unreasonable or *contra bonos mores* but more implicit on the remainder of the requirements. If the defendant's conduct is considered reasonable in light of the *boni mores*, constitutional imperatives, and all surrounding circumstances of the case, then his conduct is justified in infringing the plaintiff's interests. Thus the defence of consent may succeed. If the recent approach to determining wrongfulness is applied, it will still depend on the reasonableness of the defendant's conduct and public policy influenced by constitutional imperatives in concluding whether the defendant should not be held liable, and whether his conduct is justified. In order to state that public policy dictates whether liability should be imposed, the reasonableness of the defendant's conduct must still be considered. Public policy is reflected in the *boni mores*. We have yet to see how the courts will apply the recent approach in instances of consent.

3.4.2 Private defence (defence or self-defence)⁵⁶⁶

A defendant's conduct may be found lawful and reasonable under the circumstances if in protecting his interests⁵⁶⁷ or that of another's⁵⁶⁸ against an imminent or actual attack, he causes harm to the attacker.⁵⁶⁹ The attack or impending attack as well as the conduct in retaliation by the defender must meet the following requirements: the

⁵⁶⁶ See Ahmed in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 54.

⁵⁶⁷ In instances where the defender's own interests are infringed or threatened, such defender acts in self-defence and where the defender acts by protecting the interests of another or where another's interest are threatened, the defender acts in defence (Van der Walt and Midgley *Delict* 193-194).

⁵⁶⁸ See *R v Patel* 1959 3 SA 121 (A) where the defender shot his own brother in defence; *Ntanjana v Vorster and Minister of Justice* 1950 4 SA 398 (C) where the defender shot a fellow policeman in defence. See also Neethling and Potgieter *Delict* 92 fn 410; Van der Walt and Midgley *Delict* 193; Boberg *Delict* 791; Loubser and Midgley (eds) *Delict* 175.

⁵⁶⁹ Neethling and Potgieter *Delict* 88; Loubser and Midgley (eds) *Delict* 175; Van der Walt and Midgley *Delict* 193; Burchell *Delict* 73-74; Neethling, Potgieter and Visser *Neethling's law of personality* 95.

conduct must emanate from a human being;⁵⁷⁰ be objectively⁵⁷¹ wrongful⁵⁷² and must have begun or be imminently threatening,⁵⁷³ but must not have stopped.⁵⁷⁴ Fault on the part of the attacker is not a requirement.⁵⁷⁵ Thus the defensive conduct may be directed towards an attacker who lacks culpability or accountability.⁵⁷⁶

If, for example, two people both attack each other unlawfully using dangerous weapons, then private defence will not be applicable because it is clearly *contra bonos mores* and unreasonable to seriously injure or kill a person.⁵⁷⁷ If a person is lawfully attacked, such as in an instance of a lawful arrest by a policeman, then such person cannot rely on self-defence if he harms the policeman.⁵⁷⁸ The policeman's conduct is thus reasonable.

There are two approaches followed by the courts which actually produce the same result albeit by using different approaches: the first being more theoretically sound according to the established principles of the law of delict in the South African law; and the second leading to confusion between the elements of wrongfulness and fault – an approach followed in Anglo-American tort law⁵⁷⁹ where there is no differentiation between wrongfulness and fault.

⁵⁷⁰ If one is attacked by an animal, the defence that should be employed is necessity. However, if an animal is deployed as an instrument by the plaintiff to attack the defendant or another, then such defendant may rely on defence. See Neethling and Potgieter *Delict* 89; Van der Walt and Midgley *Delict* 193; Loubser and Midgley (eds) *Delict* 175.

⁵⁷¹ *Kgaleng v Minister of Safety and Security* 2001 4 SA 854 (W) 865; Neethling 2002 SALJ 283 ff; Neethling and Potgieter *Delict* 90; Van der Walt and Midgley *Delict* 194-195; Burchell *Delict* 74; Boberg *Delict* 788.

⁵⁷² The attack must be unlawful, unreasonable, and violate any protected interest such as life, property, bodily integrity or honour. See *R v Attwood* 1946 AD 331, 340; *R v Ndara* 1955 4 SA 182 (A) 184; *Ntanjana v Vorster and Minister of Justice* 1950 4 SA 398 (C) 404-405; *Ntsomi v Minister of Law and Order* 1990 1 SA 512 (C); Neethling and Potgieter *Delict* 89-90; Van der Walt and Midgley *Delict* 193; Boberg *Delict* 788; Loubser and Midgley *et al Delict* 175.

⁵⁷³ See *R v Patel* 1959 3 SA 121 (A); Neethling, Potgieter and Visser *Neethling's law of Personality* 95.

⁵⁷⁴ *S v Kibi* 1978 4 SA 173 (E) 181; *S v Mogohlwane* 1982 2 SA 587 (T) 592; Neethling and Potgieter *Delict* 91-92; Boberg *Delict* 788; Loubser and Midgley (eds) *Delict* 176.

⁵⁷⁵ *Kgaleng v Minister of Safety and Security* 2001 4 SA 854 (W) 865; Neethling and Potgieter 2007 SALJ 282; Neethling and Potgieter *Delict* 86 fn 358-359; Loubser and Midgley (eds) *Delict* 176.

⁵⁷⁶ See Neethling and Potgieter *Delict* 92; Van der Walt and Midgley *Delict* 194.

⁵⁷⁷ See *S v Jansen* 1983 3 SA 534 (NC) 536-537; Neethling and Potgieter *Delict* 90 fn 394; Van der Walt and Midgley *Delict* 194.

⁵⁷⁸ Neethling and Potgieter *Delict* 90 fn 394; Loubser and Midgley (eds) *Delict* 175.

⁵⁷⁹ See chapter 4 para 2.4.3; chapter 5 para 2.5.1; chapter 7 paras 2.4-2.5.

1. The attack must be wrongful based on the actual events that occurred *ex post facto*. In terms of the *ex post facto* approach, in such instances of putative defence where the person incorrectly believes that the attack on him is unlawful; his defensive attack objectively viewed will be wrongful.⁵⁸⁰ However, fault in the form of negligence or intention may be absent.⁵⁸¹ In *Kgaleng v Minister of Safety and Security*,⁵⁸² X shot and killed a person in the belief that the deceased was activating a hand grenade and was about to throw it at him. In actual fact, it was not a hand grenade but a tear gas canister. X pleaded self-defence, alternatively that “he *bona fide* and reasonably believed that he was entitled to do so”.⁵⁸³ Cloete J⁵⁸⁴ held that the ground of justification defence is aimed at showing that “the attack by the defendant was not wrongful. For that very reason, the test is objective” and the fact that X was not in physical danger did not justify his shooting the deceased.⁵⁸⁵ Therefore the plea of defence did not succeed.⁵⁸⁶ X did however escape delictual liability based on the surmise that fault in the form of intention⁵⁸⁷ was absent as well as negligence, as the reasonable person would have acted no differently.⁵⁸⁸

2. The attack must be wrongful according to an *ex ante* objective approach⁵⁸⁹ – based on whether the reasonable person believed that there was an unlawful attack⁵⁹⁰ or an

⁵⁸⁰ *Kgaleng v Minister of Safety and Security* 2001 4 SA 854 (W).

⁵⁸¹ See Neethling and Potgieter *Delict* 84 and Van der Walt and Midgley *Delict* 194; *contra* Fagan 2005 *SALJ* 97, but see Botha’s criticism (2013 *SALJ* 154ff) of Fagan’s view, where he states that Fagan’s views are incorrect in respect of the *ex ante* approach and is influenced by English Law.

⁵⁸² 2001 4 SA 854 (W).

⁵⁸³ *Kgaleng v Minister of Safety and Security* 2001 4 SA 854 (W) 856.

⁵⁸⁴ In *Kgaleng v Minister of Safety and Security* 2001 4 SA 854 (W) 865. See also Boberg *Delict* 788.

⁵⁸⁵ See *Director of Public Prosecutions, Gauteng v Pistorius* 2016 1 All SA 346 (SCA) [52].

⁵⁸⁶ *Kgaleng v Minister of Safety and Security* 2001 4 SA 854 (W) 865.

⁵⁸⁷ To achieve a particular result and consciousness of wrongfulness, or consciousness of the unreasonableness of the conduct based on the facts known objectively, as submitted by Knobel in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 236.

⁵⁸⁸ *Kgaleng v Minister of Safety and Security* 2001 4 SA 854 (W) 874-875. See also *S v De Oliveira* 1993 2 SACR 59 (A) 63-64.

⁵⁸⁹ See Visser in Du Bois (gen ed) *Wille’s Principles of South African law* 1144-1145.

⁵⁹⁰ Botha 2013 *SALJ* 156-162 validly criticises the two requirements for private defence formulated by Fagan (2005 *SALJ* 97-99). According to Fagan, the requirements are, firstly that the reasonable person in the wrongdoer’s position “would have believed that the victim posed a danger” to the wrongdoer or third person; and secondly the means of defence used by the wrongdoer must be reasonably commensurate with the danger. Botha states that Fagan does not refer to the “triggering requirement of an imminent or commenced unlawful act” (157), he refers to a mere belief of harm and not specific harm of death or serious injury (160). Furthermore Botha points out that neither *Ntanjana v Vorster and Minister of Justice* 1950 4 SA 398 (C) nor *Minister of Law and Order v Milne* 1998 1 SA 289 (W) supports Fagan’s requirement of the belief of harm as both cases in fact required an unlawful attack (161). Turning to the second requirement, Botha (161-162) states that in respect of Fagan’s second

imminent attack.⁵⁹¹ Fagan⁵⁹² points out that the courts followed an *ex ante* approach based on the reasonable belief of an attack and the circumstances manifest at the time in *Ntanjana v Vorster and Minister of Justice*,⁵⁹³ *Ntsomi v Minister of Law and Order*,⁵⁹⁴ *Minister of Law and Order v Milne*,⁵⁹⁵ and *Mugwena v Minister of Safety and Security*.⁵⁹⁶ The defensive acts were judged against the action of a reasonable person. The supporters of the *ex ante* approach believe that the approach is more suitable especially in instances where a person harms another intentionally.⁵⁹⁷ However, the *ex ante* approach does not necessarily produce better results, in fact, the opposite may be argued. The defender's subjective belief may be relevant but should not be the decisive factor in concluding the presence of danger or imminent danger.⁵⁹⁸ Neethling and Potgieter⁵⁹⁹ correctly submit that this approach conflates the elements of wrongfulness and negligence. By using the *ex ante* approach the court confused the role of reasonableness in respect of the elements of fault and wrongfulness and in fact alludes to the test for negligence pronounced in *Kruger v Cotzee*.⁶⁰⁰ They argue however that in *Ntsomi v Minister of Law and Order*,⁶⁰¹ the reasonable policeman was used as an embodiment of the objective *boni mores* criterion, in the sense that according to the *boni mores*, the policeman acted reasonably.⁶⁰² The correct approach that the courts should apply in ensuring correct theoretical foundations in the law of delict relating to practical situations, is the objective *ex post facto* approach followed in *Kgaleng v Minister of Safety and Security*.⁶⁰³ The *ex ante* approach supported by Fagan is the approach followed in Anglo-American law.⁶⁰⁴ The defence is generally applied to the intentional torts of

requirement there is no mention of the aspect that the defensive act must be necessary because "it does not fit into his theory" which in fact shows the conflict between the belief requirement (prevalent in instances of homicide in criminal law) and the requirements for defence.

⁵⁹¹ See Loubser and Midgley (eds) *Delict* 178.

⁵⁹² See 2005 *SALJ* 97-99. See Botha's criticism of Fagan's *ex ante* approach (Botha 2013 *SALJ* 171 ff).

⁵⁹³ 1950 4 SA 398 (C) 405-406.

⁵⁹⁴ 1990 1 SA 512 (C) 526.

⁵⁹⁵ 1998 1 SA 289 (W) 293.

⁵⁹⁶ 2006 4 SA 150 (SCA) 159.

⁵⁹⁷ Visser in Du Bois (gen ed) *Wille's Principles of South African law* 1144, 1146.

⁵⁹⁸ Van der Walt and Midgley *Delict* 194.

⁵⁹⁹ 2007 *SALJ* 282-283.

⁶⁰⁰ 1966 2 SA 428 (A) 78-79.

⁶⁰¹ 1990 1 SA 512 (C) 526.

⁶⁰² *Cape Town Municipality v Bakkerud* 2000 3 SA 1049 (SCA) 1054-1055; Neethling and Potgieter *Delict* 49 fn 83, 92-93 fn 415.

⁶⁰³ 2001 4 SA 854 (W) 864-865, 874-875.

⁶⁰⁴ See chapter 4 para 2.4.3; chapter 5 para 2.5.1.

trespass to the person. A reasonable belief of an attack in the circumstances may be sufficient.⁶⁰⁵ The reasonable belief is judged *ex ante* but objectively by the standard of the reasonable person.⁶⁰⁶ It should also be noted that the intentional torts require intentional conduct from the defendant and the duty of care, or breach of duty does not feature in determining the intentional torts. In using the *ex ante* approach in our law, as followed in Anglo-American tort law, wrongfulness and fault are indeed combined in considering the reasonableness of the defendant's conduct which should be avoided.

The defensive act must be: directed towards the aggressor; necessary (not excessive)⁶⁰⁷ in that there must be no other reasonable alternative way of protecting one's interest or that of another's,⁶⁰⁸ and the defensive act must be objectively reasonable.⁶⁰⁹ If for instance there is an alternative way to avert the harm then the defence may not succeed.⁶¹⁰ But that does not necessarily mean that the defence will not succeed if there were less harmful alternative ways of averting danger.⁶¹¹ Different factors are considered when judging the reasonableness of the defensive act⁶¹² and there need not be strict proportionality between the attack and the defensive act, or between the values of the conflicting interests.⁶¹³ The courts do not expect the defender to necessarily flee.⁶¹⁴ Nor do they expect the defender to choose a particular course of action⁶¹⁵ or weapon that might be considered more appropriate

⁶⁰⁵ See chapter 4 para 2.4.3; chapter 5 para 2.5.1.

⁶⁰⁶ See chapter 4 para 2.4.3; chapter 5 para 2.5.1.

⁶⁰⁷ *Minister of Law and Order v Milne* 1998 1 SA 289 (W) 293; *Ntamo v Minister of Safety and Security* 2001 1 SA 830 (Tk) 836; Van der Walt and Midgley *Delict* 194; Loubser and Midgley (eds) *Delict* 176.

⁶⁰⁸ *R v Attwood* 1946 AD 331, 340; *Ntanjana v Vorster and Minister of Justice* 1950 4 SA 398 (C) 406; *Minister of Law and Order v Milne* 1998 1 SA 289 (W) 293; *Ntamo v Minister of Safety and Security* 2001 SA 830 (Tk) 837; *Ntsomi v Minister of Law and Order* 1990 1 SA 512 (C) 528-530; *S v Makwanyane* 1995 3 SA 391 (CC) 449; *Mugwena v Minsiter of Safety and Security* 2006 4 SA 150 (A) 158; Boberg *Delict* 793; Neethling and Potgieter *Delict* 92-93.

⁶⁰⁹ Van der Walt and Midgley *Delict* 194; Neethling, Potgieter and Visser *Neethling's law of personality* 96.

⁶¹⁰ *Chetty v Minister of Police* 1976 2 SA 450 (N) 455-456; Loubser and Midgley (eds) *Delict* 176.

⁶¹¹ *Ntanjana v Vorster and Minister of Justice* 1950 4 SA 398 (C) 408; Van der Walt and Midgley *Delict* 194.

⁶¹² See *Ntamo v Minister of Safety and Security* 2001 SA 830 (Tk) 840-841; Neethling and Potgieter *Delict* 94 fn 427; Van der Walt and Midgley *Delict* 194; Loubser and Midgley *et al Delict* 176-177.

⁶¹³ See *Ex parte Die Minister van Justice: In re S v Van Wyk* 1967 1 SA 488 (A) 496-498; Neethling and Potgieter *Delict* 94; Van der Walt and Midgley *Delict* 194; Loubser and Midgley (eds) *Delict* 178; Burchell *Delict* 74; Boberg *Delict* 788-789.

⁶¹⁴ *Ntsomi v Minister of Law and Order* 1990 1 SA 512 (C) 530; Neethling and Potgieter *Delict* 93; Loubser and Midgley (eds) *Delict* 177.

⁶¹⁵ See *Ntanjana v Vorster and Minister of Justice* 1950 4 SA 398 (C) 406.

under the circumstances in employing such defensive act in a situation of imminent danger.⁶¹⁶ However, a notable disproportion between conflicting interests will lead to the defensive action being considered unreasonable and wrongful.⁶¹⁷ For example, traditionally, a person may under certain circumstances kill another to protect his property,⁶¹⁸ defend one's chastity,⁶¹⁹ or a wife's honour,⁶²⁰ but not for stealing something trivial like butter.⁶²¹ It inevitably depends on the circumstances of the case⁶²² and whether the defensive act employed was justified and reasonable.⁶²³ It follows that if there were other alternatives to averting the harm or if the defensive act in retaliation was clearly disproportionate and unreasonable under the circumstances, then the ground of justification, defence may not be applicable, negating wrongfulness. In *Ntamo v Minister of Safety and Security*⁶²⁴ where a policeman shot and killed an attacker raising self-defence, the court held that the use of force was not necessary. There were other alternatives to avert harm. The policeman was unable to prove an absence of wrongfulness.

The influence of reasonableness plays a partially explicit and partially implicit role in establishing whether the defendant may justifiably infringe the interests of the plaintiff in self-defence or defence. The influence of reasonableness is explicit on the requirements that: there must have been no other reasonable means of protecting one's interest or that of another's; and that the defensive act must be objectively reasonable. The influence of reasonableness on the remainder of the requirements is more implicit. Thus if the defendant acts reasonably, then his infringement of the

⁶¹⁶ *Ntsomi v Minister of Law and Order* 1990 1 SA 512 (C) 530; Neethling and Potgieter *Delict* 97; Van der Walt and Midgley *Delict* 194.

⁶¹⁷ *Ex parte Die Minister van Justisie: In re S v Van Wyk* 1967 1 SA 488 (A) 498; Neethling and Potgieter *Delict* 95; Loubser and Midgley (eds) *Delict* 178; Neethling, Potgieter and Visser *Neethling's law of personality* 96.

⁶¹⁸ See *Ex parte: Die Minister van Justisie In re S v Van Wyk* 1967 1 SA 488 (A) where the defender set up a gun in order to protect property, however, *in casu* the defender did take reasonable precautions to warn people of the potential harm. See *S v Makwanyane* 1995 3 SA 391 (CC) 449 where the court held that killing a person in defence of protecting property might not in future be in line with constitutional values. See also Neethling and Potgieter *Delict* 94 fn 427; Van der Walt and Midgley *Delict* 195; Loubser and Midgley (eds) *Delict* 175.

⁶¹⁹ *S v Mokoena* 1976 4 SA 162 (O).

⁶²⁰ *R v Van Vuuren* 1961 3 SA 305 (E); Neethling and Potgieter *Delict* 90; Loubser and Midgley (eds) *Delict* 176.

⁶²¹ *Ex parte Die Minister van Justisie: In re S v Van Wyk* 1967 1 SA 488 (A) 503-504; Van der Walt and Midgley *Delict* 194.

⁶²² See *Ntanjana v Vorster and Minister of Justice* 1950 4 SA 398 (C) 408 ff.

⁶²³ *Ntanjana v Vorster and Minister of Justice* 1950 4 SA 398 (C) 408; Van der Walt and Midgley *Delict* 195.

⁶²⁴ 2001 1 SA 830 (Tk) 837.

attacker's interests in protecting his own or another's interests is not wrongful and the defence will succeed. The boundary as to how far the defendant may go in infringing the attacker's interests is dependent on whether the conduct is considered reasonable or not in light of the *boni mores*, constitutional imperatives, and all surrounding circumstances of the case. If the defendant, in retaliating, exceeds the boundary of reasonableness by striking the plaintiff when there is no threat of attack or if the attack has ceased; or using unnecessary, excessive and clearly disproportionate force for something trivial, then his conduct may be considered *contra bonos mores* and unreasonable. In turn, he may not rely on defence. Naturally if the defendant uses necessary force in order to protect his interests, or those of another, against an imminent attack, then his conduct may be considered reasonable. The defence may then succeed.

If the recent approach to determining wrongfulness is applied, it will still inevitably depend on the reasonableness of the defendant's conduct in view of public policy influenced by constitutional imperatives. A conclusion may then be made as to whether liability should be imposed on the defendant for acting in defence, in infringing the interests of the plaintiff. The interest of both parties is still weighed as in the traditional approach.

3.4.3 Necessity⁶²⁵

A defendant when faced with such a situation of (*vis maior*) superior force, in which he protects his interests or that of another's only by reasonably violating the interests of an innocent third person; may rely on the defence of necessity in order to escape delictual liability.⁶²⁶ In terms of necessity, the harm is inflicted on an innocent person, whereas in terms of defence, the attack is directed at the attacker.⁶²⁷

⁶²⁵ See Ahmed in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 54-55.

⁶²⁶ *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 2 SA 118 (SCA) 122; *Maimela v Makhado Municipality* 2011 6 SA 533 (SCA) 539-540; Neethling and Potgieter *Delict* 97; Loubser and Midgley (eds) *Delict* 171; Van der Walt and Midgley *Delict* 192; Burchell *Delict* 75; Boberg *Delict* 787-788; Neethling, Potgieter and Visser *Neethling's law of personality* 97.

⁶²⁷ Van der Walt and Midgley *Delict* 192; Neethling and Potgieter *Delict* 98-99; Loubser and Midgley (eds) *Delict* 171; Burchell *Delict* 75; Boberg *Delict* 788-789; Visser in Du Bois (gen ed) *Wille's Principles of South African law* 1146.

The following requirements must be met: the state of necessity must objectively⁶²⁸ be present or at least be imminent but not have ceased to exist.⁶²⁹ A person may act out of necessity in defending himself against an attack by an animal or some other natural force.⁶³⁰

Whether a state of necessity existed must be considered objectively, taking into account what actually transpired.⁶³¹ A subjective belief by the defendant that he was justified in acting in the manner he did is not sufficient to succeed with the defence.⁶³² Subjective factors such as fear may affect accountability or fault, but not wrongfulness.⁶³³ As in the case of defence, any legally recognised interest may be infringed, such as property, life, privacy, and so forth.⁶³⁴ The act performed in such state of necessity must have been necessary,⁶³⁵ reasonable and not excessive.⁶³⁶ Loubser and Midgley⁶³⁷ point out that the general criterion of reasonableness applies to necessity. Factors such as the extent of the harm, the value of the interest that is threatened, the nature of the threat, and the likelihood of harm are considered.⁶³⁸ If a

⁶²⁸ *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 2 SA 118 (SCA) 122.

⁶²⁹ *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 2 SA 118 (SCA) 123; Neethling and Potgieter *Delict* 99; Loubser and Midgley (eds) *Delict* 174; Burchell *Delict* 75. An interdict or, under certain circumstances, a declaratory order may be of relief in instances of future expected harm.

⁶³⁰ Neethling and Potgieter *Delict* 99; Van der Walt and Midgley *Delict* 192; Loubser and Midgley (eds) *Delict* 171, 173; Burchell *Delict* 75; Boberg *Delict* 79.

⁶³¹ Van der Walt and Midgley *Delict* 192.

⁶³² *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 2 SA 118 (SCA) 122. See *S v Pretorius* 1975 2 SA 85 (SWA) where a father believed that his child had taken a number of pills and thought that the child's life was in danger. He was charged with exceeding the speeding limit on a public road. The court found that the father acted reasonably in a state of necessity and set aside the conviction of speeding. In reality, the child was not in danger and the fact that there was putative necessity renders the father's conduct unlawful, therefore the defence of necessity would not have been applicable. However, the father should have escaped a conviction as fault was absent. The father *bona fide* believed that he had to rush his child to hospital, exceeding the speed limit out of necessity which is what the reasonable person would have done in the circumstances. See Loubser and Midgley's (*Delict* 172-173) discussion of the case above as well as *Petersen v Minister of Safety and Security* 2010 1 All SA 19 (SCA) where the actions of the police in staving off an attack by firing rubber bullets at a crowd which led to the injury of a boy was justified by necessity. See also Neethling and Potgieter *Delict* 99 fn 455; Van der Walt and Midgley *Delict* 192; Burchell *Delict* 76.

⁶³³ See *R v Mahomed* 1938 AD 30. See Boberg *Delict* 791; Neethling and Potgieter *Delict* 99; Van der Walt and Midgley *Delict* 193 fn 12.

⁶³⁴ Neethling and Potgieter *Delict* 100; Loubser and Midgley (eds) *Delict* 173; Burchell *Delict* 75.

⁶³⁵ There should not have been any other way of averting the harm – *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 2 SA 118 (SCA) 123. If fleeing is a possibility then that option should be taken (*S v Bradbury* 1967 1 SA 387 (A) 404). See Neethling and Potgieter *Delict* 100; Loubser and Midgley (eds) *Delict* 174; Burchell *Delict* 75.

⁶³⁶ Neethling and Potgieter *Delict* 101; Van der Walt and Midgley *Delict* 192; Burchell *Delict* 75.

⁶³⁷ (Eds) *Delict* 171-172.

⁶³⁸ Van der Walt and Midgley *Delict* 192.

person is legally obliged to endure harm he may not rely on the defence of necessity.⁶³⁹

In *S v Goliath*,⁶⁴⁰ our courts justified homicide by an act of compulsion out of “necessity”, however, it was pointed out by the court that in this case, it was based on the facts of the case and the defence of necessity must generally be applied with caution. With regard to *defence* there need not be proportionality between the conflicting interests, but in *necessity* such proportionality should apply.⁶⁴¹ It depends on the facts of the case.⁶⁴² Although it is contentious, the defence of necessity may be raised where one creates the state of necessity oneself.⁶⁴³

The Supreme Court of Appeal in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck*,⁶⁴⁴ held that the question that needs to be asked in each case “is whether the conduct that caused the harm was a reasonable response to the situation that presented itself”⁶⁴⁵ and whether the reasonable person would have acted in the same manner.⁶⁴⁶ Nugent JA⁶⁴⁷ stated that it has not yet been authoritatively confirmed in our law whether necessity excludes wrongfulness or fault in the form of negligence⁶⁴⁸ and also did not find it necessary to pronounce whether it excluded fault or wrongfulness. Nevertheless, Scott⁶⁴⁹ points out that most academic authors view necessity as a ground of justification. Nugent JA⁶⁵⁰ found that in this case, the “causing of bodily harm was wrongful (on any jurisprudential approach) in accordance

⁶³⁹ Van der Walt and Midgley *Delict* 192; Neethling and Potgieter *Delict* 103; Loubser and Midgley (eds) *Delict* 174; Burchell *Delict* 75.

⁶⁴⁰ 1972 3 SA 1 (A).

⁶⁴¹ *Maimela v Makhado Municipality* 2011 6 SA 533 (SCA) 541. See Neethling and Potgieter *Delict* 101; Van der Walt and Midgley *Delict* 192. Loubser and Midgley (eds) *Delict* 174 point out that the rationale behind the need for proportionality is because the harm is caused to an innocent person in cases of necessity whereas in defence the harm is directed at the attacker. Neethling and Potgieter *Delict* 102.

⁶⁴² See *R v Mahomed* 1938 AD 30; *S v Pretorius* 1975 2 SA 85 (SWA) 90; Van der Walt and Midgley *Delict* 192; Neethling and Potgieter *Delict* 102-103; Loubser and Midgley (eds) *Delict* 173. But see *S v Kibi* 1978 4 SA 173 (E) 179 and *S v Bradley* 1967 1 SA 387 (A) 393 where it was held that one cannot rely on necessity if he created such state himself.

⁶⁴³ 2007 2 SA 118 (SCA) 122-123.

⁶⁴⁴ *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 2 SA 118 (SCA) 122; Boberg *Delict* 788.

⁶⁴⁵ *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 2 SA 118 (SCA) 123; See *S v Pretorius* 1975 2 SA 85 (SWA) referred to by Van der Walt and Midgley *Delict* 172.

⁶⁴⁶ In *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 2 SA 118 (SCA) 122-123. 122.

⁶⁴⁷ Scott 2007 *De Jure* 393-397 refers to *inter alia* Boberg *Delict* 787-788, Price 1954 *SALR* 15 as well as Van der Walt and Midgley, Neethling and Potgieter.

⁶⁴⁸ *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 2 SA 118 (SCA) 124.

with ordinary principles. The harm was clearly foreseeable, and ought reasonably to have been avoided by refraining from shooting ... and in the circumstances it was negligent to have caused it". The court referred to the factors in determining preventability of harm⁶⁵¹ and in this case, too, conflated the elements of wrongfulness and fault.⁶⁵² Neethling and Potgieter⁶⁵³ state that the correct approach would have been to determine the existence of the two elements separately by first establishing (*ex post facto* – taking into account what actually transpired) whether a state of necessity existed.⁶⁵⁴ The defendant's fault in the form of negligence must then be determined (*ex ante*) based on the reasonable person test.

The influence of reasonableness on necessity is partly implicit and partly explicit in considering the reasonableness of the defendant's conduct in infringing the interests of the plaintiff. The influence of reasonableness is explicit with regard to the requirement that the act performed in such a state of necessity must have been reasonable, necessary and not excessive. If the defendant is faced with a situation of necessity and has no other option but to infringe the interests of the plaintiff, then depending on the circumstances of the case, taking factors such as the value of the interest threatened, the nature of the threat, etcetera, into account, his conduct may be reasonable and justifiable. If the state of necessity ceased to exist; or if the defendant infringed the interests of the plaintiff unnecessarily, using extreme measures to protect his or another's interests, then his conduct may be considered unreasonable. The conflicting interests of both parties are weighed in determining whether the defendant acted reasonably in infringing the plaintiff's interests and protecting his own or that of another. Thus if the defendant's conduct is reasonable according to the *boni mores*, constitutional imperatives and in light of all surrounding circumstances of the case, then his conduct is justified. The defence will apply negating wrongfulness.

Again, according to the recent approach, the reasonableness of the defendant's conduct, public policy and constitutional imperatives will be applicable in concluding whether or not it is reasonable to impose liability on the defendant or rather not to

⁶⁵¹ 123.

⁶⁵² See Scott 2007 *De Jure* 397-400; Neethling and Potgieter *Delict* 98.

⁶⁵³ *Delict* 98 fn 447.

⁶⁵⁴ Burchell *Delict* 76; Van der Walt and Midgley *Delict* 127.

impose liability on the defendant because his conduct was justified. Again we have yet to see how the courts will apply and formulate the recent approach to grounds of justification.

3.4.4 Provocation⁶⁵⁵

A defendant may rely on the defence of provocation in instances where he causes harm to the plaintiff as a result of being provoked by actions or words.⁶⁵⁶ Provocation differs from necessity and private defence in that it is as an “act of revenge”.⁶⁵⁷ The retaliatory conduct takes place immediately after the provocative conduct. It is still to be confirmed in our law whether it applies as a complete defence or as a mitigating factor⁶⁵⁸ in determining compensation,⁶⁵⁹ and whether it excludes wrongfulness or fault.⁶⁶⁰ Nevertheless, there is a fair amount of support in our law for the view that it applies as a ground of justification.⁶⁶¹ With regard to wrongfulness, the provocative conduct is objectively weighed against the retaliatory action using the reasonableness criterion (according to the *boni mores*) in light of all the surrounding circumstances.⁶⁶² Where the retaliatory conduct and the provocative conduct are

⁶⁵⁵ See Ahmed in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 55.
⁶⁵⁶ *Powell v Jonker* 1959 4 SA 443 (T) 445-446; *Bennet v Minister of Police* 1980 3 SA 24 (C) 31-32; *Bester v Calitz* 1982 3 SA 864 (O) 875, 880-881; *Wapnick v Durban City Garage* 1984 2 SA 414 (D) 419-420; Neethling and Potgieter *Delict* 104; Loubser and Midgley (eds) *Delict* 179; Boberg *Delict* 827; Neethling, Potgieter and Visser *Neethling's law of personality* 104.

⁶⁵⁷ Neethling and Potgieter *Delict* 105. See also Van der Walt and Midgley *Delict* 206; Loubser and Midgley (eds) *Delict* 180.

⁶⁵⁸ The following cases support the view that provocation should be applied as a mitigating factor and not a complete defence: *Thomson v Harding* 1914 CPD 32; *Blou v Rose Innes* 1914 TPD 102, 104-105; *Powell v Jonker* 1959 4 SA 443 (T) 446; *Winterbach v Masters* 1989 1 SA 922 (E) 925.

⁶⁵⁹ See *Bester v Calitz* 1982 3 SA 864 (O) 875 ff; Loubser and Midgley (eds) *Delict* 180; Neethling and Potgieter *Delict* 104; Neethling, Potgieter and Visser *Neethling's law of personality* 104.

⁶⁶⁰ It can serve as a ground excluding fault in instances where the defendant cannot be held accountable (*Powell v Jonker* 1959 4 SA 443 (T)). In *Jeftha v Williams* 1981 3 SA 678 (C) 683, the court held that provocation excluded fault in the form of intention. Boberg *Delict* 829 in reference to *Blou v Rose Innes* 1914 TPD 102, 104 argues against the defence and states that one should employ self-control, thus retaliatory conduct should not be encouraged or allowed by law, but Neethling 1985 *THRHR* 251-252 submits that assault in retaliation to an assault is a natural reaction by the most reasonable persons and should be permitted by the law. See Neethling and Potgieter *Delict* 104; Van der Walt and Midgley *Delict* 204; Boberg *Delict* 828.

⁶⁶¹ See *Bester v Calitz* 1982 3 SA 864 (O) 877-881; *Wapnick v Durban City Garage* 1984 2 SA 414 (D) 419-420; *Mordt v Smith* 1968 4 SA 750 (RA); *Dzvairo v Mudoti* 1973 3 SA 287 (RA), as well as Neethling and Potgieter *Delict* 104 fn 502, in respect of authors supporting this view and further case law.

⁶⁶² See *Powell v Jonker* 1959 4 SA 443 (T) 446; *Bennett v Minister of Police* 1980 3 SA 24 (C) 31-32; *Bester v Calitz* 1982 3 SA 864 (O) 878-881; Van Aswegen 1982 *De Jure* 370-371; Neethling and Potgieter *Delict* 105. Cf Van der Walt and Midgley *Delict* 204-205.

disproportionate, provocation as a complete defence may fail but provocation may apply in limiting the award of compensation.⁶⁶³ The courts consider the nature and value of the interest affected, the provocative conduct as well as the retaliatory conduct.⁶⁶⁴ Loubser and Midgley⁶⁶⁵ submit that the retaliatory conduct must be reasonable according to the *boni mores*, where reasonableness is equated with the reaction of the reasonable person. In instances where an insult by both the plaintiff and the defendant are in proportion as a result of *compensatio*, both delicts (*iniuriae*) negate each other.⁶⁶⁶

Provocation is usually not applied as a complete defence in circumstances where X verbally assaults Y, and Y then retaliates by physically assaulting X. This is disproportionate and the conduct is unreasonable.⁶⁶⁷ If however, X physically assaults Y provoking him and Y thereafter in retaliation physically assaults X, then Y may rely on provocation as a complete defence;⁶⁶⁸ provided Y's reaction was immediate⁶⁶⁹ and reasonable. That is, the physical assault by Y must not be out of proportion in respect of the physical assault by X.⁶⁷⁰

The question asked by our courts is whether the reasonable person in the position of the defendant would have been provoked by the plaintiff's conduct (assault, defamation or insult).⁶⁷¹ Subjective factors, such as the defendant's state of mind⁶⁷² are considered in determining the reasonableness of the conduct.⁶⁷³ Once again this approach (which conforms to the *ex ante* approach) has been criticised by Neethling

⁶⁶³ *Powell v Jonker* 1959 4 SA 443 (T) 446; Loubser and Midgley (eds) *Delict* 181.

⁶⁶⁴ Loubser and Midgley (eds) *Delict* 181.

⁶⁶⁵ (Eds) *Delict* 180-181.

⁶⁶⁶ Neethling and Potgieter *Delict* 108. Cf Van der Walt and Midgley *Delict* 204.

⁶⁶⁷ Even if the verbal provocation was gravely insulting. See *Blou v Rose Innes* 1914 TPD 104-105; *Powell v Jonker* 1959 4 SA 443 (T) 446; *Bennett v Minister of Police* 1980 3 SA 24 (C) 31-32; Neethling and Potgieter *Delict* 105; Neethling, Potgieter and Visser *Neethling's law of personality* 105; Loubser and Midgley (eds) *Delict* 181.

⁶⁶⁸ Neethling and Potgieter *Delict* 106; Neethling, Potgieter and Visser *Neethling's law of personality* 105.

⁶⁶⁹ A deliberate or premeditated reaction may be deemed unreasonable (Loubser and Midgley (eds) *Delict* 181).

⁶⁷⁰ *Bennet v Minister of Police* 1980 3 SA 24 (C) 31-32; *Powell v Jonker* 1959 4 SA 443 (T) 445; Neethling and Potgieter *Delict* 106-107; Loubser and Midgley (eds) *Delict* 181; Neethling, Potgieter and Visser *Neethling's law of personality* 105.

⁶⁷¹ *Bester v Calitz* 1982 3 SA 864 (O) 878-881; *Bennet v Minister of Police* 1980 3 SA 24 (C) 31. See Neethling and Potgieter *Delict* 106; Loubser and Midgley (eds) *Delict* 180-181.

⁶⁷² For example, anger or rage.

⁶⁷³ Neethling and Potgieter *Delict* 107 fn 528; Neethling, Potgieter and Visser *Neethling's law of personality* 105.

and Potgieter⁶⁷⁴ as bringing about conflation in respect of the elements of wrongfulness and fault. They state that *prima facie* unlawful conduct is sometimes determined with reference to the *boni mores* embodied in the reasonable person.

The influence of reasonableness on provocation is partly implicit and partly explicit: whether it applies as a complete defence or a mitigating factor; or whether it applies as defence negating wrongfulness or fault; and whether the traditional approach or the recent approach to wrongfulness is applied. It is submitted that the reasonableness of both the plaintiff's and defendant's conduct is compared and weighed. The provocative conduct is objectively weighed against the retaliatory conduct using the criterion of reasonableness in light of all the surrounding circumstances. Naturally, if the provocative conduct clearly outweighs the retaliatory conduct, then in principle it is reasonable to apply provocation as a complete defence. Factors relevant in determining the reasonableness of the conduct, such as the nature and value of the interest affected, etcetera, are considered. There are factors which are common to determining wrongfulness and fault in our law (such as subjective factors) and relate to whether the defendant's conduct was reasonable. This does lead to the conflation of the two elements but have been applied by our courts.⁶⁷⁵ Furthermore, as reiterated,⁶⁷⁶ the *ex ante* approach to determining the reasonableness of the defendant's conduct also leads to the confusion of the two elements.

3.4.5 Statutory authority

In respect of statutory authority, a defendant's conduct is considered lawful if his actions infringe another's interest in terms of a statute.⁶⁷⁷ This defence is often invoked by policemen, prison wardens and other peace officers.⁶⁷⁸ There are two requirements: the statute must authorise the infringement of the interests and the

⁶⁷⁴ *Delict* 49.

⁶⁷⁵ See paras 3.1.7, 3.1.11 above; paras 4.3, 4.4 below.

⁶⁷⁶ See paras 3.4.2; 3.4.3. above

⁶⁷⁷ *Union Government (Minister of Railways) v Sykes* 1913 AD 156; *East London Western District Farmers' Association v Minister of Education and Development Aid* 1989 2 SA 63 (A); *Simon's Town Municipality v Dews* 1993 1 SA 191 (A); *Government of the Republic of South Africa v Basdeo* 1996 1 SA 355 (A); Neethling and Potgieter *Delict* 114-115; Burchell *Delict* 79; Van der Walt and Midgley *Delict* 196; Loubser and Midgley (eds) *Delict* 181; Neethling, Potgieter and Visser *Neethling's law of personality* 101.

⁶⁷⁸ Neethling, Potgieter and Visser *Neethling's law of personality* 101.

conduct of the defendant must not go beyond the parameters conferred by the particular statute.⁶⁷⁹ In respect of the first requirement, the intention of the legislature must be considered.⁶⁸⁰ With regard to the latter requirement, the defendant's conduct must be reasonable. There should have been no alternative means of preventing or limiting harm.⁶⁸¹ The courts refer to the general criterion of reasonableness⁶⁸² and constitutional imperatives.⁶⁸³ Previously the courts stated with regard to reasonableness of the conduct that the statutory powers should not have been negligently exceeded.⁶⁸⁴ Burchell⁶⁸⁵ points out that this was before there was a clear recognition of the distinction between the elements of wrongfulness and fault and the courts did thereafter acknowledge that it is a question of wrongfulness.⁶⁸⁶ The courts consider the cost and effectiveness of actions employed in order to avoid or limit the infringement of the interest while exercising such statutory authority.⁶⁸⁷ In order to illustrate the application of the reasonableness criterion, an example with regard to section 49 of the Criminal Procedure Act,⁶⁸⁸ the "[u]se of force in effecting arrest", may be used. The police officer may only use force if he believes on reasonable grounds that it is necessary. There must be no other alternative means of affecting an arrest such as by means of an oral warning, warning shot or shooting the suspect in the leg.⁶⁸⁹ The force used must be proportional under the circumstances in order to affect an arrest or stop the suspect from fleeing.⁶⁹⁰ Thus only reasonable force must be used.

⁶⁷⁹ Neethling and Potgieter *Delict* 115; Burchell *Delict* 79; Loubser and Midgley (eds) *Delict* 181.
⁶⁸⁰ See Neethling and Potgieter *Delict* 115, Van der Walt and Midgley *Delict* 196-197, and Loubser and Midgley (eds) *Delict* 182 with regard to guidelines used by the courts in order to determine the intention of the legislature. Cf Burchell *Delict* 80.

⁶⁸¹ See Neethling and Potgieter *Delict* 115-116.

⁶⁸² *Minister of Community Development v Koch* 1991 3 SA 751 (A) 761; Neethling and Potgieter *Delict* 115-118; Van der Walt and Midgley *Delict* 198; Loubser and Midgley (eds) *Delict* 182-183.

⁶⁸³ S 12 of the Constitution entitles every human to the right to freedom and security of the person which includes the right to be free from all forms of violence.

⁶⁸⁴ Such as in *Johannesburg Municipality v African Realty Trust* 1927 AD 163, 172-173. See Neethling and Potgieter *Delict* 116 fn 591; Loubser and Midgley (eds) *Delict* 183; Burchell *Delict* 81.

⁶⁸⁵ *Delict* 81. See Van der Walt and Midgley (eds) *Delict* 198-199 who refer to the courts' use of due care, or the duty of care, which was influenced by English law where there is no conceptual difference between wrongfulness and fault.

⁶⁸⁶ See *Simon's Town Municipality v Dews* 1993 1 SA 191 (A) 196.

⁶⁸⁷ *Breede River (Robertson) Irrigation Board v Brink* 1936 AD 359; Neethling and Potgieter *Delict* 116 fn 592; Loubser and Midgley (eds) *Delict* 183.

⁶⁸⁸ 51 of 1977.

⁶⁸⁹ *Matlou v Makhuhubedu* 1978 1 SA 946 (A) 958.

⁶⁹⁰ *Govender v Minister of Safety and Security* 2000 1 SA 959 (D) 967; *Matlou v Makhuhubedu* 1978 1 SA 946 (A) 956; *Ex parte Minister of Safety and Security; in re State v Walters* 2002 4

The defendant who relies on the defence of statutory authority must prove that the causing of harm was within the statutory bounds of authority⁶⁹¹ and the plaintiff must prove that the defendant exceeded the bounds of statutory authority.⁶⁹²

The influence of reasonableness on the requirements for statutory authority is also partially implicit and partially explicit. A statute which authorises the infringement of a person's interests must be reasonable. Here the Constitution is applicable as the fundamental rights are protected. It is trite that any provision in legislation which is in conflict with the Constitution and Bill of Rights may be struck off as invalid and the courts may request the legislature to remedy any defect.

The requirement that the conduct of the defendant must not go beyond the parameters conferred by the particular statute relates to reasonableness. This is explicitly illustrated in terms of the example of section 49 of the Criminal Procedure Act⁶⁹³ provided above. The act itself allows a policeman to make an arrest on reasonable grounds of suspicion. Force may only reasonably be used if there is no other option. In using the necessary force, there must be no other reasonable alternative means of affecting an arrest. The force used to arrest or apprehend the suspect must be reasonable. Naturally if unnecessary, excessive force is used – then the use of such force may be considered unreasonable according to the *boni mores*, constitutional imperatives and surrounding circumstances of the case. The defendant in using such reasonable force lawfully exercises his own interests authorised by the statute in infringing the interests of the suspect. Thus the defence of statutory authority may succeed. If the recent approach to determining wrongfulness is used, the reasonableness of the defendant's conduct will still be considered in light of public policy and constitutional imperatives in reaching a conclusion as to whether or not it will be reasonable to impose liability on the defendant.⁶⁹⁴

SA 613 (CC) 643; Neethling and Potgieter *Delict* 117-118; Loubser and Midgley (eds) *Delict* 183. Cf Van der Walt and Midgley *Delict* 196.

⁶⁹¹ *Johannesburg Municipality v African Reality Trust* 1927 AD 163, 175; Van der Walt and Midgley *Delict* 193; Loubser and Midgley (eds) *Delict* 182; Burchell *Delict* 82.

⁶⁹² Neethling and Potgieter *Delict* 116; Van der Walt and Midgley *Delict* 196-197.

⁶⁹³ 51 of 1977.

⁶⁹⁴ See Van der Walt and Midgley *Delict* 198.

3.4.6 Official Capacity

Public officials such as law enforcement personnel and judicial officers may rely on official capacity in instances where they cause harm to a plaintiff in a reasonable manner, while acting in such capacity.⁶⁹⁵ The reason for their immunity from liability while exercising their authority in such capacity is because of the idea that the law enforcement and judiciary must remain independent. They must be able to exercise their functions without the fear of being held liable.⁶⁹⁶ An obvious example is where a judicial officer detains the plaintiff for contempt of court after warnings were given and not heeded to. In such instances the judicial officer's conduct is reasonable and he may be immune from liability. If a judicial officer acts with malice, his conduct may be considered unreasonable and wrongful.⁶⁹⁷ In such a case, the public official exceeds his bound of authority.⁶⁹⁸ The policy consideration behind immunity from liability is understandable, however, such immunity from liability will only apply if the public official's conduct was reasonable in light of the *boni mores*, constitutional imperatives and all surrounding circumstances (according to the traditional approach to determining wrongfulness). Notice may be taken again of the decision in the *Carmichele* saga and all other decisions following the approach where the state was held liable for the conduct of the public officials. The public officials in the *Carmichele* saga had breached their legal duty to protect Carmichele from harm. Their conduct was unreasonable and the state was held liable for the omissions. Thus the state was not immune from liability.

In respect of the recent approach, with regard to whether the defence of official capacity will apply thereby negating wrongfulness, it will still depend on whether the public official's conduct was reasonable and justifiable in allowing immunity from liability. Thus in both approaches the influence of reasonableness is apparent. As

⁶⁹⁵ See *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 1 SA 461 (SCA) 470; *May v Udwin* 1981 1 SA 1 (A) 19-20; *Moeketsi v Minister van Justisie* 1988 4 SA 707 (T) 711-713; Neethling and Potgieter *Delict* 119; Van der Walt and Midgley *Delict* 202; Loubser and Midgley (eds) *Delict* 183.

⁶⁹⁶ *May v Udwin* 1981 1 SA 1 (A) 19; Neethling and Potgieter *Delict* 119; Van der Walt and Midgley *Delict* 202.

⁶⁹⁷ *May v Udwin* 1981 1 SA 1 (A) 19-20; *Moeketsi v Minister van Justisie* 1988 4 SA 707 (T) 711-713; Neethling and Potgieter *Delict* 119; Van der Walt and Midgley *Delict* 136.

⁶⁹⁸ *Moeketsi v Minister van Justisie* 1988 4 SA 707 (T) 713; *May v Udwin* 1981 1 SA 1 (A) 19; Neethling and Potgieter *Delict* 119; Van der Walt and Midgley *Delict* 204; Loubser and Midgley (eds) *Delict* 183.

mentioned,⁶⁹⁹ even though our courts refer to the reasonableness of imposing liability, they still also refer to the *boni mores*, public policy, constitutional imperatives and the practical tests to determining wrongfulness. These practical tests relate to the infringement of rights or breach of a legal duty to prevent harm or loss.

3.4.7 Official command

In instances where a defendant obeys an official command and in so doing infringes the interests of the plaintiff, his infringement may be considered lawful.⁷⁰⁰ According to *S v Banda*,⁷⁰¹ the following requirements must be met: the command must come from an official with the required authority over the defendant; there must have been a duty on the defendant to obey the command; and the defendant must have caused no more harm than was necessary in carrying out the order.⁷⁰²

Whether the command given was lawful, is of importance when questioning whether there was a duty upon such subordinate to obey the command. The courts have acknowledged that there is no blind duty to obey orders.⁷⁰³ There are two recognised approaches: the first, that a wrongful order remains wrongful⁷⁰⁴ and the second, that only the execution of an illegal order is wrongful.⁷⁰⁵ In instances where a subordinate obeys a wrongful command, such person in reality acts out of necessity as a result of being forced to obey.⁷⁰⁶ Whether the command is wrongful has been determined with reference to the judgement of the reasonable person in the position of the subordinate who acted upon the official command.⁷⁰⁷ In instances where X obeys a wrongful order, the applicable ground of justification is necessity in the form of compulsion.⁷⁰⁸

⁶⁹⁹ See para 3.2 above.

⁷⁰⁰ Neethling and Potgieter *Delict* 119-120; Van der Walt and Midgley *Delict* 204; Loubser and Midgley (eds) *Delict* 183; Burchell *Delict* 78.

⁷⁰¹ 1990 3 SA 466 (B) 480; Neethling and Potgieter *Delict* 120; Loubser and Midgley (eds) *Delict* 183-184; Van der Walt and Midgley *Delict* 204.

⁷⁰² Neethling and Potgieter *Delict* 120; Loubser and Midgley (eds) *Delict* 183-184.

⁷⁰³ Neethling and Potgieter *Delict* 120.

⁷⁰⁴ *R v Arlow* 1960 2 SA 449 (T) 452; Neethling and Potgieter *Delict* 120.

⁷⁰⁵ *S v Banda* 1990 3 SA 466 (B) 480; *R v Arlow* 1960 2 SA 449 (T) 452; Neethling and Potgieter *Delict* 120; Van der Walt and Midgley *Delict* 204; Loubser and Midgley (eds) *Delict* 184 fn 117-118.

⁷⁰⁶ Neethling and Potgieter *Delict* 114; Loubser and Midgley (eds) *Delict* 184.

⁷⁰⁷ *S v Banda* 1990 3 SA 466 (B) 496; Neethling and Potgieter *Delict* 120; Loubser and Midgley (eds) *Delict* 184; Van der Walt and Midgley *Delict* 137.

⁷⁰⁸ See *S v Goliath* 1972 3 SA 1 (A); Neethling and Potgieter *Delict* 120; Loubser and Midgley (eds) *Delict* 184.

Friedman J in *S v Banda*⁷⁰⁹ was of the view that there is a difference between the objective criterion of reasonableness and the reasonableness person test for wrongfulness. Neethling and Potgieter submit that the question that needs to be answered in respect of wrongfulness is what would the reaction of the reasonable person (as an embodiment of the *boni mores*) be in the circumstances?⁷¹⁰ Van der Walt and Midgley⁷¹¹ are not comfortable with the test and state that, strictly speaking, it is not in accordance with the determination of wrongfulness based on the objective criterion (an *ex post facto* approach). As reiterated above,⁷¹² this approach leads to the confusion between the elements of wrongfulness and fault.

In instances where the defendant in obeying a lawful command infringes the plaintiff's interests, such infringement must take place in a reasonable manner according to the *boni mores*, constitutional imperatives and in light of all surrounding circumstances. In respect of the defendant, his conduct may be considered reasonable if he used only the required necessary force on the plaintiff to execute the lawful command. If the defendant uses excessive, unnecessary force in executing the lawful command, then his conduct may be considered unreasonable, *contra bonos mores* and unjustified. In instances where a subordinate executes an unlawful command, his conduct may still be considered reasonable as he acts out of necessity due to being forced to execute such unlawful command. Alternatively his conduct may be considered reasonable as the reasonable person as the embodiment of the *boni mores* would have reacted in the same manner. The influence of reasonableness here is thus explicit and implicit on the other requirements of the defence of official command. According to the recent approach, the reasonableness of the policeman's conduct may still be considered even if indirectly in concluding that, according to public policy, it would not be reasonable to impose liability on the subordinate.

3.4.8 Discipline

In terms of common law, a parent or person in *loco parentis*, such as guardians and teachers, may apply their discretion in disciplining a child for educational or

⁷⁰⁹ 1990 3 SA 466 (B) 484; 495.

⁷¹⁰ Neethling and Potgieter *Delict* 120-121 fn 633.

⁷¹¹ *Delict* 204 fn 5.

⁷¹² See para 3.4.2 -3.4, 3.4.7 above.

correctional purposes.⁷¹³ Corporal punishment has been abolished by the legislature.⁷¹⁴ The harm suffered by the child in meting out such discipline may be regarded as lawful⁷¹⁵ as long as the disciplinary conduct was metered out reasonably and moderately.⁷¹⁶ For example, punishing a child repetitively (where prior punishment did not correct the child's behaviour), malice or improper motive is a strong indication of unreasonableness.⁷¹⁷ According to case law the following factors may be taken into account in determining what reasonable and moderate punishment is:⁷¹⁸ the "nature and seriousness of the transgression"; the degree of force or punishment inflicted; the "physical and mental condition" of the child; age and gender of the child; the "physical disposition of the child"; the "purpose and motive of the person inflicting the punishment"; and the method used in respect of such correction. There is a presumption that the person meting out the punishment is acting reasonably and without malice, but if one wants to challenge such conduct, he has the onus of proving that such conduct was unreasonable.⁷¹⁹

If the conduct used in meting out punishment to a child in order to discipline such child is reasonable and moderate, then the harm suffered by the child is justified. Thus the interests of the child are infringed lawfully if, according to the *boni mores* and constitutional imperatives, in light of all surrounding circumstances, the conduct of the parent or person in *loco parentis* in exercising the discipline is reasonable. The influence of reasonableness is more explicit on the defence of discipline. Not too long ago it was common practice for schools to mete out punishment in order to regulate behaviour by means of corporal punishment. Parents or guardians were also free to use physical force in order to discipline children. However, the *boni mores* has changed with regard to disciplining children by using physical means – it has in fact

⁷¹³ Neethling and Potgieter *Delict* 120.

⁷¹⁴ Section 10 of the South African Schools Act 84 of 1996.

⁷¹⁵ Neethling and Potgieter *Delict* 121; Van der Walt and Midgley *Delict* 201; Loubser and Midgley (eds) *Delict* 184; Burchell *Delict* 78.

⁷¹⁶ *Du Preez v Conradie* 1990 4 SA 46 (B) 51-53; *R v Scheepers* 1915 AD 337, 338; *R v Roux* 1932 OPD 59, 61; Loubser and Midgley (eds) *Delict* 185; Neethling and Potgieter *Delict* 122; Van der Walt and Midgley *Delict* 201.

⁷¹⁷ *R v Janke and Janke* 1913 TPD 385, 388; *Du Preez v Conradie* 1990 4 SA 46 (B) 51-52; Loubser and Midgley (eds) *Delict* 185; Neethling and Potgieter *Delict* 122.

⁷¹⁸ See *R v Janke and Janke* 1913 TPD 385-386; Neethling and Potgieter *Delict* 122; Van der Walt and Midgley *Delict* 201; Loubser and Midgley (eds) *Delict* 185.

⁷¹⁹ *Hiltonian Society v Crofton* 1952 3 SA 130 (A); Neethling and Potgieter *Delict* 123; Loubser and Midgley (eds) *Delict* 185; Boberg *Delict* 844.

been abolished. Furthermore, the Constitution provides for the right of a child not to be punished in a degrading, cruel and inhuman manner.⁷²⁰

3.5 Conclusion

The influence of reasonableness on wrongfulness as shown is explicit, whether the traditional test to wrongfulness is applied, that is, the harm suffered must be caused in an unreasonable manner according to the *boni mores*, or the recent approach, that wrongfulness depends on whether it would be reasonable to hold a person liable according to public policy or policy considerations. According to the recent approach, the traditional approach to determining wrongfulness is still applied, but the courts have in a sense integrated the recent approach as part of the test to determining wrongfulness.

Thus at the core of the wrongfulness enquiry is a balancing of interests. The question is: whether the plaintiff's interests have been infringed in a reasonable manner by the defendant's conduct; whether the defendant exercised his own lawful interests in infringing the plaintiff's interest; and whether the exercise of the interests are in conformity with the public interest. The wrongfulness enquiry currently encompasses: the practical approach to determining wrongfulness in the infringement of rights or breach of a legal duty to prevent harm or loss; a balancing of interests; the consideration of constitutional imperatives; the consideration of public policy which is reflected in the *boni mores*; and whether it is reasonable to impose liability, assuming all the other elements are present.⁷²¹

4. Fault

The explicit (in respect of fault in the form of negligence) and implicit influence (in respect of fault in the form of intention) of reasonableness on the delictual element of fault will now be critically analysed. The courts in South Africa often conflate the delictual elements of wrongfulness and fault and it is apparent that the influence of

⁷²⁰ See s 12(1) of the Constitution.

⁷²¹ *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) 216; *Loureiro v iMvula Quality Protection (Pty) Ltd* 2014 5 BCLR 511 (CC) 525.

reasonableness is at the centre of this confusion.⁷²² Therefore, it is necessary to critically analyse the differences as well as the overlap with regard to these two elements.

Fault is generally a requirement in order to establish delictual liability.⁷²³ As mentioned, there are exceptions where fault is not a requirement, such as in instances of strict liability⁷²⁴ and where an interdict is sought.⁷²⁵ Fault refers to the culpability, legal blameworthiness, or reprehensible state of mind or conduct of someone who has acted wrongfully.⁷²⁶ Blameworthiness relates to the defendant's "reprehensible state of mind or conduct of someone who acted wrongfully".⁷²⁷ Insofar as fault relates to the defendant's state of mind, fault is referred to as the subjective element of delict.⁷²⁸ Wrongfulness is said to qualify the conduct whereas fault is said to qualify the wrongdoer.⁷²⁹

4.1 Accountability

Accountability is a pre-requisite for fault⁷³⁰ and entails an investigation into whether a person at the time of the delict had the mental capacity to be at fault, to understand the difference between what is right and wrong and thereafter act in accordance with such understanding.⁷³¹ An investigation into subjective factors relating to the defendant, such as his state of mind, knowledge, experience, maturity and general mental development at the time of the delict are considered.⁷³² Our law has

⁷²² See Ahmed in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 61.

⁷²³ Neethling and Potgieter *Delict* 129; Loubser and Midgley (eds) *Delict* 103.

⁷²⁴ See para 1 above.

⁷²⁵ See para 1 above.

⁷²⁶ Van der Walt and Midgley *Delict* 225 submits that the courts are indecisive as to whether wrongfulness should be determined before fault.

⁷²⁷ Neethling and Potgieter *Delict* 129. Cf Knobel in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 235 fn 34 who does not approve of the characterisation of fault, and in particular negligence, as "conduct" in South African law.

⁷²⁸ See Neethling and Potgieter *Delict* 129; cf Loubser and Midgley (eds) *Delict* 103; Van der Walt and Midgley *Delict* 225.

⁷²⁹ See Boberg *Delict* 269-270; para 3 above.

⁷³⁰ Neethling and Potgieter *Delict* 130-131; Loubser and Midgley (eds) *Delict* 103; Van der Walt and Midgley *Delict* 226; Burchell *Delict* 84; Visser in Du Bois (gen ed) *Wille's Principles of South African law* 1122.

⁷³¹ *Weber v Santam Versekeringsmaatskappy Bpk* 1983 1 SA 381 (A) 389; Neethling and Potgieter *Delict* 131; Loubser and Midgley (eds) *Delict* 104; Burchell *Delict* 83; Van der Walt and Midgley *Delict* 226.

⁷³² *Weber v Santam Versekeringsmaatskappy Bpk* 1983 1 SA 381 (A) 390; Van der Walt and Midgley *Delict* 226-227; cf Burchell *Delict* 83.

acknowledged that under certain circumstances children;⁷³³ mentally impaired, emotionally distressed,⁷³⁴ intoxicated⁷³⁵ and provoked⁷³⁶ persons may lack accountability.⁷³⁷

According to sections 7 and 11 of the Child Justice Act,⁷³⁸ a child from birth to nine years of age is *culpaе incapax* and cannot be held accountable. A child from ten to fourteen years of age can be held accountable unless the contrary is proven and a child between fourteen to eighteen years of age is presumed to be *culpaе capax*. In terms of common law, a child below the age of seven is *culpaе incapax* and a child between seven and fourteen years of age is *culpaе capax*.⁷³⁹ A child between fourteen and eighteen years of age is *culpaе capax* depending on the circumstances of the case.⁷⁴⁰ Jansen and Neethling⁷⁴¹ submit that the Child Justice Act⁷⁴² applies to the accountability of children with regard to crimes. The common law position still applies to delictual liability.⁷⁴³

In respect of the influence of reasonableness, it is generally unreasonable to hold a very young child accountable as their mental capacity may not have developed sufficiently to understand what is right and wrong and act in accordance with such

⁷³³ Boberg *Delict* 659.

⁷³⁴ See *S v Campher* 1987 1 SA 940 (A); *S v Laubscher* 1998 1 SA 163 (A); Neethling and Potgieter *Delict* 132; Loubser and Midgley (eds) *Delict* 107.

⁷³⁵ See *S v Chretien* 1981 1 SA 1097 (A) where the accused was found not guilty of murder and assault as a result of being in such a state of intoxication that it rendered him unaccountable and lacking fault in the form of intention. See also Neethling and Potgieter *Delict* 132; Loubser and Midgley (eds) *Delict* 227; Van der Walt and Midgley *Delict* 227. If a person takes an intoxicating substance before he becomes intoxicated, thereafter committing a delict, he may still be held liable as a result of his prior act while he was still accountable. See para 2 above relating to the discussion of prior voluntary conduct leading to the conclusion of blameworthy conduct.

⁷³⁶ Neethling and Potgieter *Delict* 132; Loubser and Midgley (eds) *Delict* 108.

⁷³⁷ Neethling and Potgieter *Delict* 131-132; Loubser and Midgley (eds) *Delict* 105; Visser in Du Bois (gen ed) *Wille's Principles of South African law* 1122-1123.

⁷³⁸ 75 of 2008.

⁷³⁹ See *Weber v Santam Versekeringsmaatskappy Bpk* 1983 1 SA 381 (A) and *Eskom Holdings Ltd v Hendricks* 2005 5 SA 503 (SCA) where the children lacked accountability on the basis that the children were between seven and fourteen years of age and did not act in accordance with the appreciation between what was right and wrong.

⁷⁴⁰ See *Weber v Santam Versekeringsmaatskappy Bpk* 1983 1 SA 381 (A) 389, 399; *Jones v Santam Bpk* 1965 2 SA 542 (A) 552-554; Neethling and Potgieter *Delict* 131-132; Visser in Du Bois (gen ed) *Wille's principles of South African law* 1123; Loubser and Midgley's (eds) *Delict* 105-107 discussion of *Weber* and *Eskom Holdings Ltd*; Van der Walt and Midgley *Delict* 227.

⁷⁴¹ 2017 *THRHR* 474.

⁷⁴² 75 of 2008.

⁷⁴³ See also Loubser and Midgley (eds) *Delict* 105; Van der Walt and Midgley *Delict* 227 who refer to the common law position with regard to delictual liability of children. See also Jansen and Neethling 2017 *THRHR* 474-482.

understanding. Naturally, if a child has the mental capacity to distinguish between right and wrong and act in accordance with such understanding then it may be reasonable to hold him accountable. If a person at the time of the commission of the delict was mentally impaired, emotionally distressed, intoxicated or provoked to such an extent that he did not have the mental capacity to distinguish between right and wrong and act in accordance with such appreciation, then it may be unreasonable to hold him accountable. Furthermore his actions may be regarded as involuntary negating the element of conduct. Thus if his actions are involuntary then it is unreasonable to hold him liable as conduct will be absent. However, the facts of each case must be considered and it is possible that it may still be reasonable to hold a person, such as, an intoxicated person accountable and liable in delict based on prior conduct (prior to the state of intoxication) which was negligent or intentional.⁷⁴⁴ It is only reasonable that all the surrounding circumstances of the case must be considered.

4.2 Intention

The two forms of fault recognised are intention (*dolus*) and negligence (*culpa* in the narrow sense).⁷⁴⁵ In respect of the *actio legis Aquiliae* and the Germanic action for pain and suffering, fault in the form of intention or negligence is sufficient to ground delictual liability, providing that all the other elements are present, whereas in respect of the *actio iniuriarum*, fault in the form of intention, *animus iniuriandi* (literally “the will to injure”) is required.⁷⁴⁶

The test for intention is subjective in that it involves the assessment of the defendant’s state of mind in respect of the result.⁷⁴⁷ A person acts with intent when he directs his will towards achieving a consequence while aware that his conduct in order to achieve such result is wrongful.⁷⁴⁸ Intention thus encompasses two elements: direction of the

⁷⁴⁴ See para 1 above.

⁷⁴⁵ Neethling and Potgieter *Delict* 130; Burchell *Delict* 85; Van der Walt and Midgley *Delict* 226; Loubser and Midgley (eds) *Delict* 103; Burchell *Delict* 85; Visser in Du Bois (gen ed) *Wille’s principles of South African law* 1123.

⁷⁴⁶ Neethling and Potgieter *Delict* 130; Loubser and Midgley (eds) *Delict* 103-104.

⁷⁴⁷ Loubser and Midgley (eds) *Delict* 109; Van der Walt and Midgley *Delict* 227.

⁷⁴⁸ *Dantex Investment Holdings (Pty) Ltd v Brenner* 1989 1 SA 390 (A) 396; *Hattingh v Roux* 2011 5 SA 135 (WCC)141; *Minister of Finance v Gore* 2007 1 SA 111 (SCA) 139-140; cf *Mediterranean Shipping Co (Pty) Ltd v Tebe Trading (Pty) Ltd* 2007 2 All SA 489 (SCA) 494; *Kgaleng v Minister of Safety and Security* 2001 4 SA 854 (W) 874; Neethling and Potgieter

will; and subjective awareness that the willed conduct is wrongful with reference to the criterion of reasonableness (consciousness of wrongfulness).⁷⁴⁹ It is therefore logical according to the second element that wrongfulness should be determined before intent as in order to be “conscious of wrongfulness”, wrongfulness must be present. However, according to the recent approach to determining wrongfulness where fault is assumed, wrongfulness does not need to be determined before fault. Nevertheless, irrespective of whether the traditional or recent approach is followed, the defendant must regard his conduct as unreasonable.

In *Le Roux v Dey*,⁷⁵⁰ the Supreme Court of Appeal held that in respect of *animus iniuriandi* (intention to injure) for purposes of the *actio iniuriarum*, “consciousness of wrongfulness” is not a requirement. Even with regard to specific forms of *iniuria* under the *actio iniuriarum*, such as unlawful detention, or wrongful attachment of goods, the courts, due to policy considerations, may modify the rules with regard to intention, requiring an attenuated form of intention where consciousness of wrongfulness is not required.⁷⁵¹ Fagan⁷⁵² is also of the opinion that knowledge of wrongfulness is not a necessary element of intent. It makes sense that he would be inclined to support this view because he submits that wrongfulness need not be determined before fault and that wrongfulness turns on an *ex ante* approach as to whether it is reasonable to impose liability on the defendant. Nevertheless, Neethling⁷⁵³ submits that it has not yet been confirmed by the Constitutional Court⁷⁵⁴ that “consciousness of wrongfulness” is no longer an element of intent, therefore it is still accepted as an element of intent, even in cases on *iniuria*.⁷⁵⁵ Neethling and Potgieter⁷⁵⁶ also point

Delict 132; Van der Walt and Midgley *Delict* 227; Loubser and Midgley (eds) *Delict* 109; Boberg *Delict* 268; Visser in Du Bois (gen ed) *Wille's Principles of South African law* 1129; Knobel 2010 *THRHR* 115-116; Neethling and Potgieter 2014 *SALJ* 252.

⁷⁴⁹ Loubser and Midgley (eds) *Delict* 109-110; Van der Walt and Midgley *Delict* 227; Neethling and Potgieter *Delict* 132-133.

⁷⁵⁰ 2010 4 SA 210 (SCA) 224.

⁷⁵¹ See *Dantex Investment Holdings (Pty) Ltd v Brenner* 1989 1 SA 390 (A) 396-397; *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A) 154; *Ramsay v Minister van Polisie* 1981 4 SA 802 (A) 818-819; Van der Walt and Midgley *Delict* 228; Loubser and Midgley (eds) *Delict* 112-113.

⁷⁵² 2005 *SALJ* 117; para 3.3.2 above.

⁷⁵³ 2010 *Obiter* 706-714.

⁷⁵⁴ The Constitutional Court held that it was not necessary for the Supreme Court of Appeal to have decided on whether “coloured intent” (consciousness of wrongfulness) was an element of intent and therefore found it unnecessary for it to do so too (*Le Roux v Dey* 2011 3 SA 274 (CC) 319)). See also Loubser and Midgley (eds) *Delict* 112.

⁷⁵⁵ See Neethling and Potgieter *Delict* 135-136; Ahmed 2012 *Obiter* 417; Loubser and Midgley (eds) *Delict* 111-112; Neethling and Potgieter *Delict* 135-136.

⁷⁵⁶ *Delict* 135 fn 43.

out that it is problematic applying the element of “consciousness of wrongfulness” to the recent approach to determining wrongfulness – can the defendant be consciously aware of the reasonableness of imposing liability on himself? As opposed to the consciousness of whether one’s conduct is reasonable according to the *boni mores*. On another note, a defendant cannot in a strict sense, legally be conscious of wrongfulness of his conduct and have intent in respect of himself.⁷⁵⁷

There are three forms of intent. A person can direct his will: directly (*dolus directus*, where the defendant desires to bring about a particular consequence); indirectly (*dolus indirectus*, where the defendant desires to bring about a consequence but concurrently indirectly causes another consequence which he is aware of, he thus has indirect intent in respect of the second consequence); or by actually subjectively foreseeing the possibility of a harmful consequence ensuing, reconciling himself with such possibility and nevertheless continuing with the conduct (*dolus eventualis*).⁷⁵⁸ The courts⁷⁵⁹ sometimes make use of the word “reckless” when referring to the defendant’s intent in the form of *dolus eventualis*, stating that the defendant nevertheless “recklessly” continues with the conduct. Respected authors are of the opinion that recklessness is a term associated with negligence, a more serious degree of negligence, and should be avoided when referring to intent.⁷⁶⁰ With regard to negligence, the question is whether objectively viewed, the consequence seen was reasonably foreseeable whereas with respect to *dolus eventualis*, the question is whether the defendant actually subjectively foresaw the possibility of the harmful consequence.⁷⁶¹ If the defendant foresees the possibility of a harmful consequence with respect to his action but believes that it will not happen, then *dolus eventualis* is not present as the defendant did not accept or reconcile himself with the harmful consequence, but rather *luxuria* or conscious negligence, may be present.⁷⁶²

⁷⁵⁷ Neethling and Potgieter *Delict* 44 fn 58, 129 fn 7; Neethling and Potgieter 2014 *SALJ* 252; Ahmed 2012 *Obiter* 419.

⁷⁵⁸ *Black v Joffe* 2007 3 SA 171 (C) 186; Van der Walt and Midgley *Delict* 227-228; Loubser and Midgley (eds) *Delict* 109-111; Neethling and Potgieter *Delict* 133-135; Boberg *Delict* 268-269; Visser in Du Bois (gen ed) *Wille’s principles of South African law* 1129.

⁷⁵⁹ For example, see *Black v Joffe* 2007 3 SA 171 (C) 186 where Dlodlo J stated that in respect of *dolus eventualis* “one acts with the intention of attaining a particular object but subjectively realises or appreciates that another consequence may reasonably result and one reconciles oneself with this possibility, and recklessly proceeds with the conduct nevertheless”. See also *Minister of Justice and Constitutional Development v Moleko* 2008 3 All SA 47 (SCA) [64].

⁷⁶⁰ See Neethling and Potgieter *Delict* 134; Van der Walt and Midgley *Delict* 228.

⁷⁶¹ Neethling and Potgieter *Delict* 134.

⁷⁶² Neethling and Potgieter *Delict* 134; Loubser and Midgley (eds) *Delict* 111.

In respect of definite intent (*dolus determinatus*), the defendant has a specific person or object in mind and intent may be present in instances of direct intent, indirect intent or *dolus eventualis*. In respect of indefinite intent (*dolus indeterminatus*), the defendant does not have a specific person or object in mind but may have direct intent (in respect of a specific consequence), indirect intent (in realising that other consequences will inevitably occur) or *dolus eventualis* (by foreseeing and reconciling himself with the possibility of the harmful consequence as a result of his conduct).⁷⁶³ Even though theoretically different forms of intent are recognised, in practice, any form of intention is sufficient to ground delictual liability, providing the other elements are present and no specific weight is attached to the different forms of intent.⁷⁶⁴

The following defences,⁷⁶⁵ depending on the circumstances may exclude intent: emotional distress; jest; intoxication; provocation; and mistake. A *bona fide* mistake may exclude either of the elements of intent (“direction of the will”⁷⁶⁶ or “consciousness of wrongfulness”) where the defendant thought his actions were lawful and reasonable, but, in reality, were not.⁷⁶⁷ In principle, whether there is a mistake regarding an aspect of law, a fact, or whether the mistake is reasonable or not, such mistake should exclude fault.⁷⁶⁸ Van der Walt and Midgley⁷⁶⁹ submit that the requirement that a mistake must be reasonable (for example, where the media is the defendant) and not negligent is irreconcilable with the subjective nature of intent which focuses on the defendant’s state of mind at the time of the delict. The defendant (media) must show that their lack of intention was reasonable thus showing that there was no “consciousness of wrongfulness”. The focus should not be on the reasonableness of conduct (publication of the defamatory statement) and not whether the conduct was negligent.⁷⁷⁰ A last note with regard to intent, one’s motive should

⁷⁶³ Neethling and Potgieter *Delict* 134-135.

⁷⁶⁴ Neethling and Potgieter *Delict* 134.

⁷⁶⁵ See in general Neethling and Potgieter *Delict* 364; Loubser and Midgley (eds) *Delict* 115-117; Van der Walt and Midgley *Delict* 233-235.

⁷⁶⁶ For example, when one accidentally clicks on send, subsequently sending a defamatory message.

⁷⁶⁷ Neethling and Potgieter *Delict* 364; Loubser and Midgley (eds) *Delict* 115-116; Van der Walt and Midgley *Delict* 163.

⁷⁶⁸ See *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA); *Maisel v Naeren* 1960 4 SA 836 (C); Loubser and Midgley (eds) *Delict* 115-116; Neethling and Potgieter *Delict* 135-136; cf Van der Walt and Midgley *Delict* 233.

⁷⁶⁹ *Delict* 233-234. See *Hassen v Post Newspapers (Pty) Ltd* 1965 3 SA 562 (W).

⁷⁷⁰ Van der Walt and Midgley *Delict* 223-224.

not be confused with intent. Motive refers to the reason for one's conduct and may assist in proving intent, in particular "consciousness of wrongfulness"⁷⁷¹ or as Knobel⁷⁷² interprets it, consciousness of the unreasonableness of the conduct.

4.2.1 Conclusion

The influence of reasonableness on intent is partly implicit and partly explicit. It is only reasonable to hold the defendant liable if intention is present with respect to the first element. That is, if the wrongdoer directs his will with the aim of achieving a consequence whether such consequence is achieved directly or indirectly, with a definite person or object in mind, or without a definite person or object in mind. The consequence may be in the form of harm or loss. It is also reasonable that the wrongdoer should be held liable for the consequences he intended, providing all the other elements of delictual liability are present. In this sense the influence of reasonableness is implicit. According to the second element of intent, consciousness of wrongfulness, wrongfulness co-determines intention. If we consider the view that the second element of intent is the conscious unreasonableness of one's conduct, then the influence of reasonableness is explicit.

It may be unreasonable, in principle, to hold the defendant liable when the defendant makes a joke or mistake. If the defendant causes harm to the plaintiff as a result of the joke or mistake, then the defendant must prove that his lack of intention was reasonable in focusing on the defendant's state of mind instead of proving that the joke or mistake was reasonable. For example, in *Le Roux v Dey*,⁷⁷³ schoolchildren in making a joke, created an image in which the faces of the school principal and deputy principal were super-imposed on an image of two naked men sitting in a sexually indelicate manner. This image was publicly posted and viewed by many. The Constitutional Court confirmed that this was defamatory and injured the feelings of the deputy principal who brought a claim to the court in terms of the *actio iniuriarum*. The schoolchildren alleged that they lacked intent (*animus iniuriandi*) and that they did not appreciate the wrongfulness of their conduct.⁷⁷⁴ The court held that a

⁷⁷¹ Neethling and Potgieter *Delict* 136; Van der Walt and Midgley *Delict* 223.

⁷⁷² In Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 236.

⁷⁷³ 2011 (3) SA 274 (CC).

⁷⁷⁴ *Le Roux v Dey* 2011 (3) SA 274 (CC) 317.

“defendant who foresaw the possibility that his attempt at humour might be defamatory to the plaintiff, but nonetheless proceeds with the attempt”, will have intent in the form of *dolus eventualis*.⁷⁷⁵ The children knew that they were “messing” with the deputy principal’s image and carried on regardless. They intended to amuse others by ridiculing and humiliating the two figures of authority.⁷⁷⁶ With regard to the second element of intent, the court held that accountability was not in dispute and the fact that the children admitted that they would not superimpose the face of their parents or church leader on the image, proved that they knew what they were doing was wrongful.⁷⁷⁷ The schoolchildren were ordered to make an apology and pay a sum of money⁷⁷⁸ which may be considered reasonable. Thus the children did not prove that their lack of intention was reasonable in their aim to humiliate and make fun of the two figures of authority. Nor did they show that their lack of intention was reasonable due to an absence of being aware that their conduct was wrongful or unreasonable.

The relationship between reasonableness and blameworthiness in instances of intention is implicit insofar as it is reasonable, in principle, to hold someone liable if he has directed his will at attaining a particular harmful result. In addition, the contested premise that the defendant must consciously be aware of the wrongfulness or unreasonableness of his conduct, would strengthen the relationship between intention and reasonableness and could, depending on terminology, make the role of reasonableness explicit.

In instances where a person is severely intoxicated it is submitted that intention may be absent as the defendant may not be conscious of wrongfulness or the unreasonableness of his conduct. However, it is necessary to investigate whether there was voluntary intentional conduct prior to the state of intoxication. If there was, then it may be reasonable to hold the defendant liable, in principle, as conduct and fault in the form of intent is present. In instances of severe emotional distress, depending on the circumstances, it may be unreasonable to hold the defendant liable as the conduct may be involuntary negating the element of conduct. Wrongfulness

⁷⁷⁵ *Le Roux v Dey* 2011 (3) SA 274 (CC) 317-318.

⁷⁷⁶ *Le Roux v Dey* 2011 (3) SA 274 (CC) 318.

⁷⁷⁷ *Le Roux v Dey* 2011 (3) SA 274 (CC) 318-319.

⁷⁷⁸ See chapter 2 par 1 and par 6.2 below with regard to the principle of restorative justice and the customary law concept of *ubuntu*.

may be absent as the conduct may be regarded as reasonable (when acting out of necessity) as well as fault in the form of intention (because the defendant was not conscious of the wrongfulness or unreasonableness of the conduct) or negligence (as the reasonable person in the same position would have acted no differently).⁷⁷⁹ In instances of provocation, depending on the circumstances, wrongfulness may be absent, as the conduct may not be considered unreasonable. Fault in the form of intention may be absent because consciousness of wrongfulness or unreasonableness of one's conduct is lacking. Negligence may also be absent if the conduct undertaken was no different from that of the reasonable person. If provocation were to apply as a mitigating factor reducing the plaintiff's claim, then negligence is present on the part of the defendant as his conduct strayed from that of the reasonable person, and contributory negligence is present on the part of the plaintiff, in that his conduct also strayed from that of the reasonable person.

4.3 Negligence and contributory negligence

The test for determining negligence is objective when compared to intention in that the defendant's state of mind is not enquired into, but instead the defendant's conduct is compared with the yardstick of the fictitious "reasonable person" (*diligens* or *bonus paterfamilias*).⁷⁸⁰ Nonetheless, at a theoretical level there is recognition that negligence, as a form of fault and hence blameworthiness, is or may be related to a mental state of carelessness, thoughtlessness or imprudence on the part of the wrongdoer. The test for negligence may be described as more objective than that of intention, but more subjective than wrongfulness.⁷⁸¹

⁷⁷⁹ See para 2 above.

⁷⁸⁰ See Loubser and Midgley (eds) *Delict* 117; Neethling and Potgieter *Delict* 137; Van der Walt and Midgley *Delict* 237; Boberg *Delict* 274.

⁷⁸¹ Cf Neethling and Potgieter *Delict* 137; Knobel in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 234-237.

The reasonable person test is the basic criterion for determining negligence.⁷⁸² It is flexible and value based.⁷⁸³ Members of the community generally assume that fellow members will comply with a “uniform standard of conduct” and a member’s conduct must conform to the “ideals and standards of a particular community”.⁷⁸⁴ The adjudicator in determining negligence must however try to take into account all the relevant facts and circumstances⁷⁸⁵ that were subjectively known to the defendant at the time of the “alleged wrongdoing”. All the relevant facts and circumstances that would have been foreseeable by the reasonable person in the position of the defendant at the time of the “alleged wrongdoing” must also be considered.⁷⁸⁶ When the adjudicator considers the conduct of the defendant in comparison to the conduct of the reasonable person an *ex post facto* approach is not applied.⁷⁸⁷ How far a person’s conduct strayed from the standard of the reasonable person applies to “contributory negligence” too.⁷⁸⁸ Negligence relates to the defendant’s conduct while “contributory negligence” relates to the plaintiff’s conduct.⁷⁸⁹ The same reasonable person test applied to the defendant applies to the plaintiff. Contributory negligence on the part of the plaintiff has the effect of reducing his claim for compensation.⁷⁹⁰ “Contributory negligence” is regulated by the Apportionment of Damages Act.⁷⁹¹ For the purpose of this study, this act will not be discussed further. It should however be noted that it is reasonable to reduce the award of damages claimed by the plaintiff

⁷⁸² See *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA) 325 and *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 SA 827 (SCA) 839-840 where the courts stated that “the true criterion for determining negligence is whether in the particular circumstances the conduct complained of falls short of the standard of the reasonable person”. Dividing the enquiry into different stages, however useful, is no more than an aid or guideline for resolving this issue. It is probably so that there can be no universally applicable formula which will prove to be appropriate in every case”. See *Kruger v Coetzee* (1966 2 SA 428 (A) 430) with regard to the different stages of enquiry as well as the adapted version in *Mukheiber v Raath* 1999 3 SA 1065 (SCA) 1077 (which is the concrete approach to determining negligence).

⁷⁸³ See Van der Walt and Midgley *Delict* 237, 243.

⁷⁸⁴ Van der Walt and Midgley *Delict* 237.

⁷⁸⁵ In *Mkhatswa v Minister of Defence* 2000 1 SA 1104 (SCA) [23] the court stated that the determination of negligence “ultimately depends upon a realistic and sensible judicial approach to all the relevant facts and circumstances that bear on the matter at hand”. See Van der Walt and Midgley *Delict* 244 fn 9.

⁷⁸⁶ See Knobel 2008 *THRHR* 654; cf Van der Walt and Midgley *Delict* 240.

⁷⁸⁷ *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA) 325; *S v Bochriss Investments (Pty) Ltd* 1988 1 SA 861 (A) 866-867; *McCarthy Ltd t/a Budget Rent A Car v Sunset Beach Trading 300 t/a Harvey World Travel* 2012 6 SA 551 (GNP) 567; *iMvula Quality Protection (Pty) Ltd v Loureiro* 2013 3 SA 407 (SCA) 417.

⁷⁸⁸ Neethling and Potgieter *Delict* 170; Van der Walt and Midgley *Delict* 237-238.

⁷⁸⁹ Neethling and Potgieter *Delict* 167.

⁷⁹⁰ Neethling and Potgieter *Delict* 167.

⁷⁹¹ 34 of 1956.

depending on the circumstances, in instances where the plaintiff besides the defendant, is also at fault with respect to the damage he sustains.

The courts have provided the following guidelines as an aid in determining negligence, or rather refer to stages of enquiry in determining negligence, which was formulated by Holmes JA in *Kruger v Coetzee*⁷⁹² and has been endorsed by our courts.⁷⁹³

“(a) a *diligens paterfamilias* in the position of the defendant-
(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
(ii) would take reasonable steps to guard against such occurrence; and
(b) the defendant failed to take such steps”.⁷⁹⁴

Holmes JA⁷⁹⁵ pointed out that requirement (a)(ii) above is sometimes overlooked and that the reasonable steps that would be taken must depend on the circumstances of each case.⁷⁹⁶ Based on the above test it is evident that four factors must be taken into account in the enquiry relating to negligence.⁷⁹⁷

Firstly the adjudicator must place the objective, hypothetical, abstract, concept of the “reasonable person” that is supposed to embody the qualities of the ever-changing South African community⁷⁹⁸ in the position of the defendant.⁷⁹⁹ There is much to be said about the reasonable person test that requires a study on its own but for

⁷⁹² 1966 2 SA 428 (A) 430.

⁷⁹³ See *Ngubane v SA Transport Services* 1991 1 SA 756 (A) 776; *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA) 237-238; *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA) 325; *Minister of Safety and Security v Rudman* 2005 2 SA 16 (SCA) 39; *Neethling v Oosthuizen* 2009 5 SA 376 (WCC) 379-380; *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) 441, 448; *McCarthy Ltd t/a Budget Rent A Car v Sunset Beach Trading 300 t/a Harvey World Travel* 2012 6 SA 551 (GNP) 566; *Hawekwa Youth Camp v Byrne* 2010 6 SA 83 (SCA) 91; *Minister of Correctional Services v Lee* 2012 3 SA 617 (SCA) 626; *Loureiro v iMvula Quality Protection (Pty) Ltd* 2014 5 BCLR 511 (CC) 527. See also cases cited by Neethling and Potgieter *Delict* 138-139 fn 68; Loubser and Midgley (eds) *Delict* 118; Van der Walt and Midgley *Delict* 242-244.

⁷⁹⁴ In *Mukheibir v Raath* 1999 3 SA 1065 (SCA) 1077, the court endorsed Boberg's (*Delict* 390) adaptation of the test (which is the concrete approach to negligence), but the courts in any case subsequently reaffirmed the classic test (see previous footnote). See also Van der Walt and Midgley *Delict* 244 fn 1; Neethling and Potgieter *Delict* 138 fn 65; Loubser and Midgley (eds) *Delict* 118-119, 123 fn 62.

⁷⁹⁵ *Kruger v Coetzee* 1966 2 SA 428 (A) 430.

⁷⁹⁶ See Neethling and Potgieter *Delict* 138; Loubser and Midgley (eds) *Delict* 119.

⁷⁹⁷ As pointed out by Loubser and Midgley (eds) *Delict* 119.

⁷⁹⁸ See Neethling and Potgieter *Delict* 142; Loubser and Midgley (eds) *Delict* 118.

⁷⁹⁹ See *Weber v Santam Versekeringsmaatskappy Bpk* 1983 1 SA 381 (A) 410-411; Neethling and Potgieter *Delict* 142; Loubser and Midgley (eds) *Delict* 117-118.

purposes of this study some general remarks will suffice in illustrating the explicit influence of reasonableness on negligence.

The reasonable person does not relate to a specific gender⁸⁰⁰ or particular physical characteristics of a person,⁸⁰¹ such person is not exceptionally skilled, developed or too careful, nor is the person underdeveloped, thoughtless or reckless.⁸⁰² It is settled in our law that the “reasonable person” yardstick applies to children who may be held accountable.⁸⁰³ Thus the reasonable person test is flexible and adaptable in that the courts adapt the standard depending on the circumstances of each case, so if in a given case the courts are trying to determine the negligence of an expert such as a doctor, the “reasonable doctor”⁸⁰⁴ standard is applied. The “reasonable expert” test is similar to the reasonable person test albeit a reasonable measure of the particular expertise is applied.⁸⁰⁵ It is submitted that it is reasonable to adapt the standard of reasonableness when dealing with an expert in the interests of fairness and justice.

The Constitutional Court decision of *Loureiro v iMvula Quality Protection (Pty) Ltd* (hereinafter referred to as “*Loureiro*”)⁸⁰⁶ referred to earlier⁸⁰⁷ serves as a good example of how the courts determine negligence and will be referred to as the four

⁸⁰⁰ Neethling and Potgieter *Delict* 142.

⁸⁰¹ *Weber v Santam Versekeringsmaatskappy Bpk* 1983 1 SA 381 (A) 410-411.

⁸⁰² See in general Neethling and Potgieter *Delict* 141-142; Loubser and Midgley (eds) *Delict* 117-118, 133-136; Van der Walt and Midgley *Delict* 239. Van den Heever JA in *Herschel v Mrupe* 1954 3 SA 464 (A) 490 stated that the concept of the “*bonus paterfamilias*” is not that of a timorous faintheart always in trepidation lest he or others suffer some injury; on the contrary, he ventures out into the world, engages in affairs and takes reasonable chances. He takes reasonable precautions to protect his person and property and expects others to do likewise”. See also *iMvula Quality Protection v Loureiro* 2013 3 SA 407 (SCA) 416.

⁸⁰³ Previously our courts used to follow the “reasonable child” test which took into account the youthfulness of the child wrongdoer, but the approach took a turn in *Jones v Santam Bpk* 1965 2 SA 542 (A) 551-552 when the court stated that in all cases the objective “reasonable person” test must be applied. In *Roxa v Mtshayi* 1975 3 SA 761 (A) 765-766, the court stated that first it must be ascertained whether the child is accountable taking subjective factors into account and thereafter testing negligence. This approach was endorsed in *Weber v Santam Versekeringsmaatskappy Bpk* 1983 1 SA 381 (A) 400 and in *Eskom Holdings Ltd v Hendricks* 2005 5 SA 503 (SCA) 511-512. See in general Neethling and Potgieter *Delict* 143-145; Loubser and Midgley (eds) *Delict* 135-136 and their discussion of *Haffajee v South African Railways and Harbours* 1981 3 SA 1062 (W); Van der Walt and Midgley *Delict* 273-274; Burchell *Delict* 90-91.

⁸⁰⁴ See *Van Wyk v Lewis* 1924 AD 438 456; *Lymbrey v Jefferies* 1925 AD 236; *Esterhuizen v Administrator, Transvaal* 1957 3 SA 710 (T) 723; *Louwrens v Oldwage* 2006 1 All SA 197 (SCA) 207; *Medi-Clinic v Vermeulen* 2015 1 SA 241 (SCA) 243 with respect to the reasonable doctor test.

⁸⁰⁵ See Neethling 2002 *SALJ* 287; Neethling and Potgieter *Delict* 145-147; Loubser and Midgley (eds) *Delict* 134; Van der Walt and Midgley *Delict* 269-270; Boberg *Delict* 346.

⁸⁰⁶ 2014 5 BCLR 511 (CC) 529.

⁸⁰⁷ See para 3.2 above.

factors mentioned above are discussed. It is recalled that in this case, the security guard opened the pedestrian gate to a robber who posed as a police officer. The court in referring to the “reasonable person” adapted the standard and tested the security guard’s conduct against the conduct of a reasonable security guard. In the end, the court concluded that the security guard in the circumstances of the case “failed to meet the standard of a reasonable security guard”.

Secondly, the adjudicator must evaluate whether the reasonable person in the defendant’s position would have reasonably foreseen the possibility of his conduct causing harm. This is considered the cornerstone of the test for negligence.⁸⁰⁸ Loubser and Midgley⁸⁰⁹ advise that with regard to reasonable foreseeability of harm an adjudicator should avoid applying the objective, *ex post facto* criterion of reasonableness used in determining wrongfulness, but what should be considered is the foresight of the reasonable person.⁸¹⁰ There are two main approaches in respect of the application of the reasonable foreseeability test: the abstract (absolute) approach and the concrete (relative) approach.⁸¹¹ According to the abstract approach the question that must be answered is whether, in light of all the circumstances, damage was in general reasonably foreseeable.⁸¹² Thus it is not necessary that the nature or extent of the damage, or the resulting consequence is reasonably foreseen. The resultant consequence is addressed with reference to legal causation.⁸¹³ This approach was enunciated in *Kruger v Coetzee*.⁸¹⁴ There is however more support for

⁸⁰⁸ Van der Walt and Midgley *Delict* 246.

⁸⁰⁹ (Eds) *Delict* 112-113.

⁸¹⁰ *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA) 325. See Loubser and Midgley (eds) *Delict* 119-120; Boberg *Delict* 274; Neethling and Potgieter *Delict* 150 fn 151. See in general Burchell *Delict* 92-97.

⁸¹¹ Loubser and Midgley (eds) *Delict* 121-122; Neethling and Potgieter *Delict* 148-150; Burchell *Delict* 92-93.

⁸¹² *Herschel v Mrupe* 1954 3 SA 464 (A) 474; *Kruger v Coetzee* 1966 2 SA 428 (A) 430.

⁸¹³ Loubser and Midgley (eds) *Delict* 121; Neethling and Potgieter *Delict* 148.

⁸¹⁴ 1966 2 SA 428 (A) 430. However, Knobel *SALJ* 584 submits that if one reads the decision of *Kruger v Coetzee* as a whole it may be argued that the concrete approach, not the abstract approach, was applied. See further Van der Walt and Midgley *Delict* 242-244 who refer to the abstract approach (formulated in *Kruger v Coetzee* 1966 2 SA 428 (A) 430), the relative approach (followed in *Mukheiber v Raath* 1999 3 SA 1065 (SCA) 1077) and a third approach (*Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 SA 827 839 – a hybrid of the abstract and the relative approach which appears to be the approach with more support (see *eBotswana v Sentech* 2013 6 SA 327 (GSJ) 342). Loubser and Midgley (eds) *Delict* 122 refer to this third approach as the hybrid of the relative approach. Boberg *Delict* 276-277; Neethling and Potgieter *Delict* 149; as well as Burchell *Delict* 93-94 121-122 prefer the relative approach (legal causation must still be established). Cf Knobel 2006 *SALJ* 579ff.

the concrete approach⁸¹⁵ enunciated in *Mukheiber v Raath*⁸¹⁶ which is a modified version of the abstract approach formulated in *Kruger v Coetzee*. According to the concrete approach, the question relating to negligence is based on the reasonable foreseeability of the specific consequence.⁸¹⁷ If this approach were to be applied in a strict sense then the enquiry into legal causation may seem unnecessary.⁸¹⁸ However, the courts in the application of this approach, state that the precise nature and extent of the damage as well the precise manner in which it was caused need not be reasonably foreseeable, but the general nature of the damage and the general manner in which it was caused must be reasonably foreseeable.⁸¹⁹ In this way, the enquiry into legal causation as a requirement to establishing delictual liability is not negated.⁸²⁰ If the concrete approach is followed where the general nature of the damage and the general manner in which it was caused was not foreseeable, there would be no finding of negligence. If the abstract approach is followed, negligence may be present if harm in general was foreseeable. The conclusion in respect of the element of negligence may differ depending on which approach is used, but in terms of delictual liability the end result may be the same.

⁸¹⁵ See *Mukheiber v Raath* 1999 3 SA 1065 (SCA) 1077; *Van der Spuy v Minister of Correctional Services* 2004 2 SA 463 (SE) 472-473; *Ablort-Morgon v Whyte Bank Farms (Pty) Ltd* 1988 3 SA 531 (E) 536; *Boberg Delict* 276-277; *iMvula Quality Protection v Loureiro* 2013 3 SA 407 (SCA) 416; *Sea Harvest Corporation (Pty) Ltd v Duncan Cold Storage (Pty) Ltd* 2000 1 SA 827 (SCA) 839. See previous footnote in respect of the authors that prefer the (relative) concrete approach.

⁸¹⁶ 1999 3 SA 1065 (SCA) 1077 which was a formulation of negligence proposed by *Boberg Delict* 390. Cf *Scott* 2000 *De Jure* 360ff.

⁸¹⁷ *Neethling and Potgieter Delict* 143; *McKerron Delict* 28-34, *Boberg Delict* 276-277; *Loubser and Midgley* (eds) *Delict* 121.

⁸¹⁸ See *Loubser and Midgley* (eds) *Delict* 121-122; *Burchell Delict* 93-94.

⁸¹⁹ In *Mukheiber v Raath* 1999 3 SA 1065 (SCA) 1077 the court stated:

“(a) A reasonable person in the position of the defendant:

(i) Would have foreseen harm of the general type that actually occurred

(ii) Would foresee the general type of causal sequence by which that harm occurred

(iii) Would have taken steps to guard against it.(b) The defendant failed to take those steps”.

See *iMvula Quality Protection v Loureiro* 2013 3 SA 407 (SCA) 416; *Sea Harvest Corporation (Pty) Ltd v Duncan Cold Storage (Pty) Ltd* 2000 1 SA 827 (SCA) 839; *Boberg Delict* 276-277; *Neethling and Potgieter Delict* 149 fn 144; *Loubser and Midgley* (eds) *Delict* 122-123.

⁸²⁰ Even though the Supreme Court of Appeal stated a preference for the concrete approach they still employed the criteria for legal causation to limit liability in *Mukheiber v Raath* 1999 3 SA 1065 (SCA) 1077 and *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 SA 827 (SCA) 839; *Smit v Abrahams* 1992 3 SA 158 (C) 163. See further *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A) 768; *Neethling and Potgieter Delict* 149 fn 145; *Loubser and Midgley* (eds) *Delict* 122.

The important factors to be considered are how significant is the likelihood of the harm materialising and how serious the damage will be if the risk materialises?⁸²¹ If the likelihood of the risk of harm is significant, then it may be concluded that harm is reasonably foreseeable⁸²² and if the likelihood of harm is slight then there may be no reasonable foreseeability of harm.⁸²³ It will inevitably depend on the circumstances of each case as it is not possible to lay down hard and fast rules.⁸²⁴

Turning to *Loureiro*, the court indeed referred to all relevant facts and circumstances present in South Africa, as well as all the relevant facts and circumstances that would have been foreseeable by the reasonable person in the position of the security guard at the time of the “alleged wrongdoing”. In this case, Van der Westhuizen J⁸²⁵ pointed out that South Africa is plagued with crime where more than sixteen thousand murders took place during 2012 and 2013. Almost one hundred and six thousand armed robberies took place during 2012 and 2013. He pointed out that many of “our people live behind high walls and electrified fences; others rely on the communities around them for security; and many are mercilessly exposed to the cruelty of crime”. He⁸²⁶ also pointed out that our Police Service is not perceived as capable of performing their function in combatting crime and that the private security industry is “a large and powerful feature of South Africa’s crime-control terrain”. Bearing the aforesaid in mind, upon evaluating whether the reasonable person in the defendant’s position would have reasonably foreseen the possibility of his conduct causing harm, he stated:⁸²⁷

⁸²¹ *Lomagundi Sheetmetal and Engineering (Pvt) Ltd v Basson* 1973 4 SA 523 (RA) 524-525; *McCarthy Ltd t/a Budget Rent A Car v Sunset Beach Trading 300 t/a Harvey World Travel* 2012 6 SA 551 (GNP) 567; *Za v Smith* 2015 4 SA 574 (SCA) 587. See Van der Walt and Midgley *Delict* 251-252; Loubser and Midgley (eds) *Delict* 122; Neethling and Potgieter *Delict* 150.

⁸²² See, for example, *Lomagundi Sheetmetal and Engineering (Pvt) Ltd v Basson* 1973 4 SA 523 (RA) 525 where it was held that the reasonable person would have foreseen the risk of fire and would have taken steps to remove the flammable bales. See discussion of this case by Loubser and Midgley (eds) *Delict* 251-252 and Neethling and Potgieter *Delict* 150 fn 153 .

⁸²³ *Herschel v Mrupe* 1954 3 SA 464 (A) 477. See *Bolton v Stone* 1951 AC 850f and *Stratton v Spoomet* 1994 1 SA 803 (T) 810-811 where the court held that although it might be reasonable to foresee that children may be harmed as a result of an accident with a train, it was not reasonably foreseeable that a child might suffer injury as a result of an electric shock. See also Loubser and Midgley (eds) *Delict* 123; Van der Walt and Midgley 251-252 *Delict* 178-179; Neethling and Potgieter *Delict* 150-151 fn 153.

⁸²⁴ Loubser and Midgley (eds) *Delict* 122; Neethling and Potgieter *Delict* 150.

⁸²⁵ *Loureiro v iMvula Quality Protection (Pty) Ltd* 2014 5 BCLR 511 (CC) 513.

⁸²⁶ *Loureiro v iMvula Quality Protection (Pty) Ltd* 2014 5 BCLR 511 (CC) 513.

⁸²⁷ *Loureiro v iMvula Quality Protection (Pty) Ltd* 2014 5 BCLR 511 (CC) 527.

“[a] reasonable person would have foreseen the possibility that the man at the gate was an imposter. The robbers drove up in an unmarked car. While the car had a flashing blue light, the light was fixed to the dashboard of the car, not to its roof. Underneath his reflective vest, the man who walked up the driveway was dressed in a blazer of a type that an on-duty police officer would not usually wear. He did not announce his identity or his business. According to [the security guard]’s evidence, the man only “flashed” the identity card at him, giving him no opportunity to compare the card’s picture with the man bearing it.

[The security guard] was stationed at the entrance of the Loureiros’ home for the express purpose of ensuring that unauthorised persons did not gain access. That required him to make sure that all persons who seek access are entitled to do so. And a reasonable person in his position as a security guard on duty would have foreseen the possibility that an unauthorised person might try to gain access by purporting to be someone that he is not – including, or indeed especially, a police officer. It is exactly because police officers are clothed in authority that it is foreseeable that an imposter may exploit this apparent authority. Robbers seldom disclose their identity and announce their intention to rob when they seek access to their target.”

Thus it was held that the harm or loss was reasonably foreseeable.⁸²⁸

Thirdly, in respect of reasonable preventability of harm, the question that must be answered is whether with respect to the foreseeable harm, the defendant took adequate reasonable steps to prevent the manifestation of the harm. The courts take the following factors⁸²⁹ into account in respect of reasonable preventability: the degree or extent of the risk of harm created by the wrongdoer;⁸³⁰ the gravity of the possible damage if the risk of harm materialises;⁸³¹ the utility of the wrongdoers conduct;⁸³² and the cost and difficulty of taking preventative steps.⁸³³ The degree or

⁸²⁸ *Loureiro v iMvula Quality Protection (Pty) Ltd* 2014 5 BCLR 511 (CC) 527.

⁸²⁹ *Ngubane v SA Transport Services* 1991 1 SA 756 SA 46 (A) 776; *Pretoria City Council v De Jager* 1997 2 SA 46 (A) 55-56; *Cape Metropolitan Council v Graham* 2001 1 SA 1197 (SCA); *Mostert v Cape Town City Council* 2001 1 SA 105 (SCA) 119. See further cases referred to by Neethling and Potgieter *Delict* 152 fn 158; Van der Walt and Midgley *Delict* 254-259; Loubser and Midgley (eds) *Delict* 124-129; Burchell *Delict* 100-103.

⁸³⁰ If the harm would have been foreseen by the reasonable person but such harm would have been slight, then the reasonable person may not have taken steps to prevent harm and so too the defendant may not be found negligent. See *Herschel v Mrupe* 1954 3 SA 464 (A) 477 481; Van der Walt and Midgley *Delict* 254-255; Neethling and Potgieter *Delict* 152 fn 159.

⁸³¹ Even if there is only a slight possibility that the risk of harm may materialise but the risk of harm would be significant if it materialises, then the reasonable person would take steps to prevent such harm and, so too, the wrongdoer may be found negligent if he did not take steps to prevent the harm. See *Ngubane v South African Transport Services* 1991 1 SA 756 (A) 777; Neethling and Potgieter *Delict* 152 fn 160.

⁸³² See *S v Makwanazi* 1967 2 SA 593 (N) where the court weighed the utility of the driver’s conduct (getting passengers to their destination on time) against the risk of travelling on the wrong side of the road in order to overtake a stationary vehicle which could have caused harm (resulting in an accident) and found that the extent of the risk in relation to the risk and gravity of the harm outweighed the interests of the passengers. The driver was found negligent. See Van der Walt and Midgley *Delict* 256-257; Neethling and Potgieter *Delict* 153 fn 162.

⁸³³ See *Oosthuizen v Van Heerden* 2014 6 SA 423 (GP) 433 where the court held that the risk of passing an infectious disease onto neighbouring cattle was low. The cost of erecting a fence to contain the affected cattle so that they would not wander onto the neighbouring land infecting other cattle was high. The court held that the respondent was thus not negligent in the circumstances of the case.

extent of the risk of harm must be weighed against the utility of the wrongdoers conduct, and the cost and difficulty of taking preventative measures. If the degree or extent of the risk outweighs the utility of the wrongdoers conduct, then the reasonable person would take measures to prevent the ensuing harm. If the wrongdoer failed to take such steps, then he acted negligently. *Vice versa*, if the cost and difficulty of taking preventative measures outweigh the degree or extent of the risk, then the reasonable person would not take measures to prevent the ensuing harm.⁸³⁴ It goes without saying that a person should not be expected to guard against every possibility of harm.⁸³⁵

Once again, turning to *Loureiro*, Van der Westhuizen J⁸³⁶ considered the following factors in respect of reasonable preventability of harm:

“the risk created by providing access to a person without first verifying who he is or what he wants was great, as was the gravity of possible consequences. The burden of eliminating this risk was slight. A reasonable person would have taken steps to ascertain the identity of the man at the gate including, for example, determining whether the card flashed was a legitimate police identity card and at least enquiring why the man sought access to the premises. Even if one were to believe that he was a police officer, a reasonable person would have still checked that he was making a lawful demand. If he could not satisfy these enquiries, a reasonable person would not have opened the gate. A reasonable person also would have attempted to make contact with the main house or his employer to find out if the police were expected. [The security guard] failed to take any of these fairly easy precautions. When one is tasked with protecting a property against intruders, it is simply not reasonable to open a door for a stranger without adequately verifying who that person is or what he or she wants. [The security guard's] conduct fell short of that of a reasonable person”.

Fourthly, only if it transpires that the wrongdoer's conduct falls short in comparison to the reasonable steps taken by the reasonable person, then such wrongdoer would be found negligent⁸³⁷ as the court in *Loureiro* correctly concluded.

⁸³⁴ See for example *S v Makwanazi* 1967 2 SA 593 (N) where it was held that a reasonable person would have taken simple precautions which were not too costly by putting padlocks on the gates or erecting a structure in order to prevent harm; *Enslin v Nhlapo* 2008 5 SA 146 (SCA) 149-150 where it was held that simple measures could have been taken to prevent a herd of cattle from straying onto a public road, in particular, a cattle grid could have been erected or a padlock could have been put onto a steel gate preventing the cattle from entering the public road or installing a cattle grid; Loubser and Midgley (eds) *Delict* 127-128; Neethling and Potgieter *Delict* 153 fn 164.

⁸³⁵ *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 SA 827 (SCA) 837; *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) 445; *Boberg Delict* 210.

⁸³⁶ *Loureiro v iMvula Quality Protection (Pty) Ltd* 2014 5 BCLR 511 (CC) 528.

⁸³⁷ *Kruger v Coetzee* 1966 2 SA 428 (A) 430; Loubser and Midgley (eds) *Delict* 119; *Boberg Delict* 274; *Burchell Delict* 103-104.

It is also important to note that negligence must be determined in light of the prevailing conditions or surrounding circumstances. The following factors have been considered by our courts when judging negligence *in light of surrounding circumstances*: situations of sudden emergency;⁸³⁸ instances where one makes an error in judgment (such error must be *bona fide* and reasonable); an assumption that others will act in a reasonable manner; acting according to the general practice of a community; statutory exclusions that apply; when dealing with dangerous objects or situations, greater care is usually required; greater care is expected of a person dealing with minors, people living with disabilities⁸³⁹ or persons living with a mental impairment.

4.3.1 Conclusion

The influence of reasonableness on negligence is explicit with regard to the conduct of the defendant and the plaintiff (in respect of contributory negligence). In respect of negligence, with regard to the explicit influence of reasonableness, what must be determined is – did the defendant’s conduct and or the plaintiff’s conduct, if relevant, stray from the standard of the reasonable person? And if answered in the affirmative, then how far did the conduct stray? This is usually expressed as a percentage by the courts which is relevant in reducing the plaintiff’s award of compensation.⁸⁴⁰ As mentioned,⁸⁴¹ the courts recently have tried to distinguish between wrongfulness and negligence by stating that the inquiry into the reasonableness of the defendant’s conduct is a question of negligence and not wrongfulness. As said, and shown, this distinction is not plausible as the reasonableness of the defendant’s conduct is also important in respect of the enquiry into wrongfulness. Rather reasonableness has varying degrees of influence on both wrongfulness and negligence which is in fact explicit.

⁸³⁸ However, the defendant must be in a situation of imminent peril which was not caused as a result of his own doing and he must not have acted in an unreasonable manner.

⁸³⁹ See Neethling and Potgieter *Delict* 154-158; Loubser and Midgley (eds) *Delict* 130-133; Van der Walt and Midgley *Delict* 262-272.

⁸⁴⁰ Neethling and Potgieter *Delict* 170.

⁸⁴¹ See para 3.4 above.

4.4 The conflation of the elements of wrongfulness, fault and legal causation⁸⁴²

As mentioned, both the test for wrongfulness and negligence is generally objective in nature at least in contrast to intention. However, Knobel⁸⁴³ and Loubser and Midgley⁸⁴⁴ point out that the test for negligence is not purely objective but entails an objective-subjective enquiry. It is objective in the sense that the standard of the reasonable person applies to all but compared to wrongfulness is subjective, in that: “the reasonable person is placed in the position of the wrongdoer to take account of the facts known to the wrongdoer as well as the facts that he should have known”.

As mentioned also, wrongfulness is established: if the defendant infringes the plaintiff’s interests in an unreasonable manner according to the *boni mores*, according to the traditional approach; or if it is reasonable to impose liability on the defendant, according to the recent approach. Negligence is determined with reference to the conduct of the reasonable person. The courts however sometimes conflate the elements of not only wrongfulness and negligence but also causation. The concept of reasonableness is at the epicentre of the conflation. In particular the conflation stems from: the courts’ application of the requirement of “duty of care” in the English tort of negligence in our law which refers to the tests for negligence, wrongfulness and legal causation; the use of the criterion of reasonable foreseeability of harm (which is the subjective foresight or knowledge on the part of the defendant that his conduct would cause harm)⁸⁴⁵ by our courts in determining wrongfulness, fault and legal causation; the use of the criterion of reasonable preventability of harm by our courts in determining both wrongfulness and negligence; and the use of the test for negligence (reasonable foreseeability and preventability of harm) in determining wrongfulness.

(a) The influence of the requirement of “duty of care” in the English tort of negligence

A number of academic writers point out that the confusion between wrongfulness and negligence has been brought about largely due to the influence of the “duty of care”

⁸⁴² See Ahmed in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 56-57.

⁸⁴³ In Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 237.

⁸⁴⁴ (Eds) *Delict* 156-157. See para 3.3.5 above.

⁸⁴⁵ Van Aswegen 1993 *THRHR* 184.

concept in the English tort of negligence.⁸⁴⁶ The notion of a legal duty to prevent harm is sometimes misinterpreted by the courts “as a legal duty not to act negligently” or other synonymous statements.⁸⁴⁷ In respect of the legal duty relating to wrongfulness, Neethling and Potgieter⁸⁴⁸ refer to the enquiry as to “whether a legal duty existed according to the *boni mores* to act positively to prevent an infringement of a legally protected interest”. The courts must refrain from referring to the legal duty as a “legal duty not to act negligently”.⁸⁴⁹ This statement associates the wrongfulness enquiry, in particular a breach of a legal duty, with the test for negligence usurping the test for negligence.⁸⁵⁰ This clearly conflates the elements of wrongfulness and fault⁸⁵¹ and in fact alludes to the English concept of the “duty of care” and “breach of the duty of care” which encompasses the enquiry into wrongfulness and negligence simultaneously. Our courts have not regarded the concept of a duty of care as being a part of our law.⁸⁵² The courts also often refer to the duty of care synonymously with the legal duty to prevent harm when determining wrongfulness which should be avoided as it creates legal uncertainty. Loubser and Midgley⁸⁵³ point out that the

⁸⁴⁶ See Brand 2007 SALJ 80; Boberg *Delict* 30-31; Gowar 2011 *THRHR* 685ff. Loubser and Midgley (eds) *Delict* 149; Neethling and Potgieter *Delict* 158-160; Nugent 2006 SALJ 559; Van der Walt and Midgley *Delict* 121 fn 5; Ahmed 2012 *Obiter* 418. Cf Scott 1999 *De Jure* 342.

⁸⁴⁷ See *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 3 SA 138 (SCA) 144; *Gouda Boerdery BK v Transnet* 2005 5 SA 490 (SCA) 499; *Hattingh v Roux* 2011 5 SA 135 (WCC) 140; *Minister of Correctional Services v Lee* 2012 3 SA 617 (SCA) 623-624; Fagan 2000 *Acta Juridica* 51-53; Fagan 2005 SALJ 110-112; cases referred to by Neethling and Potgieter *Delict* 57 fn 135. Loubser and Midgley (eds) *Delict* 151 submit that “this statement basically implies that: negligence renders negligent conduct wrongful ... [w]rongfulness assumes that all the other requirements for liability either have been met, or will be met. It seems that the best way to describe the legal duty required for wrongfulness in its full sense is ‘the legal duty not to cause harm negligently or intentionally’, or, in the case of strict liability, simply ‘not to cause harm’”. See also Brand 2007 SALJ 80-81; Neethling and Potgieter 2007 *THRHR* 123-125; Van der Walt and Midgley *Delict* 115.

⁸⁴⁸ *Delict* 57.

⁸⁴⁹ See Scott 1999 *De Jure* 342.

⁸⁵⁰ See *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 3 SA 138 (SCA) 144; Neethling and Potgieter *Delict* 57; Neethling and Potgieter 2006 *TSAR* 611 ff; 2007 *THRHR* 123-124.

⁸⁵¹ See Neethling and Potgieter 2006 *TSAR* 611, 2007 *THRHR* 123-124; Neethling 2006 SALJ 212-213.

⁸⁵² *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 27; *Local Transitional Council of Delmas v Boshoff* 2005 5 SA 514 (SCA) 522; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 1 SA 461 (SCA) 468; *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 3 SA 138 (SCA) 144; *Hawekwa Youth Camp v Byrne* 2010 6 SA 83 (SCA) 90; *Herschel v Mrupe* 1954 3 SA 464 (A) 485-486; *Administrateur Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) 833; *McCarthy Ltd t/a Budget Rent A Car v Sunset Beach Trading 300 t/a Harvey World Travel* 2012 6 SA 551 (GNP) 559-561; *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2014 2 SA 214 (SCA) 222 .

⁸⁵³ (Eds) *Delict* 149. They refer to the courts unfortunate use of the duty of care concept in *Union Government v Ocean Accident & Guarantee Corporation Ltd* 1956 1 SA 577 (A) 585.

concept of “reasonable foreseeability” of harm has been used in the determination of wrongfulness with reference to the “duty of care” concept based on the test of the reasonable person thus blurring the distinction between wrongfulness and fault.⁸⁵⁴ It is manifestly clear that the concept of “duty of care” involves the tests for wrongfulness and negligence and the various uses of “reasonable foreseeability of harm” leads to the confusion.

(b) The use of the criterion “reasonable foreseeability of harm” by our courts in determining wrongfulness, fault and legal causation⁸⁵⁵

Reasonable foreseeability of harm has been used as a factor in determining wrongfulness,⁸⁵⁶ that is, in establishing whether conduct is unreasonable or not and in establishing the presence of a legal duty to prevent harm or loss. Reasonable foreseeability of harm is also one of the legs of inquiry in respect of negligence.⁸⁵⁷ It is evident that there is an overlap where the courts use reasonable foreseeability of harm to determine both wrongfulness and negligence.

Neethling and Potgieter⁸⁵⁸ refer to *Gouda Boerdery BK v Transnet*⁸⁵⁹ where Scott JA acknowledged that in the past, the courts “determined the issue of foreseeability as part of the enquiry into wrongfulness and, after finding that there was a legal duty to act reasonably, proceeded to determine the second leg of the negligence inquiry [preventability], the first (being foreseeability) having already been decided”. Scott

⁸⁵⁴ 1956 1 SA 577 (A) 585.

⁸⁵⁵ See *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2014 2 SA 214 (SCA) 225.

⁸⁵⁶ See *Government of the Republic of South Africa v Basdeo* 1996 1 SA 355 (A) 368-370; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA) 159-160; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking Standards Authority SA* 2006 1 SA 461 (SCA) 468; *Gouda Boerdery BK v Transnet* 2005 5 SA 490 (SCA) 499; *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA) 324; *Harrington No v Transnet (Ltd)* 2007 2 SA 228 (C) 246; *Stewart v Botha* 2008 6 SA 310 (SCA) 314; *eBotswana (Pty) Ltd* 2013 6 SA 327 (GSJ) 340; *iMvula Quality Protection (Pty) Ltd v Loureiro* 2013 3 SA 407 (SCA) 418. Cf *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2014 2 SA 214 (SCA) 225. See *contra Cape Empowerment Trust Limited v Fisher Hoffman Sithole* 2013 5 SA 183 (SCA) 197-198 where Brand JA held that “foreseeability and direct consequences ... do not play a role in establishing wrongfulness”. Cf Neethling 2006 SALJ 206-207.

⁸⁵⁷ *McCarthy Ltd t/a Budget Rent A Car v Sunset Beach Trading 300 t/a Harvey World Travel* 2012 6 SA 551 (GNP) 566.

⁸⁵⁸ *Delict* 163 fn 222.

⁸⁵⁹ 2005 5 SA 490 (SCA) 499 referred to by Neethling and Potgieter *Delict* 163 fn 222.

JA⁸⁶⁰ did, however, warn that if this approach is taken the distinction between wrongfulness and negligence should not be overlooked.

Loubser and Midgley⁸⁶¹ also refer to *Premier, Western Cape v Faircape Property Developers (Pty) Ltd*⁸⁶² where Lewis JA used reasonable foreseeability of harm as a factor in determining both wrongfulness and negligence, but state that although it may add weight in determining wrongfulness it may not be the decisive factor.⁸⁶³

“The foreseeability of harm to the plaintiff is also ‘a relevant consideration in the determination of lawfulness’... . One of the enquiries, then, for determining whether the Minister was under a legal duty to prevent harm ... is whether the Minister should have foreseen that his conduct ‘might endanger or prejudice others in regard to their legally protected interests’. A similar question is inevitably repeated when one is determining the issue of negligence. ... Would a reasonable Minister have foreseen that the applicant ... would be prejudiced or would suffer loss.”

The court in *Premier, Western Cape v Faircape Property Developers (Pty) Ltd*⁸⁶⁴ held that the “test for reasonableness goes not only to negligence, but also to determine the boundaries of lawfulness”.⁸⁶⁵ In *Country Cloud Trading v MEC, Department of Infrastructure Development*,⁸⁶⁶ dealing with intention and pure economic loss, the Constitutional Court stated that:

“[t]he relevance of fault and fault-related considerations in the wrongfulness query has been recognised on a number of occasions by the Supreme Court of Appeal. ... This is not to conflate the elements of fault and wrongfulness. ... It is merely a recognition of the fact that where fault rises to the level of intention, and where other fault-related elements (such as motive to cause harm) are present, this may be relevant in establishing wrongfulness.”

In this case, Khampepe J⁸⁶⁷ in respect of “foreseeability of harm” opined that it was not relevant to wrongfulness but to fault and that it served to “limit potential plaintiffs and diminish the risk of limitless liability”. The idea of limiting potential plaintiffs is echoed in the “duty of care” concept. Furthermore the idea of diminishing the risk of limitless liability, a policy consideration relevant to establishing wrongfulness

⁸⁶⁰ *Gouda Boerdery BK v Transnet* 2005 5 SA 490 (SCA) 499.

⁸⁶¹ (Eds) *Delict* 149-150.

⁸⁶² 2003 6 SA 13 (SCA) [42], [46].

⁸⁶³ See Neethling and Potgieter *TSAR* 894.

⁸⁶⁴ 2003 6 SA 13 (SCA) [42].

⁸⁶⁵ See *Cape Empowerment Trust v Fisher Hoffman Sithole* 2013 5 SA 183 (GSJ) 193.

⁸⁶⁶ 2015 1 SA 1 (CC) 15-16.

⁸⁶⁷ *Country Cloud Trading v MEC, Department of Infrastructure Development* 2015 1 SA 1 (CC) 16.

according to the recent approach and a duty of care, conflates wrongfulness and legal causation.

Neethling and Potgieter⁸⁶⁸ point out that Harms JA in *Steenkamp NO v Provincial Tender Board, Eastern Cape*⁸⁶⁹ stated that even though the role of reasonable foreseeability might be a factor taken into account in determining wrongfulness “it can never be decisive of the issue ... and since foreseeability also plays a role in determining legal causation, it would lead to the temptation to make liability dependent on the foreseeability of harm without anything more, which would be undesirable”. If the criterion of reasonable foreseeability of harm is regarded as a determining factor in the enquiry into wrongfulness, there will be conflation between wrongfulness and negligence leading to the “absorption of the English law tort of negligence into our law, thereby distorting it”.⁸⁷⁰

Fagan⁸⁷¹ states that in certain instances the reasonable foreseeability criterion does not have a bearing on conduct but is used as tool to limit liability. The courts⁸⁷² too, have held on occasion that the criterion of reasonable foreseeability is more appropriately considered as part of the determination of legal causation rather than wrongfulness. Brand JA in *Cape Empowerment Trust v Fisher Hoffman Sithole*⁸⁷³ stated that the criterion of “reasonable foreseeability” does “not play a role in establishing wrongfulness”.⁸⁷⁴ As will be discussed further on “reasonable foreseeability” of harm is one of the subsidiary theories that may be applied in determining legal causation, the primary theory being the flexible test based on policy considerations, fairness, reasonableness and justice.⁸⁷⁵ The courts have also viewed the criterion of reasonable foreseeability as an independent test which should be

⁸⁶⁸ *Delict* 163 fn 222; Neethling and Potgieter 2014 *TSAR* 893-894.

⁸⁶⁹ 2006 3 SA 151 (SCA) 159-160 referred to by Neethling and Potgieter *Delict* 163 fn 222.

⁸⁷⁰ *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 1 SA 461 (SCA) 468; Neethling and Potgieter *TSAR* 894.

⁸⁷¹ 2005 *SALJ* 110; cf Neethling 2006 *SALJ* 212.

⁸⁷² See *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) 163; *eBotswana vSentech* 2013 6 SA 327 (GSJ) 342; *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2014 2 SA 214 (SCA) 225; *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 1 SA 1 (CC) 14; Neethling and Potgieter *Delict* 164 fn 222.

⁸⁷³ 2013 5 SA 183 (GSJ) 197-198.

⁸⁷⁴ Neethling and Potgieter 2014 *TSAR* 895.

⁸⁷⁵ See *S v Mokgethi* 1990 1 SA 32 (A) 40-41; *Smit v Abrahams* 1994 4 SA 1 (A) 18; Neethling and Potgieter 2014 *TSAR* 891.

applied in a flexible manner.⁸⁷⁶ Neethling and Potgieter⁸⁷⁷ acknowledge that the criterion of reasonable foreseeability may be relevant in determining wrongfulness and legal causation, but warn that the distinctive functions of the two elements must not be overlooked.

In *eBotswana v Sentech*⁸⁷⁸ Spilg J referred to the element of wrongfulness with the issue of remoteness (legal causation). Spilg J submitted “wrongfulness, as one of the requirements of delictual liability, is established provided that it is not too remote”. However, Spilg J was referring to situations where a plaintiff does not have a legal duty to prevent pure economic loss when faced with indeterminate liability, relating to the wrongfulness enquiry.⁸⁷⁹ Spilg J stated that “foreseeability is formulated as more properly falling within the ambit of causation. The issue involves considerations of the application of the abstract (absolute) theory of negligence”⁸⁸⁰ but also stated that it is better suited under wrongfulness – “I would prefer to consider it under the question of wrongfulness in the sense of foreseeability of both the actual harm and of the manner in which it occurred The issue of culpability will still involve ... an enquiry into whether [the defendant] ought to have foreseen harm of the kind that actually occurred ...”.⁸⁸¹ Neethling and Potgieter⁸⁸² point out that although reasonable foreseeability of harm is a policy consideration which is considered as a factor in determining wrongfulness, it is, as Van Aswegen⁸⁸³ argues, more appropriate to deal with it under legal causation. The reason for this is not to “denaturise the functions of the different delictual requirements”. Van Aswegen⁸⁸⁴ correctly points out that the “scope of delictual liability is controlled by proper application of all the requirements for delictual liability, including legal causation”.⁸⁸⁵

⁸⁷⁶ Neethling and Potgieter 2014 *TSAR* 894 refer to *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) 164-165 and *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 4 SA 276 (SCA) 297-298.

⁸⁷⁷ 2014 *TSAR* 891.

⁸⁷⁸ 2013 6 SA 327 (GSJ) 340.

⁸⁷⁹ Neethling and Potgieter 2014 *TSAR* 893.

⁸⁸⁰ In *eBotswana v Sentech* 2013 6 SA 327 (GSJ) 342.

⁸⁸¹ *eBotswana v Sentech* 2013 6 SA 327 (GSJ) 340.

⁸⁸² 2014 *TSAR* 893.

⁸⁸³ 1993 *THRHR* 192-193.

⁸⁸⁴ 1993 *THRHR* 192.

⁸⁸⁵ Knobel 2008 *THRHR* 657 submits that the floodgates argument may be relevant to wrongfulness (in determining whether an interest is worthy of protection or whether based on policy it is desirable to protect such interest), fault, or legal causation, in the sense that if the damage to the plaintiff was unforeseeable to the reasonable person, fault is lacking and if it was foreseeable it may nevertheless be too remote (where legal causation is lacking).

It is evident that the various uses of the criterion of reasonable foreseeability are leading to legal uncertainty as illustrated above. Knobel⁸⁸⁶ convincingly argues that the “reasonable foreseeability” of harm criterion does not assist in determining wrongfulness or legal causation and is best suited to determining negligence.⁸⁸⁷ Van der Walt and Midgley⁸⁸⁸ in a similar vein submit:

“[t]he reasonableness test in the context of the wrongfulness enquiry is indeed very different from the reasonableness test for negligence. Negligence concerns the degree and extent of care that the defendant should have exercised when conducting the harmful activity. The enquiry focuses on the objective care that the defendant displayed, which is a fundamentally different issue from that of wrongfulness. The test for negligence requires courts to look at the defendant’s conduct and to place themselves in the position of the actor at the time of the conduct; in other words, not to consider the matter objectively from the point of view of an interested bystander, but objectively from the defendant’s point of view at the time of the incident, without considering the broader interests of the plaintiff or society, or factors that were not known to the defendant at the time. The cornerstone of the negligence test is foreseeability of harm but also whether steps ought to have been taken to prevent such harm.”

(c) The use of the criterion “reasonable preventability of harm” by our courts in determining both wrongfulness and negligence⁸⁸⁹

Brand JA in *Za v Smith*⁸⁹⁰ stated that the test for establishing wrongfulness in cases of omissions as enunciated in *Van Eeden v Minister of Safety and Security*⁸⁹¹ was unfortunate in that it confuses the elements of wrongfulness and fault. Brand JA submitted that if the test for wrongfulness in cases of omissions is “whether it would be reasonable to have expected the defendant to take positive measures, while the test for negligence is whether the reasonable person would have taken such positive measures, confusion between the two elements is almost inevitable”.

Loubser and Midgley,⁸⁹² and Neethling and Potgieter⁸⁹³ refer to the following factors *inter alia* such as: the nature and extent of the risk of harm; the magnitude of the harm

⁸⁸⁶ 2008 *THRHR* 656-657.

⁸⁸⁷ Fabricius J in *McCarthy Ltd t/a Budget Rent A Car v Sunset Beach Trading 300 t/a Harvey World Travel* (2012 6 SA 551 (GNP) 563) submitted that foreseeability is really part of the element of negligence, although it can overlap with wrongfulness in respect of omissions (566).

⁸⁸⁸ *Delict* 96-97.

⁸⁸⁹ See Neethling 2006 *SALJ* 207-208.

⁸⁹⁰ 2015 4 SA 574 (SCA) 584.

⁸⁹¹ (*Women’s Legal Centre Trust, as Amicus Curiae*) 2003 1 SA 389 (SCA) 395.

⁸⁹² (Eds) *Delict* 158-159.

⁸⁹³ *Delict* 164 fn 223.

if the risk materialises; resources available; cost of repair; cost of preventative measures and the utility of the defendant's conduct (usually taken into account in respect of establishing negligence under reasonable preventability of harm) which the courts⁸⁹⁴ consider in determining the existence of a legal duty in respect of determining wrongfulness and the presence of grounds of justification.⁸⁹⁵ Neethling⁸⁹⁶ admits that it may be pragmatic "to assume that where the defendant had a legal duty to prevent harm to another because he had reasonable and practical preventative measures at his disposal, his failure to comply with the legal duty would also be negligent because a reasonable person in his position would have taken preventative steps, and the defendant failed to take such steps". However, it may happen that the defendant's conduct will be considered wrongful in that he failed to comply with regard to his legal duty to prevent harm but may nevertheless escape liability because his attempt coincided with the conduct of the reasonable person. In this way the functions of the two elements remain intact.

(d) The use of the criterion "reasonable foreseeability" and "reasonable preventability of harm" in determining wrongfulness

In a number of decisions, our courts⁸⁹⁷ have also used reasonable foreseeability and preventability to determine wrongfulness. For example, in *Road Accident Fund v Mtati*,⁸⁹⁸ Farlam JA used the criterion of reasonable foreseeability and preventability to determine the existence of a legal duty of a driver of a motor vehicle. Scott⁸⁹⁹ points

⁸⁹⁴ See *Ngubane v South African Transport Services* 1991 1 SA 765 (A) 766; *Mpongwana v Minister of Safety and Security* 1999 2 SA 794 (C) 803; *Administrateur, Transvaal v Van der Merwe* 1994 4 SA 347 (A) 361; *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust v amicus curiae)* 2003 1 SA 389 (SCA) 400; *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 2 SA 118 (SCA) 123; *Eskom Holdings Ltd v Hendricks* 2005 5 SA 503 (SCA) 509; Neethling 2006 SALJ 207-208; Neethling and Potgieter *Delict* 164 fn 223.

⁸⁹⁵ *Minister of Law and Order v Milne* 1998 1 SA 289 (W) 294 where Nugent J stated that what must be asked is whether the reasonable person in the position of the defendant "would have considered that there was a real risk that death or serious injury was imminent" – this relates to reasonable preventability of harm in determining negligence which was used to determine wrongfulness. See also Neethling and Potgieter *Delict* 164 fn 223; Neethling 2006 SALJ 210; cf Fagan 2005 SALJ 97-99.

⁸⁹⁶ 2006 SALJ 211-212.

⁸⁹⁷ See *Government of the Republic of South Africa v Basdeo* 1996 1 SA 355 (SCA) 370; *Premier v Faircape Property Developers (Pty) Ltd* 2003 6 SA 13 (SCA). See Neethling 2006 SALJ 205-206.

⁸⁹⁸ 2005 6 SA 215 (SCA) 228.

⁸⁹⁹ 2007 *De Jure* 397-400.

out that in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck*,⁹⁰⁰ the Supreme Court of Appeal applied the classic test for negligence in respect of determining the ground of justification, necessity. On the other hand our courts⁹⁰¹ have also in numerous decisions reiterated that the elements of wrongfulness and negligence are distinct and should not be confused.

It is acknowledged that although our courts' intention is not to conflate the elements of wrongfulness and fault, these elements are indeed being conflated.

*4.5 Should the conflation between wrongfulness and fault be encouraged or not for theoretical or practical reasons?*⁹⁰²

Neethling and Potgieter⁹⁰³ do accept the slight overlap between the elements of wrongfulness and fault but warn that in accepting such overlap the functions of the two elements should not be refuted.

Loubser and Midgley⁹⁰⁴ submit that there is some overlap between wrongfulness and fault which does not:

“indicate a logical grey area or lack of definition of the elements of a delict The aim is not to develop a theory of delict that is made up of elements that fit into perfectly separate compartments. Wrongfulness and fault have broadly different focus areas (in the case of fault: blameworthiness of conduct, and in the case of wrongfulness: overall balance of interests and the scope of responsibility), but there are also common areas. Both these elements of delict are based on reasonableness and involve value judgments”.

Nugent⁹⁰⁵ does not accept the conflation between wrongfulness and fault. He validly points out that our law could be reformulated to combine wrongfulness and negligence, as in English law, under one heading “negligence” which includes the

⁹⁰⁰ 2007 2 SA 118 (SCA) 122-123.

⁹⁰¹ See *Simon's Town Municipality v Dews* 1993 1 SA 191 (A) 196; *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 27; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking Standards Authority* SA 2006 1 SA 461 (SCA) 468; *Gouda Boerdery BK v Transnet* 2005 5 SA 490 (SCA) 499; *Stewart v Botha* 2008 6 SA 310 (SCA) 314; *Local Transitional Council of Delmas v Boshoff* 2005 5 SA 514 (SCA) 522; *Road Accident Fund v Mtati* 2005 6 SA 215 (SCA) 227-228; *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) 441-442; *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA) 1204; Neethling 2006 SALJ 204-205.

⁹⁰² See Neethling 2006 SALJ 209 ff; Ahmed in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 56-57.

⁹⁰³ 2006 SALJ 214.

⁹⁰⁴ (Eds) *Delict* 159.

⁹⁰⁵ 2006 SALJ 557ff.

element of “duty of care”, but that wrongfulness and negligence have been developed and have different distinctive roles in our law. Nugent⁹⁰⁶ submits that wrongfulness establishes whether “conduct is capable of attracting liability for negligence. Negligence determines whether the conduct has indeed attracted liability ... [wrongfulness] first identifies a range of harmful conduct that is capable of attracting liability, and then attaches liability to that conduct if it is accompanied by fault”. Nugent⁹⁰⁷ however also condones the recent approach to determining wrongfulness, and does not agree that wrongfulness should be determined before fault. It is contradictory that Nugent states that two elements can be determined separately but then states that wrongfulness firstly identifies the harmful conduct that attracts liability for negligence.

Botha⁹⁰⁸ criticises Fagan’s views who he states is under the influence of English law at least with respect to the ground of justification “defence”. He prefers the *ex post facto* approach to determining wrongfulness but does not have any issue with the use of the concept of the reasonable person in respect of determining whether the ground of justification “defence” is applicable. He⁹⁰⁹ states that it is logical for an adjudicator to refer to the reasonable grounds for thinking that there was harm and then ultimately questions whether or not the situation existed depending on whether the reasonable person in that position would have believed there was danger. Botha⁹¹⁰ states that when the court refers to the reasonable person in this context as in *Chetty v Minister of Police*,⁹¹¹ the court refers to whether the person had reasonable grounds to believe something,⁹¹² which is not the same as saying the reasonable person would have foreseen and prevented harm, the test for negligence. Botha submits that in any event it remains with the fault enquiry as one is referring to a state of mind.

“There must have been *reasonable grounds for thinking* that, because of the crowd’s behaviour, there was such danger (commenced or imminent) ... as to require Police action. Whether or not such a situation existed must be considered objectively, the question being whether *a reasonable man in the position of the Police would have believed* that there was danger.”

⁹⁰⁶ 2006 SALJ 562.

⁹⁰⁷ 2006 SALJ 562.

⁹⁰⁸ 2013 SALJ 177ff.

⁹⁰⁹ Botha 2013 SALJ 168.

⁹¹⁰ 2013 SALJ 168-171.

⁹¹¹ 1976 2 SA 450 (N) 452-453.

⁹¹² See Scott 2007 *De Jure* 394; Scott 2007 *TSAR* 193 ff who refers to the formulation of “reasonable grounds for thinking” unfortunate.

Botha⁹¹³ submits:

“[i]t is not necessarily so that the ‘ex ante reasonable person test’ of the courts in private defence conflates wrongfulness and negligence. Neither is ... the court ... necessarily appl[ying] ‘the second leg of the test for negligence’ when they refer to the reasonable person The test for negligence cannot claim exclusive ownership of reference to the reasonable person in law, not even in the law of delict.”

Even though Botha⁹¹⁴ does not agree with the views of Neethling and Potgieter, his view is closer to theirs in the sense that in these particular instances they all agree that the concept of the “reasonable person” is not being used to test negligence. Neethling and Potgieter have gone a step further into justifying the use of the concept of the reasonable person within the enquiry into wrongfulness by stating that it is being used to “express the objective *boni mores* criterion”.

In light of the confusion and legal uncertainty, it is necessary to briefly refer to the difference between wrongfulness and negligence. Van Reenen J in *Moses v Minister of Safety and Security*⁹¹⁵ aptly stated:

“In the context of delictual liability a clear distinction is made in our law between wrongfulness and negligence ... It is generally accepted that in the absence of an established norm or a recognised ground of justification, wrongfulness is determined according to the criterion of reasonableness with reference to the legal convictions of the community as established by the Courts The test is an objective one based on all the facts of a particular case By contrast, reasonableness in the context of negligence is determined with reference to the conduct of a *bonus paterfamilias* in the position of the person whose conduct is under consideration.”

Neethling⁹¹⁶ and Potgieter⁹¹⁷ point out the following differences between the test for wrongfulness and negligence:

(a) A defendant’s conduct will be considered wrongful if, after balancing competing interests, it was found that the plaintiff’s interest was infringed in an unreasonable manner according to the *boni mores*, whereas in the case of negligence, the defendant’s conduct will be tested against the yardstick of the fictitious reasonable person and an enquiry as to whether the defendant should have reasonably foreseen

⁹¹³ 2013 *SALJ* 169.

⁹¹⁴ 2013 *SALJ* 170.

⁹¹⁵ 2000 3 SA 106 (C) 113.

⁹¹⁶ 2002 *SALJ* 283.

⁹¹⁷ Neethling and Potgieter *Delict* 163-167. See also Neethling and Potgieter 2004 *Obiter* 484-485; Neethling 2002 *SALJ* 285-286.

the harm, and taken reasonable steps to prevent such harm from ensuing. The courts have in the past referred to reasonable foreseeability and reasonable preventability of harm when determining wrongfulness which no doubt brings about confusion and uncertainty.⁹¹⁸

(b) Wrongfulness refers to the legal reprehensibility of the wrongdoer's conduct, whereas negligence refers to the legal blameworthiness of the defendant's conduct. Wrongfulness qualifies the conduct of the defendant and negligence qualifies the defendant.

(c) Wrongfulness is determined *ex post facto* on facts that actually happened⁹¹⁹ whereas negligence is determined *ex ante* based on probabilities.⁹²⁰ An example of the correct approach as explained by Neethling⁹²¹ and Potgieter was taken in *Kgaleng v Minister of Safety and Security*,⁹²² where a policeman in self-defence shot and killed the deceased. It transpired that the policeman thought the deceased was about to activate a grenade and throw it in his direction. The policeman who thought his life was in danger reacted by shouting at the deceased to drop the grenade, fired a warning shot, and thereafter killed the deceased with the second shot. Cloete J first determined wrongfulness *ex post facto* and found that the policeman had acted wrongfully. His life was not really in danger because the deceased in actual fact was carrying a tear gas canister and not a grenade. With regard to fault, the policeman did not have intention as he was not conscious of the wrongfulness of the act. He thought his actions were justified. Furthermore the policeman was not negligent because a reasonable person would have acted in the same manner.

(d) Wrongfulness is determined before negligence.⁹²³

(e) The test for wrongfulness is narrower than the test for negligence. A defendant's conduct may be regarded as unreasonable and therefore wrongful, but such person

⁹¹⁸ See the cases referred to by Neethling and Potgieter *Delict* 163 fn 222-224.

⁹¹⁹ Although, as mentioned, an *ex ante* approach has been applied by our courts in respect of certain grounds of justification. See para 3.4 above with regard to the grounds of justification.

⁹²⁰ See *NM v Smith (Freedom of Expression Institute as Amicus Curiae)* 2007 5 SA 250 (CC) 274; Neethling and Potgieter *Delict* 164 fn 227.

⁹²¹ See Neethling 2006 *SALJ* 210-211; Neethling 2002 *SALJ* 284-286.

⁹²² 2001 4 SA 854 (W).

⁹²³ See Neethling and Potgieter 2001 *THRHR* 480-481; para 3 above.

may have acted reasonably according to the standard of the reasonable person thereby negating fault in the form of negligence and in turn delictual liability.

4.6 Conclusion

As has been shown thus far, the influence of reasonableness on the delictual elements of wrongfulness and fault has resulted in the courts conflating the tests for wrongfulness, negligence,⁹²⁴ and legal causation. This has occurred as a result of the separate application of the two legs of the test for negligence in establishing wrongfulness as well as legal causation (which will be discussed further under the next paragraph) and also by applying the entire test for negligence to establish wrongfulness.⁹²⁵ The tests for wrongfulness, fault and legal causation are distinct, specific and cannot be combined in a theoretically correct or practical sense. However, there are certain factors such as reasonable foreseeability of harm that are relevant to the enquiry of wrongfulness, fault and legal causation. The trick is to always bear in mind the role of the factors in determining the specific elements as there is a specific focus in such enquiry, and to ensure that the distinctive function of each element is not negated.

The concept of reasonableness plays a different role in determining the different elements. In respect of the traditional approach to determining wrongfulness, the question is – did the defendant *act reasonably* or *fail to act reasonably* (where there was a legal duty to prevent harm or loss) according to the *boni mores*, constitutional imperatives and in light of all surrounding circumstances, in infringing the plaintiff's interests? In respect of the recent approach, the question is – is it *reasonable to impose liability* on the defendant? In respect of intention, only if the wrongdoer *intended to cause harm or loss* to the plaintiff would it be reasonable to hold the wrongdoer liable. In respect of negligence the question is – did the *defendant's conduct stray from that of the reasonable person*, and if so how far?

⁹²⁴ Neethling 2006 SALJ 204ff. See also Neethling and Potgieter *Delict* 163-167.

⁹²⁵ Neethling 2006 SALJ 209. See further Fagan 2005 SALJ 90ff.

5. Causation

In this paragraph, the influence of reasonableness on “causation” will be analysed. There is often uncertainty and confusion between the elements of wrongfulness, fault and causation, once again due to the influence of reasonableness. Therefore it is necessary to critically analyse and compare the influence of reasonableness on these three elements in order to bring about clarity and certainty in respect of their different roles in determining delictual liability.

5.1 Factual causation

When determining delictual liability, the damage suffered must have been caused by the wrongful conduct of the culpable defendant.⁹²⁶ The enquiry into causation is based on two components, factual and legal causation.⁹²⁷ A factual causal nexus is determined by looking at the facts of the case.⁹²⁸ Various theories of causation have been developed but almost all the theories use⁹²⁹ the *conditio sine qua non* (“but-for” test) theory as the starting point in order to determine whether factual causation is present.⁹³⁰ According to this theory, positive conduct on the part of the defendant must be thought away in order to establish whether the consequences would have ensued.⁹³¹ In cases of omissions hypothetical positive conduct is inserted.⁹³² The

⁹²⁶ *mCubed International (Pty) Ltd v Singer* 2009 4 SA 471 (SCA) 481; Loubser and Midgley (eds) *Delict* 69.

⁹²⁷ *Siman & Co Ltd v Barclays National Bank Ltd* 1984 2 SA 888 (A) 914-915; *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) [34]; *International Shipping Company (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 700; *Minister of Police v Skosana* 1977 1 SA 31 (A) 34-35 43-44; *mCubed International (Pty) Ltd v Singer* 2009 4 SA 471 (SCA) [22]; *McCarthy Ltd t/a Budget Rent A Car v Sunset Beach Trading 300 t/a Harvey World Travel* 2012 6 SA 551 (GNP) 568; *Lee v Minister for Correctional Services* 2013 2 BCLR 129 (CC) 144; Van der Walt and Midgley *Delict* 275; Neethling and Potgieter *Delict* 183-184; Loubser and Midgley (eds) *Delict* 70.

⁹²⁸ Neethling and Potgieter *Delict* 183.

⁹²⁹ Most authors and the courts prefer the *conditio sine qua non* theory. See *International Shipping Company (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 700; *Cape Empowerment Trust v Fisher Hoffman Sithole* 2013 5 SA 183 (GSJ) 192 and the list of authors referred to by Neethling and Potgieter *Delict* 185 fn 11 as well as the cases where this theory was applied (fn 12). Cf Loubser and Midgley (eds) *Delict* 71.

⁹³⁰ Neethling and Potgieter *Delict* 183. See Ahmed in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 57.

⁹³¹ Van der Walt and Midgley *Delict* 278; Burchell *Delict* 115.

⁹³² By inserting positive hypothetical conduct, a retrospective analysis is applied of what would probably have occurred taking into account the evidence and what can be expected in the “ordinary course of human affairs” – *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) 449; Loubser and Midgley (eds) *Delict* 72; Neethling and Potgieter *Delict* 191-192.

enquiry involves whether one fact follows from another.⁹³³ If the harmful consequence(s) would have resulted without the defendant's conduct then there is no factual causation.⁹³⁴ This theory has been criticised⁹³⁵ for it not applying as a test for causation but rather as an affirmation of an *ex post facto* conclusion of an already established factual causal link.⁹³⁶ Even though the but-for test is commonly referred to by the courts, it is either applied more flexibly or is not the only test used. There are exceptions⁹³⁷ where common sense standards are applied.⁹³⁸ It is unclear from academic writers' opinions and case law whether the common sense standard is part of the but-for test, adding a flexible dimension to it, or, is it a standard on its own, separate from the but-for test? Neethling and Potgieter,⁹³⁹ for example, refer to the common sense standard as a flexible approach to the but-for test, whereas Van der Walt and Midgley⁹⁴⁰ refer to the common sense standard as a separate standard apart from the but-for test. Case law does not provide clarity either. A flexible approach to the but-for test using the common sense standard was formulated and applied in *Minister of Finance v Gore*,⁹⁴¹ where it was held that the application of the

⁹³³ *Lee v Minister for Correctional Services* 2013 2 BCLR 129 (CC) 144; Neethling and Potgieter *Delict* 195; Loubser and Midgley (eds) *Delict* 72; Ahmed in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 58.

⁹³⁴ See *International Shipping Company (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 700; Neethling and Potgieter *Delict* 187; Van der Walt and Midgley *Delict* 278; Loubser and Midgley (eds) *Delict* 71-72.

⁹³⁵ In that it is "circuitous", cannot be used in cases of cumulative causation and merely expresses the already determined causal link. See the points of criticism on the *conditio sine qua non* theory provided by Neethling and Potgieter *Delict* 187-191; Burchell *Delict* 114-115; Loubser and Midgley (eds) *Delict* 77-78. Neethling and Potgieter *Delict* 195-196 are of the view that the *conditio sine qua non* test cannot apply as a test for factual causation and that "knowledge and experience, as well as reliable evidence, are required to determine a causal link. ... Since there is no magic formula by which one can generally establish a causal *nexus*, the existence of such a *nexus* will be dependent on the facts of a particular case, and a characteristic of a causal *nexus* is that one fact arises out of another".

⁹³⁶ See Neethling and Potgieter *Delict* 190 195; Burchell *Delict* 114-115.

⁹³⁷ Where a strict application of the *conditio sine qua non* theory is not suitable. See Van der Walt and Midgley *Delict* 280-281, 284-285 who explain that the question of liability, indivisibility and the burden of proof are considered as policy issues and are dealt with under legal causation. See also Neethling and Potgieter *Delict* 188-189; Loubser and Midgley (eds) *Delict* 78.

⁹³⁸ See *Lee v Minister of Correctional Services* 2013 2 SA 144 (CC); 162; *ZA v Smith* 2015 4 SA 574 (SCA) 589 where Brand JA applied a common sense practical approach in determining factual causation. Loubser and Midgley (eds) *Delict* 80 argue that the common sense approach to determining factual causation is not a suitable test in that the idea of common sense varies between people and it does not encourage providing proper reasons for arriving at the conclusion. See also Van der Walt and Midgley *Delict* 280.

⁹³⁹ *Delict* 193-194.

⁹⁴⁰ *Delict* 280-281.

⁹⁴¹ 2007 1 SA 111 (SCA) 125. See *Siman and Co (Pty) Ltd v Barclays National Bank Ltd* 1984 2 SA 888 (A) 917-918 where a common sense approach was referred to; *Lee v Minister for Correctional Services* 2013 2 BCLR 129 (CC) 146 where the court stated that common sense must sometimes apply; Neethling and Potgieter *Delict* 194; Van der Walt and Midgley *Delict* 280; Loubser and Midgley (eds) *Delict* 73 79-80.

but-for test is not based on philosophy, science or mathematics but on common sense. In *Minister of Police v Skosana*⁹⁴² the court stated that the question is whether the defendant's conduct "caused or materially contributed" to the plaintiff's damage. In *Minister of Safety and Security v Van Duivenboden*,⁹⁴³ the court stated that factual causation may be determined by a "sensible retrospective analysis" of what would have probably occurred. Neethling and Potgieter⁹⁴⁴ point out that in cases of multiple or successive causes in South African law, such as in the facts of the English decision of *Fairchild v Glenhaven Funeral Services Ltd*⁹⁴⁵ (discussed in more detail in the next chapter),⁹⁴⁶ where the plaintiffs are unable to pinpoint exactly which defendants' caused the harm, the but-for test used flexibly would still result in liability being excluded. They suggest that instead of an unfair outcome in South African law, the flexible approach to determining legal causation may assist in reaching a fair outcome. As will be shown in the discussion of causation in English,⁹⁴⁷ American⁹⁴⁸ and French law,⁹⁴⁹ a pragmatic approach is followed in reaching a just outcome, and policy considerations are often considered under factual causation as the but-for test strictly applied would reach an unfair outcome. In South African law, a factual nexus either exists or it does not and a factual nexus is usually easily found. Policy considerations are considered under legal causation and not under factual causation.⁹⁵⁰

The courts determine a causal link between the act and the consequences based on the evidence produced and probabilities of how one fact arises from another.⁹⁵¹ A single act can in reality result in an endless chain of harmful events. In terms of fairness and legal policy, a wrongdoer should not be subject to unlimited liability, thus

⁹⁴² 1977 1 SA 31 (A) 43-44. See Van der Walt and Midgley *Delict* 281-283.

⁹⁴³ 2002 3 All SA 741 (SCA) 449.

⁹⁴⁴ *Delict* 194.

⁹⁴⁵ 2003 1 AC 32.

⁹⁴⁶ See chapter 4 para 4.

⁹⁴⁷ See chapter 4. Para 4.1.

⁹⁴⁸ See chapter 5 para 4.1.

⁹⁴⁹ See chapter 4 para 4.1.

⁹⁵⁰ See *Lee v Minister for Correctional Services* 2013 2 BCLR 129 (CC) 149-150 where Nkabinde J confirmed that factual causation is determined on the facts of the case and cannot depend on social and policy considerations "[t]here is no pressing need to contaminate the factual part of the causation enquiry with these kinds of normative standards based on social and policy considerations". See also Neethling and Potgieter *Delict* 195 and Van der Walt and Midgley *Delict* 285.

⁹⁵¹ See Neethling and Potgieter *Delict* 191, 195-196; *Lee v Minister for Correctional Services* 2013 2 BCLR 129 (CC) 144.

legal causation brings about the limitation of liability.⁹⁵² The following hypothetical situation illustrates the interplay between factual and legal causation:

X, stops at a filling station to purchase fuel. He does not check to see whether the petrol attendant has removed the hose used to fill the fuel tank. X drives off and the hose breaks, releasing fuel on the ground and around the petrol pump. Almost immediately another driver, Y, drives in and flicks his unfinished lit cigarette into the area where the spilled fuel has settled. This causes a fire which results in people getting hurt and damage to property. X, in respect of factual causation could be the factual cause for all the harmful consequences flowing from his conduct, but by employing the criteria of legal causation, and accepting that there is a *novus actus interveniens* – a break in the casual link – his liability in respect of causation can be limited.

In establishing factual causation in cases of omissions, the courts⁹⁵³ insert a hypothetical positive act, such as some form of reasonable conduct in place of the actual omission.⁹⁵⁴ This then raises the question of whether the inserted conduct must be determined objectively, in terms of what the reasonable person would have done, or subjectively, what the defendant would have done.⁹⁵⁵ By using the subjective approach, confusion may result in respect of factual causation and negligence. Ideally, what should be established first is whether the defendant could have done something to prevent the harm, thereby establishing causation, and thereafter whether there was a legal duty to act and the defendant failed to comply with that

⁹⁵² Neethling and Potgieter *Delict* 183-184; Van der Walt and Midgley *Delict* 281, 285; Loubser and Midgley (eds) *Delict* 89. It should be noted that in a strict sense not only legal causation limits liability as the other elements also assist in limiting delictual liability. For example wrongfulness also limits liability. See *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) 163-174; Neethling and Potgieter *Delict* 199 fn 99; Loubser and Midgley (eds) *Delict* 98; Burchell *Delict* 119.

⁹⁵³ See *S v Van As* 1967 4 SA 594 (A) where the policeman failed to search for children who later died of exposure. The court described the course of conduct of hypothetical police officers who would have taken reasonable steps to search for the children thus preventing their death. See also *Minister of Police v Skosana* 1977 1 SA 31 (A) 34 where the court referred to the hypothetical enquiry into what would have happened if the policemen would have ensured that the deceased received medical treatment in time thereby preventing the deceased's death; cf Burchell *Delict* 115-116; Van der Walt and Midgley *Delict* 282-284; Neethling and Potgieter *Delict* 191-193; Loubser and Midgley (eds) *Delict* 72-73.

⁹⁵⁴ *International Shipping Company (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 700; *Lee v Minister for Correctional Services* 2013 2 BCLR 129 (CC) 145; Neethling and Potgieter *Delict* 191; Van der Walt and Midgley *Delict* 283.

⁹⁵⁵ See *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA) 329; Neethling and Potgieter *Delict* 192; Loubser and Midgley (eds) *Delict* 75-76.

legal duty, thereby determining wrongfulness. Finally, in respect of the question of negligence – would the reasonable person in the position of the wrongdoer have acted in order to prevent the harm? Should the adjudicator enquire whether “lawful and reasonable conduct would have prevented the harmful consequence, the enquiries into factual causation, wrongfulness and negligence are raised simultaneously and confusion may result”.⁹⁵⁶

The influence of reasonableness on factual causation is implicit. What needs to be determined is whether the defendant’s conduct factually caused the harm or loss to the plaintiff for purposes of delictual liability. It will only be reasonable to hold the defendant liable if he in fact caused the harm. In general, South African law follows the rule *res perit domino* or “damage rests where it falls”, and this means that a good reason must exist to make someone pay for damage suffered by another person.⁹⁵⁷ Delict is one such reason, and fundamental to delictual liability is the understanding that the wrongdoer can in principle only be held liable for damage that he has in fact caused.⁹⁵⁸ If a factual causal link between the conduct and the consequences cannot be found, then naturally factual causation is absent and so is delictual liability. The common sense standard, whether part of the but-for test or as a standard on its own, lends to the reasonableness of finding factual causation in instances where the strict application of the but-for test leads to unjust results. Usually factual causation where conduct takes the form of a positive act is easily determined by the courts. Problems may arise with omissions where a subjective approach as opposed to an objective approach is applied to inserting positive reasonable conduct. The influence of reasonableness here is prevalent with regard to the inserted hypothetical positive conduct. Factual causation should be established first by considering what positive steps the wrongdoer could have taken (in terms of the but-for test), thereafter whether there was a legal duty to act (determining wrongfulness in cases of omissions) and then negligence (would the reasonable person have acted in order to prevent the harm).

⁹⁵⁶ Neethling and Potgieter *Delict* 193.

⁹⁵⁷ Neethling and Potgieter *Delict* 3.

⁹⁵⁸ There are exceptional instances where a defendant can be held liable for damage that he has not caused, for example, an employee may be held vicariously liable for the delict of an employer of course in such an instance the defendant cannot really be said to be a wrongdoer.

5.2 Legal causation

In respect of factual causation, the focus is on the facts of the case, whereas in respect of legal causation, public or legal policies, as well as value judgments, are considered.⁹⁵⁹ Legal causation is used to determine which consequences a defendant should be held delictually liable for, also commonly referred to as “imputability of harm”. The defendant is not liable for damage which is “too remote”, also referred to as the “remoteness of damage”.⁹⁶⁰ Neethling and Potgieter⁹⁶¹ point out that limitation of liability is implicitly considered when the courts consider the other elements of a delict, in particular wrongfulness and fault. The courts expressly deal with legal causation where there is a chain of consecutive consequences. In the past, the courts referred to a number of tests in order to determine legal causation⁹⁶² such as:⁹⁶³ two of English descent, the “direct consequences” theory⁹⁶⁴ and the “reasonable foreseeability” theory;⁹⁶⁵ and one of continental origin, the “adequate

⁹⁵⁹ *Minister of Police v Skosana* 1977 1 SA 31 (A) 34-35; *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 2 SA 888 (A) 914; *Tuck v Commissioner for Inland Revenue* 1988 3 SA 819 (A) 832-833; *S v Mokgethi* 1990 1 SA 32 (A) 39 ff; *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 700-701; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A) 763 ff; *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA) 332; *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) 163-164; *Neethling v Oosthuizen* 2009 5 SA 376 (WCC) 388; Neethling and Potgieter *Delict* 197-198 fn 94; Loubser and Midgley (eds) *Delict* 71; Van der Walt and Midgley *Delict* 285.

⁹⁶⁰ *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 2 SA 888 (A) 914; *Tuck v Commissioner for Inland Revenue* 1988 3 SA 819 (A) 832-833; *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 700-702; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A) 763 ff; *Road Accident v Sauls* 2002 2 SA 55 (SCA) 61; *OK Bazaars (1929) Ltd v Standard Bank of South Africa Ltd* 2002 3 SA 688 (SCA) 697; *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) 163-164; Neethling and Potgieter *Delict* 198 fn 95; Neethling and Potgieter 2014 *TSAR* 890; Boberg *Delict* 440.

⁹⁶¹ *Delict* 198.

⁹⁶² See Neethling and Potgieter *Delict* 203-216; Loubser and Midgley (eds) *Delict* 94-98; Van der Walt and Midgley *Delict* 286; Burchell *Delict* 119-121 with regard to the application of some of the subsidiary theories.

⁹⁶³ See Neethling and Potgieter *Delict* 200; cf Loubser and Midgley (eds) *Delict* 91.

⁹⁶⁴ In terms of this theory the defendant is liable for all the direct consequences stemming from the negligent conduct and not limited to the foreseeable consequences. Because this test may result in casting a wide net of liability, the courts limit it to physical consequences and apply the “foreseeable plaintiff” theory. This theory has been applied by our courts and is still used as a subsidiary test. See Loubser and Midgley (eds) *Delict* 94-95; Neethling and Potgieter *Delict* 205-206; Boberg *Delict* 440-442; Van der Walt and Midgley *Delict* 290-291; Burchell *Delict* 119-120.

⁹⁶⁵ According to this approach, the general nature of the damage (consequences) should have been reasonably foreseeable by the defendant before liability may follow. See Loubser and Midgley (eds) *Delict* 95-96; Neethling and Potgieter *Delict* 214-216; Boberg *Delict* 442-445; Van der Walt and Midgley *Delict* 292-293; Burchell *Delict* 120-121.

cause” theory.^{966 967} Initially, the “direct consequences” theory and thereafter the “reasonable foreseeability” theory were the tests most commonly applied⁹⁶⁸ until the Appellate division in *S v Mokgethi*⁹⁶⁹ adopted a flexible umbrella approach which acknowledges all the tests as subsidiary tests and does not rely on a single test.⁹⁷⁰ In respect of this approach, there is no single test for legal causation and what must be considered is “whether there is a close enough relationship between the wrongdoer’s conduct and its consequence for such consequence to be imputed to the wrongdoer in view of policy considerations based on reasonableness, fairness and justice”.⁹⁷¹ Thus the reasonableness of the defendant’s conduct is determined with “reference to the proximity or remoteness of the act to its consequence or consequences”.⁹⁷² Neethling and Potgieter⁹⁷³ aptly point out that the different theories should be regarded as:

“pointers or criteria reflecting legal policy and legal convictions about when damage should be imputed to a person: damage is imputable when, depending on the circumstances, it is a direct consequence of the conduct, or reasonably foreseeable, or if it is an adequate relationship to the conduct, or for a combination of such reasons, or simply for reasons of legal policy. A court is not bound beforehand to a single, specific theory, but has the freedom in each case to apply the theory which serves reasonableness and justice best in light of the circumstances, taking into account considerations of policy”.

⁹⁶⁶ This theory (of German and the Netherland descent) imputes a consequence or consequences on the defendant if, in the usual course of events, the conduct of the defendant has the tendency of bringing about those consequences. This theory has received criticism but is applied in criminal law. See Loubser and Midgley (eds) *Delict* 96-97; Neethling and Potgieter *Delict* 203-204; Boberg *Delict* 445-447; Van der Walt and Midgley *Delict* 294-295; Burchell *Delict* 120.

⁹⁶⁷ A theory also exists whereby the determination of legal causation is irrelevant as fault is sufficient. The defendant may be held liable for intended consequences as intended consequences cannot be too remote. Alternatively the defendant may be held liable for those consequences that he should have reasonably foreseen and prevented (especially according to the concrete approach of determining negligence). See Neethling and Potgieter *Delict* 207-214 who argue that negligence and intent cannot meaningfully apply as a criterion for legal causation. cf Loubser and Midgley (eds) *Delict* 97-98; Van der Walt and Midgley *Delict* 182; Boberg *Delict* 440.

⁹⁶⁸ See Loubser and Midgley (eds) *Delict* 91; Neethling and Potgieter *Delict* 200; Visser in Du Bois (gen ed) *Wille’s Principles of South African law* 1130.

⁹⁶⁹ 1990 1 SA 680 (A).

⁹⁷⁰ See *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) 700; *mCubed International (Pty) Ltd v Singer* 2009 4 SA 471 (SCA) 482; *Smit v Abrahams* 1994 4 SA 1 (A) 14 ff; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A) 764 ff; *OK Bazaars (1929) Ltd v Standard Bank of South Africa Ltd* 2002 3 SA 688 (SCA) 699; *Clark v Hurst* 1992 4 SA 630 (D) 659; Neethling and Potgieter *Delict* 200 fn 111 in respect of other cases which sanctioned the flexible approach. Cf Visser in Du Bois (gen ed) *Wille’s Principles of South African law* 1130.

⁹⁷¹ *S v Mokgethi* 1990 1 SA 680 (A) 40-41.

⁹⁷² Knobel 2008 *THRHR* 654. See Ahmed in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 59.

⁹⁷³ *Delict* 202.

With respect to causation, the *novus actus interveniens* (break in the causal link or intervening act) is an important concept in limiting⁹⁷⁴ or excluding liability.⁹⁷⁵ A *novus actus interveniens* may stem from the conduct of a third person, the plaintiff or a force of nature and is applied if it was not reasonably foreseeable.⁹⁷⁶ In the hypothetical case referred to above in reference to legal causation, the flicking of the unfinished lit cigarette could be regarded as a break in the causal link or an intervening act. In applying the accepted flexible approach, the question would rest on whether the *novus actus* (Y's conduct) had a bearing on the resultant harm to such an extent that the resultant harm cannot be imputed to X, based on public policy, reasonableness, fairness and justice. Reference could also be made to a subsidiary test. For example, if consideration is given to the reasonable foreseeability criterion, it may be stated that the harmful consequences would not have been reasonably foreseeable by X, therefore X should not be liable in respect of the harm suffered or the damage sustained.⁹⁷⁷

In respect of the *talem qualem* (thin skull or egg shell) rule, one must take his victim as he finds him, in other words, with all his inherent infirmities, whether physical, psychological or financial. Such person suffers more extensive loss or injury as a result of the weakness and the defendant is generally held liable for all the loss sustained.⁹⁷⁸ In a sense, it may seem unreasonable that the defendant is held liable for the full extent of the loss, but on the other hand it is reasonable to compensate the plaintiff who would have not suffered harm or loss had the defendant not caused such harm. Contributory fault where applicable may reduce an award or exclude liability. There is uncertainty as to the reasoning or justification of how the defendant should be held liable or which theory for legal causation should be applied, but the

⁹⁷⁴ See for example, *Mafesa v Parity Versekeringsmaatskappy Bpk* 1968 2 SA 603 (O) where the plaintiff sustained a fractured leg as a result of an accident. He did undergo surgery which included inserting a steel plate and the bone set satisfactorily. The plaintiff, while using crutches, subsequently slipped and fell fracturing his leg again. When the plaintiff sued the defendant, the court only held the defendant liable for the consequences as a result of the first fracture of the leg and found that the second incident was a *novus actus interveniens* which was not reasonably foreseeable. See Loubser and Midgley (eds) *Delict* 99-100; Van der Walt and Midgley *Delict* 291.

⁹⁷⁵ See in general Neethling and Potgieter *Delict* 216-219; Loubser and Midgley (eds) *Delict* 99-100; Van der Walt and Midgley *Delict* 291.

⁹⁷⁶ Neethling and Potgieter *Delict* 218-219; Loubser and Midgley (eds) *Delict* 99; Van der Walt and Midgley *Delict* 291.

⁹⁷⁷ See Neethling and Potgieter *Delict* 217.

⁹⁷⁸ Neethling and Potgieter *Delict* 219.

flexible approach is the most plausible.⁹⁷⁹ In respect of the flexible approach, the plaintiff's inherent infirmity is just another fact in the particular case to be taken into account "in view of policy considerations based on reasonableness, fairness and justice", in determining the imputability of harm.⁹⁸⁰

Legal causation and wrongfulness both serve to limit liability by means of policy considerations.⁹⁸¹ The concept of reasonableness is common to both. The question of negligence is also policy based which creates a danger of the conflation of the elements of wrongfulness, negligence and causation.⁹⁸² Brand JA in *Cape Empowerment Trust v Fisher Hoffman Sithole*⁹⁸³ submitted that wrongfulness and legal causation are both "determined by considerations of legal and public policy" and they "perform the same function" serving as "safety valves preventing imposition of

⁹⁷⁹ The reasonable foreseeability theory, direct consequences theory and the fault theory have been considered. See Neethling and Potgieter *Delict* 219-220; cf Loubser and Midgley (eds) *Delict* 99.

⁹⁸⁰ See *Smit v Abrahams* 1994 4 SA 1 (A) 14-15; Neethling and Potgieter *Delict* 220.

⁹⁸¹ Van der Walt and Midgley *Delict* 95.

⁹⁸² See *Lee v Minister for Correctional Services* 2013 2 BCLR 129 (CC) 155 where Nkabinde J stated: "[t]he concern that a flexible approach to factual causation and the relaxation of the but-for test in appropriate cases may lead to limitless liability, especially in relation to omissions, has been addressed by the development of the test for reasonableness in the wrongfulness enquiry. That enquiry now concerns the reasonableness of imposing liability on a defendant, and is not restricted to the reasonableness of the defendant's conduct, which is an element of the separate negligence enquiry in our law". This is unacceptable as delictual liability is based on the proving of each element and in each element liability may be limited. With regard to causation itself (and the application of the but-for test) a single act can be the factual cause of many harmful events, but legal causation (where the flexible approach is applied, will limit the defendant's liability (in respect of the separate element of causation). Brand JA in *Cape Empowerment Trust v Fisher Hoffman Sithole* 2013 5 SA 183 (SCA) 193-194 stated that "the element of wrongfulness introduces a measure of control. It serves to exclude liability in situations where most right-minded people, including judges, will regard the imposition of liability as untenable, despite the presence of all other elements of Aquilian liability". If the test for negligence and wrongfulness is telescoped into one [as submitted by Loubser], the function of the latter element as a measure of control is lost completely (see *Roux v Hattingh* 2012 6 SA 428 (SCA) [35]). The problem is demonstrated thus by Harms JA in *Telematrix* [14]: "To illustrate: there is obviously a duty – even a legal duty – on a judicial officer to adjudicate cases correctly and not to err negligently. That does not mean that a judicial officer who fails in the duty, because of negligence [or even gross negligence], acted wrongfully. Put in direct terms: can it be unlawful, in the sense that the wronged party is entitled to monetary compensation, for an incorrect judgment given negligently [or even grossly negligently] by a judicial officer, whether in exercising a discretion or making a value judgment, assessing the facts or in finding, interpreting or applying the appropriate legal principle? Public or legal policy considerations require that there should be no liability, i.e., that the potential defendant should be afforded immunity against a damages claim, even from third parties affected by the judgment". Brand is of the view that wrongfulness and legal causation, because they are determined by considering public policy, serve to limit liability. This view as submitted above cannot be accepted as each element in a sense limits liability and, in actual fact, policy considerations are considered in determining wrongfulness, negligence, legal causation and damage. Furthermore it would be unreasonable to hold a wrongdoer liable if all the elements of a delict as required are not present.

⁹⁸³ 2013 5 SA 183 (SCA) 197-198.

liability in a particular situation which most right-minded people will regard as untenable, despite the presence of all other elements of delictual liability and since wrongfulness and legal causation (remoteness) are both determined by considerations of policy, a certain degree of overlapping is inevitable". He continued by stating that wrongfulness and (legal) causation are two different elements:

"each with its own characteristics and content. Even where negligent conduct resulting from pure economic loss is for reasons of policy found to be wrongful, the loss may therefore, for other reasons of policy, be found to be too remote and therefore not recoverable. This happened, for example, in *International Shipping Co...*. Determination of remoteness also requires application of yardsticks such as foreseeability and direct consequences which do not play a role in establishing wrongfulness ... these yardsticks should not be applied dogmatically but rather, in a flexible manner".

First of all, as mentioned,⁹⁸⁴ it is not correct that the criterion of reasonable foreseeability does not play a role in determining wrongfulness. Secondly, wrongfulness and legal causation should not be equated because they both limit liability. Indeed every element of a delict should serve to limit liability.⁹⁸⁵ In a sense, *imposition of liability* in determining wrongfulness according to the recent approach and *imputability of liability* in determining legal causation are being used synonymously, usurping the other elements of delict in that these two elements are regarded as superior and are being equated with the general test for delictual liability.⁹⁸⁶ This breeds confusion and legal uncertainty. Neethling and Potgieter⁹⁸⁷ point out that there is no difference between the *boni mores* yardstick as interpreted by the adjudicators which Brand JA opposes and the opinion of most right-minded people, including adjudicators, to which he refers. Furthermore, if these concepts are similar then Brand JA is applying the *boni mores* yardstick to determine legal causation. Neethling and Potgieter⁹⁸⁸ refer to an example from English law, *Weller & Co v Foot-and-mouth Disease Research Institute*⁹⁸⁹ referred to by Visser,⁹⁹⁰ where the foot-and-mouth virus escaped from the institute and spread, causing loss to farmers and other companies. Visser is of the view that the escape of the virus was unreasonable but not wrongful, because it would have been unreasonable to hold the defendant liable as liability was extended too far. Neethling and Potgieter point out

⁹⁸⁴ See para 4.3 above.

⁹⁸⁵ See *Lee v Minister for Correctional Services* 2013 2 BCLR 129 (CC) 155.

⁹⁸⁶ See also Neethling and Potgieter 2014 *TSAR* 898-899.

⁹⁸⁷ 2014 *TSAR* 897-898.

⁹⁸⁸ 2014 *TSAR* 899.

⁹⁸⁹ 1966 1 QB 569.

⁹⁹⁰ In Du Bois (gen ed) *Wille's Principles of South African law* 1099.

that as a result of the “clear unreasonableness of the conduct” wrongfulness was present, but it would have been “unreasonable to hold the alleged wrongdoer liable on account of the absence of legal causation”. Indeed the concepts of *imposition of liability* and *imputability of liability* could lead to the redundancy of legal causation as an element according to the application of the recent approach to determining wrongfulness as pointed out by Neethling and Potgieter.⁹⁹¹

Loubser and Midgley⁹⁹² point out that even when conduct is found to be wrongful, the damage may be considered too remote in light of other reasons of policy thereby excluding delictual liability.⁹⁹³ Knobel⁹⁹⁴ convincingly argues that the difference “is that in the wrongfulness inquiry, legal policy primarily evaluates the negatively and positively impacted interests, whereas in the inquiry into legal causation, legal policy evaluates the remoteness between the act and the consequence”.⁹⁹⁵

5.3 Conclusion

There is no doubt that reasonableness and public policy do play an important role in determining fault, wrongfulness and legal causation,⁹⁹⁶ however, the elements are distinct in nature and function in determining delictual liability.⁹⁹⁷ Neethling and Potgieter⁹⁹⁸ aptly state that:

“the question of whether a wrongdoer should be held liable for a “remote consequence”, is completely different from the question of whether the wrongdoer’s conduct was *unreasonable* according to the legal convictions of the community (the question of wrongfulness), from the question of whether the wrongdoer should be legally *blamed* because he foresaw and reconciled himself with the consequence and the possible wrongfulness thereof (the question of intent), and from the question of whether injury was foreseeable with such a degree of probability that the reasonable man would have taken steps to avoid injury (the question of negligence). Wrongfulness, fault, factual and legal causation (imputability of harm) should be clearly distinguished. A delict is a complex juristic fact which is traditionally divided into a number of different elements. This classification is based on considerations of fairness, efficacy and logic and should not lightly be disregarded. Anyone who, for example, without due consideration, drags an element of wrongfulness into the requirement of fault or damage,

⁹⁹¹ 2014 TSAR 899.

⁹⁹² *Delict* 98.

⁹⁹³ See *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A); *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) 164; *Cape Empowerment Trust Limited v Fisher HoffmanSithole* 2013 5 SA 183 (SCA) 197-198. Loubser and Midgley (eds) *Delict* 98; Neethling and Potgieter *Delict* 201 fn 114.

⁹⁹⁴ 2008 *THRHR* 654-655.

⁹⁹⁵ See Ahmed in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 59.

⁹⁹⁶ See *Van Aswegen* 1993 *THRHR* 171ff.

⁹⁹⁷ Neethling and Potgieter *Delict* 201 fn 114.

⁹⁹⁸ *Delict* 213.

or an element of wrongfulness or fault into the requirement of legal causation, could be caught up in a web of confusion of ideas”.

One of the criteria to determine whether the defendant owes the claimant a duty of care in the tort of negligence in English law is: whether it is fair just and reasonable to impose a duty of care. Our recent approach to determining wrongfulness is: whether it is reasonable to impose liability on the defendant. Our test for legal causation is based on whether the consequences are either close or remote with reference to the act; to impute liability on such defendant based on reasonableness, fairness and justice. This test has also been used to determine causation in English tort law.⁹⁹⁹ These tests are indeed very similar; they involve normative questions based on policy, and the common normative concept is reasonableness. In turn reasonableness is closely linked to the normative concepts of “justice” and “fairness”. However, even though the way the concept of reasonableness is used in all three tests is similar, they all serve to determine *different elements*. In English law it serves to determine whether there is a duty of care in the tort of negligence and causation. In South African law it is used to determine wrongfulness and legal causation. Even though the recent approach to determining wrongfulness is different from the traditional approach, in the end they either directly or indirectly refer to the *boni mores*, as public policy is reflected in the *boni mores*. They both must consider constitutional imperatives. The traditional approach directly refers to rights, while in order to answer the question posed according to the recent approach, rights must still be considered. In focusing on interests, the ultimate question is whether the defendant acted reasonably or failed to act reasonably, in infringing the interests of the plaintiff. At the heart of the question of legal causation is one of remoteness between the conduct and the consequences. The concepts of reasonableness, fairness and justice are used to determine whether or not the defendant should be held delictually liable for all the consequences factually caused by his conduct.

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See chapter 4 para 4.1.

6. Harm, loss or damage

6.1 Introduction

In this paragraph, the influence of reasonableness will be identified and briefly analysed with respect to the element of harm, loss or damage. There is much to be said about the assessment and quantification of damage, but for purposes of this study, the influence of reasonableness on the element of damage will be briefly discussed.

The element of damage is necessary in respect of delictual liability.¹⁰⁰⁰ Firstly, it must be established whether there is damage, based on the proven facts of the case and on a balance of probabilities. Secondly, whether compensation should be awarded for the damage sustained, based on public policy,¹⁰⁰¹ and finally, the extent of the damage which involves quantification of the damage.¹⁰⁰²

“Damage is the detrimental impact upon any patrimonial or personality interest deemed worthy of protection by the law.”¹⁰⁰³ There are two broad types of loss recognised: non-patrimonial loss (non-pecuniary loss) and patrimonial loss (pecuniary loss).¹⁰⁰⁴ Patrimonial loss includes financial loss associated with a bodily injury, damage to property,¹⁰⁰⁵ and pure economic loss which does not flow from

¹⁰⁰⁰ *Jowell v Bramwell-Jones* 2000 3 SA 274 (SCA) 283 286; Neethling and Potgieter *Delict* 221; Loubser and Midgley (eds) *Delict* 45; Van der Walt and Midgley *Delict* 60.

¹⁰⁰¹ For example in *Van Jaarsveld v Bridges* 2010 4 SA 558 (SCA), the court taking into account the prevailing *mores* and public policy dismissed a claim for damages stemming from a breach of a promise to marry (broken engagement). Also our law did not previously allow compensation for psychiatric injury or pure economic loss. See also *Union Government (Minister of Railways Harbours) v Warneke* 1911 AD 657, 665 where the court held that loss of comfort and society of one’s wife who was killed cannot be compensated in terms of the *actio legis Aquiliae*. See Loubser and Midgley (eds) *Delict* 47; Neethling and Potgieter *Delict* 222; Burchell *Delict* 123.

¹⁰⁰² *Turkstra Ltd v Richards* 1926 TPD 276, 282-283; Van der Walt and Midgley *Delict* 60.

¹⁰⁰³ *Van der Merwe v Road Accident Fund (Women’s Legal Centre Trust as Amicus Curiae)* 2006 4 SA 230 (CC) 252; Neethling and Potgieter *Delict* 222; Loubser and Midgley (eds) *Delict* 47; see Ahmed in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 59.

¹⁰⁰⁴ See Potgieter, Steynberg and Floyd *Damages* 33-36; Neethling and Potgieter *Delict* 223-225; Loubser and Midgley (eds) *Delict* 49-50; Van der Walt and Midgley *Delict* 62-64.

¹⁰⁰⁵ In the landmark decision *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A) 776-777, 781 it was held that a plaintiff who suffers from negligently inflicted “nervous shock” which results in psychiatric or psychological injuries is entitled to claim damages for patrimonial loss under the *lex Aquilia*. See also *Gibson v Berkowitz* 1996 4 SA 1029 (W) 1038; Van der Walt and Midgley *Delict* 135; Neethling 2000 *TSAR* 1-2; Ahmed and Steynberg 2015 *THRHR* 182.

injury to the plaintiff or property of the plaintiff.¹⁰⁰⁶ Non-patrimonial loss may be claimed where personality rights have been infringed. Damages for “pain and suffering” may also be claimed. A plaintiff may generally recover damages in terms of: the *actio legis Aquiliae*; the *actio iniuriarum*, under the Germanic remedy of pain and suffering for infringements of physical-mental integrity in cases of physical injury;¹⁰⁰⁷ the *actio de pauperie* and the *actio de pastu* aimed at compensating the plaintiff who suffered patrimonial loss and pain and suffering as a result of the conduct of animals.¹⁰⁰⁸

In respect of injury to personality, the purpose of the award is to provide monetary compensation for solace (satisfaction) and to ease wounded feelings.¹⁰⁰⁹ Customary law principles such as *ubuntu* which postulates restorative justice have been taken into account in cases of defamation.¹⁰¹⁰ In respect of the *actio legis Aquiliae*, the aim is compensatory in nature and not penal.¹⁰¹¹ The aim is to put the plaintiff in the position he would have been in had the delict not occurred and ensure that he receives full monetary compensation for all past and future loss.¹⁰¹² With regard to pain and suffering, the purpose is reparation, to provide monetary “imperfect

¹⁰⁰⁶ *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 2 SA 888 (A) 911; Loubser and Midgley (eds) *Delict* 50; Van der Walt and Midgley *Delict* 136.

¹⁰⁰⁷ Potgieter, Steynberg and Floyd *Damages* 22.

¹⁰⁰⁸ Loubser and Midgley (eds) *Delict* 400.

¹⁰⁰⁹ Van der Walt and Midgley *Delict* 60; Neethling and Potgieter *Delict* 263.

¹⁰¹⁰ The concept of *ubuntu* and restorative justice in a case of defamation was first advocated by Mokgoro J and Sachs J in their minority judgments in *Dikoko v Mokhatla* 2006 6 SA 235 (CC). In this case the Constitutional Court confirmed that a member of the legislature was not immune from liability for defamatory statements made about another member of the legislature during a Standing Committee hearing. Damages were initially awarded in the amount of R110 000 by the High Court. The Constitutional Court did not want to interfere with the lower court's award [102], but both Mokgoro J [63]–[80] and Sachs J [112]–[121] found the award unreasonably excessive in that it was out of proportion when compared with injury to Mokhatla's reputation. They did not approve of penalising the defendant in a financial way which would push the parties further apart rather than reconcile them and restore the lost dignity and respect between them. In support of their opinions, the adjudicators referred to the principle of *ubuntu* as well as the Roman-Dutch law remedy *amende honorable* comprising of a retraction and a sincere and sufficient apology. Sachs J [120] submitted that a monetary award of damages is still necessary in cases of defamation as the threat of damages will deter a person from making defamatory statements. Furthermore damage to a person's reputation is not fully restored by an apology and counter-publication. Solace for the harm to one's reputation may still be found in the form of monetary compensation. Van der Walt and Midgley *Delict* 29 point out that the minority views of Sachs J and Mokgoro J was recognised in *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 6 BCLR 577 (CC) [199]–[203] where the Constitutional Court held that ordering a retraction and apology was an appropriate remedy for defamation. The Constitutional Court stated that *ubuntu* advocated restorative justice [202].

¹⁰¹¹ Burchell *Delict* 123.

¹⁰¹² Loubser and Midgley (eds) *Delict* 401.

compensation” (not full compensation as it is difficult to quantify)¹⁰¹³ as a result of physical injuries sustained.¹⁰¹⁴ It is submitted that the aim of satisfaction, compensation and reparation relate to reasonableness. The question is whether it is reasonable to compensate the plaintiff for the harm or loss suffered and whether the defendant should pay such compensation. The idea behind focusing on compensating the plaintiff as opposed to penalising the defendant is a reasonable aim with respect to the purpose and function of the law of delict.

6.2 Patrimonial loss

Patrimonial loss may be described as the loss in value of a positive asset in the plaintiff’s estate or the increase of a negative element in such estate.¹⁰¹⁵ An increase in a negative element may refer to a debt or an expectation of a debt, which is reasonably likely to occur in future.¹⁰¹⁶ Patrimonial loss includes: *damnum emergens* (actual loss already sustained up until the date of trial);¹⁰¹⁷ *lucrum cessans* (loss of profit and some forms of future loss);¹⁰¹⁸ pure economic loss, damage to property;¹⁰¹⁹ direct and consequential loss (loss flowing from direct loss);¹⁰²⁰ and general¹⁰²¹ and special damage.¹⁰²²

There is a general rule that loss of income earned illegally, for example, by means of criminal activity, statutory prohibitions or immoral activity, cannot be considered in a claim based in delict as it is against public policy.¹⁰²³ It is submitted that this is also

¹⁰¹³ See *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 199; Potgieter, Steynberg and Floyd *Damages* 507.

¹⁰¹⁴ Loubser and Midgley (eds) *Delict* 434; Van der Walt and Midgley *Delict* 304; Neethling and Potgieter *Delict* 253.

¹⁰¹⁵ Neethling and Potgieter *Delict* 229-230. In *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657 patrimony was referred to as “a *universitas* of rights and duties”. See also Loubser and Midgley (eds) *Delict* 50; Van der Walt and Midgley *Delict* 63.

¹⁰¹⁶ Neethling and Potgieter *Delict* 229-230; cf Burchell *Delict* 123.

¹⁰¹⁷ Potgieter, Steynberg and Floyd *Damages* 64-65; Neethling and Potgieter *Delict* 231; Van der Walt and Midgley *Delict* 63.

¹⁰¹⁸ See Potgieter, Steynberg and Floyd *Damages* 64-65 129-152; Neethling and Potgieter *Delict* 223-224; Van der Walt and Midgley *Delict* 63.

¹⁰¹⁹ Potgieter, Steynberg and Floyd *Damages* 65.

¹⁰²⁰ Potgieter, Steynberg and Floyd *Damages* 65-66.

¹⁰²¹ General damage in practice usually refers to non-patrimonial loss, pain and suffering as well as future loss, whereas special damage refers to patrimonial loss incurred before the trial (Potgieter, Steynberg and Floyd *Damages* 23 66-68). Cf Van der Walt and Midgley *Delict* 306.

¹⁰²² See Neethling and Potgieter *Delict* 231; Van der Walt and Midgley *Delict* 306.

¹⁰²³ See for example, *Dhlamini v Protea Assurance Co Ltd* 1974 4 SA 906 (A) where a hawker prior to an accident earned an income illegally without the required licence. The court refused her claim for future loss of income based on public policy. See also *Heese NO v Road Accident*

reasonable as the law of delict or law in general cannot condone illegal activity. It is reasonable that the plaintiff should not be allowed to recover loss of income sustained as a result of his own illegal activity. Wrongfulness may be excluded as such activity is considered unlawful or there is no damage with regard to the specific head of damage, loss of income.¹⁰²⁴ In English law this relates to the defence of illegality which when applied to the tort of negligence negates the element of duty of care, while in the intentional torts; it excludes the claim in the specific tort based on public policy.¹⁰²⁵ This rule is, however, less severe when dealing with loss of earning capacity. Damages may be awarded even if past loss of earnings were considered illegal.¹⁰²⁶ This approach is also extended to dependants. Thus exceptions apply, for instance: where the unlawful activity may have discontinued; where no harm to the public is envisaged; where the legislation could have been challenged; or where the activity was legalised after the breadwinner's death.¹⁰²⁷ It is submitted that this again relates to reasonableness, in that compensation for loss of earning capacity is based on the future which is uncertain and there is no guarantee in knowing that the illegal activity would have continued in the future. Furthermore, it may be unreasonable that an innocent dependant who relied on the illegal income is deprived of the loss of income. However, this will have to be weighed against the idea that the law cannot condone illegal activity.

The courts make use of the sum-formula approach in assessing patrimonial damage.¹⁰²⁸ It is a comparative method whereby the plaintiff's current patrimonial position after the damage has occurred, is subtracted from the hypothetical position the plaintiff would have been in had the damage not occurred.¹⁰²⁹ A sum of money is attached to the hypothetical position and compared with the plaintiff's current position.¹⁰³⁰ Sometimes the courts also make use of the concrete concept of damage

Fund 2014 1 SA 357 (WCC). See in general Neethling and Potgieter *Delict* 248-250; Van der Walt and Midgley *Delict* 312-313; Loubser and Midgley (eds) *Delict* 420-421; Burchell *Delict* 129-132.

¹⁰²⁴ Neethling and Potgieter *Delict* 249.

¹⁰²⁵ See chapter 4 para 2.4.7.

¹⁰²⁶ See *Marine & Trade Insurance Co Ltd v Katz* 1979 4 SA 961 (A) 970.

¹⁰²⁷ See case law referred to by Neethling and Potgieter *Delict* 250 fn 285.

¹⁰²⁸ See *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657; *Dippenaar v Shield Insurance Co Ltd* 1979 2 SA 904 (A) 917; *De Vos v SA Eagle Versekeringsmaatskappy Bpk* 1985 3 SA 447 (A) 451; *Rudman v Road Accident Fund* 2003 2 SA 234 (SCA) 240; Neethling and Potgieter *Delict* 232 fn 101; Loubser and Midgley (eds) *Delict* 416.

¹⁰²⁹ See Potgieter, Steynberg and Floyd *Damages* 76-78 criticism of the sum-formula approach.

¹⁰³⁰ Potgieter, Steynberg and Floyd *Damages* 22; Neethling and Potgieter *Delict* 232.

when assessing patrimonial damage. The position prior to the delict and the position after the delict are compared. A hypothetical position is not taken into account.¹⁰³¹ Due to the fact that patrimonial damage may easily be reflected in mathematical figures, it is submitted that these methods of assessment are reasonable methods. Furthermore it is a reasonable approach in compensating the plaintiff, as even though he cannot be placed in exactly the same position he would have been in had the delict not occurred, he is still fairly compensated.¹⁰³²

Where the plaintiff has incurred medical and similar related expenses as a result of an injury; the claimant may recover such costs reasonably incurred.¹⁰³³ Reasonably incurred costs refer to costs incurred as a result of remedying, or mitigating the extent of the loss. The plaintiff is not obliged to use public medical service providers in order to comply with the requirement of incurring reasonable medical and similar related costs.¹⁰³⁴ Reasonable transport costs incurred may be claimed for travelling to and from the hospital or other medical providers' etcetera. This may apply to the plaintiff's relatives too, such as a wife attending to her husband while in hospital, or other persons depending on the circumstances of the case.¹⁰³⁵ Where the plaintiff suffers a disability, as a result of the injury sustained and requires: special prosthesis; equipment; modification to his home or vehicle and so on, these additional costs, in principle may be claimed.¹⁰³⁶ Here too, reasonable – necessary costs can be recovered. The same principles relating to reasonableness of past medical and similar related expenses apply to future medical and related costs. The plaintiff must however provide proof by way of expert medical evidence of the future costs.¹⁰³⁷

In respect of loss of support, as a result of the death of the breadwinner, the obligation or right of support must be proven by the dependant. The point is to put the dependant in the position he would have been in had the breadwinner not been killed. Past and

¹⁰³¹ See *Kantey & Templer (Pty) Ltd v Van Zyl* NO 2007 1 SA 610 (C) 625; *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 2 SA 146 (A) 150; *De Jager v Grunder* 1964 1 SA 446 (A) 449 456; Potgieter, Steynberg and Floyd *Damages* 78-80; Neethling and Potgieter *Delict* 32; Loubser and Midgley (eds) *Delict* 416.

¹⁰³² See Steynberg 2011 *PER* 2 ff.

¹⁰³³ Potgieter, Steynberg and Floyd *Damages* 456.

¹⁰³⁴ Potgieter, Steynberg and Floyd *Damages* 456.

¹⁰³⁵ Potgieter, Steynberg and Floyd *Damages* 457-458.

¹⁰³⁶ Potgieter, Steynberg and Floyd *Damages* 458.

¹⁰³⁷ Potgieter, Steynberg and Floyd *Damages* 459.

future loss of support may be claimed.¹⁰³⁸ Funeral expenses may be recovered but are limited to the reasonable, necessary costs of: preparing the body for burial or cremation; the hearse; transport to attend the ceremony; telephone calls; refreshments; and for erecting the tombstone.¹⁰³⁹

The plaintiff is entitled to claim past loss of income as well as loss of future income. With regard to past loss of income, the plaintiff must prove his actual loss.¹⁰⁴⁰ In respect of loss of earning capacity, a person suffers loss in the form of a reduction in earning capacity. This head of damages is difficult to assess as it is based on assumptions of future events. Actuarial evidence plays an important role and is often relied on by the courts.¹⁰⁴¹

6.3 Non-patrimonial loss

Non-patrimonial loss does not affect a person's patrimony or estate but has a negative effect on one's personality interests.¹⁰⁴² The legally recognised personality rights (*corpus, fama* and *dignitas*) include: reputation, liberty, privacy, physical-mental integrity, dignity, feelings, and identity.¹⁰⁴³ Under the Germanic remedy of pain and suffering, the following damages which include both physical and mental injury may be claimed: pain and suffering, shock, loss of amenities, shortened life expectancy, and disfigurement.¹⁰⁴⁴

In assessing non-patrimonial loss a comparative method is also used in that the "utility or quality of the personality interests" is compared before and after the delict in order to determine the presence and extent of the loss.¹⁰⁴⁵ In determining the extent of the loss, our courts try to attach a monetary value commensurate to the nature, duration

¹⁰³⁸ See Potgieter, Steynberg and Floyd *Damages* 478-490 with regard to the method of assessing loss of support.

¹⁰³⁹ Potgieter, Steynberg and Floyd *Damages* 478.

¹⁰⁴⁰ Potgieter, Steynberg and Floyd *Damages* 463.

¹⁰⁴¹ See Potgieter, Steynberg and Floyd *Damages* 464-477.

¹⁰⁴² *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as Amicus Curiae)* 2006 4 SA 230 (CC) 253; Neethling and Potgieter *Delict* 250.

¹⁰⁴³ Neethling and Potgieter *Delict* 251.

¹⁰⁴⁴ See in general Neethling and Potgieter *Delict* 253-255. See further Loubser and Midgley (eds) *Delict* 424-427; Van der Walt and Midgley *Delict* 317-318; Potgieter, Steynberg and Floyd *Damages* 497; Burchell *Delict* 135-140.

¹⁰⁴⁵ Neethling and Potgieter *Delict* 252.

and intensity of the physical and mental harm experienced.¹⁰⁴⁶ Objective factors such as a person's life expectancy, age, gender, social status, lifestyle, degree of consciousness and culture are considered.¹⁰⁴⁷ The object of the award is to compensate the plaintiff without unnecessarily burdening the defendant.¹⁰⁴⁸ Of importance, a fair and reasonable approach (*ex aequo et bono*) is adopted by the courts in assessing non-patrimonial loss.¹⁰⁴⁹ In exercising the fair and reasonable approach, the court must on the one hand compensate the plaintiff in a conservative manner¹⁰⁵⁰ and should not unnecessarily burden the defendant.¹⁰⁵¹ Potgieter, Steynberg and Floyd¹⁰⁵² aptly submit:

“[i]n a sense ‘fairness’ (equity) is a vague concept without a fixed meaning and a court should therefore guard against describing its award as ‘fair’ merely for safety’s sake without having actually used a fair method of assessment. Fairness is probably a collective concept in respect of *inter alia* the following principles: the court should consider all the relevant circumstances which give an indication of the extent of the non-pecuniary loss and ignore irrelevant considerations such as undue sympathy for the defendant; the basic compensatory function should receive the necessary emphasis; the court should, without being unreasonable, exercise its discretion carefully and conservatively and rather award too little than too much; the amount of damages should not unnecessarily burden a defendant in favour of the plaintiff; an award should as far as reasonably possible be consistent with awards in comparable decisions; the tendency to grant higher awards may be considered as a factor; the high value placed on personality interests in the Constitution must be taken into consideration in assessing damages; the general economic conditions in the country should be taken into account in a justifiable manner. If these principles are applied, one may safely assume that a fair approach has been adopted.”

The court must take into account prior comparable awards¹⁰⁵³ where the circumstances of the particular case are generally similar to the cases being compared.¹⁰⁵⁴

With regard to the *actio iniuriarum*, in respect of intentional personality infringements (*iniuria*), the courts are at liberty to make a monetary award based on *ex aequo et*

¹⁰⁴⁶ *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194; *Jacobs v Chairman, Governing Body, Rhodes High School* 2011 1 SA 160 (WCC) 190; *Swartbooi v Road Accident Fund* 2012 3 All SA 593 (WCC) [22]; *Radebe v Hough* 1949 1 SA 380 (A); Neethling and Potgieter *Delict* 260.

¹⁰⁴⁷ Neethling and Potgieter *Delict* 261; Loubser and Midgley (eds) *Delict* 424; Potgieter, Steynberg and Floyd *Damages* 498-499.

¹⁰⁴⁸ Neethling and Potgieter *Delict* 261; Potgieter, Steynberg and Floyd *Damages* 500.

¹⁰⁴⁹ Neethling and Potgieter *Delict* 261-262; Potgieter, Steynberg and Floyd *Damages* 500-502.

¹⁰⁵⁰ See *Pitt v Economic Insurance Co Ltd* 1957 3 SA 284 (D) 287.

¹⁰⁵¹ Potgieter, Steynberg and Floyd *Damages* 500-502; Van der Walt and Midgley *Delict* 326.

¹⁰⁵² *Damages* 501-502.

¹⁰⁵³ See *Protea Assurance Co Ltd v Lamb* 1971 1 SA 530 (A) 535-536.

¹⁰⁵⁴ See Neethling and Potgieter *Delict* 262; Van der Walt and Midgley *Delict* 327; Potgieter, Steynberg and Floyd *Damages* 502-506.

bono, what is fair and just.¹⁰⁵⁵ The “court has a wide discretion to determine damages which is fair and reasonable having regard to all the circumstances of the case and the prevailing attitudes of the community”.¹⁰⁵⁶ Potgieter, Steynberg and Floyd¹⁰⁵⁷ point out that “the principle of fairness can be embodied in the judgement of the reasonable person: will the *reasonable person*, in light of all the relevant circumstances, view the award as fair in accordance with the legal convictions of the community?” The court in considering what is reasonable and fair depending on the circumstances of the case and the *boni mores* must consider a number of factors, such as general factors, constitutional imperatives,¹⁰⁵⁸ and mitigating as well as aggravating circumstances.¹⁰⁵⁹

For the purposes of this study, one case of *iniuria*, “defamation” may be referred to just to illustrate the type of factors considered by the courts. Similar principles are in any case applicable to other forms of *iniuria*. The general factors that may be considered are *inter alia*: the character of the plaintiff;¹⁰⁶⁰ the status of the plaintiff or defendant in society;¹⁰⁶¹ severity of the defamation;¹⁰⁶² nature and extent of the publication;¹⁰⁶³ political effect of defamation, if any;¹⁰⁶⁴ prior decisions which may influence the award; the effect of oral defamation in comparison to written defamation; conduct of the defendant in failing to apologise up until the date of trial;¹⁰⁶⁵ amount of the award suggested by the plaintiff and defendant.¹⁰⁶⁶ The following mitigating factors are also considered which may have the effect of reducing the award:¹⁰⁶⁷ truth in the defamatory statement; whether an apology or retraction was offered;¹⁰⁶⁸ lack of intention or improper motive;¹⁰⁶⁹ personal state of the defendant; where the

¹⁰⁵⁵ *Jonker v Schultz* 2002 2 SA 360 (O) 367; Potgieter, Steynberg and Floyd *Damages* 513; Neethling and Potgieter *Delict* 263; Loubser and Midgley (eds) *Delict* 427; Van der Walt and Midgley *Delict* 319-320.

¹⁰⁵⁶ *Tuch v Myerson* 2010 2 SA 462 (SCA) 468, where the court was dealing with a case of defamation.

¹⁰⁵⁷ *Damages* 514.

¹⁰⁵⁸ Van der Walt and Midgley *Delict* 319-320.

¹⁰⁵⁹ Potgieter, Steynberg and Floyd *Damages* 515-517.

¹⁰⁶⁰ See Potgieter, Steynberg and Floyd *Damages* 517-518.

¹⁰⁶¹ See Potgieter, Steynberg and Floyd *Damages* 519-520.

¹⁰⁶² See Potgieter, Steynberg and Floyd *Damages* 521-522.

¹⁰⁶³ See Potgieter, Steynberg and Floyd *Damages* 520-521.

¹⁰⁶⁴ See Potgieter, Steynberg and Floyd *Damages* 522.

¹⁰⁶⁵ See Potgieter, Steynberg and Floyd *Damages* 523.

¹⁰⁶⁶ See Potgieter, Steynberg and Floyd *Damages* 524.

¹⁰⁶⁷ See Neethling and Potgieter *Delict* 264-265; Van der Walt and Midgley *Delict* 319-320.

¹⁰⁶⁸ See Potgieter, Steynberg and Floyd *Damages* 526-529.

¹⁰⁶⁹ See Potgieter, Steynberg and Floyd *Damages* 529-530.

defendant was not the author of defamation;¹⁰⁷⁰ any delay in the plaintiff instituting the action;¹⁰⁷¹ and any provocation by the plaintiff.¹⁰⁷² The following aggravating circumstances may be considered in increasing the award:¹⁰⁷³ conduct of the defendant;¹⁰⁷⁴ the manner in which it was published, for example if recklessness was involved;¹⁰⁷⁵ significance of defamation;¹⁰⁷⁶ improper motive;¹⁰⁷⁷ whether the defendant succeeded in tarnishing the plaintiff's good name;¹⁰⁷⁸ and the penal aim of satisfaction.¹⁰⁷⁹

6.4 Damage to property¹⁰⁸⁰

A plaintiff is entitled to compensation for damage to his property resulting from a delict. The "reasonable market value" of the property before and after the date of delict is compared ("diminution in market value"). If the property is beyond repair or completely damaged then the damage is assessed at the market value at the time it was completely damaged.¹⁰⁸¹ However, this comparison is not always used in practice because it is often difficult to prove the market value of the property before and after the delict. In such instances the reasonable cost of necessary repairs is referred to as a simpler option in assessing damage.¹⁰⁸² In *Erasmus v Davis*,¹⁰⁸³ the court referred to the following instances where the reasonable cost of repairs method cannot be appropriately applied: in instances where the cost of repairs exceeds the market value of the property before the date of the delict; where the repair costs exceed the decrease in value of the property; and where the repairs restore the property to its position before the date of delict but not its value before the date of delict (the plaintiff would receive little compensation).¹⁰⁸⁴ Furthermore, any

¹⁰⁷⁰ See Potgieter, Steynberg and Floyd *Damages* 530.

¹⁰⁷¹ See Potgieter, Steynberg and Floyd *Damages* 531.

¹⁰⁷² See Potgieter, Steynberg and Floyd *Damages* 531.

¹⁰⁷³ See Neethling and Potgieter *Delict* 264; Van der Walt and Midgley *Delict* 320.

¹⁰⁷⁴ See Potgieter, Steynberg and Floyd *Damages* 531-532.

¹⁰⁷⁵ See Potgieter, Steynberg and Floyd *Damages* 534.

¹⁰⁷⁶ See Potgieter, Steynberg and Floyd *Damages* 532.

¹⁰⁷⁷ See Potgieter, Steynberg and Floyd *Damages* 533.

¹⁰⁷⁸ See Potgieter, Steynberg and Floyd *Damages* 534.

¹⁰⁷⁹ See Potgieter, Steynberg and Floyd *Damages* 534-535.

¹⁰⁸⁰ See Ahmed in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 60.

¹⁰⁸¹ See *Monumental Art Co v Kenston Pharmacy (Pty) Ltd* 1976 2 SA 111 (C).

¹⁰⁸² See in general Neethling and Potgieter *Delict* 247; Van der Walt and Midgley *Delict* 307; Loubser and Midgley (eds) *Delict* 417; Potgieter, Steynberg and Floyd *Damages* 419-421; Burchell *Delict* 127.

¹⁰⁸³ 1969 2 SA 1 (A) 18.

¹⁰⁸⁴ See also Potgieter, Steynberg and Floyd *Damages* 420-421.

consequential loss in respect of the damage to the property may be recovered.¹⁰⁸⁵ Neethling and Potgieter¹⁰⁸⁶ refer to other principles applied in assessing quantum of damage with regard to: alienation; theft; or destruction of property; loss of use; negligent and fraudulent misrepresentation; unlawful competition; infringement of immaterial property rights; duress; nuisance; unlawful competition; claims in terms of statutes; defamation; adultery; unlawful imprisonment and other special damages which will not be discussed for purposes of this study.

6.5 Principles applicable to patrimonial and non-patrimonial loss

Some general factors are considered by the courts when quantifying loss¹⁰⁸⁷ such as: inflation;¹⁰⁸⁸ interest;¹⁰⁸⁹ tax;¹⁰⁹⁰ time of the assessment;¹⁰⁹¹ currency;¹⁰⁹² and contingencies.¹⁰⁹³

Patrimonial and non-patrimonial damage is generally assessed from the date of cause of action.¹⁰⁹⁴ All past and prospective loss must generally¹⁰⁹⁵ be claimed once based on a single cause of action, in terms of the once and for all rule.¹⁰⁹⁶ It is submitted that this is a reasonable rule as it would be unfair to expect the defendant to pay compensation indefinitely in the future. It is reasonable that all loss should be assessed and claimed once and for all so that the defendant is able to pay the

¹⁰⁸⁵ Van der Walt and Midgley *Delict* 307.

¹⁰⁸⁶ *Delict* 247-248. See also Potgieter, Steynberg and Floyd *Damages* 424-452.

¹⁰⁸⁷ See Ahmed in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 60.

¹⁰⁸⁸ Especially relevant with prior comparable awards, future expenses, as well as loss of earnings. See Van der Walt and Midgley *Delict* 328-329; Loubser and Midgley (eds) *Delict* 412-413; Potgieter, Steynberg and Floyd *Damages* 325-329.

¹⁰⁸⁹ Van der Walt and Midgley *Delict* 330; Loubser and Midgley (eds) *Delict* 412.

¹⁰⁹⁰ Considered in assessing past loss of earnings and future earning capacity. See Van der Walt and Midgley *Delict* 329; Loubser and Midgley (eds) *Delict* 412.

¹⁰⁹¹ Usually assessed from the date of delict. See *General Accident Insurance Co SA Ltd v Summers*; *General Accident Insurance Co SA Ltd v Nhlumayo*, *Southern Versekeringsassosiasie Bpk v Carstens* 1987 3 SA 577 (A); Van der Walt and Midgley *Delict* 330; Loubser and Midgley (eds) *Delict* 411-412.

¹⁰⁹² Payment may be made in a foreign currency or the equivalent South African Rand value. See *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A); *Burger v Union National South British Insurance Co* 1975 4 SA 72 (W) 74-75; Van der Walt and Midgley *Delict* 331; Loubser and Midgley (eds) *Delict* 413-414.

¹⁰⁹³ Loubser and Midgley (eds) *Delict* 414-415.

¹⁰⁹⁴ Potgieter, Steynberg and Floyd *Damages* 92.

¹⁰⁹⁵ See the exceptions referred to by Neethling and Potgieter *Delict* 236, and Loubser and Midgley (eds) *Delict* 407-408.

¹⁰⁹⁶ *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A) 835. See in general Neethling and Potgieter *Delict* 235-236; Van der Walt and Midgley *Delict* 315-316; Loubser and Midgley (eds) *Delict* 404-407.

compensation with the knowledge that it will be the end of the matter. This is also reasonable in terms of the legal processes.

Mention should be made briefly of “contingencies” which are uncertain positive or negative events.¹⁰⁹⁷ They are unrelated to the defendant’s conduct. If these events materialise, it would affect a person’s “health, income, earning capacity, quality of life, life expectancy or dependency on support in future or could have done so in the past”.¹⁰⁹⁸ They must be considered in a fair and reasonable manner and may result in increasing or decreasing the plaintiff’s award during quantification of the award. To begin with, the plaintiff must prove a likelihood of prospective loss occurring on a balance of probabilities.¹⁰⁹⁹ Thereafter the court considers whether the likelihood will materialise making allowance for such contingency usually reducing¹¹⁰⁰ the award by a percentage¹¹⁰¹ (between five to eighty percent).¹¹⁰² The courts do not rely on a particular test and in practice rely on actuarial evidence as a guide in order to establish the probability of the likelihood of the contingency arising thereafter deciding how much the award should be reduced by.¹¹⁰³ However, the courts need not rely on the actuarial evidence¹¹⁰⁴ and deal with each case based on its own facts relying on normative concepts such as fairness and reasonableness.¹¹⁰⁵ The courts “make an award of an arbitrary, globular amount of what seems to it to be fair and reasonable, even though the result may be no more than an informed guess”.¹¹⁰⁶ For example, the following contingencies are often considered by the courts: that the plaintiff’s business might not be a success; the probability of future non-fatal accidents; the

¹⁰⁹⁷ *Southern Insurance Association Ltd v Bailey* 1984 1 SA 98 (A) 117; *Minister of Defence v Jackson* 1991 4 SA 23 (ZSC) 34-35; *Ngubane v SA Transport Services* 1991 1 SA 756 (A) 781-782; Van der Walt and Midgley *Delict* 313-314.

¹⁰⁹⁸ Potgieter, Steynberg and Floyd *Damages* 25, 142.

¹⁰⁹⁹ See *Burger v Union National South British Insurance Co* 1975 4 SA 72 (W) 74-75; *Blyth v Van den Heever* 1980 1 SA 191 (A) 225-226; Van der Walt and Midgley *Delict* 314.

¹¹⁰⁰ See Steynberg 2008 *De Jure* 109-125 who in detail discusses positive and negative contingencies. See also Potgieter, Steynberg and Floyd *Damages* 144 fn 105.

¹¹⁰¹ Van der Walt and Midgley *Delict* 314.

¹¹⁰² See Steynberg 2007 *THRHR* 238.

¹¹⁰³ Van der Walt and Midgley *Delict* 225; Loubser and Midgley (eds) *Delict* 415.

¹¹⁰⁴ *Krugell v Shield Versekeringsmaatskappy* 1982 4 SA 95 (T) 101; see cases referred to by Potgieter, Steynberg and Floyd *Damages* 145 fn 107.

¹¹⁰⁵ See *Southern Insurance v Association v Bailey* 1984 1 SA 98 (SA) 113-114 116-117; *Griffiths v Mutual & Federal Insurance Co Ltd* 1994 1 SA 535 (A) 546; Van *Minister of Defence v Jackson* 1991 4 SA 23 (ZSC) 31; *Ngubane v SA Transport Services* 1991 1 SA 756 (A) 781; *Hendricks v President Insurance Co Ltd* 1993 3 SA 158 (C) 163-165; *Lebona v President Versekeringsmaatskappy Bpk* 1991 3 SA 395 (W); Loubser and Midgley (eds) *Delict* 415; Van der Walt and Midgley *Delict* 314; Potgieter, Steynberg and Floyd *Damages* 144-145 fn 106.

¹¹⁰⁶ See *Griffiths v Mutual & Federal Insurance Co Ltd* 1994 1 SA 535 (A) 546; Van der Walt and Midgley *Delict* 314.

probability of the plaintiff being employed in the future; the prospect of a widow remarrying or the likelihood of a divorce if her husband had not died when quantifying loss of support; shortened life expectancy which means that an award for future income may be reduced.¹¹⁰⁷

A plaintiff may also gain a benefit when loss is sustained. This benefit is referred to as “a compensating advantage”, such as *ex gratia* (charitable) benefits or insurance benefits. Some benefits may be taken into account in reducing the plaintiff's claim and some may not be taken into account as they are regarded irrelevant - *res inter alios acta* (also referred to as the collateral source rule).¹¹⁰⁸ The courts have in the past adopted a casuistic approach in dealing with the collateral source rule, but there seems to be some kind of consensus in that *ex gratia* benefits and benefits acquired through ordinary insurance contracts where monthly premiums are paid by the plaintiff; are excluded in quantifying the damages. Employment benefits relating to paid sick leave, medical insurance payments, pension payments and disability benefits generally are considered in reducing the compensation awarded for damages.¹¹⁰⁹

In respect of compensating advantages, there are two conflicting considerations where a balance must be obtained. On the one hand it may seem as though the plaintiff receives double compensation, while on the other hand society would frown upon the idea of the defendant benefitting from the plaintiff's precaution in securing insurance or from a third party's generosity.¹¹¹⁰

For example, in *Standard General Insurance Co Ltd v Dugmore*,¹¹¹¹ the plaintiff, who had been injured in a motor vehicle accident and was incapacitated and unable to work, was entitled to monthly disability pension payments and benefits in terms of an insurance policy. The court had to decide whether these amounts should be

¹¹⁰⁷ Loubser and Midgley (eds) *Delict* 415.

¹¹⁰⁸ See in general Neethling and Potgieter *Delict* 238-244; Van der Walt and Midgley *Delict* 323-324; Loubser and Midgley (eds) *Delict* 408-411; Burchell *Delict* 141-145.

¹¹⁰⁹ See Van der Walt and Midgley *Delict* 324; Potgieter, Steynberg and Floyd *Damages* 232-233; Neethling and Potgieter *Delict* 239-242; Loubser and Midgley (eds) *Delict* 410 with respect to some examples of the benefits that the courts consider or not in quantifying the damages.

¹¹¹⁰ *Standard General Ins Co Ltd v Dugmore* 1997 1 SA 33 (A) 48; *Zysset v Santam Ltd* 1996 1 SA 273 (C) 279; *Van Wyk v Santam Bpk* 1998 4 SA 731 (C) 737; Van der Walt and Midgley *Delict* 323-324; Potgieter, Steynberg and Floyd *Damages* 232-233.

¹¹¹¹ 1997 1 SA 33 (A).

disregarded or taken into account in quantifying the damages. The court in the end did not take account of the insurance policy benefit, but did take into account the pension benefit. The court agreed with Boberg¹¹¹² that there is no single test applicable to determine which benefits are deductible and which are collateral. In South Africa and in England the problem is normative in nature. Policy considerations and fairness play a role. The courts have thus adopted a flexible approach and take into account general principles such as reasonableness, fairness, and justice.¹¹¹³ Van der Walt and Midgley¹¹¹⁴ state that the collateral source rule functions as an *ex post facto* rationalisation of the adjudicator's conclusion that a benefit is legally *res inter alios acta*. Potgieter, Steynberg and Floyd¹¹¹⁵ list the following factors and principles *inter alia* the courts consider in respect of the collateral source: source of the benefit; characteristic of the benefit; how the benefit is financed; assessment of the value of the benefit; the reason for and basis of the benefit; the intention with which the benefit is received or given; the relevance of the benefit; the nature of the loss; causation; and whether a punitive element should be considered.

A plaintiff must take reasonable steps where applicable to mitigate his initial loss or prevent further loss caused by the defendants conduct.¹¹¹⁶ This applies to patrimonial and non-patrimonial loss suffered till date of trial, as well as future loss.¹¹¹⁷ A failure to take such reasonable steps or an omission to prevent further loss¹¹¹⁸ will result in the plaintiff not being entitled to compensation for damages that he could have reasonably prevented.¹¹¹⁹ The plaintiff must take all reasonable steps and the

¹¹¹² *Delict* 479. See *Standard General Ins Co Ltd v Dugmore* 1997 1 SA 33 (A) 41-42 47.

¹¹¹³ See *Standard General Ins Co Ltd v Dugmore* 1997 1 SA 33 (A) 41-42; *Zysset v Santam Ltd* 1996 1 SA 273 (C) 278-279; *Santam v Byleveldt* 1973 2 SA 146 (A) 150-151; *Van Wyk v Santam Bpk* 1998 4 SA 731 (C) 737-738; *Ongevallekommissaris v Santam Bpk* 1999 1 SA 251 (A) 261; Potgieter, Steynberg and Floyd *Damages* 229 fn 5; Neethling and Potgieter *Delict* 243; Loubser and Midgley (eds) *Delict* 409-410; Van der Walt and Midgley *Delict* 323.

¹¹¹⁴ *Delict* 323. See also *Botha v Rondalia Versekeringskorporasie van SA Bpk* 1978 1 SA 996 (T) 1001.

¹¹¹⁵ *Damages* 270-273. See also Van der Walt and Midgley *Delict* 323.

¹¹¹⁶ See in general Neethling and Potgieter *Delict* 244-245; Van der Walt and Midgley *Delict* 331; Loubser and Midgley (eds) *Delict* 422-424; Potgieter, Steynberg and Floyd *Damages* 295-301; Burchell *Delict* 126.

¹¹¹⁷ Potgieter, Steynberg and Floyd *Damages* 295.

¹¹¹⁸ See cases referred to by Potgieter, Steynberg and Floyd *Damages* 296-297 fn 150.

¹¹¹⁹ See *Butler v Durban Corporation* 1936 NPD 139; *Shrog v Valentine* 1949 3 SA 1228 (T); *Van Almelo v Shield Insurance Co Ltd* 1980 2 SA 411 (C); *Modimogale v Zweni* 1990 4 SA 122 (B); Neethling and Potgieter *Delict* 244; Van der Walt and Midgley *Delict* 331; Loubser and Midgley (eds) *Delict* 422; Potgieter, Steynberg and Floyd *Damages* 296.

standard of reasonableness on the part of the plaintiff need not be too high.¹¹²⁰ The plaintiff must take all reasonable steps to mitigate the loss as soon as he is aware or should have been reasonably aware that he should mitigate his loss.¹¹²¹ A plaintiff who takes reasonable steps to mitigate the loss sustained may in addition recover loss incurred as a result of taking such reasonable steps.¹¹²² The defendant need only compensate the plaintiff for the actual loss even if the plaintiff exceeded conduct expected of him.¹¹²³ If the plaintiff failed to take the reasonable steps required of him, the onus is on the defendant to prove same and if the defendant discharges the onus, then the plaintiff must prove his loss had he taken the reasonable steps.¹¹²⁴ Van der Walt and Midgley¹¹²⁵ point out that there is uncertainty as to whether the principle of mitigation of loss stems from legal causation or negligence (based on the standard of the reasonable person),¹¹²⁶ however, the two approaches reach the same conclusion.

6.6 Conclusion

As shown above, reasonableness plays a more explicit role in determining whether compensation should be awarded for damage suffered by the plaintiff. Reasonableness is inextricably linked to the concepts of fairness and justice. Thus it may be stated that it is only reasonable for delictual liability to follow if harm, damage or loss is sustained.¹¹²⁷ In respect of the damage sustained, it is only fair and reasonable to compensate the plaintiff: as it may not be physically possible to put the plaintiff in exactly the same position he was before the delict; or for the property to be in the same position prior to the delict. If the plaintiff is entitled to compensation, then fair and reasonable compensation must be awarded to the plaintiff taking all considerations into account.

¹¹²⁰ Due to the fact that the defendant is the culpable person. See *Silva v Coutinho* 1971 3 SA 123 (A) 145; *Everett v Marian Heights (Pty) Ltd* 1970 1 SA 198 (C) 201. See further cases referred to by Potgieter, Steynberg and Floyd *Damages* 298 fn 153.

¹¹²¹ *Krugell v Shield Versekeringsmpy Bpk* 1982 4 SA 95 (T) 99; Neethling and Potgieter *Delict* 244; Potgieter, Steynberg and Floyd *Damages* 296-297.

¹¹²² See *Romansrivier Koöp Wynkelder v Chemserve Manufacturing* 1993 2 SA 358 (C) 367; Neethling and Potgieter *Delict* 244; Loubser and Midgley (eds) *Delict* 422-423; Potgieter, Steynberg and Floyd *Damages* 299-230.

¹¹²³ Neethling and Potgieter *Delict* 244; Potgieter, Steynberg and Floyd *Damages* 300.

¹¹²⁴ Neethling and Potgieter *Delict* 245; Steynberg and Floyd *Damages* 301.

¹¹²⁵ *Delict* 331. See also Loubser and Midgley (eds) *Delict* 423-424.

¹¹²⁶ See Potgieter, Steynberg and Floyd *Damages* 295 fn 145.

¹¹²⁷ Except in instances where an interdict is sought.

The influence of reasonableness is apparent in determining: the plaintiff's general duty to mitigate loss, assessing patrimonial loss with respect to reasonable and fair mathematical approaches; assessing non-patrimonial loss, where the courts apply a "fair and reasonable" approach; applying contingencies, considering which benefits may be deducted or are collateral, where reasonableness, fairness and justice are considered by the courts; and loss in respect of damage to property, where the reasonable market value of the property is considered or the reasonable costs of repair of such property is considered. In terms of the *actio iniuriarum*, the courts determine damage based on what is fair and reasonable taking note of all the prevailing circumstances and legal convictions of the community embodied in the judgment of the reasonable person.

Finally the idea that the aim of the law of delict is to compensate the plaintiff is a reasonable one as opposed to penalising the defendant which is more an aim of criminal law. The concept of *ubuntu* and restorative justice also focus on repair as opposed to penalising the defendant. The aim with compensation as well as restorative justice is to bring back balance and in so doing ensure an outcome that is reasonable and fair.

7. Wrongful conception, wrongful birth and wrongful life claims

To begin with, it should be noted that there is a lack of authority in the law of delict for wrongful conception, birth, and life claims.¹¹²⁸ Generally, the South African textbooks on the law of delict do not discuss these claims. The reason being, no doubt, that these claims were not recognised in our law until very recently.¹¹²⁹

Wrongful conception (also referred to as "wrongful pregnancy") claims usually stem from failed sterilisation procedures, or where the sterilisation procedure was not

¹¹²⁸ See however the discussion of these claims in Neethling and Potgieter *Delict* 70 fn 229; Boezaart in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 93ff; Mukheibir in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 345 ff.

¹¹²⁹ See Mukheibir in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 345 ff.

performed at all,¹¹³⁰ resulting in an unwanted pregnancy.¹¹³¹ The child is born without any disabilities.¹¹³² Wrongful birth claims stem from instances where a congenital condition is not detected during pregnancy, resulting in the birth of a child with a disability.¹¹³³ As a result of the failure to detect and inform the parents of the congenital condition, the parents are denied the right to choose to terminate the pregnancy.¹¹³⁴ If they had been informed of the possibility or existence of the disability they would have had the option to terminate the pregnancy and, thus, the right to autonomy is impaired.¹¹³⁵ In both wrongful conception and birth claims, the claim is usually instituted by the parents of the child against medical practitioners or medical institutions.¹¹³⁶ Wrongful life claims, on the other hand, are instituted by the child living with a disability or disabilities based on the failure of the medical practitioner or employees of medical institutions to detect the congenital disability.¹¹³⁷

Wrongful conception claims have been recognised in South Africa both in a claim based in contracts¹¹³⁸ and in delict.¹¹³⁹ *Administrator, Natal v Edouard*,¹¹⁴⁰ dealt with a contractual claim for damages stemming from the failed sterilisation of the mother which resulted in the birth of a child. The court granted child rearing expenses which were pre-determined by the parties.¹¹⁴¹ The court took note of the parent's financial reasons for not wanting another child. The court held that the wrong consisted of the unwanted burden of the child rearing costs and not the unwanted birth.¹¹⁴² The legal

¹¹³⁰ Mukheibir in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 346-347.

¹¹³¹ See *Administrator, Natal v Edouard* 1990 3 SA 581 (A); *Mukheibir v Raath* 1999 3 SA 1065 (SCA).

¹¹³² See *Administrator, Natal v Edouard* 1990 3 SA 581 (A); *Mukheibir v Raath* 1999 3 SA 1065 (SCA).

¹¹³³ See *Freidman v Glicksman* 1996 1 SA 1134 (W); Mukheibir in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 347.

¹¹³⁴ See *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) 205.

¹¹³⁵ See *Friedman v Glicksman* 1996 1 SA 1134 (W) 1138; *Stewart v Botha* 2008 6 SA 310 (SCA) 319; the Choice on Termination of Pregnancy Act, 1996 provides for the termination of a pregnancy where there is a risk that a child may be born with a disability. Sections 12(2)(a) and 27 of the Constitution also provide for the right to terminate a pregnancy.

¹¹³⁶ See Mukheibir in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 347.

¹¹³⁷ See *H v Fetal Assessment Centre* 2015 2 SA 193 (CC); Mukheibir *Essays in honour of Johann Neethling* 346-347.

¹¹³⁸ In *Administrator, Natal v Edouard* 1990 3 SA 581 (A). See Mukheibir in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 347.

¹¹³⁹ In *Mukheibir v Raath* 1999 3 SA 1065 (SCA). See Mukheibir in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 347.

¹¹⁴⁰ 1990 3 SA 581 (A).

¹¹⁴¹ *Administrator, Natal v Edouard* 1990 3 SA 581 (A) 596.

¹¹⁴² *Administrator, Natal v Edouard* 1990 3 SA 581 (A) 590.

loss the parents suffer lies in the financial costs of maintaining the child which may be recovered.¹¹⁴³ Van Heerden J,¹¹⁴⁴ in allowing the claim for child rearing costs,¹¹⁴⁵ stated that it would in fact assist the parents in raising the child. He thus dismissed the reasons advanced for not allowing child rearing expenses *inter alia* because it is morally wrong to burden the defendant with the costs of child rearing while allowing the parents the benefit and joy in raising the child. In *Mukheibir v Raath*,¹¹⁴⁶ the parents of the child alleged that the medical practitioner had negligently misrepresented to them that a sterilisation procedure had been performed on the mother. The parents stopped taking contraceptive measures which resulted in the birth of a child. The parents claimed in delict for pure economic loss. The court held that whether the claim is framed in contracts or in delict, the medical practitioner owes a duty of care to the patients and that it was not *contra bonos mores* for the medical practitioner to be held liable for the damages. The court further held that delictual claims need not be limited to claims based on socio-economic reasons as was held in *Administrator, Natal v Edouard*. Other reasons such as a couple deciding not to have more children are acceptable.¹¹⁴⁷

Wrongful birth claims were recognised in *Friedman v Glicksman*¹¹⁴⁸ and *Stewart v Botha*.¹¹⁴⁹ In *Friedman v Glicksman*, the medical practitioner failed to detect congenital defects during pregnancy. The child was born with severe disabilities. The mother's claim for child rearing costs as well as future medical and hospital expenses were allowed by the court.¹¹⁵⁰ In *Stewart v Botha*, the medical practitioners were likewise sued for not detecting congenital defects during pregnancy. The child was born with severe disabilities. The court allowed the mother's claim for damages consisting of costs for the child's maintenance, special schooling needs, as well as future hospital and medical costs. In both these cases, wrongful life claims were also instituted on behalf of the child but the courts refused to recognise these claims as it

¹¹⁴³ *Administrator, Natal v Edouard* 1990 3 SA 581 (A) 590. See *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) 213.

¹¹⁴⁴ *Administrator, Natal v Edouard* 1990 3 SA 581 (A) 590.

¹¹⁴⁵ *Administrator, Natal v Edouard* 1990 3 SA 581 (A) 590.

¹¹⁴⁶ 1999 3 SA 1065 (SCA).

¹¹⁴⁷ See *Mukheibir v Raath* 1999 3 SA 1065 (SCA) [46], [49]. *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) 213.

¹¹⁴⁸ 1996 1 SA 1134 (W). See Mukheibir in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 347.

¹¹⁴⁹ 2008 6 SA 310 (SCA). See Mukheibir in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 347.

¹¹⁵⁰ *Friedman v Glicksman* 1996 1 SA 1134 (W) 1140.

was considered *contra bonos mores* to acknowledge non-existence over existence.¹¹⁵¹

Mukheibir¹¹⁵² points out that there has been much debate worldwide on the recognition of wrongful life claims because of the fact *inter alia* that the child's claim is based on the premise that he should not have been born, acknowledging this is considered against public policy. Furthermore, the assessment of damages is considered problematic as it entails comparing the child's current state of quality of life to the position had it not been born.¹¹⁵³ However, the Constitutional Court in South Africa recognised a wrongful life claim in *H v Fetal Assessment Centre*.¹¹⁵⁴ In this case, it was alleged that employees of the centre had negligently failed to notify the mother of the risk of Down Syndrome from a scan. Had the mother been aware of the risk she would have terminated the pregnancy. Damages for future medical and hospital expenses as well as non-patrimonial loss were claimed.

Froneman J¹¹⁵⁵ criticised the particulars of claim which referred to the duty of care owed to the mother and the breach of the duty of care by the centre, in reference to negligence. He submitted that those terms are associated with the tort of negligence in English law that do not assist in determining wrongfulness in the South African law of delict. He¹¹⁵⁶ stated that the birth of a child is a celebration for most people, but the realities of living with disabilities should not be ignored. He further stated that the term "wrongful life" used is "unfortunate and wrong" as the issue is not the wrongful life of the child, but rather whether a child is entitled to compensation as a result of living with a disability. In recognising a wrongful life claim, Froneman J¹¹⁵⁷ referred to developing the law of delict in line with constitutional imperatives. In respect of the existence of harm, he referred to the loss suffered by the parents. The loss suffered entailed, the costs of raising a child with a disability but if the parents for any reason are unable to claim or do not claim, the child may in lieu of the parents be entitled to

¹¹⁵¹ See *Stewart v Botha* 2008 6 SA 310 (SCA) 319. *Friedman v Glicksman* 1996 1 SA 1134 (W) 1141-1142. Mukheibir in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 348-349.

¹¹⁵² In Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 346-347.

¹¹⁵³ See *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) 202.

¹¹⁵⁴ *H v Fetal Assessment Centre* 2015 2 SA 193 (CC).

¹¹⁵⁵ *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) 197.

¹¹⁵⁶ *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) 201. See also *Administrator, Natal v Edouard* 1990 3 SA 581 (A) 585-596.

¹¹⁵⁷ *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) 210.

claim.¹¹⁵⁸ Thus there is one wrongdoer, the medical practitioner or the medical institution, and the harm lies in the burden imposed on the parents.¹¹⁵⁹ With regard to wrongfulness, Froneman J¹¹⁶⁰ held that wrongfulness lay in the breach of a legal duty not to cause loss to the child and not to violate the rights of the child under section 28(2) of the Constitution. He submitted that the child's dignity is not infringed in claiming, as allowing the claim will assist the child in dealing with the disability she is living with, thus enabling her to live "as comfortably as possible".¹¹⁶¹ Further, under wrongfulness, Froneman J¹¹⁶² dealt with indeterminate liability, stating that the liability is determinate in that either the child or the parents may claim for the loss and that it was not unreasonable to impose liability. Factual causation lay in the fact that had the misdiagnosis not occurred, then the birth leading to the loss would not have occurred. Froneman J¹¹⁶³ acknowledged that policy considerations may still negate legal causation, but that it was for the High Court to find, including whether all the elements of delictual liability were present. Mukheiber¹¹⁶⁴ submits that this decision was positive in recognising a wrongful life claim, but criticises the claim being dependant on the parents not claiming. She submits that this may assist with indeterminate liability, but the child's harm (patrimonial and non-patrimonial) is distinct from the parents. Mukheiber¹¹⁶⁵ submits that the court should have relied on shifting the loss onto the medical practitioner for his wrongful and culpable conduct instead of referring to the best interests of the child.

The court provided a summary of the different jurisdictions that recognise wrongful life claims. For purposes of this study it was noted that the United Kingdom does not recognise wrongful life claims, they do not have a constitution protecting rights and section 1(2) of the Congenital Disabilities (Civil Liability) Act¹¹⁶⁶ denies wrongful life claims. The reasons for the denial includes *inter alia* the idea that it would burden

¹¹⁵⁸ 214-216. See Mukheiber in Potgieter, Knobel and Jansen (eds) *Essays honour of Johann Neethling* 350-351.

¹¹⁵⁹ *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) 215-216.

¹¹⁶⁰ 216-217. See Mukheiber in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 351.

¹¹⁶¹ *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) 217. See Mukheiber in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 352.

¹¹⁶² *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) 217. See Mukheiber in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 352.

¹¹⁶³ *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) 218. See Mukheiber in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 351.

¹¹⁶⁴ In Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 355.

¹¹⁶⁵ In Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 356.

¹¹⁶⁶ 1976.

medical practitioners “in their socially and morally exacting role” and that medical practitioners would advise abortions in difficult cases out of fear of being sued.¹¹⁶⁷ France also does not recognise wrongful life claims¹¹⁶⁸ and in the United States of America a few states allow such claims.¹¹⁶⁹ Wrongful birth claims are allowed in the United Kingdom and in most states in the United States of America.¹¹⁷⁰

In respect of wrongful conception claims, the harm lies in the costs of raising the child. In respect of wrongful birth claims, the harm lies in maintaining the child living with a disability with special schooling and other needs, as well as future hospital and medical costs.¹¹⁷¹ A distinction is made between a claim submitted by either the parents or the child. A claim by the parents is a wrongful birth claim, where the parents were denied the choice to terminate the pregnancy had they known of the congenital conditions. Wrongful life claims are instituted by the child. The harm, as Mukheiber convincingly argues above, suffered by the parents and the child is distinct. The child may be entitled to claim patrimonial and non-patrimonial loss. It is thus only reasonable that both the child and parents should be entitled to damages. The parents may suffer not only special damages based on the costs of raising the child with special needs but also medical and hospital costs. They may even suffer non-patrimonial loss. The conduct is usually in the form of an omission and it is only reasonable to hold the medical practitioner or medical institutions liable if conduct is present. Wrongfulness may lie: in the breach of a legal duty by the medical practitioner to either inform the parents of the risk of conceiving or the risk of the child being born with a congenital condition; or by breach of a legal duty to prevent harm ensuing. We have not had a case yet where the mother was informed of a congenital condition and refused to terminate the pregnancy, resulting in the birth of a child living with a disability which led to a wrongful life claim. The parents’ right to terminate the pregnancy, their freedom of security of person in terms of section 12 of the Constitution, is limited.¹¹⁷² Their right is not limited in a reasonable and justified manner. Therefore such limitation may be considered unreasonable. The limitation of the child’s rights in terms of section 28 of the Constitution is also unreasonable. Thus

¹¹⁶⁷ *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) 222.

¹¹⁶⁸ *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) 222.

¹¹⁶⁹ California, New Jersey, Maine and Washington.

¹¹⁷⁰ *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) 228-231.

¹¹⁷¹ *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) 213.

¹¹⁷² *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) 213.

wrongfulness in terms of the traditional approach may be present in the breach of a legal duty or infringement of a right. According to the recent approach it is not unreasonable to hold the medical practitioner or medical institution liable. Fault usually in the form of negligence would be determined based on the standard of the reasonable professional. Thus if the conduct of the medical practitioner or staff in the circumstances of the case strays from the standard of the reasonable professional, then negligence is present. The birth of either an unexpected child which results in the costs of raising the child, or the costs of raising a child with special needs including medical costs, may not have occurred had the medical practitioners or medical staff acted reasonably. Thus, factual causation would be found easily. In terms of legal causation, it would depend on whether it is fair, just and reasonable to impute liability on the medical practitioners or medical institutions for the harm or loss suffered by either the parents or the child. Thus the influence of reasonableness on wrongful conception, wrongful birth and wrongful life claims is predominantly explicit.

8. Psychiatric or psychological injury

Due to a lack of authority in Roman-Dutch law in respect of claims for psychiatric or psychological injury, our courts have referred to English law for guidance.¹¹⁷³ In English law, claims for negligently inflicted psychiatric injury is also one of the recognised categories of duty of care. In other words, depending on the circumstances, the defendant may owe the claimant a duty to avoid causing him psychiatric injury. In South Africa, the majority of delictual claims that have come before the court relate to claims for psychiatric injury as a result of emotional shock.¹¹⁷⁴ Psychiatric injury may be sustained through *inter alia* fright, stress, emotional shock, or mental suffering.¹¹⁷⁵ In order to succeed in a claim in delict resulting from psychological or psychiatric injury, such injury must not be minor. That is, as Neethling and Potgieter¹¹⁷⁶ put it – the injury must be “reasonably serious”.¹¹⁷⁷ For example, the courts have awarded compensation where the injury resulted in

¹¹⁷³ See Neethling and Potgieter *Delict* 286. Chapter 4 para 3.3.2.

¹¹⁷⁴ See Neethling and Potgieter *Delict* 285; Ahmed and Steynberg 2015 *THRHR* 181 ff.

¹¹⁷⁵ There is no *numerus clausus* (Loubser and Midgley (eds) *Delict* 307. See also Neethling and Potgieter *Delict* 285; Ahmed and Steynberg 2015 *THRHR* 184-185.

¹¹⁷⁶ *Delict* 287.

¹¹⁷⁷ See Loubser and Midgley (eds) *Delict* 307 list of psychiatric injuries that have been recognised and where the courts have awarded compensation.

“major depressive disorder”; “serious shock”, personality changes, and so forth.¹¹⁷⁸ Furthermore evidence must be produced to prove the psychiatric injury.¹¹⁷⁹

No doubt as a result of the influence of English law there is a distinction between “primary” and “secondary” victims of psychiatric injury or emotional shock. This is evident where the legislation regulating road accident claims makes reference to primary and secondary victims as well as numerous cases.¹¹⁸⁰ The following distinction between primary and second victims who suffer emotional shock may be referred to.

“In the case of claims for emotional shock suffered by primary victims of the accident, the emotional shock is usually accompanied by physical injuries sustained. On the other hand, in the case of claims for emotional shock suffered by secondary victims, the emotional shock is not usually accompanied by physical injuries (although the secondary victim may have been in physical danger). A secondary victim is one who typically witnessed or heard of a disturbing event.”¹¹⁸¹

South African law does not refer to the principles of proximity (applicable in English law) which limit claims for psychiatric injury especially with regard to secondary victims. However, in all the cases where compensation was awarded for secondary emotional shock “a strong emotional bond or close relationship between the secondary victim and the injured or deceased had existed”.¹¹⁸²

The *actio legis Aquiliae* may be applied to claim patrimonial loss.¹¹⁸³ Where non-patrimonial loss is suffered as a result of the infringement of the plaintiff’s physical-mental integrity, compensation for damages may be claimed with the *actio iniuriarum*

¹¹⁷⁸ See Ahmed and Steynberg 2015 *THRHR* 190-191 with regard to the list of cases.

¹¹⁷⁹ Neethling and Potgieter *Delict* 285. See authority cited by Ahmed and Steynberg 2015 *THRHR* 184.

¹¹⁸⁰ S 19(g) of the Road Accident Fund Act 56 of 1996 makes reference to claimants who suffer secondary emotional shock. Such claimants are excluded from claiming from the Road Accident Fund and must claim from the wrongdoer in terms of common law. Primary victims are in principle entitled to claim compensation for emotional shock from the Road Accident Fund, provided the other requirements have been met. See Ahmed and Steynberg 2015 *THRHR* 186-188 in respect of the cases where reference is made to primary and secondary victims.

¹¹⁸¹ Ahmed and Steynberg 2015 *THRHR* 185-186.

¹¹⁸² Ahmed and Steynberg *THRHR* 2015 188.

¹¹⁸³ See *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A) 776-777, 781; *Gibson v Berkowitz* 1996 4 SA 1029 (W) 1038; Neethling and Potgieter *Delict* (2010) 5, 275; Ahmed and Steynberg 2015 *THRHR* 182.

or the action for pain and suffering.¹¹⁸⁴ Psychiatric injury caused intentionally or negligently may ground delictual liability.¹¹⁸⁵

Generally all the required elements of a delict must be proven but as a result of the influence of English law, the courts have placed emphasis on the criterion of “reasonable foreseeability of harm” which as mentioned is relevant in determining wrongfulness, (a factor considered when determining whether the defendant’s conduct was reasonable in infringing a right or the presence of a legal duty to prevent harm), negligence (the first leg of the test to negligence) and legal causation (where reasonable foreseeability of harm may be one of the criterion applied as part of the flexible test).¹¹⁸⁶ In *Barnard v Santam Bpk*,¹¹⁸⁷ the court stated that it was irrelevant whether “reasonable foreseeability” of harm was determined within the ambit of negligence or legal causation.

As mentioned, wrongfulness usually lies in the infringement of a right or breach of a legal duty. In cases of psychiatric injury the person’s physical-mental integrity is usually infringed. Thus the defendant’s infringement of the plaintiff’s interests is unreasonable, grounding wrongfulness.¹¹⁸⁸ Since *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk*,¹¹⁸⁹ the nervous system and brain are deemed as part of a person’s body so an injury to the brain (psychiatric or psychological injury) is regarded as a physical injury.¹¹⁹⁰

In determining negligence using the criterion of reasonable foreseeability of harm, the courts tend to prefer the concrete approach, thus the general nature of the harm and the general manner of its occurrence must be foreseen in respect of a specific plaintiff,¹¹⁹¹ as opposed to the abstract approach.¹¹⁹² Thus if it can be concluded on a balance of probabilities that the reasonable person in the position of the defendant

¹¹⁸⁴ Where for example, emotional shock was caused intentionally, the *actio iniuriarum* may be an appropriate remedy. See Loubser and Midgley (eds) *Delict* 308-309.

¹¹⁸⁵ See authority referred to by Ahmed and Steynberg 2015 *THRHR* 182 fn 6, 191 fn 75-76.

¹¹⁸⁶ Ahmed and Steynberg 2015 *THRHR* 184.

¹¹⁸⁷ 1999 1 SA 202 (SCA) 210.

¹¹⁸⁸ Neethling and Potgieter *Delict* 325-326; Ahmed and Steynberg 2015 *THRHR* 190.

¹¹⁸⁹ 1973 1 SA 769 (A) 777, 779.

¹¹⁹⁰ Ahmed and Steynberg 2015 *THRHR* 190.

¹¹⁹¹ See Loubser and Midgley (eds) *Delict* 309.

¹¹⁹² See Ahmed and Steynberg 2015 *THRHR* 193 fn 86 in respect of the cases where the courts have referred to the concrete approach. See also para 2.4.2 above in respect of the difference between the two approaches.

should have foreseen the reasonable possibility of psychiatric injury to the specific plaintiff and would have taken reasonable steps to avoid the harm, then negligence is present.¹¹⁹³ If “the negligent conduct of the wrongdoer directly placed the plaintiff in personal danger, it should not be too difficult to prove that the harm to the plaintiff was reasonably foreseeable by the wrongdoer, and more so in the case of intentionally inflicted harm”.¹¹⁹⁴ When one intentionally causes shock to another, the court has held that the defendant “must foresee the natural consequences of his intentional act”.¹¹⁹⁵

“Reasonable foreseeability of harm” in respect of a secondary victim could sometimes be more challenging to prove.¹¹⁹⁶ Botha JA in *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk*,¹¹⁹⁷ stated that in instances where the victim is in personal danger, it is easier to conclude that the possibility of harm should have been reasonably foreseeable as compared to instances where the plaintiff saw the harm being inflicted or heard of it. Ultimately the court must consider the facts and the surrounding circumstances in order to determine whether the psychiatric injury was reasonably foreseeable and whether the defendant could have reasonably taken steps to prevent the harm.¹¹⁹⁸

The courts do not have problems finding factual causation or the presence of conduct. It is reasonable to hold the defendant liable only if the defendant’s conduct caused the psychiatric injury. In respect of factual causation, the defendant must have factually caused the psychiatric injury. Mention has already been made of the fact that the damage or harm must be a recognised form of psychiatric or psychological injury but such injury must be proven. The courts however do encounter problems

¹¹⁹³ *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA) 60. See also Ahmed and Steynberg *THRHR* 193-194.

¹¹⁹⁴ Ahmed and Steynberg 2015 *THRHR* 194 as well as the cases referred to.

¹¹⁹⁵ *Boswell v Minister of Police* 1978 3 SA 268 (E) 274. See Ahmed and Steynberg 2015 *THRHR* 194.

¹¹⁹⁶ Ahmed and Steynberg 2015 *THRHR* 194.

¹¹⁹⁷ 1973 1 SA 769 (A) 781.

¹¹⁹⁸ See *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA) 60; *Barnard v Santam Bpk* 1999 1 SA 202 (SCA) 214; *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A) 780; *Majiet v Santam Ltd* 1997 4 All SA 555 (C) 558; Ahmed and Steynberg 2015 *THRHR* 194-195.

with finding legal causation.¹¹⁹⁹ The flexible criterion¹²⁰⁰ is applied in determining legal causation and what must be established is whether there is a close enough relationship between the defendant's conduct and the psychiatric injury sustained in order for the defendant to be held liable for the psychiatric injury in view of policy considerations based on reasonableness, fairness and justice.¹²⁰¹ If the psychiatric injury is too remote, for example, if a secondary victim did not have a close relationship with the primary victim and saw an incident over the television, his psychiatric injury may be regarded too remote and the defendant may not be held delictually liable for the secondary victim's psychiatric injury.

There is no *numerus clausus* with regard to which type of relationships are recognised by the courts.¹²⁰² In *Road Accident Fund v Sauls*, the court stated that the "question is one of legal policy, reasonableness, fairness and justice (legal causation), that is, was the relationship between the primary and secondary victims such that the claim should be allowed, taking all the facts into consideration".¹²⁰³ This could also be applied under the question of wrongfulness as explained by Loubser and Midgley.¹²⁰⁴ If the plaintiff for example was at the scene of the accident or came across the aftermath of the accident and subsequently suffered psychiatric injury, the courts would in all probability more readily conclude that the harm was reasonably foreseeable.¹²⁰⁵ The number of secondary victims who could for example hear and see the aftermath of an accident could be limitless. The policy considerations in respect of indeterminate liability and the floodgates argument have been considered by the courts.¹²⁰⁶ The flexible approach to establishing legal causation could easily limit liability with respect to psychiatric injury sustained by secondary victims.¹²⁰⁷ Thus legal causation in our law serves to limit claims and the criterion of reasonable foreseeability of harm when applied to the different elements must be applied

¹¹⁹⁹ See *Barnard v Santam Bpk* 1999 1 SA 202 (SCA) 215; Ahmed and Steynberg 2015 *THRHR* 195.

¹²⁰⁰ *S v Mokgethi* 1990 1 SA 32 (A) 39-41. See *Barnard v Santam Bpk* 1999 1 SA 202 (SCA) 215; Ahmed and Steynberg 2015 *THRHR* 195.

¹²⁰¹ *S v Mokgethi* 1990 1 SA 32 (A) 40-41. Ahmed and Steynberg 2015 *THRHR* 195-196.

¹²⁰² Ahmed and Steynberg 2015 *THRHR* 196 in respect of the list of relationships.

¹²⁰³ 2002 2 SA 55 (SCA) 62-63. See Ahmed and Steynberg 2015 *THRHR* 196. Cf *Swartbooi v Road Accident Fund* 2013 1 SA 30 (WCHC) 34.

¹²⁰⁴ (Eds) *Delict* 310.

¹²⁰⁵ Ahmed and Steynberg 2015 *THRHR* 196-197.

¹²⁰⁶ See *Clinton-Parker and Dawkins v Administrator, Transvaal* 1996 2 SA 37 (W) 63; *Majiet v Santam Ltd* 1997 4 All SA 555 (C) 558; Ahmed and Steynberg 2015 *THRHR* 196.

¹²⁰⁷ Ahmed and Steynberg 2015 *THRHR* 197.

correctly within the ambit of each element. The influence of reasonableness on claims for psychiatric injury is explicit, particularly with the requirement of reasonable foreseeability of harm.

9. Pure economic loss

It should be noted that the English tort of negligence where pure economic loss falls within what is referred to as a recognised category of duty of care has influenced claims for pure economic loss in the South African law of delict to a large extent.¹²⁰⁸ As submitted, the recent approach to determining wrongfulness by our courts is similar to the English third element of establishing a duty of care in the tort of negligence (that is, whether it is fair, just and reasonable to impose a duty of care). These two approaches are also similar to determining legal causation. They are all policy based inquiries but are still applied differently with regard to each element.

There is no clear definition of pure economic loss.¹²⁰⁹ It has been defined in a negative sense where it refers to loss which is *not* related to damage to corporeal property or physical injury.¹²¹⁰ Alternatively, Neethling and Potgieter¹²¹¹ submit that it refers to “financial loss that does flow from damage to property or impairment of personality but which does not involve the *plaintiff’s* property or person; or if it does, the *defendant* did not cause such damage or injury”. Pure economic loss may be caused intentionally or negligently. For example, pure economic loss may be caused by a negligent misrepresentation¹²¹² or by an intentional interference with contractual relations.¹²¹³ Pure economic loss can be difficult to quantify as the loss can be uncertain and may seem endless.¹²¹⁴

¹²⁰⁸ See chapter 4 para 3.3.3.

¹²⁰⁹ In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* 2006 1 SA 461 (SCA) 465 Harms JA referred to Neethling and Potgieter (4 ed) *Delict* as well as the “Stair Memorial Encyclopaedia *The Laws of Scotland* (1996) vol 15 para 273”.

¹²¹⁰ See *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 377; *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) 498; Loubser and Midgley (eds) *Delict* 228.

¹²¹¹ *Delict* 290-291.

¹²¹² See *Mukheiber v Raath* 1999 3 SA 1065 (SCA).

¹²¹³ See *Country Cloud Trading v MEC, Department of Infrastructure Development* 2015 1 SA 1 (CC) 10; Neethling and Potgieter *Delict* 306-309; Loubser and Midgley (eds) *Delict* 234-237.

¹²¹⁴ *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 378; Loubser and Midgley (eds) *Delict* 228.

In *Administrateur, Natal v Trust Bank van Afrika Bpk*,¹²¹⁵ the court alluded to the proper determination of the elements of wrongfulness, negligence and causation which would assist in allaying the fear of indeterminate liability in cases of pure economic loss.¹²¹⁶ All the elements of a delict must however be present to ground liability.¹²¹⁷

Wrongfulness will be established if there is either an infringement of a subjective right or breach of a legal duty to prevent pure economic loss.¹²¹⁸ Neethling and Potgieter point out that an infringement of a subjective right could occur for example where there is an interference with a contractual relationship, in cases of unlawful competition, and where the right to good will or a personal right is involved.¹²¹⁹ The causing of pure economic loss is not *prima facie* wrongful as in the case of causing physical harm which includes psychiatric or psychological injury.¹²²⁰ However, wrongfulness in cases of pure economic loss is usually established where there is a breach of a legal duty to prevent economic loss.¹²²¹ The test applied is the *boni mores* or reasonableness criterion requiring a value judgment, taking all circumstances into account, and involves policy considerations.¹²²² In applying the *boni mores* criterion, the interests of the parties involved must also be weighed against the public interest.¹²²³

¹²¹⁵ 1979 3 SA 824 (A). See Van der Walt and Midgley *Delict* 137.

¹²¹⁶ See Neethling, Potgieter and Scott *Casebook on the law of delict* 759.

¹²¹⁷ See *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* 2006 1 SA 461 (SCA) 468; Neethling and Potgieter *Delict* 291.

¹²¹⁸ See *Lillicrap, Wassenaar and Partners v Pilkington Brothers(SA) (Pty) Ltd* 1985 1 SA 475 (A) 498; *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 379; *Zimbabwe Banking Corporation Ltd v Pyramid Motor Corporation (Pty) Ltd* 1985 4 SA 553 (ZS) 561, 562-563; Neethling and Potgieter *Delict* 291; Van der Walt and Midgley *Delict* 138; Loubser and Midgley (eds) *Delict* 230.

¹²¹⁹ Neethling and Potgieter *Delict* 291.

¹²²⁰ *Minister of Finance v Gore* 2007 1 SA 111 (SCA) 138; *Fourway Haulage SA Pty Ltd v SA National Roads Agency Ltd* 156; *Zimbabwe Banking Corporation Ltd v Pyramid Motor Corporation (Pty) Ltd* 1985 4 SA 553 (ZS) 561, 562-563; *Country Cloud Trading v MEC, Department of Infrastructure Development* 2015 1 SA 1 (CC) 9. See cases referred to by Neethling and Potgieter *Delict* 291 fn 155.

¹²²¹ See *Fourway Haulage SA Pty Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) 156; *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) 832-833; *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 26-27; Loubser and Midgley (eds) *Delict* 230. See cases referred to by Neethling and Potgieter *Delict* 291-292 fn 153

¹²²² *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A) 797; *Zimbabwe Banking Corporation Ltd v Pyramid Motor Corporation (Pty) Ltd* 1985 4 SA 553 (ZS) 562-563; Neethling and Potgieter 2015 *THRHR* 635; Neethling and Potgieter *Delict* 292; Van der Walt and Midgley *Delict* 138.

¹²²³ *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 384; *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A) 797-798; *Zimbabwe Banking*

Neethling and Potgieter¹²²⁴ refer to the following factors¹²²⁵ in applying the *boni mores* or reasonableness criterion in order to determine whether there is a legal duty to prevent pure economic loss: reasonable foreseeability of harm;¹²²⁶ whether the defendant's knew or foresaw that his negligent conduct may cause pure economic loss;¹²²⁷ practical measures that could have been taken to avert the loss (is the cost involved reasonably proportionate to the loss suffered by the plaintiff and could the harm be averted with relative ease?);¹²²⁸ where the defendant as a professional professing certain knowledge and competence has a duty not to cause economic loss;¹²²⁹ the degree of the risk of economic loss that may be suffered by the plaintiff (where the greater the degree of the risk, the more likely the defendant would have been expected to prevent the loss);¹²³⁰ the extent of the loss (if it is indeterminate it may be unlikely that the defendant had a legal duty to prevent the economic loss);¹²³¹ where a statutory provision may indicate whether there is a legal duty on a person to prevent economic loss;¹²³² and that by not recognising a legal duty in a circumstance may leave a "serious lacuna in the law".¹²³³

1224 *Corporation Ltd v Pyramid Motor Corporation (Pty) Ltd* 1985 4 SA 553 (ZS) 562, 564; Neethling and Potgieter *Delict* 292-293; Van der Walt and Midgley *Delict* 138.

1225 *Delict* 293-297.

1226 There is no *numerus clausus* in respect of the factors that may be used by the adjudicators in applying the *boni mores* criterion in order to determine whether there is a legal duty to prevent pure economic loss (Neethling and Potgieter *Delict* 292).

1227 *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 384. Brand JA in *Fourway Haulage SA Pty Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) 163 stated that reasonable foreseeability of harm should rather be dealt with under legal causation instead of negligence. See Neethling and Potgieter *Delict* 294 fn 167.

1228 See *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 386; *BOE Bank Ltd v Ries* 2002 2 SA 39 (SCA) 49; *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A) 799; *Boberg Delict* 146-147; Neethling and Potgieter *Delict* 293.

1229 See *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 384; Neethling and Potgieter *Delict* 294; Loubser and Midgley (eds) *Delict* 230.

1230 See *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A) 799; Neethling and Potgieter *Delict* 294; Loubser and Midgley (eds) *Delict* 230;

1231 *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 384; *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A) 799; Neethling and Potgieter *Delict* 95; Loubser and Midgley (eds) *Delict* 230.

1232 Loubser and Midgley (eds) *Delict* 232.

1233 See *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 31, 33 where it was stated that there was no legal duty on the council to avoid pure economic loss; *Minister of Law and Order v Kadir* 1995 1 SA 303 (A) 319 where the court held that the police did not have a legal duty to take down particulars of witnesses to a hit and run motor vehicle accident which would be required by the road accident victim in a civil claim; Neethling and Potgieter *Delict* 296 fn 174; Loubser and Midgley (eds) *Delict* 231.

1233 *Ries v Boland Bank PKS Ltd* 2000 4 SA 955 (C) 970; Neethling and Potgieter *Delict* 297.

Loubser and Midgley¹²³⁴ in addition to the factors mentioned above refer to the importance of whether there is a special relationship between the parties¹²³⁵ and “fraud or dishonesty” as factors which may lead to the conclusion that the causing of harm was unreasonable and wrongful.¹²³⁶ Van der Walt and Midgley¹²³⁷ also refer to the principles of equity and fairness which may lean towards or against allowing a claim for pure economic loss.

Generally, the courts are reluctant to award compensation for pure economic loss and in addition to the factors referred to above consider a number of policy considerations in determining the presence of a legal duty to prevent pure economic loss.¹²³⁸ The common policy considerations the courts refer to for not imposing liability for pure economic loss include:¹²³⁹ the concern of indeterminate liability;¹²⁴⁰ the opening of the floodgates to a high influx of claims¹²⁴¹ (the courts would more readily impose liability for a single loss occurring once to one plaintiff);¹²⁴² where the parties could have protected themselves from loss or liability by other means;¹²⁴³ the plaintiff’s vulnerability to risk of pure economic loss (where the plaintiff could have protected himself from vulnerability to risk of loss by other means such as by

¹²³⁴ (Eds) *Delict* 230-231.

¹²³⁵ For example, in cases where persons offer professional services or where a fiduciary duty is present. If there is no special relationship, a legal duty may not be present to prevent harm, the authors refer to *Franschoekse Wynkelder (Ko-operatief) Bpk v South African Railways and Harbours* 1981 3 SA 36 (C) 41. See *Delphisure Group Insurance Brokers Cape (Pty) Ltd v Dippenaar* 2010 5 SA 499 (SCA) 508-509.

¹²³⁶ *Minister of Finance v Gore NO* 2007 1 SA 111 (SCA) 140.

¹²³⁷ *Delict* 138.

¹²³⁸ See *Minister of Finance v Gore NO* 2007 1 SA 111 (SCA) 138.

¹²³⁹ See the policy considerations referred to in *Delphisure Group Insurance Brokers Cape (Pty) Ltd v Dippenaar* 2010 5 SA 499 (SCA) 508-509. See also Neethling and Potgieter 2015 *THRHR* 636-637. Cf Loubser and Midgley (eds) *Delict* 152-156.

¹²⁴⁰ See *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 377-378; *Fourway Haulage SA Pty (Ltd) v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) 161; *Country Cloud Trading v MEC, Department of Infrastructure Development* 2015 1 SA 1 (CC) 11; Loubser and Midgley (eds) *Delict* 232. There was however no question of indeterminate liability found in *Delphisure Group Insurance Brokers Cape (Pty) Ltd v Dippenaar* 2010 5 SA 499 (SCA) 509; *Fourway Haulage SA Pty (Ltd) v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) 161-162; *Country Cloud Trading v MEC, Department of Infrastructure Development* 2015 1 SA 1 (CC) 10.

¹²⁴¹ See *Shell and BP SA Petroleum Refineries (Pty) Ltd v Osborne Panama SA* 1980 3 SA 653 (D).

¹²⁴² *Greenfield Engineering Works Pty Ltd v NKR Construction (Pty) Ltd* 1978 4 SA 901 (N) 916-917; *Fourway Haulage SA Pty (Ltd) v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) 161; Loubser and Midgley (eds) *Delict* 232.

¹²⁴³ Such as by obtaining insurance or by contractual means (*Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 3 SA 138 (SCA)). See also *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A) 799; Neethling and Potgieter *Delict* 296; Loubser and Midgley (eds) *Delict* 230.

contractual means);¹²⁴⁴ the law of delict should not undermine and interfere with contractual relations where the law of contract may be applied;¹²⁴⁵ and liability on the defendant would be refused if such imposition is deemed an additional burden which would hamper his activities.¹²⁴⁶ The courts try to contain liability relating to pure economic loss within “reasonably predictable limits”.¹²⁴⁷

Neethling and Potgieter¹²⁴⁸ point out that in particular, vulnerability to risk in a contractual setting has been used more recently by the courts¹²⁴⁹ as a factor in applying the *boni mores* criterion to determine whether there was a legal duty to prevent pure economic loss. They¹²⁵⁰ state that the criterion of vulnerability to risk will “be satisfied if the plaintiff could not reasonably have avoided the risk by other means”. Brand JA, in line with the recent approach to determining wrongfulness stated that “under the influence of Australian Jurisprudence, vulnerability to risk signifies that the plaintiff could not reasonably have avoided the risk of harm by other means ... a finding of non-vulnerability on the part of the plaintiff is an important indicator against the imposition of delictual liability on the defendant”.¹²⁵¹

In order to illustrate the influence of reasonableness in determining whether delictual liability will follow based on claims for pure economic loss, a few examples from case law will be considered briefly.

In *Delphisure Group Insurance Brokers Cape (Pty) Ltd v Dippenaar*,¹²⁵² two wheat farmers cancelled applications for insurance made with one company for their crop in

¹²⁴⁴ See *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A) 799; *Fourway Haulage SA Pty (Ltd) v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) 162; *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 1 SA 1 (CC) where the court held that the appellant was not vulnerable to risk and could have claimed its loss in terms of contractual relations; Neethling and Potgieter *Delict* 296-297; Loubser and Midgley (eds) *Delict* 230.

¹²⁴⁵ See *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 4 (A) 500; *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 1 SA 1 (CC) 19.

¹²⁴⁶ *Fourway Haulage SA Pty (Ltd) v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) 162; Neethling and Potgieter *Delict* 297; Loubser and Midgley (eds) *Delict* 232.

¹²⁴⁷ Loubser and Midgley (eds) *Delict* 228. See also Van der Walt and Midgley *Delict* 138.

¹²⁴⁸ 2015 *THRHR* 635.

¹²⁴⁹ See cases referred to by Neethling and Potgieter 2015 *THRHR* 636.

¹²⁵⁰ Neethling and Potgieter 2015 *THRHR* 635-636.

¹²⁵¹ *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* 2013 5 SA 183 (SCA) 195. See Neethling and Potgieter 2015 *THRHR* 636.

¹²⁵² 2010 5 SA 499 (SCA).

favour of a product called “Farmsure” which was supposed to have been underwritten by another company (Lloyd’s). The farmers did this as a result of the advice from an insurance broker and marketer. Their crops did not grow successfully during the season and it transpired that “Farmsure” was non-existent, meaning that they were not covered and it was too late for them to take out insurance with another company. Thus the farmers suffered pure economic loss and were unable to recover such loss from insurance. They sued the broker for their loss alleging negligent misrepresentation. In the *court a quo*, their claims succeeded but the broker appealed the decision. The Supreme Court of Appeal confirmed that the misrepresentation of facts was negligent and that wrongfulness would be present only if there were “public or legal policy considerations that require liability to follow”.¹²⁵³ In considering various factors the court stated *inter alia* that: there was no question of indeterminate liability (being limited to the farmers who were offered “Farmsure”); the risk could not have been avoided by contractual means (they were vulnerable to risk); the extension of delictual liability would not impose an unwarranted burden upon the defendant; and the farmers were vulnerable to risk as they were persuaded by a professional who gave them the advice to buy a product which did in fact not exist. Thus wrongfulness was present.¹²⁵⁴ The Supreme Court of Appeal confirmed that it was reasonable to hold the broker delictually liable for the pure economic loss sustained by one of the farmers, in line with the recent approach to determining wrongfulness. It may be argued, of course, that the same factors above are relevant in concluding that there was a legal duty upon the broker to prevent the pure economic loss. It is reasonable to expect the broker to have taken some action in preventing the harm. He should have acted reasonably *ex post facto* in light of all circumstances. He was a professional who provided advice which the farmers relied on. The farmers’ reliance on the broker’s advice could be considered reasonable. The farmers’ could not reasonably have avoided the risk by taking out other insurance as by the time they found out Farmsure did not exist they were not able to take out other insurance.

In *Flionis v Bartlett*,¹²⁵⁵ just over three million rand was deposited into a firm of attorneys’ trust account by an attorney, Bartlett, without indicating that he was the depositor, nor the purpose of the deposit. Bartlett was unaware at the time the deposit

¹²⁵³ *Delphisure Group Insurance Brokers Cape (Pty) Ltd v Dippenaar* 2010 5 SA 499 (SCA) 508.

¹²⁵⁴ *Delphisure Group Insurance Brokers Cape (Pty) Ltd v Dippenaar* 2010 5 SA 499 (SCA) 509.

¹²⁵⁵ 2006 3 SA 575 (SCA).

was made, that he was a victim of fraud. Upon realising the fraud he requested his deposit back. The firm of attorneys' alleged that the money was already paid out. Bartlett sued one of the partners of the firm of attorneys, Flionis, for pure economic loss. The court *a quo* found that there was a legal duty on the firm of attorneys to prevent the loss. On appeal to the Supreme Court of Appeal, the court confirmed that Flionis was liable for the pure economic loss sustained by Bartlett, but reduced the award of damages as a result of contributory negligence on the part of Bartlett. In establishing wrongfulness, Howie P stated:¹²⁵⁶

"The enquiry remains whether there was a legal duty on Flionis ... to deal with the money without negligence. Put another way: if he was negligent should the law impose on him liability for such negligence?

This being an instance of mere economic loss resulting from omission ... the incidence of the legal duty to act without negligence is a matter of legal policy. The decision whether the duty exists depends on various factors including prevailing ideas of justice and where the loss should fall. This enquiry involves applying the general criterion of reasonableness having regard to the legal convictions of the community as assessed by the court."

In considering various factors, Howie J¹²⁵⁷ stated that in this case, Bartlett could not have been protected by other means. That is, by contractual means, he was vulnerable to risk. Howie J referred to the following in finding that there was a legal duty on Flionis to act reasonably in preventing the economic loss:

"First and foremost [Flionis] as recipient, was a firm of practising attorneys. As such it proclaimed to the public that it possessed the expertise and trustworthiness to deal with trust money reasonably and responsibly. Second, Bartlett relied on that and particularly on the fact that the money would be in the appellant's trust account until he instructed otherwise. ... Bartlett's reliance on the money being safe in a trust account was reasonable even if, as I shall point out, his failure to communicate with Flionis was not. Third, even where an attorney discovers an anonymous and unexplained deposit it requires minimal management to transfer the money to a trust suspense account. It is then a task of no difficulty to trace the depositor with the aid of the firm's own bank. After that one need merely leave the money where it is until receipt of instructions by or on behalf of the depositor or the person for whose benefit the deposit was made. Fourth, unreasonable conduct that might put the money at risk would, as a reasonable foreseeability, cause loss to the depositor or beneficiary. The legal convictions of the community would undoubtedly clamour for liability to exist in these circumstances."

In dealing with negligence, Howie P¹²⁵⁸ submitted that a reasonable person in Bartlett's position would not have deposited such a large amount of money based on the word of someone he hardly knew and without acquainting himself with Flionis, the partner of the firm in order to avoid the risk. The court found that both Flionis and

¹²⁵⁶ *Flionis v Bartlett* 2006 3 SA 575 (SCA) 588.

¹²⁵⁷ *Flionis v Bartlett* 2006 3 SA 575 (SCA) 588-589.

¹²⁵⁸ *Flionis v Bartlett* 2006 3 SA 575 (SCA) 590-591.

Bartlett's conduct strayed from the standard of the reasonable person.¹²⁵⁹ This case referred to the traditional and recent approaches to determining wrongfulness.

In *Country Cloud Trading CC v MEC, Department of Infrastructure Development*,¹²⁶⁰ the respondent (the Department) entered into a building contract with iLima. Under financial strain at a later stage, iLima borrowed twelve million rand from the appellant (Country Cloud – third party) in terms of a loan agreement. The loan agreement was conditional upon the Department's managing agent paying back the twelve million rand to Country Cloud from the monies that would be owed to iLima by the Department, in respect of the building contract. The Department subsequently cancelled the building contract with iLima. iLima went into liquidation and Country Cloud sued the Department in respect of its pure economic loss relating to the loan.¹²⁶¹ The court *a quo* dismissed the claim. The Supreme Court of Appeal on appeal also dismissed Country Cloud's claim finding that due to policy considerations of indeterminate liability¹²⁶² and that the plaintiff was not vulnerable to risk¹²⁶³ it was unreasonable to impose delictual liability on the Department (referring to the recent approach to determining wrongfulness). The Supreme Court of Appeal in response to Country Cloud's allegation that the Department unlawfully interfered with a contractual relationship held that the claim could not be framed within the specific form of *damnum iniuria datum* where, if proven, would be deemed *prima facie* wrongful, yet the court found intent in the form of *dolus eventualis* on the part of the Department.¹²⁶⁴ Country Cloud then appealed to the Constitutional Court alleging *inter alia* that the department unlawfully interfered with the contractual relationship (loan agreement) between iLima and Country Cloud.

The Constitutional Court confirmed that Country Cloud's claim was for pure economic loss and that there was no unlawful interference in a contract which would have been

¹²⁵⁹ *Flionis v Bartlett* 2006 3 SA 575 (SCA) 590.

¹²⁶⁰ *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 1 SA 1 (CC).

¹²⁶¹ 2015 1 SA 1 (CC) 5-6.

¹²⁶² In the sense that if a non-contracting party to the original contract succeeded in a claim for pure economic loss (in delict) against a contracting party as a result of cancellation of the contract, it would open the floodgate to claims by any non-contracting parties (strangers) suffering loss which could lead to indeterminate liability.

¹²⁶³ *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 1 SA 1 (CC) 7-8.

¹²⁶⁴ This was confirmed by the Constitutional Court, see *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 1 SA 1 (CC) 7, 13.

deemed *prima facie* wrongful.¹²⁶⁵ Country Cloud was deemed a third party and a stranger to the contract.¹²⁶⁶ Intent in the form of *dolus eventualis* was however acknowledged.¹²⁶⁷ In concluding that wrongfulness was absent, the court¹²⁶⁸ stated that: there was no risk of indeterminate liability; the plaintiff was not vulnerable to risk; and therefore there was no “pressing need for the law of delict to step in to protect the plaintiff against loss”.¹²⁶⁹ The court held that Country Cloud did not persuade the court that the Department was responsible for the economic loss, that Country Cloud was wronged, or that the Department “owes a duty to Country Cloud”. The claim for pure economic loss was dismissed. The court was not prepared to extend delictual liability where there were existing contractual relations and other reasonable avenues that the appellant could have embarked upon, such as trying to recover the loss from a party to the contract that stood as surety for the loan amount.¹²⁷⁰ The court alluded to both the approaches to determining wrongfulness; it was not reasonable to impose liability on the Department for the pure economic loss sustained by iLima and there was no legal duty upon the department to act reasonably *ex post facto* in preventing the pure economic loss sustained by iLima. The Constitutional Court¹²⁷¹ referred to both the element of wrongfulness and legal causation with respect to policy considerations which assist in excluding liability for pure economic loss.

In *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole*,¹²⁷² the appellant sued a firm of auditors based on a negligent misstatement (a profit certificate) by one of the auditors of the firm which led to the appellant sustaining loss as a result of relying on the statement. Brand JA¹²⁷³ stated that factual causation was present and that the

¹²⁶⁵ *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 1 SA 1 (CC) 2.

¹²⁶⁶ *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 1 SA 1 (CC) 11.

¹²⁶⁷ *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 1 SA 1 (CC) 14.

¹²⁶⁸ *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 1 SA 1 (CC) 16.

¹²⁶⁹ *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 1 SA 1 (CC) 19, 20-22. In this case the court held that Country Cloud could have claimed from the contracting party who stood as surety for the loan amount.

¹²⁷⁰ *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 1 SA 1 (CC) 22-23. See also *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (pty) Ltd* 2006 3 SA 138 (SCA).

¹²⁷¹ *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 1 SA 1 (CC) 8-10.

¹²⁷² 2013 5 SA 183.

¹²⁷³ *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* 2013 5 SA 192.

auditor was in fact grossly negligent. In determining wrongfulness, Brand JA¹²⁷⁴ stated that public and legal policy considerations dictate whether the firm of auditors should be “held legally liable for the loss resulting from the misstatement or whether it should be afforded legal immunity”. In particular he¹²⁷⁵ referred to three considerations in considering whether it was reasonable to impose liability on the firm of auditors: “whether the representation was made in a business context and in response to a serious request”; “whether the plaintiff was dependent upon the defendant to provide the information or advice sought”; and whether the plaintiff was vulnerable to risk.¹²⁷⁶ In respect of the first consideration it was found that the request was serious and made in a business context, however, with regard to the second consideration, the court doubted whether the appellant was dependant on the statement as he could have obtained independent advice.¹²⁷⁷ As for the third consideration, whether the appellant was vulnerable to risk; Brand JA¹²⁷⁸ found that the appellant was initially covered against the risk but through its own conduct deprived itself of contractual remedies and failed to remove itself from a “disadvantageous transaction”. Therefore, the appellant was the author of its own misfortune and made itself vulnerable to risk. It may be argued that the first two considerations could lead to a conclusion of the presence of a legal duty upon the firm of auditors to act reasonably in preventing the pure economic loss, while the third consideration would not. Thus a weighing of the different considerations and in light of all the circumstances, it may be argued that there was no legal duty on the firm of auditors to act reasonably in preventing the pure economic loss.

In respect of legal causation, Brand JA¹²⁷⁹ stated that wrongfulness and legal causation, which are both determined by legal and public policy, serve the same purpose in preventing the imposition of liability and that by the appellant not extricating itself from the transaction when it had an opportunity to do so, resulted in not only wrongfulness not being established but also legal causation. The court¹²⁸⁰ also referred to the reasonable foreseeability criterion in determining legal causation,

¹²⁷⁴ *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* 2013 5 SA 192.

¹²⁷⁵ *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* 2013 5 SA 194.

¹²⁷⁶ *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* 2013 5 SA 195-197.

¹²⁷⁷ *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* 2013 5 SA 194-195.

¹²⁷⁸ *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* 2013 5 SA 196-197.

¹²⁷⁹ *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* 2013 5 SA 197.

¹²⁸⁰ *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* 2013 5 SA 198-200.

stating that in essence, the loss was not reasonably foreseeable as the auditor did not reasonably foresee that the appellant would not protect itself contractually. Also, according to the direct consequences criterion and the flexible approach to determining legal causation, legal causation was absent.

The facts of this case are similar to the facts in the English decision *Caparo Industries plc v Dickman*.¹²⁸¹ In this case, also dealing with a negligent misstatement by an auditor resulting in pure economic loss, the House of Lords influenced by policy considerations found that no duty of care was owed by the auditor to prospective investor shareholders and existing shareholders. In *Caparo Industries plc*, the plaintiff's reliance on the auditor's account was found to be unreasonable as the reports were relied upon for investment purposes and not in respect of statutory obligations.¹²⁸²

It is apparent that the influence of reasonableness in determining delictual liability for pure economic loss is linked to policy considerations. Both the tests for determining wrongfulness and legal causation (similar to the criteria for determining a duty of care in English law) are based on policy considerations. However care should be taken when determining the elements of wrongfulness and legal causation. In respect of pure economic loss, the question of wrongfulness depends on whether according to the *boni mores* there was a legal duty to act reasonably *ex post facto* in preventing the pure economic loss. According to the recent approach to determining wrongfulness, it depends on whether public policy dictates that it is reasonable to impose liability on the defendant for the pure economic loss. In determining legal causation in terms of the flexible approach, the question is whether it is fair, just and reasonable that the defendant should be held delictually liable for the pure economic loss factually caused by his conduct. If the pure economic loss is indeterminate, then the consequences may be considered too remote and legal causation may be absent. Turning to the influence of reasonableness on the other elements, the questions that must be answered are; was the conduct unreasonable when judged according to the standard of the reasonable person *ex ante*;¹²⁸³ in respect of intention, did the

¹²⁸¹ 1990 2 AC 605.

¹²⁸² See chapter 4 paras 3.2.2.1 and 3.3.3.

¹²⁸³ In *Flionis v Bartlett* 2006 3 SA 575 (SCA), the court found contributory negligence on the part of Bartlett and negligence on the part of Flionis.

defendant direct his will towards causing the pure economic loss and was he conscious of the wrongfulness or consciousness of the unreasonableness of his conduct? In *Country Cloud Trading CC v MEC, Department of Infrastructure Development*,¹²⁸⁴ the court found that the Department had intention in the form of *dolus eventualis*. Thus the influence of reasonableness on claims for pure economic loss is mainly explicit.

10. Wrongful deprivation of liberty, wrongful arrest and assault

As mentioned, wrongful deprivation of liberty will be referred to briefly, mainly because the intentional torts of trespass to a person which include battery, assault and false imprisonment is discussed under Anglo-American law. Therefore in order to compare the influence of reasonableness on Anglo-American tort law and the South African law of delict effectively, mention will be made of assault and wrongful deprivation of liberty. The influence of English law is also apparent in respect of the development of this as a specific form of *iniuria*.¹²⁸⁵

Generally any unjustified (where no ground of justification is applicable) interference with a person's liberty or freedom of movement is regarded as *prima facie* wrongful¹²⁸⁶ and actionable under the *actio iniuriarum*.¹²⁸⁷ The actual deprivation of liberty (*libertas*) is in principle an infringement of a personality interest (wrongful) and may be considered an *iniuria*.¹²⁸⁸ Furthermore section 12 of the Constitution protects the right to "freedom and security of a person"¹²⁸⁹ which includes the right not to be arbitrarily deprived of freedom or without just cause. Section 21 of the Constitution

¹²⁸⁴ 2015 1 SA 1 (CC).

¹²⁸⁵ Neethling and Potgieter *Delict* 328.

¹²⁸⁶ See *Stoffberg v Elliott* 1923 CPD 148; *Zealand v Minister of Justice and Constitutional Development* 2008 2 SACR 1 (CC); Neethling and Potgieter *Delict* 328; Loubser and Midgley (eds) *Delict* 316.

¹²⁸⁷ If a person sustains patrimonial loss, such as loss of income, as a result of wrongful deprivation of liberty, compensation may be claimed with the *Actio legis Aquiliae*. An interdict may also be sought in order to prevent the respondent from threatening or continuing the infringement of his liberty. See Neethling, Potgieter and Visser *Neethling's law of personality* 122; Neethling and Potgieter *Delict* 328.

¹²⁸⁸ See *Birch v Johannesburg City Council* 1949 1 SA 231 (T) 238; Neethling and Potgieter *Delict* 329.

¹²⁸⁹ Which includes the right not to be detained without trial and the right not to be deprived of freedom arbitrarily and without just cause.

protects the right to “freedom of movement”.¹²⁹⁰ Section 35 (1) of the Constitution specifically refers to the rights of an arrested, detained and accused person which include *inter alia*: the right to be brought before a court as soon as reasonably possible; to be charged or informed of the reason if detention continues; and to be released or released from detention if it is in the interests of justice, subject however to reasonable conditions. In practice, wrongful deprivation of liberty commonly occurs in instances of wrongful detention or wrongful arrest.¹²⁹¹

Neethling and Potgieter¹²⁹² state that the harm suffered must not be “trivial”¹²⁹³ and there must be intention (*animus iniuriandi*) to physically restrict or deprive a person of their freedom of movement. The restriction need not be a complete and there need not be total restriction.¹²⁹⁴ In English law complete restriction is a requirement and if there are “reasonable means of escape” then it is not regarded as complete restriction.¹²⁹⁵ According to the requirements, objectively the plaintiff’s freedom of movement must be restricted or deprived, thus it is not relevant if the plaintiff is unaware that he is being deprived of his liberty.¹²⁹⁶ The plaintiff must prove that the defendant deprived him of his liberty.¹²⁹⁷ Neethling and Potgieter point out that the courts ignore the requirement of intention as a result of the influence of English law and refer to it as a form of strict liability.¹²⁹⁸ Loubser and Midgley refer to the requirement of intention (*animus iniuriandi*) but in an attenuated form¹²⁹⁹ as consciousness of wrongfulness as a requirement for intention is also disregarded. The defendant cannot rely on “mistake” in order to escape liability.¹³⁰⁰

¹²⁹⁰ See *Thandani v Minister of Law and Order* 1991 1 SA 702 (E) 707; Loubser and Midgley (eds) *Delict* 316.

¹²⁹¹ Loubser and Midgley (eds) *Delict* 316.

¹²⁹² *Delict* 328.

¹²⁹³ The maxim *de minimus non curat lex* (the law does not concern itself with trifles) will apply. See *S v Bester* 1971 4 SA 28 (T) 29; Van der Walt and Midgley *Delict* 163.

¹²⁹⁴ See Neethling, Potgieter and Visser *Neethling’s law of personality* 113.

¹²⁹⁵ See chapter 4 para 2.3.

¹²⁹⁶ Neethling and Potgieter *Delict* 328-329.

¹²⁹⁷ Neethling and Potgieter *Delict* 329.

¹²⁹⁸ See *Donono v Minister of Prisons* 1973 4 SA 259 (C) 262; *Shoba v Minister van Justisie* 1982 2 SA 54 (C) 559; cases referred to by Neethling, Potgieter and Visser *Neethling’s law of personality* 119 fn 66. Neethling and Potgieter *Delict* 329.

¹²⁹⁹ Loubser and Midgley (eds) *Delict* 317-318.

¹³⁰⁰ See *Smit v Meyerton Outfitters* 1971 1 SA 137 (T) 139; *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A) 157; *Ramsay v Minister van Polisie* 1981 4 SA 802 (A) 818-819; Neethling, Potgieter and Visser *Neethling’s law of personality* 120.

However, trivial deprivation of liberty which is normal in everyday life such as being a passenger on a train or bus will not be considered *contra bonos mores*.¹³⁰¹ Grounds of justification negating wrongfulness, which may be applicable include: consent (for example, where a person agrees to the deprivation of liberty before entering a premises),¹³⁰² private defence (for example, where an insane person is deprived of his liberty because he poses a threat to the public),¹³⁰³ necessity (for example, where passengers on a ship are temporarily confined to their cabin during a storm at sea),¹³⁰⁴ discipline (confining a child to their room as a form of reasonable punishment),¹³⁰⁵ and statutory authority (for example lawful arrest).¹³⁰⁶

In instances where a prisoner is detained in custody longer than required as a result of negligent conduct by the state, his detention is unlawful from the moment the detention became unnecessary. Thus the delay in releasing the detainee will be unreasonable.¹³⁰⁷ In *Zealand v Minister of Justice and Constitutional Development*,¹³⁰⁸ the Registrar of the Court negligently failed to issue the documents pertaining to the prisoner's release and the prisoner was detained more than five years after his conviction and sentence were set aside.¹³⁰⁹ The Constitutional Court found that the prisoner's detention was unlawful and the state was liable in delict. The court placed emphasis on the constitutional right to freedom and security of a person.¹³¹⁰

Where a statute authorises the deprivation of liberty, it will be lawful: if there is some form of physical control over the arrestee; and the arrestor informs the arrestee of the cause of the arrest.¹³¹¹ The arrestor bears the onus of proving that the arrest was

¹³⁰¹ See *Bester v Calitz* 1982 3 SA 864 (O) 880; Van der Walt and Midgley *Delict* 163; Neethling and Potgieter *Delict* 329.

¹³⁰² See authority cited by Neethling, Potgieter and Visser *Neethling's law of personality* 115 fn 37.

¹³⁰³ See *Naude and Du Plessis v Mercier* 1917 AD 32 where the defence was raised. See Neethling, Potgieter and Visser *Neethling's law of personality* 115 fn 35.

¹³⁰⁴ Neethling, Potgieter and Visser *Neethling's law of personality* 115.

¹³⁰⁵ Neethling, Potgieter and Visser *Neethling's law of personality* 115.

¹³⁰⁶ Neethling, Potgieter and Visser *Neethling's law of personality* 116.

¹³⁰⁷ See Neethling and Potgieter 2012 *Obiter* 393.

¹³⁰⁸ 2008 4 SA 458 (CC).

¹³⁰⁹ See also *Alves v LOM Business Solutions (Pty) Ltd* 2012 1 SA 399 (GSJ); Neethling and Potgieter 2012 *Obiter* 390ff.

¹³¹⁰ S 12.

¹³¹¹ Neethling, Potgieter and Visser *Neethling's law of personality* 116-117.

justified.¹³¹² An arrest may be made with or without a warrant.¹³¹³ If an arrest is made without a warrant¹³¹⁴ there must usually, among other requirements¹³¹⁵ be reasonable grounds of suspicion of a person having committed an offence.¹³¹⁶ If it follows that there were no reasonable grounds of suspecting that the arrestee committed an offence then the deprivation of the arrestee's liberty is unreasonable and wrongful.¹³¹⁷ As mentioned, "freedom of movement" and "freedom of security of a person" are fundamental rights protected by our Constitution and an arrest must be justifiable.¹³¹⁸ If the arrest is made with a valid warrant¹³¹⁹ a copy of the warrant must be provided to the arrestee upon arrest.¹³²⁰ Naturally, if a warrant was required by law and an arrest was made without the required valid warrant then the arrest would be unreasonable and wrongful.¹³²¹ If the arrestor incorrectly but reasonably believes that he is arresting the correct suspect, who subsequently turns out to be the incorrect person, such arrestor will not be held liable.¹³²² If there is an improper motive behind the lawful arrest, where the main intention is not to bring the arrestee before the court, such lawful arrest may be rendered unreasonable and wrongful.¹³²³ The arrestor's conduct may be deemed unreasonable and wrongful due to the improper motive.¹³²⁴ If the arrest was however made with the *bona fide* intention of questioning the arrestee further in order to decide whether the arrestee should be tried before the court, then the arrest will not be regarded as unreasonable and unlawful.¹³²⁵

¹³¹² *Zealand v Minister of Justice and Constitutional Development* 2008 2 SACR 1 (CC); Loubser and Midgley (eds) *Delict* 316.

¹³¹³ See s 40(1)(a) and (b) of the Criminal Procedure Act 51 of 1977; Neethling, Potgieter and Visser *Neethling's law of personality* 118.

¹³¹⁴ See in general Neethling 2011 *THRHR* 660ff.

¹³¹⁵ See Neethling 2011 *THRHR* 660 refers to five other requirements: the aim must be to bring the arrestee before the court; the arrest must be necessary to ensure the suspect appears before the court; the body of the person must be touched unless the arrestee willingly submits to custody; as soon as reasonably possible the arrestee must be informed of his arrest; and he must be taken to the police station.

¹³¹⁶ A Schedule 1 offence. See Neethling, Potgieter and Visser *Neethling's law of personality* 118; Loubser and Midgley (eds) *Delict* 316-317.

¹³¹⁷ See *May v Union Government* 1954 3 SA 120 (N); Loubser and Midgley (eds) *Delict* 317.

¹³¹⁸ See Neethling 2011 *THRHR* 661.

¹³¹⁹ See Neethling, Potgieter and Visser *Neethling's law of personality* 117 in respect of the requirements for a valid warrant.

¹³²⁰ Neethling, Potgieter and Visser *Neethling's law of personality* 117.

¹³²¹ Neethling, Potgieter and Visser *Neethling's law of personality* 118.

¹³²² Neethling, Potgieter and Visser *Neethling's law of personality* 117.

¹³²³ Neethling, Potgieter and Visser *Neethling's law of personality* 119.

¹³²⁴ Loubser and Midgley (eds) *Delict* 317.

¹³²⁵ Neethling, Potgieter and Visser *Neethling's law of personality* 119.

In respect of wrongful deprivation of liberty or wrongful arrest and the influence of reasonableness on each element of a delict, what must be determined is whether: the defendant's *conduct* objectively caused the deprivation of liberty; the plaintiff's restriction of movement is reasonably significant, not trivial; the plaintiff's *liberty was reasonably infringed by the defendant's conduct* (an applicable ground of justification would negate wrongfulness); the defendant *intended* to restrict the plaintiff's freedom of movement (in respect of intentional conduct); the defendant's conduct strayed from that of the reasonable person (in respect of negligent conduct); the defendant *factually caused* the wrongful deprivation of liberty; there is a close enough relationship between the defendant's conduct and the harm suffered in order for the defendant to be held liable for the *iniuria* in view of policy considerations based on reasonableness, fairness and justice. Thus the influence of reasonableness on wrongful deprivation of liberty and wrongful arrest is predominantly explicit.

There seems to be no suitable definition for assault in the South African law of delict. However, any infringement of the body (*corpus*) whether accompanied by violence or not, with pain or without, direct or indirect, may lead to delictual liability.¹³²⁶ A threat, whether made verbally or by means of a gesture, can result in fear of bodily harm which may be actionable under the *actio iniuriarum*.¹³²⁷ There is no specific form of *iniuria* requiring intentional conduct recognised as "battery" (the intention to make unlawful physical contact) or "assault" (fear or reasonable anticipation of imminent unlawful violence) *per se* as found in Anglo-American law.¹³²⁸ What is important in South African law is to consider whether there was an infringement of the body. The harm suffered must not be trivial otherwise the maxim *de minimis non curat lex* will apply;¹³²⁹ the infringement must be wrongful; and the wrongdoer's conduct must be intentional.¹³³⁰ In respect of wrongfulness in instances of commissions¹³³¹ wrongfulness lies in the infringement of the body or *corpus* which is *contra bonos*

¹³²⁶ Neethling, Potgieter and Visser *Neethling's law of personality* 87.

¹³²⁷ See *R v Umfaan* 1908 TS 62, 67-68; Neethling, Potgieter and Visser *Neethling's law of personality* 87.

¹³²⁸ See chapter 4 para 2.1.

¹³²⁹ Taking someone by the arm or giving someone a light slap may not lead to delictual liability. See *S v Bester* 1971 4 SA 28 (T); *R v Van Vuuren* 1961 3 SA 305 (E) 307; Neethling and Potgieter *Delict* 346 fn 55.

¹³³⁰ See *Esterhuizen v Administrator, Transvaal* 1957 3 SA 710 (T) 722 and cases referred to by Neethling and Potgieter *Delict* 346 fn 56.

¹³³¹ In respect of omissions it must be determined if there was a legal duty to act positively in preventing the harm. See Neethling, Potgieter and Visser *Neethling's law of personality* 93-94.

mores per se. Loubser and Midgley¹³³² refer to assault where “a person claims for damages for failed surgical operations, the cause of action is often framed as a violation of bodily integrity in the form of assault”. The authors do however, question whether it is “conceptually correct” to categorise such conduct in our law as assault. Van der Walt and Midgley,¹³³³ point out that the Supreme Court of Appeal has questioned whether it is conceptually sound for the defendant to be held liable for assault in respect of medical treatment where, for instance, the medical practitioner fails to mention a risk.¹³³⁴ It is submitted that it may be more suitable to frame a claim within the *actio legis Aquiliae* where the form of fault is negligence. Where a person’s blood is withdrawn from his body without his consent, it is regarded as an intentional infringement of a person’s bodily integrity and privacy, not an assault.¹³³⁵ An infringement of a personality right may however, in principle, result in claims under the *actio de pauperie*, *actio legis Aquiliae*, *actio iniuriarum* and the action for pain and suffering.¹³³⁶

11. Conclusion

The concept of reasonableness applies differently in respect of each delictual element.¹³³⁷ The influence of reasonableness is implicit on the elements of conduct, factual causation and intent, but explicit on the elements of wrongfulness, negligence, legal causation and harm. In truth it can only be reasonable to hold the defendant delictually liable if all the elements of a delict are present.

In summary, the influence of reasonableness on the elements of a delict are evident and what must be determined is whether: the defendant acted or failed to act (conduct); the defendant acted reasonably in exercising his own lawful interests according to the *boni mores* and constitutional imperatives, in infringing the interests of the plaintiff (the traditional approach to determining wrongfulness); it is reasonable to impose liability on the defendant (the recent approach to determining

¹³³² (Eds) *Delict* 314.

¹³³³ *Delict* 164.

¹³³⁴ See *Braude v McIntosh* 1998 3 SA 60 (SCA) 67-68; 1998 2 All SA 555 (A) 562-563; Van der Walt and Midgley *Delict* 164 fn 11; Loubser and Midgley (eds) *Delict* 314.

¹³³⁵ Van der Walt and Midgley *Delict* 164.

¹³³⁶ Loubser and Midgley (eds) *Delict* 315.

¹³³⁷ See Ahmed in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 60.

wrongfulness); (where intention is relevant) the defendant intended to cause the harm or loss through direction of his will and was aware of the unreasonableness of the conduct; (where negligence is relevant) the defendant's or plaintiff's conduct strayed from that of the reasonable person and if so, how far?; the defendant factually caused the harm or loss suffered by the plaintiff (factual causation); it is fair, just and reasonable to impute the harm or loss factually caused by the defendant's conduct upon the defendant; reasonably serious harm or loss was sustained, not trivial harm or loss; it is fair and reasonable to compensate the plaintiff and if so what is fair, just and reasonable compensation that the defendant should pay (assessment of damage)?

The concept of reasonableness is, as shown, an important concept in determining each element of a delict and determining whether a delict has been committed. It is closely linked to the principles of fairness and justice. Furthermore public policy, policy considerations and the constitutional imperatives have a bearing on what is reasonable, fair and just in providing a value judgment as to whether a delict was committed or not.

Chapter 4: Law of the United Kingdom

“Justice and reasonableness is a test of ‘ordinary reason and common sense’. ... As such it encompasses a wide range of considerations. At its narrowest, it focuses on justice and fairness as between the parties. At a broader level, it will consider the reasonableness of a duty from the perspective of legal policy, focusing on the operation of the legal system and its principles. At a still wider but more controversial level, it may take account of the social and public policy implications of imposing a duty”.¹

1. Introduction

In this chapter the focus will be on the implicit and explicit influence of reasonableness on some aspects of the English law of torts. The definition of tort law and the aims of tort law will be referred to. Insurance and the Human Rights Act,² as two modern influences of tort law will be referred to briefly. The rules pertaining to whether a person has capacity will be discussed. Thereafter the implicit and explicit influence of reasonableness on the torts of trespass to the person and the tort of negligence³ as well as the defences to these torts will be discussed. Finally, the implicit and explicit influence of reasonableness on causation and harm (loss or damage) will be discussed.

As mentioned,⁴ the term “tort” in English law which is synonymous to the term “delict” generally refers to a “civil wrong”. In English law, there are specific torts, hence the generally accepted reference to the law of torts, in the plural form.⁵ Torts are civil wrongs which protect numerous interests against violation.⁶ There are civil wrongs which are *not* torts such as breach of contract⁷ or breach of trust.⁸ There is no generally accepted definition of a tort⁹ but the following definition offered by Witting¹⁰ is suitable in that it places tort law in context.

¹ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 450.

² 1988.

³ See chapter 1 para 4 as to reasons for choosing the tort of negligence and the torts of trespass to the person.

⁴ In chapter 1 para 5.

⁵ See Peel and Goudkamp *Winfield and Jolowicz on tort* 13-14.

⁶ Steele *Tort* 3.

⁷ Steele *Tort* 3.

⁸ See also Lunney and Oliphant *Tort* 1.

⁹ See Steele *Tort* 4.

¹⁰ Witting *Street on torts* 3-4.

“Tort is that branch of the civil law relating to obligations imposed by operation of law on all natural and artificial persons. These obligations, owed by one person to another, embody norms of conduct that arise outside (or in addition to) contract and unjust enrichment. Tort enables the person to whom the obligation is owed to pursue a remedy on his own behalf where breach of a relevant norm of conduct infringes his interests to a degree recognised by the law as such an infringement.”

What is essentially common to tort law and the law of delict is that where some harm or loss is suffered by the claimant as a result of infringements of legally recognised interests;¹¹ the claimant is entitled to redress by the law.¹² The courts may create new heads of tortious liability in order to reflect the changing circumstances. This may occur rapidly, as in the instance of the tort of inducing breach of contract, or over time, as with the tort of negligence.¹³ Conflict of interests between persons will inevitably occur and the conduct of a person or group of persons could cause harm or threaten to cause harm to others, requiring such harmed persons to turn to the law for a remedy.¹⁴

According to Williams¹⁵ there are four possible aims of tort law: appeasement (which now plays a subordinate role in redressing torts); justice; deterrence (aimed at preventing commission of torts and regulating future conduct of the general community); and compensation (whereby the wrongdoer who caused the harm must compensate the victim).¹⁶ In respect of justice, Williams¹⁷ refers to the idea of the law of tort as an “expression of a moral principle” as well as the theory of ethical retribution where justice requires the wrongdoer to pay compensation to the victim. From the perspective of the wrongdoer, justice requires that the wrongdoer should tolerate financial loss and from the perspective of the victim, justice requires that the victim should benefit from the compensation.¹⁸ Williams¹⁹ submits that according to the utilitarian theory (“of which the deterrent theory is an application”) punishment meted out to the wrongdoer must not be greater than is necessary to remedy the mischief in question, but that in reality awarded damages tend to be more than is required to

¹¹ See Witting *Street on torts* 10-14 who refers to *inter alia* the following protected interests: personal; proprietary; intellectual property; economic relations; business and trade; financial; reputation; due process; and privacy.

¹² Except if an injunction (interdict) is sought. See Witting *Street on torts* 4-5.

¹³ Peel and Goudkamp *Winfield and Jolowicz on tort* 37.

¹⁴ Peel and Goudkamp *Winfield and Jolowicz on tort* 2.

¹⁵ 1951 *CLP* 138. See Lunney and Oliphant *Tort* 18-19.

¹⁶ See discussion by Witting *Street on torts* 16-19 on corrective justice, deterrence, loss distribution and economic analysis of tort law.

¹⁷ 1951 *CLP* 140.

¹⁸ Williams 1951 *CLP* 140-141.

¹⁹ 1951 *CLP* 146.

remedy the mischief in question. In analysing whether the rules of tort law are consistent with the theories of liability, Williams concludes that where possible “the law seems to ride two to three horses at once”,²⁰ in other words two to three purposes of tort law are achieved. However, sometimes depending on the situation, one purpose is selected and in dealing with intentional torts the tendency is to choose the deterrent purpose. In dealing with the other torts, the compensatory purpose tends to be chosen.²¹

There is no doubt that tort law involves “allocating responsibility for certain types of losses”.²² In respect of fault based liability, the loss may be shifted to the defendant and in cases of strict liability where fault is not required, the focus is more on loss spreading.²³ In English tort law, fault based liability is prevalent but there are instances where strict liability applies.²⁴ Two statutes which follow strict liability are the Consumer Protection Act²⁵ which regulates liability for defective products²⁶ and the Animals Act²⁷ which regulates liability for damage caused by domestic and wild animals.²⁸ Vicarious liability is a form of strict liability whereby the defendant is held liable for the tort of another. The most common example where it applies is that of the employer who is held vicariously liable for the tort committed by the employee.²⁹ The rule in *Rylands v Fletcher* in regard to a type of nuisance is regarded as a form of strict liability.³⁰ The rule is relied on in determining liability for damage caused “by the escape of dangerous things accumulated on one’s land, regardless of fault” and the dangerous things accumulated must not have occurred in the natural use of the land.³¹ For purposes of

²⁰ Williams 1951 *CLP* 172.

²¹ See also Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 43-47.

²² Peel and Goudkamp *Winfield and Jolowicz on tort* 2.

²³ This idea is evident in instances of for example, strict or vicarious liability as well as distribution of loss through social security or social insurance, and by private insurance companies paying for losses. See in general Giliker *Tort* 3-9; Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 50-63.

²⁴ Giliker *Tort* 5.

²⁵ 1987.

²⁶ See in general Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 590-629; Giliker *Tort* 313-344.

²⁷ 1971.

²⁸ See in general Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 524-540 with regard to liability for animals; Giliker *Tort* 344-351.

²⁹ See in general Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 554-589.

³⁰ Steele *Tort* 593.

³¹ Steele *Tort* 665.

this study, the rule will not be discussed further.³² The main rationales for imposing strict liability are the same in all the jurisdictions discussed in this thesis and in order to avoid repetition will not be repeated here, suffice it to say that the influence of reasonableness on strict liability is implicit.³³

In most instances, the claimant claims compensation in a monetary form for the harm or loss sustained. In some instances the defendant must “disgorge” the profits made from his wrongdoing (usually where the wrongful activity was illegal) even if the claimant has not suffered any loss.³⁴ In order to prevent harm from occurring an injunction (interdict) is applied for.³⁵

As mentioned above, there are two important modern influences on English tort law; insurance and the Human Rights Act.³⁶ In many tort cases, the dispute ultimately takes place between the claimant’s and the defendant’s insurers. Previously, whether one of the parties was insured was not considered by the courts. Now, who should insure against loss is sometimes taken into account in order to determine whether it is fair, just and reasonable to impose a duty on the defendant.³⁷

Lunney and Oliphant³⁸ point out that third party insurance liability is dependent on the tort system and there is a willingness by the courts to acknowledge the “influence of insurance considerations in contexts where ‘policy’ is a relevant factor, e.g. in determining whether it is fair, just and reasonable to recognise a duty of care”. The question has been asked whether insurance liability has affected principles of liability in tort law, in particular, in the application of the duty of care concept. Divergent answers are given, and some academic writers³⁹ are of the view that insurance liability

³² See in general Steele *Tort* 665-704; Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 503-523.

³³ See the rationales for imposing strict liability in chapter 3 para 1, chapter 5 para 1 and chapter 6 para 1. See also Lunney and Oliphant *Tort* 573-574 who refer to the rationales for strict liability with regard to defective products; Steele *Tort* 564-568 who refers to justifications for vicarious liability.

³⁴ Peel and Goudkamp *Winfield and Jolowicz on tort* 2.

³⁵ See in general Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 874-880.

³⁶ 1988.

³⁷ See Witting *Street on torts* 35.

³⁸ *Tort* 26-27.

³⁹ See Merkin 2012 *MLR* 301; Abraham *Liability century* 2008 referred to by Lunney and Oliphant *Tort* 27.

has been influential in changing tort law principles, while Stapleton⁴⁰ regards its influence as limited. However, that the law of damages has been influenced by insurance liability is not open to doubt.

The courts have an obligation according to the Human Rights Act 1988⁴¹ (hereinafter referred to as the “Human Rights Act”) to consider the rights⁴² contained in the European Convention on Human Rights and Fundamental Freedoms.⁴³ The following rights, in particular, affect tort law: right to life (Article 2); right not to be subjected to torture or inhuman and degrading treatment (Article 3); right to liberty and security of person (Article 5); right to a fair trial (Article 6); right to respect for private and family life (Article 8); right to freedom of thought, conscience and religion (Article 9); and the right to freedom of expression (Article 10).⁴⁴ In South Africa, the Constitution⁴⁵ and the Bill of Rights continually influence the law of delict.⁴⁶ The Human Rights Act requires courts or tribunals to interpret legislation in accordance with the Convention rights and in dealing with cases involving Convention rights must consider the European Commission and decisions of the Court of Human Rights. There is still some uncertainty as to the effect of these rights on tort law and in any case many of the rights are already protected by the common law.⁴⁷ English tort law is yet to see the full impact of the Human Rights Act.⁴⁸ Its influence is expected to be gradual and indirect.⁴⁹ There is even a possibility that it may be repealed and replaced.⁵⁰

As will be shown further on in the study,⁵¹ a public authority will not usually incur liability in tort for an omission in terms of common law, but a claimant may argue that the public authority violated their Convention rights through an omission. In *Van Colle v*

⁴⁰ 1995 *MLR* 820 referred to by Lunney and Oliphant *Tort* 27.

⁴¹ Which came into effect on 2 October 2000.

⁴² Some Convention rights are not incorporated in the Human Rights Act 1998 (Lunney and Oliphant *Tort* 30).

⁴³ See McBride and Bagshaw *Tort* 71; Lunney and Oliphant *Tort* 30.

⁴⁴ See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 88. Cf McBride and Bagshaw *Tort* 71.

⁴⁵ Constitution of the Republic of South Africa, 1996.

⁴⁶ See Chapter 3 para 3.1.3.

⁴⁷ Lunney and Oliphant *Tort* 28.

⁴⁸ Lunney and Oliphant *Tort* 32.

⁴⁹ See McBride and Bagshaw *Tort* 73; Witting *Street on torts* 7-10.

⁵⁰ See para 3.3.1.1 below.

⁵¹ See para 3.3.1 below.

Chief Constable of Hertfordshire Police,⁵² *Smith v Chief Constable of Sussex Police*⁵³ and *Michael v Chief Constable of South Wales Police*,⁵⁴ where the police failed to save victims from serious injury and death, the United Kingdom's highest court⁵⁵ had the opportunity to bring the tort of negligence in line with the Human Rights Act under Article 2 but did not find the need to.⁵⁶ An example of the direct effect of the Human Rights Act on English common law is section 6(1), which states that it is unlawful for "a public authority to act in a way which is incompatible with a Convention right" except where section 6(2) applies. Section 6(2) in brief refers to an instance when a public authority performs a statutory duty. Thus such public authority will not be liable even if a Convention right is violated while performing a statutory duty, unless the statutory provision is incompatible with a Convention right.⁵⁷ Furthermore, not all of the Convention rights are absolute. They may be restricted by prescribed law which is "necessary in a democratic society" in order to comply with certain purposes.⁵⁸ In *Osman v United Kingdom*,⁵⁹ the European Court of Human Rights stated that Article 2 imposed an obligation to perform a positive act to protect the life of a person who was at risk, which included an obligation upon the police to "do all that could be reasonably expected of them to avoid a real risk" to a person's life "of which they have or ought to have knowledge" of.⁶⁰ According to the facts of the case, however, the European Court of Human Rights found that Article 2 had not been violated. As will be shown below,⁶¹ the European Court of Human Rights is generally cautious in ruling against the decisions of the English courts. Case law dealing with the violation of Convention rights will be discussed under the relevant paragraphs dealing with the particular aspects of English tort law.

The influence of reasonableness on the theories of tort liability relating to appeasement, justice, deterrence, compensation, and vindication (in respect of

⁵² 2009 1 AC 225.

⁵³ 2009 1 AC 225.

⁵⁴ 2015 UKSC 2.

⁵⁵ Since October 2009, the highest court in the UK known as the "House of Lords" has been replaced with the "Supreme Court" (see Civil Procedure (Amendment) Rules 1999).

⁵⁶ McBride and Bagshaw *Tort* 74.

⁵⁷ McBride and Bagshaw *Tort* 75, 81.

⁵⁸ McBride and Bagshaw *Tort* 73.

⁵⁹ 1999 1 FLR 193.

⁶⁰ *Osman v United Kingdom* 1999 1 FLR 193, 223.

⁶¹ See para 3.3.1 below.

violation of rights, such as the right to one's good name)⁶² is implicit. It is reasonable to award compensation to the claimant for harm or loss suffered. It is reasonable to sue someone who has infringed an interest or right, for example, with respect to defamation in vindicating the right to one's good name.⁶³ It is reasonable to deter others from committing torts when decisions are made highlighting the consequences of one's conduct. Justice is associated with fairness and reasonableness and when applied to a decision in tort law should result in an equitable result. The aim of delict and tort law is to regulate behaviour between private individuals and at the heart of it lies the issue of interests and rights. In contrast criminal law is penal in nature and a crime is an offence in the eyes of the public.

1.1 Capacity

At the outset of a tort case, a preliminary issue that may arise is the issue of "capacity" which "refers to the status of legal persons and their ability to sue or be sued in tort".⁶⁴

The age of majority in English law is eighteen.⁶⁵ In English tort law, there are no similar rules and presumptions relating to the accountability of a child as found in South African law.⁶⁶ In English criminal law, a child under ten years of age cannot be held criminally accountable.⁶⁷ In tort law, a person who has fulfilled the requirements for a tort may be held liable for the tort committed.⁶⁸ In the tort of negligence, the test applied to a minor, is the "reasonable child". The conduct of the child is tested against that of an ordinary "reasonable and prudent child of his age".⁶⁹ Even though it may seem harsh that a very young child can be held liable for a tort, testing the child's conduct and the foreseeability of harm against that of a reasonable child of a similar age may be seen as a mitigating factor.⁷⁰ A fifteen-year-old child who pushes a person into a river may have capacity and be held liable in the tort but naturally a two-year-old child

⁶² See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 692.

⁶³ See in general Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 690-696 with regard to damages for defamation.

⁶⁴ Witting *Street on torts* 651.

⁶⁵ Since 1970 according to s 1(1) of the Family Law Reform Act 1969.

⁶⁶ See chapter 3 para 4.1.

⁶⁷ S 50 of the Children and Young Persons Act 1933.

⁶⁸ See *Jennings v Rundall* 1799 101 ER 1419, 1421-1422; McBride and Bagshaw *Tort* 737.

⁶⁹ *Mullin v Richards* 1998 1 WLR 1304; Peel and Goudkamp *Winfield and Jolowicz on tort* 769.

⁷⁰ McBride and Bagshaw *Tort* 737.

will not have capacity.⁷¹ In *Gorley v Codd*,⁷² a sixteen-year-old boy was found negligent for accidentally shooting the claimant with a rifle.⁷³ A guardian or parent is generally not held liable for the act of a minor unless: the minor is employed by the parent and commits a tort while in the course and scope of employment; the minor commits a tort authorised by the parent; or the minor commits a tort in instances where the parent was negligent in their supervision over the child.⁷⁴ Thus a father will not be held liable if a dog belonging to his daughter bit another person, where the daughter (over sixteen years of age) was old enough to exercise control over the dog.⁷⁵

A mentally disordered person can generally be held liable⁷⁶ unless “he cannot understand the nature and consequence of his act”.⁷⁷ The question to be determined is whether the defendant had the “requisite state of mind for liability in the particular tort with which he is charged”.⁷⁸ For example, in *Morris v Marsden*,⁷⁹ the defendant had been found unfit to plead in criminal proceedings but was found liable in the tort of battery as he had the required intention and his actions were voluntary at the time the tort was committed, even though he could not tell right from wrong.⁸⁰ Stable J⁸¹ stated that if a person was in a complete state of automatism, acting without intention and “carelessness” causing grievous injury, then he will not be held liable.⁸²

In the tort of negligence, the criterion applied is the reasonable person. It has been held that the reasonable person may have certain conditions such as a condition

⁷¹ Witting *Street on torts* 659.

⁷² 1967 1 WLR 19.

⁷³ See Lyons 2010 30 LS 257 who highlights the inconsistent treatment in different areas of the law relating to the attribution of responsibility of adolescents. See Witting *Street on torts* 659 fn 47.

⁷⁴ See Peel and Goudkamp *Winfield and Jolowicz on tort* 770-771; Witting *Street on torts* 660.

⁷⁵ See *North v Wood* 1914 1 KB 629; Peel and Goudkamp *Winfield and Jolowicz on tort* 771.

⁷⁶ McBride and Bagshaw *Tort* 737.

⁷⁷ Peel and Goudkamp *Winfield and Jolowicz on tort* 778 in reference to *Hanbury v Hanbury* 1892 8 TLR 559, 569.

⁷⁸ Peel and Goudkamp *Winfield and Jolowicz on tort* 778; Witting *Street on torts* 658.

⁷⁹ 1952 All ER 925.

⁸⁰ Peel and Goudkamp *Winfield and Jolowicz on tort* 778; Witting *Street on torts* 658-659; McBride and Bagshaw *Tort* 738.

⁸¹ *Morris v Marsden* 1952 All ER 927.

⁸² Witting *Street on torts* 659.

leading to a heart attack,⁸³ and that such a person who is unaware of his condition, cannot be held liable for the harm he caused as a result of such condition.⁸⁴

Capacity in English law appears to operate at three different levels, seen from a South African perspective. For a person to have capacity, firstly, the conduct must be voluntary. Secondly, accountability is a prerequisite for both forms of fault. Thirdly, a mental element of intention (in the form of a special purpose or malice) is required for intentional torts. Where a person is mentally disordered, a lack of capacity may exclude liability by either finding: that the act was not voluntary or, where this is not the case and ordinary intention (that is, without consciousness of wrongfulness) is present, a further mental element (in the form of a special purpose or malice) required for the relevant particular tort is absent in the circumstances due to the defendant's mental disorder.⁸⁵ Also what is referred to as accountability in South African law may be absent.

The influence of reasonableness on capacity is implicit. In English tort law, due to the fact that there are no presumptions relating to accountability of a child as in South African law, in principle a minor of any age may have capacity. However, this is reasonable because in English tort law, the test applied to a minor is the "reasonable child" where the conduct of the minor is judged according to a minor of the same age. It is therefore reasonable that a sixteen-year-old child may be held to have capacity and held liable for accidentally shooting at someone or not being in control of a pet that harms another, as generally a sixteen-year-old child is old enough to understand the consequences of his actions. It would be unreasonable for a two-year-old child to have capacity as clearly any two-year-old child would not be able to understand the consequences of his actions.

In the tort of negligence and the torts of trespass to the person, there is no general requirement of the element of conduct like in the South African law of delict. However,

⁸³ See *Waugh v James K Allen Ltd* 1964 2 Lloyd's Rep 1; Peel and Goudkamp *Winfield and Jolowicz on tort* 779.

⁸⁴ See *Mansfield v Weetabix Ltd* 1998 1 WLR 1263; Peel and Goudkamp *Winfield and Jolowicz on tort* 779; chapter 3 para 2 where a similar approach has been applied in South African law where a person suffers a heart attack; chapter 2 para 4.

⁸⁵ See *Witting Street on torts* 659; Peel and Goudkamp *Winfield and Jolowicz on tort* 778.

to ground liability in the tort of negligence or the torts of trespass to the person, some form of conduct is required and inferred from the facts. There is a differentiation between a positive act and an omission but as will be shown, generally a person may not be held liable for an omission.⁸⁶ The defence of automatism is applicable in the tort of negligence and the intentional torts. It is unreasonable for the defence of automatism to apply where prior negligent or intentional voluntary acts subsequently lead to involuntary acts resulting in harm to another. Thus it is reasonable for the defence of automatism to apply if there were no prior negligent or intentional acts leading to involuntary conduct causing harm.

A person who is unaware of his condition, and, for example, suffers a heart attack which leads to mechanical movements resulting in harm or loss, may not reasonably be held to have capacity or be liable in the tort of negligence. A similar approach has been followed in South Africa.⁸⁷ It is interesting that English tort law refers to the reasonable person as the hypothetical ordinary person who may have a condition such as a heart attack leading to mechanical acts (where there was no prior fault related act) causing harm. In such instances there is no breach of a duty of care and therefore no liability in the tort of negligence. In the South African law of delict, conduct would be absent as the conduct is involuntary, as well as fault, providing there was no prior fault-related voluntary conduct which leads to the subsequent involuntary act.⁸⁸

2. Torts of trespass to the person

Trespass in short refers to a specific wrong.⁸⁹ Unlike the tort of “negligence”, there is no tort of “intention” in English law. Due to historic reasons and development⁹⁰ over time, liability stemming from intentional harm had crystallised into specific torts often referred to as intentional torts, such as battery, assault, false imprisonment⁹¹ and so on.⁹² There is no general definition of “intention” in the intentional torts.⁹³ In English

⁸⁶ See below para 3.3.1.

⁸⁷ See chapter 3 para 2.

⁸⁸ See chapter 3 para 2.

⁸⁹ Steele *Tort* 39.

⁹⁰ Which is beyond the scope of this study and will therefore not be discussed.

⁹¹ These forms of trespass to the person stemmed from the “writ of trespass”. See Murphy in Jones (gen ed) *Clerk and Lindsell on torts* 1092.

⁹² Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 359.

⁹³ Steele *Tort* 30.

criminal law, “recklessness” refers to the offender’s consciousness of the risk he is taking, while in tort law, recklessness in respect of the consequences, but also recklessness in respect of the circumstances, may fall within the ambit of “intention”.⁹⁴ In each intentional tort, the required intention varies.⁹⁵ The torts of trespass are some of the oldest torts and embody trespass to the person, land or goods.⁹⁶ Trespass to the person may constitute a crime and a tort.⁹⁷ Even though the principles applied to both may overlap and the decisions dealing with trespass to the person in terms of a crime are useful in dealing with trespass to the person as a tort and *vice versa*,⁹⁸ they still cover different areas of the law, with different requirements,⁹⁹ serving different purposes.¹⁰⁰ Recently, the English common law, dealing with trespass to the person has been supplemented by the statutory tort of “harassment”.¹⁰¹ Lord Sumption in *Hayes v Willoughby*¹⁰² stated that harassment is “a persistent and deliberate course of unreasonable and oppressive conduct ... calculated to and does cause [a] person alarm, fear and distress”.¹⁰³ Conduct deemed to be harassment is now regulated by the Protection From Harassment Act¹⁰⁴ which will not be discussed in the thesis, save to point out that the influence of reasonableness is explicit. The influence of reasonableness is explicit in that the conduct of the defendant leading to liability depends on whether it is reasonable or not under the circumstances and whether the reasonable person would think that such conduct amounted to harassment.¹⁰⁵ A defence may be raised that the conduct under the circumstances was reasonable.¹⁰⁶ It is submitted that the criterion of the reasonable person is applied objectively similar

⁹⁴ Peel and Goudkamp *Winfield and Jolowicz on tort* 51.

⁹⁵ In battery, intention is directed at the consequence, thus unlawful physical contact must be intended. In respect of assault, the defendant must intend to cause anticipation of imminent harm (explained in para 2.2 below). In respect of false imprisonment, the defendant must intend to physically restrict the claimant’s person. See Steele *Tort* 30; Lunney and Oliphant *Tort* 51.

⁹⁶ See Peel and Goudkamp *Winfield and Jolowicz on tort* 55; Giliker *Tort* 409; Lunney and Oliphant *Tort* 42.

⁹⁷ See Lunney and Oliphant *Tort* 56.

⁹⁸ See *Scott v Shepherd* 1773 2 Wm BI 892, 899; Witting *Street on torts* 253.

⁹⁹ For example, where *mens rea* referring to the subjective element of intent (knowledge of wrongdoing) is not required in tort law. See Lunney and Oliphant *Tort* 56.

¹⁰⁰ Peel and Goudkamp *Winfield and Jolowicz on tort* 57-58.

¹⁰¹ See Witting *Street on torts* 250; Steele *Tort* 81-85.

¹⁰² 2013 1 WLR 935, 1.

¹⁰³ See s 7(2) of the Protection from Harassment Act 1997; Murphy in Jones (gen ed) *Clerk and Lindsell on Torts* 1101; Witting *Street on torts* 262-264.

¹⁰⁴ 1997.

¹⁰⁵ See s 1(2) of the Protection from Harassment Act 1997; Murphy in Jones (gen ed) *Clerk and Lindsell on Torts* 1101.

¹⁰⁶ Murphy in Jones (gen ed) *Clerk and Lindsell on torts* 1103.

to those rare instances where the reasonable person is applied as the embodiment of the *boni mores* in South African law.¹⁰⁷

Articles 2 (right to life), 3 (freedom from torture or degrading treatment) and 5 (Right to liberty and security of a person) of the European Convention on Human Rights also protect similar interests with those relating to trespass to the person in English common law. The common law has in essence been protecting the same interests but to a lesser degree.¹⁰⁸ It may occur that the claimant's claim in terms of common law may fail but a remedy may be available under the Convention rights.¹⁰⁹ However, in terms of tort law, compensation awarded to a successful claimant may be considerably more than compensation awarded in terms of the Human Rights Act where the primary aim is to vindicate rights.¹¹⁰ Currently, the courts are expected to develop the common law in order to conform to the protection covered in the Convention rights.¹¹¹ It is envisaged that the common law will develop and liability relating to trespass to the person will extend in conforming to the Convention rights.¹¹² The general requirements for trespass to the person are: direct;¹¹³ positive; intentional conduct;¹¹⁴ resulting in

¹⁰⁷ See Neethling and Potgieter *Delict* 49 fn 83, 92-93 fn 415, 120-121 fn 633 who refer to the use of the reasonable person standard as the embodiment of the *boni mores* in determining wrongfulness instead of the negligence standard. See chapter 3 para 3.4.2, 3.4.3, 3.4.4 and 3.4.7.

¹⁰⁸ Witting *Street on torts* 259.

¹⁰⁹ For example, with regard to false imprisonment protected under article 5 of the European Convention on Human Rights, see *HL v UK* 2005 40 EHRR 32, *Surrey CC v P* 2014 2 WLR 642; Witting *Street on torts* 267.

¹¹⁰ Witting *Street on torts* 272.

¹¹¹ According to s 6 of the Human Rights Act.

¹¹² See Witting *Street on torts* 249.

¹¹³ See *Sterman v EW & W J Moore Ltd* 1970 1 QB 596. Examples of "directness" with regard to battery, is a blow to the face. With regard to assault (where physical contact is not required) threatening telephone calls will fall under "directness" and with regard to false imprisonment, physical arrest by the police will be considered as "direct". See also Peel and Goudkamp *Winfield and Jolowicz on tort* 56; Witting *Street on torts* 251, 256-257.

¹¹⁴ Initially intention was not required but after *Fowler v Lanning* 1959 1 QB 426 and *Letang v Cooper* 1965 1 QB 232 (dealing with battery), it is clear that in trespass to the person; intention also including "subjective recklessness" is required (Peel and Goudkamp *Winfield and Jolowicz on tort* 56-57). It has been argued that it has not yet been ruled out that liability in the tort of trespass to the person may stem from negligent conduct – see *Weaver v Ward* 1617 80 ER 284 and *Scott v Shepherd* 1773 96 ER 525. It is important to note that in English law, with the tort of negligence, harm is required while it is not important in trespass to a person. Furthermore there are different prescription periods with regard to claims in trespass and negligence. Cf Murphy in Jones (gen ed) *Clerk and Lindsell on torts* 1093; Witting *Street on torts* 251-254; Giliker *Tort* 409; McBride and Bagshaw *Tort* 42-45; Steele *Tort* 40-47; Lunney and Oliphant *Tort* 43-51.

immediate harm but damage need not be proven.¹¹⁵ In the tort of negligence, the claimant is awarded compensation for negligent conduct. While in trespass, the aim is to protect the claimant's legally recognised interest in his land, goods, or person from wrongful interference by the defendant which may lead to compensation.¹¹⁶ Thus interference with a person may take place in the form of battery, assault, and false imprisonment.¹¹⁷ With the torts of trespass, the lawfulness of the wrongdoer's conduct leading to the intended consequences (physical restraint or contact) is assessed.¹¹⁸ The wrongdoer's bad motive will not necessarily mean that an act is unlawful.¹¹⁹ The influence of reasonableness on trespass to the person which includes battery, assault and false imprisonment¹²⁰ will now be discussed.

2.1 Battery¹²¹

Battery is an act by the "defendant that directly and intentionally" causes harm to the claimant through some kind of unlawful, non-consensual, undesired, physical contact.¹²² According to the requirements, there must be direct, physical, "hostile"¹²³ contact which is not consented to.¹²⁴ However, bodily contact will not be considered hostile if it conforms to the ordinary, generally acceptable contact that occurs in everyday life, such as brushing against someone in a crowded corridor.¹²⁵ There must

¹¹⁵ See Peel and Goudkamp *Winfield and Jolowicz on tort* 57; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 359; Giliker *Tort* 409.

¹¹⁶ See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 360; Giliker *Tort* 409.

¹¹⁷ Murphy in Jones (gen ed) *Clerk and Lindsell on torts* 1092.

¹¹⁸ Steele *Tort* 29.

¹¹⁹ See *Allen v Flood* 1898 AC 1; Steele *Tort* 32.

¹²⁰ Peel and Goudkamp *Winfield and Jolowicz on tort* 55.

¹²¹ Usually referred to as assault in other jurisdictions (Giliker *Tort* 414).

¹²² See *Witting Street on torts* 249. Cf Murphy in Jones (gen ed) *Clerk and Lindsell on torts* 1092; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 362; Steele *Tort* 33.

¹²³ This was enunciated in *Wilson v Pringle* 1987 QB 237, but really refers to some kind of "offensive" conduct as submitted by Peel and Goudkamp *Winfield and Jolowicz on tort* 60. Cf *Witting Street on torts* 254 who refers to conduct that "the claimant might object to, something that the claimant might regard as an unlawful intrusion on his rights to physical integrity". Lord Goff in *F v West Berkshire HA* 1990 2 AC 1, 73 did not approve of the correctness of the use of term "hostile". Cf McBride and Bagshaw *Tort* 43-44; Lunney and Oliphant *Tort* 58-61.

¹²⁴ Whether or not there was consent will be determined objectively. If the claimant's conduct results in the defendant reasonably believing that consent is present then battery may not be present, it depends on what the reasonable person thinks of the claimant's behaviour. The claimant must prove that he did not consent (*Frieman v Home Office (No 2)* 1983 All ER 589, 594-5). See Peel and Goudkamp *Winfield and Jolowicz on tort* 61; Murphy in Jones (gen ed) *Clerk and Lindsell on torts* 1143; *Witting Street on torts* 255.

¹²⁵ See *Collins v Wilcock* 1984 1 WLR 1172, 1178-1179; *F v West Berkshire Health Authority* 1989 2 All ER 545, 564; *Wainwright v Home Office* 2004 2 AC 406, 417; Peel and Goudkamp *Winfield and Jolowicz on tort* 58-59, 60 fn 35; Murphy in Jones (gen ed) *Clerk and Lindsell on torts* 1096;

be a voluntary¹²⁶ intentional positive act by the defendant¹²⁷ and the consequences need not be foreseeable.¹²⁸ In this tort, the intention refers to the intention to make unlawful physical contact.¹²⁹ Thus where X intends to strike Y but instead strikes Z, intent is present but is referred to as “transferred intent”.¹³⁰ The harm or injury must be direct.¹³¹ This is interpreted widely. For example, in *Scott v Shepherd*¹³² the wrongdoer threw a lighted squib (firework) into the marketplace, the squib was picked up and thrown by other traders till it exploded in the plaintiff’s face. The court found the defendant liable for battery and that it was direct.¹³³ In *Haystead v Chief Constable of Derbyshire*,¹³⁴ a woman was punched in the face resulting in her dropping the baby she was holding. The court referred to this as reckless battery.¹³⁵

The influence of reasonableness is implicit on voluntariness but explicit on lawfulness and reasonableness of the defendant’s act. In principle, if the defendant’s conduct is involuntary or reasonable then an element may be absent or a defence to battery may be applicable. Furthermore, it is unreasonable to hold the defendant liable for battery if any of the requirements are absent. The conduct required is direct, physical, unlawful, non-consensual contact. If a person is reasonably expected to endure the direct physical voluntary contact or if the contact is inconsequential then there is no battery.

Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 362-363; Witting *Street on torts* 254; 72-73. Giliker *Tort* 413; Steele *Tort* 47-49.

¹²⁶ McBride and Bagshaw *Tort* 38-39.

¹²⁷ Obstructing an entrance or standing in a person’s way is not sufficient. See Witting *Street on torts* 255-256.

¹²⁸ See Peel and Goudkamp *Winfield and Jolowicz on tort* 58; Murphy in Jones (gen ed) *Clerk and Lindsell on torts* 1094; Giliker *Tort* 412.

¹²⁹ Trindade 1982 *OJLS* 220; Steele *Tort* 33.

¹³⁰ See Witting *Street on torts* 252-253; Giliker *Tort* 412. The question has been raised as to whether transferred malice should rather fall under negligence – see Beever 2009 *LS* 400ff.

¹³¹ McBride and Bagshaw *Tort* 39.

¹³² 96 ER 525.

¹³³ See Witting *Street on torts* 253; Giliker *Tort* 412.

¹³⁴ 2000 3 All ER 890.

¹³⁵ See Witting *Street on torts* 253.

2.2 Assault

Assault is an act by the defendant that intentionally and directly “causes the claimant reasonably to apprehend the imminent infliction of battery”.¹³⁶ In other words, it refers to the claimant’s fear or reasonable anticipation of imminent, unlawful violence by the defendant.¹³⁷ Contact is not required. Thus if X points a gun at Y and misses Y, then X has committed assault, but if Y gets shot then it is battery.¹³⁸ There must be a reasonable anticipation of harm. The claimant must be aware of the attempted harm¹³⁹ and this is tested objectively.¹⁴⁰ In *Stephen v Myers*,¹⁴¹ the plaintiff was threatened with harm but a third party intervened and stopped the attack. Thus the defendant was not liable for battery but assault.¹⁴² Fault in the form of intention is required even if the defendant was reckless¹⁴³ with regard to the consequences of his actions.¹⁴⁴ The intended harm or force must be immediate¹⁴⁵ and direct. Thus, if the claimant is aware that the defendant cannot inflict the harm directly and immediately, then there is no assault.¹⁴⁶ In *Tuberville v Savage*,¹⁴⁷ the defendant placed his hand on his sword and stated that “if it were not assize time, I would not take such language from you”. The uttered words clearly meant that the defendant would not cause harm as it was a conditional threat.¹⁴⁸

¹³⁶ See *Collins v Wilcock* 1984 1 WLR 1178, *Witting Street on torts* 249; Murphy in Jones (gen ed) *Clerk and Lindsell on torts* 1092; Steele *Tort* 35; Lunney and Oliphant *Tort* 54.

¹³⁷ See Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 359, 361.

¹³⁸ See Giliker *Tort* 414.

¹³⁹ If a claimant is hit from the rear, it is considered as battery and not assault. See *Witting Street on torts* 257; McBride and Bagshaw *Tort* 40.

¹⁴⁰ A person’s own fear, which is a subjective factor is not considered; see *Witting Street on torts* 258; Giliker *Tort* 414.

¹⁴¹ 172 ER 735.

¹⁴² See Peel and Goudkamp *Winfield and Jolowicz on tort* 64; Giliker *Tort* 414; Lunney and Oliphant *Tort* 54.

¹⁴³ See *Pritchard v Co-operative Group Ltd* 2012 QB 320; *Breslin v McKeivitt* 2011 NICA 33 where recklessness was deemed to satisfy the requirement for intention in respect of battery; Lunney and Oliphant *Tort* 53.

¹⁴⁴ See *Bici v Ministry of Defence* 2004 EWHC 786 where the claim for assault failed as the defendant did not cause the victim to reasonably anticipate the fear of imminent violence; Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 361; McBride and Bagshaw *Tort* 43 fn 21; Giliker *Tort* 414.

¹⁴⁵ A threat of violence or force in the future is not sufficient. See *R v Beasley* 1981 73 Cr App R 44.

¹⁴⁶ See Giliker *Tort* 415.

¹⁴⁷ 1669 1 Mod Rep 3; 86 ER 684.

¹⁴⁸ See Peel and Goudkamp *Winfield and Jolowicz on tort* 65; Murphy in Jones (gen ed) *Clerk and Lindsell on torts* 1097; Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 362; McBride and Bagshaw *Tort* 39.

Inciting words are usually not considered as assault, however in *R v Ireland*,¹⁴⁹ the House of Lords held that liability depends on whether the victim reasonably believed that the verbal threats (received telephonically) could be carried out soon, so as to qualify as an “immediate” threat.¹⁵⁰ In *Read v Cocker*¹⁵¹ the defendant was found liable for assault when he made a gesture and threatened to break the plaintiff’s neck if he did not leave the shop.¹⁵² The defendant intended to commit assault.

The influence of reasonableness on the requirements for assault is explicit with regard to immediate reasonable fear of harm or reasonable belief of an imminent threat which could lead to harm. If any of the requirements are absent then it is unreasonable to hold the defendant liable for assault. The threat of harm or violence must be imminent and immediate. It is unreasonable to hold a person liable for assault if the threat was remote, conditional or withdrawn, as then the threat is not urgent and there is no immediate fear of violence. Furthermore, if the threat of violence or harm is not immediate, then the defendant cannot be held liable for assault as the claimant is not in danger and should not fear imminent harm.

2.3 False imprisonment

False imprisonment refers to the act of the defendant who intentionally and directly “causes the claimant’s confinement within an area delimited by the defendant”.¹⁵³ The

¹⁴⁹ 1998 AC 147. Even though this was a criminal case, the reasoning may be applied to assault as a tort.

¹⁵⁰ *R v Ireland* 1998 AC 147, 162. See Peel and Goudkamp *Winfield and Jolowicz on tort* 65; *Witting Street on torts* 258-259; Lunney and Oliphant *Tort* 55-57.

¹⁵¹ 138 ER 1437.

¹⁵² See McBride and Bagshaw *Tort* 40; Giliker *Tort* 416.

¹⁵³ Confinement need not be limited to a prison cell or room. See Murphy in Jones (gen ed) *Clerk and Lindsell on torts* 1092, 1104; Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 370; *Witting Street on torts* 249, 264.

conduct must usually consist of a positive act,¹⁵⁴ be intentional,¹⁵⁵ direct and immediate.¹⁵⁶ There must be wrongful, unlawful¹⁵⁷ deprivation of the claimant's freedom of movement (force need not be used)¹⁵⁸ and the claimant need not be aware of it.¹⁵⁹ There must be a complete restriction of movement¹⁶⁰ and no "reasonable means of escape".¹⁶¹ For example, in *Robertson v Balmain Ferry Co Ltd*,¹⁶² the plaintiff was restricted from exiting the wharf until he paid a penny. The plaintiff had paid the penny earlier to catch a boat to the other side of the wharf and had changed his mind in not taking the boat but to rather exit the wharf. At the exits of the wharf above the turnstile was a notice requiring payment of a penny by persons entering and leaving. The plaintiff refused to pay the penny and was thus not allowed to leave. In the claim for false imprisonment, the Privy Council held that the charge of a penny was a reasonable condition, entitling people to exit the wharf in the circumstances. Therefore his claim failed.

¹⁵⁴ For example, if the public authority omits to release a claimant, it will not necessarily amount to false imprisonment unless the claimant has the right to be released and the defendant is obliged to release the claimant. See *Iqbal v Prison Officers Association* 2010 QB 732 where the prison warders went on strike and did not release the claimant at the time the strike was going on. At the time, the Governor ordered that the prisoners remain in their cells throughout the day while the strike was going on. A failure by the prison warders to turn up to work did not lead to liability for false imprisonment. However, a deliberate dishonest refusal might lead to a claim for (omission) misfeasance in public office (per Lord Neuberger MR [40]-[42]). In *Roberts v Chief Constable of the Cheshire Constabulary* 1999 WLR 662, the claimant was arrested on suspicion of burglary and detained without review for over two hours longer than that authorised by the statute. His detention of approximately 2 hours 20 minutes was considered unlawful and he was falsely imprisoned for that time. See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 372; *Witting Street on torts* 269; McBride and Bagshaw *Tort* 41, 59; Giliker *Tort* 416; Steele *Tort* 63-64.

¹⁵⁵ See *Iqbal v Prison Officers Association* 2010 QB 732 [72]; McBride and Bagshaw *Tort* 45.

¹⁵⁶ Giliker *Tort* 417.

¹⁵⁷ Murphy in Jones (gen ed) *Clerk and Lindsell on torts* 1105; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 370.

¹⁵⁸ Giliker *Tort* 416.

¹⁵⁹ See *Grainger v Hill* 132 ER 769 where the claimant was so ill and unable to move, and *Meering v Grahame-White Aviation Co Ltd* 1920 122 LT 44 where the claimant was detained without knowing he was detained. The claimant was entitled to damages for false imprisonment. Atkin LJ (53) opined "I think a person can be imprisoned while he is asleep, while in a state of drunkenness, while he is unconscious, and while he is a lunatic". See also *Murray v Ministry of Defence* 1988 1 WLR 692, 703-704; Peel and Goudkamp *Winfield and Jolowicz on tort* 66-67; Murphy in Jones (gen ed) *Clerk and Lindsell on torts* 1105; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 372; *Witting Street on torts* 270; McBride and Bagshaw *Tort* 42; Giliker *Tort* 419.

¹⁶⁰ If the claimant is able to move in a different direction such as along another footpath then it does not amount to complete restriction as was held in *Bird v Jones* 1845 7 QB 742. See Peel and Goudkamp *Winfield and Jolowicz on tort* 67-68; Murphy in Jones (gen ed) *Clerk and Lindsell on torts* 1104-1105; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 370, 375; *Witting Street on torts* 266-267; McBride and Bagshaw *Tort* 40; Giliker *Tort* 417; Lunney and Oliphant *Tort* 62-64.

¹⁶¹ Giliker *Tort* 418.

¹⁶² 1910 AC 295.

In certain circumstances, the defendant's conduct may be necessary, thereby making the conduct reasonable in adversely impacting upon a plaintiff's interests. Thus the influence of reasonableness is explicit in relation to lawfully restricting a person's freedom of movement. For example, in *Austin v Metropolitan Police Commissioner*,¹⁶³ the police cordoned off an area, restricting movement of about three thousand people for just over seven hours. The appeal court held that the conduct of the police was reasonable and necessary in order for them to avoid violence and disorder. The House of Lords¹⁶⁴ held that Article 5 (right to liberty and security of person) of the European Convention on Human Rights had not been violated. Holding people in a cordoned off section for just over seven hours did not amount to deprivation of liberty and was lawful and necessary under the circumstances to avoid violence. McBride and Bagshaw¹⁶⁵ consider this as falling under necessity, as the courts acknowledged that the police had no other alternative to keeping the peace other than depriving innocent people of their liberty. The European Court of Human Rights also upheld the decision of the House of Lords.¹⁶⁶

In *R v Bournemouth Community and Mental Health NHS Trust, ex parte L*,¹⁶⁷ the claimant, a patient in the mental health ward of a hospital, was not physically restrained but the staff did intend to section him under the Mental Health Act¹⁶⁸ if he tried to leave. He did in fact attempt to leave, at which time the staff sectioned him. According to the evidence, the staff continuously sedated the patient and discouraged friends and family from visiting him. When he was discharged, he sued the hospital submitting that the employees had falsely imprisoned him from the time he entered the hospital until the time he was sectioned under the Mental Health Act. The House of Lords found the detention lawful based on necessity and dismissed the claim of false imprisonment.¹⁶⁹ The European Court of Human Rights¹⁷⁰ however, found that the patient's right to

¹⁶³ 2005 EWHC 480.

¹⁶⁴ 2009 1 AC 564.

¹⁶⁵ *Tort* 55.

¹⁶⁶ See *Austin v United Kingdom* 2012 55 EHRR 14; McBride and Bagshaw *Tort* 36-37; Steele *Tort* 73-75.

¹⁶⁷ 1998 2 WLR 764.

¹⁶⁸ 1983.

¹⁶⁹ Murphy in Jones (gen ed) *Clerk and Lindsell on torts* 1106.

¹⁷⁰ *HL v United Kingdom* 2005 40 EHRR 32.

liberty (Article 5) had been violated.¹⁷¹ Here it may be argued that the staff's conduct was unreasonable in not allowing visitors, in infringing his freedom of movement and his right not to be treated.

Where the arrest and detention is lawful or where legislation authorises a person to use reasonable means to completely restrict the claimants freedom of movement, there is no false imprisonment.¹⁷²

In instances where intentional harm is caused indirectly, it does not fall under trespass to the person because the harm is caused indirectly, but the rule in *Wilkinson v Downton*¹⁷³ will apply. In this case, the defendant told the plaintiff that her husband was involved in an accident and was seriously injured. He was in fact not involved in an accident and the defendant claimed it was a practical joke. However, the plaintiff suffered (indirect harm) severe shock as a result of the false news (there was no force or threat) and the defendant was held liable. Wright J¹⁷⁴ stated that he had "wilfully

¹⁷¹ McBride and Bagshaw *Tort* 41.

¹⁷² See s 3 of the Criminal Law Act 1967 which allows a person to use reasonable force in preventing crime or affecting a lawful arrest. See also s 12(1) of the Prison Act 1952, s 24 of Police and Criminal Evidence Act 1984, s 329 of Criminal Justice Act 2003 and s 136 of the Mental Health Act 1983 which allows lawful arrest or detention under certain circumstances. These statutes will not be discussed further in this thesis as it is beyond the scope of this study. A local authority may however be held liable for false imprisonment if a prisoner is detained longer than the correct prison term. See also *R v Governor of Brockhill Prison, ex parte Evans (NO 2)* 2001 2 AC 19 where a mistake was made in respect of the calculation of the prison term but the governor was still held liable for false imprisonment; *R (Lumba) v Secretary of State for the Home Department* 2012 1 AC 245 where the majority of the court held that the imprisonment of the claimants (foreign national prisoners) was unlawful and resulted in false imprisonment; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 374, 376-378; McBride and Bagshaw *Tort* 56-59, 61; Steele *Tort* 65-71.

¹⁷³ 1897 2 QB 57 (Witting 1998 *UNSWLJ* 55 prefers the view that in such a case there was negligent as opposed to intentional conduct by the defendant). In *Janvier v Sweeney* 1919 2 KB 316, the rule in *Wilkinson v Downton* 1897 2 QB 57 was followed where a private detective posed as a police officer in order to obtain letters belonging to her employer. The private detective threatened her with arrest for association with a German spy and she sustained psychiatric injury as a result. She was entitled to damages. In *Khorasandjian v Bush* 1993 QB 727, the plaintiff was harassed and suffered stress. The court granted her an injunction against the defendant (her ex-boyfriend). The conduct of the defendant was intentional. The tort of harassment was not initially recognised as a tort in common law and a claim had to be framed under either trespass or nuisance. As mentioned, claims for harassment are now regulated by the Protection of Harassment Act 1997. See Peel and Goudkamp *Winfield and Jolowicz on tort* 70-75; Murphy in Jones (gen ed) *Clerk and Lindsell on torts* 1098-1100; Witting *Street on torts* 259-261; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 378-380; Giliker *Tort* 412, 420-422; Steele *Tort* 77-81; para 2 above.

¹⁷⁴ *Wilkinson v Downton* 1897 2 QB 57, 59.

done an act calculated to cause physical harm” which “in fact ... caused physical harm”.¹⁷⁵

The influence of reasonableness is explicit on the requirements of the tort of false imprisonment where it is directly related to the reasonableness of the defendant’s conduct. If the defendant acts unreasonably in infringing the freedom of movement of the claimant, then there is false imprisonment. If the defendant is detained or imprisoned unnecessarily longer than he should have been, then the defendant’s conduct is unreasonable, unlawful and there is false imprisonment. If the defendant exercises his lawful interests, whether it be out of necessity, by use of reasonable force authorised by statute or for any other lawful reason, the defendant’s conduct is considered reasonable and the restriction of freedom of movement does not constitute false imprisonment. According to the requirements, the restriction of freedom of movement must be complete and if there is a reasonable means of taking another exit, direction, path or ensuring one is no longer restricted in movement, then there is no false imprisonment.

2.4 Defences in respect of trespass to the person

There are many defences in tort law and in keeping within the scope of the study; only the main defences to the tort of negligence which can be compared with those in the South African law of delict will be discussed in this thesis. Similarly in dealing with the torts of trespass to the person where intentional conduct is required, only the main defences to trespass to the person will be discussed.

Witting,¹⁷⁶ interestingly, recognises different categories of defences, namely “absent element defences,” “justification defences”, “public policy defences” and “non-defences”. With absent element defences, an element in a tort is missing; there is no tort, such as in instances where there is valid consent.¹⁷⁷ This category includes the

¹⁷⁵ The circumstance under which this rule applies has been curtailed by the decision of *Wainwright v Home Office* 2004 2 AC 406. See discussion by Lunney and Oliphant *Tort* 69-74.

¹⁷⁶ *Street on torts* 316-317.

¹⁷⁷ Peel and Goudkamp *Winfield and Jolowicz on tort* 784 also submit that a “plea of consent is a denial and not a defence”.

“doctrines of inevitable accident”,¹⁷⁸ “involuntariness”,¹⁷⁹ and “physical compulsion”.¹⁸⁰ Justification defences would include self-defence, discipline, statutory authority etcetera where it depends on whether the defendant’s conduct is reasonable. Thus although a tort is committed “acting tortuously was reasonable in the circumstances” and liability will not ensue. In respect of public policy defences, such as illegality, a tort is committed but the defendant is exempt from liability as a result of the policy consideration. Non-defences include “insanity, infancy, duress or provocation”.

2.4.1 Consent

Consent may be applied as a defence to all three torts of trespass to a person.¹⁸¹ Consent may be given expressly or implied¹⁸² and the claimant must prove consent with trespass to the person.¹⁸³ If consent is given, then the physical interference with a person’s body is considered lawful.¹⁸⁴ If a subjective test is applied, consent would be present where the claimant in fact agreed to the physical interference of his body. If an objective test is applied, the claimant’s subjective belief is not relevant and it would depend on whether the reasonable person could conclude that under the circumstances of the case, the claimant consented to the contact.¹⁸⁵ In practice, it does not seem to matter which approach is used as the “main guide that the court has to

¹⁷⁸ In such instances, the accident which occurred was inevitable and could not have been avoided by taking reasonable care under the circumstances. Because the defendant acted reasonably, he is not at fault, there is no negligence. In respect of trespass to the person there must be proof of fault in the form of intention which will also be absent (see Peel and Goudkamp *Winfield and Jolowicz on tort* 792; *Witting Street on torts* 319). Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 781 point out that it may apply as a defence in cases of *res ipsa loquitur* or where fault is not required such as in cases of strict liability.

¹⁷⁹ *Witting Street on torts* 318 refers to the courts and academic writers who often state that involuntariness negates fault in that X could be found liable for the involuntary movement (for example, an epileptic fit causing harm to another) if he could have avoided the movements occurring (by for example taking his medication to prevent epileptic fits). In actual fact it really negates the “act element” of the tort. This is the same view found in the South African law of delict (see chapter 3 para 2).

¹⁸⁰ Here again *Witting Street on torts* 319 submits that the “act” element is missing. The claimant carries the burden of proof with respect to the “absent element defences”.

¹⁸¹ *Steele Tort* 36.

¹⁸² Peel and Goudkamp *Winfield and Jolowicz on tort* 784; *Witting Street on torts* 320.

¹⁸³ See Peel and Goudkamp *Winfield and Jolowicz on tort* 61, 784; *Giliker Tort* 424.

¹⁸⁴ *Re F (Mental Patient: Sterilisation)* 1990 2 AC 1, 72.

¹⁸⁵ Peel and Goudkamp *Winfield and Jolowicz on tort* 784. *Witting Street on torts* 320 fn 16 submits that it is uncertain whether the test should be subjective (whether the claimant in fact consented to the contact) or objective but refer to *Bennett v Tugwell* 1971 2 QB 267, 273 where an objective approach was preferred.

the claimant's mental state is his conduct".¹⁸⁶ If the defendant mistakenly believes that consent is present when it is in actual fact not, even though the defendant's mistake is deemed reasonable, the defendant will still be held liable.¹⁸⁷ The consent must refer to a specific act.¹⁸⁸ If there is misrepresentation,¹⁸⁹ fraud¹⁹⁰ or duress¹⁹¹ involved, then the apparent consent is rendered invalid.¹⁹² For example, in *R v Williams*,¹⁹³ the plaintiff acquiesced to sexual assault by her singing tutor on the false information that it would improve her voice. Thus even though she acquiesced to sexual assault, it was under false information.¹⁹⁴ Where consent is withdrawn, the general rule is that interference with a person's body from the point that the consent is withdrawn will be considered unlawful.¹⁹⁵ However, an exception would apply where it would not be reasonable to stop such interference immediately when the consent is withdrawn. In such instances, the defendant will have a reasonable time period within which to stop the interference.¹⁹⁶ For example, in *Herd v Weardale Steel, Coal and Coke Ltd*,¹⁹⁷ a miner was taken to the bottom of a pit to work but refused to continue working as he felt it was unsafe. He demanded he be taken back to the surface. The employer refused to take him back up until the end of the morning shift. The employee sued the employer submitting that he had been falsely imprisoned. The employer was not found liable for false imprisonment as the House of Lords held that he had voluntarily agreed to enter the pit, and the employer was not obliged to take him back up until the shift ended. McBride and Bagshaw¹⁹⁸ point out that it was reasonable for the employer to take the employee back up within a reasonable time, at the end of the shift.

¹⁸⁶ Witting *Street on torts* 321.

¹⁸⁷ See *Chatterton v Gerson* 1981 QB 432; Peel and Goudkamp *Winfield and Jolowicz on tort* 785.

¹⁸⁸ If the claimant consents to a specific procedure it does not automatically mean that he consents to another. See *Appleton v Garrett* 1995 34 BMLR 32; Peel and Goudkamp *Winfield and Jolowicz on tort* 784.

¹⁸⁹ See *Chatterton v Gerson* 1981 QB 432, 443; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 364.

¹⁹⁰ See *R v Dica* 2004 QB 1257; *R v Cort* 2004 QB 388; Murphy in Jones (gen ed) *Clerk and Lindsell on torts* 1145.

¹⁹¹ See *Centre for Reproductive Medicine v U* 2002 EWCA Civ 565; Witting *Street on torts* 321 fn 22.

¹⁹² Witting *Street on torts* 321.

¹⁹³ 1923 1 KB 340.

¹⁹⁴ See Peel and Goudkamp *Winfield and Jolowicz on tort* 785; McBride and Bagshaw *Tort* 46 fn 31; Giliker *Tort* 422; Lunney and Oliphant *Tort* 84.

¹⁹⁵ McBride and Bagshaw *Tort* 47.

¹⁹⁶ McBride and Bagshaw *Tort* 47.

¹⁹⁷ 1915 AC 67.

¹⁹⁸ *Tort* 47. See also Peel and Goudkamp *Winfield and Jolowicz on tort* 68-69; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 373-374.

In respect of sporting activities, consent to injury is implied under the circumstances if the rules relating to the playing of the sport are followed.¹⁹⁹ The defence of consent may negate claims in battery and negligence.²⁰⁰ In respect of a claim in negligence, if the defendant, a participant acts recklessly or with a high degree of carelessness beyond what is expected of participants in a sport, then there will be a breach of a duty of care.²⁰¹

In respect of medical treatment, a major (adult) with full legal capacity has the right to either consent to medical treatment or not, even if the treatment is necessary to save his life.²⁰² If there is no consent, then it may be regarded as battery.²⁰³ In English law,

¹⁹⁹ See *Blake v Galloway* 2004 1 WLR 2844 where a claim for battery was dismissed as well as a claim in negligence. The child was injured in the eye while playing a game. The court held that consent to the risk of injury was present. If however, the game is not played by a player according to the rules, then consent is absent (McBride and Bagshaw *Tort* 49). See also *Condon v Basi* 1985 1 WLR 866; *Witting Street on torts* 320.

²⁰⁰ Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 768.

²⁰¹ *Blake v Galloway* 2004 1 WLR 2844, 2853. See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 768.

²⁰² See *Airedale NHS Trust v Bland* 1993 AC 789, 866; *B v An NHS Hospital Trust* 2002 EWHC 429 where the claimant refused to remain on a ventilator and the medical practitioners refused to switch it off. The court held that her request to switch off the ventilator was valid as she was old and intelligent enough to decide whether or not to continue with the treatment. In *Re JT (Adult refusal of medical treatment)* 1998 1 FLR 48, the patient was detained under the Mental Health Act 1983 but capable of understanding information and able to make a decision regarding treatment. She had capacity and refused dialysis which was necessary to keep her alive. In *Re T (Adult: Refusal of Treatment)* 1993 Fam 95, a patient refused a blood transfusion but the doctors administered a blood transfusion. In the circumstances, it transpired that due to her illness, influence of her mother and lack of information, the administration of the blood transfusion was lawful. There was in fact lack of capacity which did not infringe her right to autonomy. The courts are still not willing to approve of cases of assisted suicide no matter how compelling the circumstances of the case based on policy considerations. For example in *Pretty v United Kingdom* (2346/02) 2002 35 EHRR 1, the patient wanted to commit suicide as she was suffering from motor neuron disease and wanted her husband to assist her in her death but for him not be prosecuted in terms of the Suicide Act 1961. The Director of Public Prosecutions denied her request and the European Court of Human Rights found that it was justified to deny her request based on the policy decision to protect the weak and vulnerable people in society who may be manipulated by allowing assisted suicide. See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 368-369; Giliker *Tort* 425-427. Recently in South Africa in *Stransham-Ford v Minister of Justice and Correctional Services and Others* (GP) (unreported case no 27401/15, 4 May 2015) Fabricius J held that a doctor assisting with the death of his patient who was terminally ill with prostate cancer would not face any prosecution or disciplinary hearings as the conduct of the doctor would be considered lawful. The patient however had died at the time when the ruling was handed down in the High Court. Cf list of cases referred to in Peel and Goudkamp *Winfield and Jolowicz on tort* 61 fn 42-43; McBride and Bagshaw *Tort* 53-55.

²⁰³ See *re F (Mental Patient: Sterilisation)* 1990 2 AC 1; *Airedale NHS Trust v Bland* 1993 1 All ER 821, 881; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 363-364; *Witting Street on torts* 323.

the right to self-determination is held in high regard. For example, in *St George's Healthcare NHS Trust v S*,²⁰⁴ the court held that a doctor who performs a caesarean section on a patient, who has capacity and refuses to undergo the operation in order to save a foetus, commits battery.²⁰⁵ If a person refuses to give consent for a blood transfusion and is given blood, then it may amount to battery.²⁰⁶ An adult may even refuse to eat and cannot be force-fed.²⁰⁷

In terms of section 8(1) of the Family Law Reform Act,²⁰⁸ a minor over sixteen years of age may consent to medical treatment and a minor below sixteen years of age may also consent to medical treatment,²⁰⁹ provided the minor is able to understand the consequences of the medical treatment (according to common law).²¹⁰ If the minor is under sixteen years of age and not capable of understanding the consequences of the medical treatment often stated as not “*Gillick* competent” (after the well-known case *Gillick v West Norfolk Area Health Authority*),²¹¹ then one of the parents may give the required consent.²¹² In *Gillick v West Norfolk Area Health Authority*, the House of Lords held that a girl under the age of sixteen years could consent to receive contraceptive advice and treatment without the parents’ consent, provided the child had “sufficient understanding and intelligence”. However, the court has jurisdiction to override any decision to consent involving a minor, being a ward of the court, where necessary. Such decision must be in the best interests of the child.

A person must be given a broad idea of what to expect in respect of treatment.²¹³ In *Sidaway v Bethlem Royal Hospital*,²¹⁴ the House of Lords held that a medical practitioner need not inform the patient of all the risks of a procedure, but was required

²⁰⁴ 1998 2 WLR 936.

²⁰⁵ McBride and Bagshaw *Tort* 55.

²⁰⁶ See *Malette v Shulman* 1990 67 DLR 4 321; Giliker *Tort* 424.

²⁰⁷ See *B v Croydon HA* 1995 Fam 133,137; *Secretary of State for the Home Department v Robb* 1995 Fam 127; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 367. 1969.

²⁰⁸ S 8(3) of the Family Law Reform Act 1969.

²⁰⁹ See *Re P (A Minor)* 1981 80 LGR 301; *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* 1993 Fam 64; *Re Y (Mental Incapacity: Bone Marrow Transplant)* 1998 3 All ER 673; Peel and Goudkamp *Winfield and Jolowicz on tort* 63; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 364-366; Witting *Street on torts* 324; McBride and Bagshaw *Tort* 48.

²¹¹ 1986 AC 112.

²¹² McBride and Bagshaw *Tort* 48.

²¹³ *Chatterton v Gerson* 1981 QB 432, 443. Cf McBride and Bagshaw *Tort* 46-47; Lunney and Oliphant *Tort* 83-84.

²¹⁴ 1985 AC 871, 883.

to provide a reasonable amount of information pertaining to the nature of the procedure and any noteworthy risks to the procedure which would influence the judgement of the reasonable patient. The medical practitioner's liability in negligence will be determined according to the "*Bolam test*",²¹⁵ that is, according to the practices of a respectable body of opinion.²¹⁶ The Mental Capacity Act²¹⁷ regulates which treatment should be administered to mental patients but whether the type of treatment is legal depends on principles of common law.²¹⁸

The influence of reasonableness on the defence of consent is partially implicit and partially explicit. It is reasonable to hold the defendant liable for trespass to the person if on the face of it, consent was obtained but such apparent consent was obtained through misrepresentation, fraud or duress. The apparent consent is invalid. It is reasonable to hold the defendant liable for trespass to the person if any requirements relating to the defence are absent. In respect of sporting activities, whether there is consent to injury, or the risk thereof, will depend on whether the participants' conduct was reasonable. In other words, the question is did the participants' play the sport according to the rules of the game? In English law the right to autonomy is held in high regard and even if a patient with capacity refuses lifesaving medical treatment (which may be considered by some as unreasonable) it is in accordance with the wishes of the patient. The patient should not be forced to undergo any treatment. If a patient is aware of the risks in undergoing medical treatment and consents to the performance of an operation resulting in detrimental consequences, then the medical practitioner's conduct may be deemed reasonable. A patient should be informed of any material risks when undergoing treatment and a failure to inform the patient will negate the requirement of knowledge and appreciation of the risk of harm. It will render the consent invalid and the defendant's conduct unreasonable and unjustified. It is only reasonable that a medical practitioner should inform the patient of material risks and not every single risk. This is judged according to whether the reasonable patient would attach any importance to such risks in making an informed decision. It has been stated that whether there is consent may depend on whether the reasonable person could

²¹⁵ See *Bolam v Friern Hospital* 1957 1 WLR 582, 586-587 where the test was enunciated. See para 3.4 below.

²¹⁶ See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 364; Giliker *Tort* 423.
²¹⁷ 2005.

²¹⁸ Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 366.

conclude that there is consent. The use of the criterion of the reasonable person in this manner is very similar to the approach of determining wrongfulness of conduct in the South African law of delict. The English use of the reasonable person standard here and the South African *boni mores* test in determining wrongfulness produce similar results.²¹⁹

2.4.2 Necessity²²⁰

A defendant may in principle raise this defence if he intervenes to prevent greater imminent risk of harm to a third party, himself or the claimant.²²¹ The defendant may not rely on this defence if he brought the situation of necessity upon himself through his own fault.²²² The defendant must act reasonably,²²³ that is, he should choose the least harmful option to avert the harm²²⁴ and use reasonable force.²²⁵ The threat of harm must be reasonably imminent.²²⁶ In *Rigby v CC Northhampshire*,²²⁷ the police fired a canister of tear gas into the plaintiff's building in order to flush out a dangerous person who broke into the building. The plaintiff's building was burnt and at the time there was no firefighting equipment on hand. The plaintiff sued the police, *inter alia* in negligence, alleging that the police should have purchased and used equipment which posed no fire risk. It was held that necessity could be raised as a defence in a claim of trespass. The police were not negligent in creating the situation of emergency but they were held liable in negligence. The court held that the police had been negligent in firing the gas canister when no fire-fighting equipment was on hand.²²⁸ Thus their conduct was unreasonable.

²¹⁹ See Neethling and Potgieter *Delict* 49 fn 83, 92-93 fn 415, 120-121 fn 633 who refer to the use of the reasonable person standard as the embodiment of the *boni mores* in determining wrongfulness instead of negligence. See chapter 3 para 3.4.2, 3.4.3, 3.4.4 and 3.4.7.

²²⁰ Witting *Street on torts* 342 is of the view that private defence is probably not a defence and not a defence to intentional torts.

²²¹ See Witting *Street on torts* 342; McBride and Bagshaw *Tort* 50-51; Giliker *Tort* 427.

²²² See *Southport Corp v Esso Petroleum Co Ltd* 1954 2 QB 182, 194,198; Peel and Goudkamp *Winfield and Jolowicz on tort* 796; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 280.

²²³ Giliker *Tort* 425.

²²⁴ Witting *Street on torts* 326.

²²⁵ Peel and Goudkamp *Winfield and Jolowicz on tort* 796.

²²⁶ Witting *Street on torts* 326.

²²⁷ 1985 1 WLR 1242.

²²⁸ See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 280.

English tort law does not recognise so-called private necessity where the defendant harms another innocent person or causes damage to such innocent person's property to protect his own interests.²²⁹ For example, if a mountaineer enters another person's cabin to shield himself from a storm, there is no harm done. But if he then eats the cabin owner's stored food and burns some furniture to warm himself with a fire, he would be liable in tort to the cabin owner for the consumed food and destroyed furniture.²³⁰ However, in instances where a defendant destroys a house to prevent fire spreading onto neighbouring land²³¹ or throws property overboard to lighten a ship in a storm; such conduct would be justified based on necessity.²³² In these instances the defendant intervenes in order to prevent harm to third parties. In *Austin v Commissioner of Police of the Metropolis*²³³ the confining of many people in Oxford Circus was considered reasonable, justified and necessary in order to prevent public disorder and violence.²³⁴

In *Re F (Mental Patient: Sterilization)*; *F v West Berkshire Health Authority*,²³⁵ it was held that in instances where it is impractical to communicate with the patient, it is necessary to take action that the reasonable person would take in the circumstances

²²⁹ Peel and Goudkamp *Winfield and Jolowicz on tort* 796. This would be regarded as an example of private necessity from an American perspective. It is a partial defence in that even though the defendant acts reasonably, he must pay for damages sustained by the claimant. In this scenario the plaintiff acts out of necessity in protecting his own interests. American law makes the distinction between private and public necessity (see chapter 5 para 2.5.5) but English law does not seem to explicitly make the differentiation. English law makes the distinction on whether the defendant acts out of necessity in respect of his own interests, for those of the claimant, and for those of third parties. In South African law, there is no distinction between private and public necessity and where the defendant acts reasonably in protecting the interests of another, his conduct is justified and he may not be held liable in delict. Furthermore the defence is a complete defence and the defendant need not pay compensation to the plaintiff for harm done (see chapter 3 para 3.4.3).

²³⁰ Peel and Goudkamp *Winfield and Jolowicz on tort* 797.

²³¹ See *Dewey v White* 1827 M & M 56; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 282.

²³² Peel and Goudkamp *Winfield and Jolowicz on tort* 797.

²³³ 2009 1 AC 564. See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 282

²³⁴ Peel and Goudkamp *Winfield and Jolowicz on tort* 797.

²³⁵ 1990 2 AC 1. In this case, the patient was thirty-six-years-old but with the mental age of a five-year or six-year-old, therefore not capable of consenting to a sterilisation. The House of Lords held that the recommended treatment would be justified if the treatment was in the best interests of the patient and would be endorsed by the views of a reasonable body of medical opinion. If there are a number of reasonable treatments available, then the recommended treatment should take into account ethical, moral, social and welfare considerations relating to the patient. See also *Re S (Adult Patient: Sterilisation: Patient's Best interests)* 2001 Fam 15 CA; *Re A (Mental Patient: Sterilisation)* 2000 1 FLR 549 CA; *Simms v Simms* 2003 Fam 83; *Portsmouth NHS Trust v Wyatt* 2005 1 WLR 3995; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 366; McBride and Bagshaw *Tort* 52-53; Giliker *Tort* 428 fn 96; Steele *Tort* 49-51; Lunney and Oliphant *Tort* 90-98.

and treat the patient (being in the best interests of the patient). Thus in this case, the defendant acts in the interests of the claimant in order to prevent further harm to the claimant. It is important to note that the defence of necessity, although important in cases involving emergency medical treatment, is not wide enough to justify treatment in all cases.²³⁶ The court's approach hinged on the treatment which would be in the best interests of the patient.²³⁷ This is in any event codified in the Mental Capacity Act.²³⁸ If a patient is over sixteen and unable to make decisions, then sections 4 to 6 of the Mental Capacity Act²³⁹ which now codifies the common law approach, provides that prior to the treatment, reasonable steps must be taken to establish the extent of the patient's lack of capacity. Treatment may be allowed in instances where it is reasonably believed that the patient lacks capacity and the treatment is in the best interests of the patient.²⁴⁰ Thus it is apparent that the influence of reasonableness is explicit.

The well-known decision of *Re (A) (Children) (Conjoined Twins: Surgical operation)*²⁴¹ involved a pair of conjoined twins where the one twin was weaker than the other. The stronger twin would soon die if not separated from the weaker twin. Based on the particular facts of the case, the court held that the medical practitioners in performing the operation to separate the twins which would result in the weaker twin dying but saving the life of the stronger twin, would be carried out lawfully as a result of "necessity" and in the best interest of both twins.²⁴²

The influence of reasonableness on the requirements of necessity is explicit, particularly with respect to the reasonableness of the defendant's conduct which is judged objectively based on the criterion of the reasonable person. The defendant must act reasonably in infringing another's interest. For conduct to be deemed reasonable, the least harmful option must be taken with minimal violation of the

²³⁶ See *Re F (Mental Patient: Sterilization)*; *F v West Berkshire Health Authority* 1990 2 AC 1, 52.
²³⁷ Shaw 1990 *MLR* 103 submits that medical practitioners are not the best group to make decisions on the best interests of a patient. See Lunney and Oliphant *Tort* 95.
²³⁸ 2005. See Steele *Tort* 51.
²³⁹ 2005.
²⁴⁰ See in particular s 5 of the Mental Capacity Act 2005. See also McBride and Bagshaw *Tort* 53; Giliker *Tort* 429; Steele *Tort* 51-53.
²⁴¹ 2001 *Fam* 147.
²⁴² See Peel and Goudkamp *Winfield and Jolowicz on tort* 797-798; McBride and Bagshaw *Tort* 55; Steele *Tort* 58.

claimant's interest and there must be a sense of urgency requiring one to violate the claimant's interests for the greater good not just for himself, such as in *Austin v Commissioner of Police of the Metropolis*.²⁴³ In respect of providing medical treatment in cases of necessity, it seems that a medical practitioner's conduct may be deemed reasonable and justified if the patient lacks capacity or if it is impractical to communicate with the patient. Again the criterion of the reasonable person is applicable in deciding whether the conduct was reasonable in the circumstances. Furthermore, emphasis is placed on acting out of necessity only when it is in the best interests of the patient. Violating the claimant's interests is reasonable only when absolutely necessary and ensuring that it is in the claimant's best interest.

2.4.3 Self-defence

The burden of proof lies with the defendant.²⁴⁴ There must be an honest reasonable belief of an attack by the defendant. The defendant's use of force in retaliation must be necessary, reasonable and not disproportionate.²⁴⁵ Sometimes threats or contacts are expected to be tolerated and depending on the circumstances it might be reasonable to do nothing.²⁴⁶ The defendant need not wait till he is struck and may retaliate with force even if the claimant taunts him with words or actions.²⁴⁷ If there was another way that the defendant could have reasonably avoided using force against the aggressor, by for example locking the door that was between the two of them, he would have been expected to take that course of action.²⁴⁸ However, the resultant harm inflicted to ward off the attack need not be in proportion to the conduct of the attacker.²⁴⁹ The courts are more lenient with the concept of proportionality here and it is acknowledged that the defendant is faced with a situation of emergency and may even kill a person in self-defence.²⁵⁰ Peel and Goudkamp²⁵¹ refer to the situation

²⁴³ 2009 1 AC 564. See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 282.

²⁴⁴ *Witting Street on torts* 325; Giliker *Tort* 430.

²⁴⁵ Peel and Goudkamp *Winfield and Jolowicz on tort* 792-793; *Witting Street on torts* 326-327; Giliker *Tort* 430.

²⁴⁶ Peel and Goudkamp *Winfield and Jolowicz on tort* 793.

²⁴⁷ See *Dale v Wood* 1822 7 Moore CP 33; Peel and Goudkamp *Winfield and Jolowicz on tort* 794.

²⁴⁸ Peel and Goudkamp in *Winfield and Jolowicz on Torts* 792.

²⁴⁹ See *Cross v Kirby* 2000 All ER (D) 212; McBride and Bagshaw *Tort* 51; *Witting Street on torts* 326.

²⁵⁰ Peel and Goudkamp *Winfield and Jolowicz on tort* 793.

²⁵¹ Peel and Goudkamp *Winfield and Jolowicz on tort* 794.

where the defendant may be attacked by an insane person or child and point out that there is a lack of authority but a defendant may be justified in using defensive force in defending himself. The authors²⁵² are also of the opinion that where excessive force is used, the defendant should not be held liable for all the damage caused but for that portion of the damage where the excessive force was used. In other words, the defendant should not be held liable for the damage caused by using reasonable force. The courts' will consider all the facts of the case in judging whether the conduct was reasonable or not.²⁵³ Should a person use unreasonable, disproportionate or excessive force, such person may be held liable for battery or assault.²⁵⁴

For example in *Lane v Holloway*,²⁵⁵ the claimant (an elderly man) provoked the defendant (a younger, stronger man) by insulting his wife, and striking him on the shoulder. The defendant retaliated by striking the claimant in the eye, whereafter he required surgery and eighteen stitches. The claimant was successful in claiming damages in battery from the defendant and the defendant could not rely on the provocation or illegality. The defendant's retaliatory actions were out of proportion to those of the claimant. If the defendant mistakenly believes that X is an attacker, such defendant may rely on self-defence as long as the "mistake was reasonable and the requirements of necessity and proportionality are satisfied according to the world as perceived by the defendant".²⁵⁶ In *Ashley v Chief Constable of Sussex Police*,²⁵⁷ the police officer alleged that he acted in self-defence based on an honest and mistaken belief that the deceased was reaching for a weapon.²⁵⁸ The police officer shot and killed the deceased who at the time of the shooting was in actual fact unarmed. On a criminal charge, the police officer was acquitted as his actions resulting from the genuine belief were justified. In the civil claim, the House of Lords held that the police

²⁵² Peel and Goudkamp *Winfield and Jolowicz on tort* 793.

²⁵³ Giliker *Tort* 430.

²⁵⁴ See *Allen v Metropolitan Police Commissioner* 1980 Crim LR 441, in respect of a lawful arrest. Cf Murphy in Jones (gen ed) *Clerk and Lindsell on torts* 1119-1120.

²⁵⁵ 1968 1 QB 379. See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 368; Giliker *Tort* 430; Lunney and Oliphant *Tort* 101-102.

²⁵⁶ See *Ashley v Chief Constable of Sussex* 2008 1 AC 962 where the House of Lords held that in respect of assault and battery, a claimant may rely on self-defence if he honestly but mistakenly believes that he is about to be attacked. However, such mistake must not be unreasonable. See Murphy in Jones (gen ed) *Clerk and Lindsell on torts* 1094; *Witting Street on torts* 327.

²⁵⁷ 2008 1 AC 962.

²⁵⁸ In the criminal case of murder, the police officer was acquitted for his genuine mistake. See *Witting Street on torts* 327.

officer's mistaken belief resulting in the use of the defensive force was unreasonable. The police officer's mistaken belief was unreasonable in that the belief was not reasonably held and the interests of both parties were considered.²⁵⁹ In this case *inter alia* negligence, assault and battery was alleged. The Chief Constable admitted negligence but in an appeal to the House of Lords denied the claim for battery and assault. The House of Lords dismissed the appeal. It is apparent that by requiring the belief to be objectively reasonable trumps the defendant's subjective belief of a mistake.

In *Cross v Kirkby*,²⁶⁰ the claimant trespassed onto the defendant's (a farmer) land in order to disrupt a hunt. The claimant attacked the defendant with a baseball bat, striking him. The defendant managed to take the bat away from the claimant and then used the bat to hit the claimant. The claimant sued the defendant for battery and the defendant raised self-defence and illegality. The court held that there was an intertwined link between the claimant's harm and his illegal actions.²⁶¹ Furthermore the defendant's actions were not unreasonable in striking the plaintiff with the bat in self-defence.²⁶²

In defending one's property, such property must be in the person's possession to institute an action in trespass.²⁶³ The law values bodily security higher than interests in property. Therefore in using force in self-defence to defend one's property will be harder to justify than using force in self-defence to protect bodily security.²⁶⁴ Proportionality is important when relying on self-defence to protect property.²⁶⁵ For

²⁵⁹ See Peel and Goudkamp *Winfield and Jolowicz on tort* 793; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 369; *Witting Street on torts* 327; *Steele Tort* 62; Lunney and Oliphant *Tort* 98-101.

²⁶⁰ 2000 All ER (D) 212.

²⁶¹ See *Witting Street on torts* 337-338.

²⁶² Jones in Jones (gen ed) *Clerk and Lindsell on torts* 285-286; McBride and Bagshaw *Tort* 753.

²⁶³ See *Holmes v Bagge and Fletcher* 1853 118 ER 629 where the captain of the cricket club forcibly removed the claimant from the field as a result of his behaviour. The captain was held liable because he did not have the required possession of the field; *Scott v Mathew Brown & Co Ltd* 1884 51 LT 746 where the defendant with force removed the true owner from the property. The defendant was held liable for battery as he did not have the required possession. Thus the defence of self-defence failed. Such defendant may make use of the defence of recapture of land but the recapture of land must be reasonable. See Peel and Goudkamp *Winfield and Jolowicz on tort* 794-795; *Witting Street on torts* 328.

²⁶⁴ *Witting Street on torts* 329.

²⁶⁵ Peel and Goudkamp *Winfield and Jolowicz on tort* 795.

example in *Revill v Newbery*,²⁶⁶ the firing of a shotgun at a burglar who broke into a shed with no outward signs of violence towards the owner, was found to be unreasonable. Using deterrents to prevent intruders from entering the property, such as spiked railings, is considered reasonable. However, setting up guns or other devices without notice, meant to cause serious bodily harm, may be considered unreasonable.²⁶⁷ Setting up a device, such as a spring gun, to protect property is regarded as an offence in terms of section 31 of the Offences Against the Person Act.²⁶⁸ The courts may be more lenient though when a person protects his property and uses force at night rather than in the day.²⁶⁹

The influence of reasonableness is explicit on the requirements of self-defence. The reasonableness of the defendant's conduct is judged objectively and *ex ante* but also arguably *ex post facto*. There must be a reasonable belief of an attack by the defendant (*ex ante*) but as shown in *Ashley v Chief Constable of Sussex Police*,²⁷⁰ whether the belief is reasonable is judged objectively. The conduct stemming from the belief is judged by considering all the circumstances of the case as well as the interest of all parties. Thus a weighing of interests takes place. In the end when judging the reasonableness of the belief as well as the conduct stemming from the belief which may result in the infringement of the claimant's interests; subjective, objective, *ex ante* as well as *ex post facto* approaches are applied. From a South African perspective this relates to the enquiries of wrongfulness and fault. In determining the reasonableness of the defendant's conduct, the use of force in self-defence must be the best option chosen, necessary, reasonable and not out of proportion. Depending on the circumstances of the case it may even be reasonable not to retaliate at all. The defensive force need not be in proportion to an initial verbal or physical attack. That is the reason why killing a person may be justified and why one may act in self-defence against a person who lacks capacity. In protecting one's property, the reasonableness of the defendant's conduct will be judged more strictly and the requirement of

²⁶⁶ 1996 QB 567. See *Witting Street on torts* 329.

²⁶⁷ See *Bird v Holbrook* 130 ER 911; Peel and Goudkamp *Winfield and Jolowicz on tort* 795; *Witting Street on torts* 330.

²⁶⁸ 1861. See Peel and Goudkamp *Winfield and Jolowicz on tort* 795.

²⁶⁹ Peel and Goudkamp *Winfield and Jolowicz on tort* 795.

²⁷⁰ 2008 1 AC 962.

proportionality between the initial act and retaliatory conduct becomes important. Naturally a person's life is much more important and valuable than property.

2.4.4 Provocation

Provocation is not considered as a complete defence but may reduce a claim²⁷¹ where the victim is partly to blame for the damage he suffered.²⁷² The influence of reasonableness is explicit in deciding whether to reduce the plaintiff's claim as the reasonableness of both the claimant's and the defendant's conduct would have to be considered and weighed objectively. The nature and value of the competing interests would also have to be weighed in order to decide whether it is reasonable to reduce the plaintiff's award of damages stemming from provocation.

2.4.5 Statutory authority, official authority

Certain public officials and bodies may rely on this defence if they cause harm while performing such acts which may be authorised in terms of the statute that confers such powers or duties upon them.²⁷³ It will depend on the interpretation of the relevant statute.²⁷⁴ In interpreting the statute, it will also have to be established whether the statute intended to confer immunity from liability or a defence.²⁷⁵ The nature of the power conferred must be considered. Thus if the defendant uses force in carrying out his functions and duties, he will be exempt from liability in tort only if he could not have avoided taking reasonable care.²⁷⁶

Certain statutes authorise the interference with the person²⁷⁷ and this applies mostly to false imprisonment. For example, section 3 of the Criminal Law Act,²⁷⁸ and section 76 of the Criminal Justice and Immigration Act²⁷⁹ authorise a person to use reasonable

²⁷¹ See *Lane v Holloway* 1968 1 QB 379.

²⁷² See *Murphy v Culhane* 1977 QB 94; *Witting Street on torts* 340.

²⁷³ *Witting Street on torts* 336.

²⁷⁴ *Witting Street on torts* 336.

²⁷⁵ *Witting Street on torts* 336.

²⁷⁶ See *Manchester Corp v Farnworth* 1930 AC 171; *Tate & Lyle Industries Ltd v Greater London Council* 1983 2 AC 509; *Witting Street* 336.

²⁷⁷ *McBride and Bagshaw Tort* 59.

²⁷⁸ 1967.

²⁷⁹ 2008.

force in assisting with the lawful arrest of offenders or suspected offenders in order to prevent crime.²⁸⁰ A constable may make an arrest with²⁸¹ or without a warrant²⁸² and will be exempt from liability if he uses reasonable force in affecting the arrest. In terms of making the arrest without the warrant, the conduct of the constable must be necessary and the arrest may only be made if there are reasonable grounds of suspicion that the person has committed or is about to commit a crime.²⁸³ A constable is also exempt from liability if he reasonably believes that he is arresting an offender, which subsequently turns out not to be the case.²⁸⁴ Due to the test being based on the subjective belief of the constable instead of an objective test, a constable is exempt from liability if he follows an “invalid or unlawful warrant”.²⁸⁵ From an objective point of view, in terms of tort law, it may be argued that the constable’s actions are reasonable because a reasonable person would have acted in the same manner – fault is absent. As mentioned,²⁸⁶ a police officer who mistakenly believes that a person has committed an offence may escape liability in terms of tort law if the mistake is considered reasonable. The influence of reasonableness is clearly explicit here. However, where a private person arrests another under the mistaken belief that such person has committed an offence, such private person may not escape liability.²⁸⁷ The different standards that are applied may be justified when one considers that the constable acts in a professional capacity as compared to the private individual.

Statutory powers may not be used for an “improper purpose” and must “not be exercised in a way that is *wholly unreasonable*.”²⁸⁸ Article 5 of the European Convention on Human Rights relating to liberty and security, can be enforced against public authorities but is limited by the application of prescribed law which includes lawful arrest in instances where there are reasonable grounds for believing that a person has committed a crime.²⁸⁹

²⁸⁰ Murphy in Jones (gen ed) *Clerk and Lindsell on torts* 1117.

²⁸¹ See s 6 of the Constables Protection Act 1750; Witting *Street on torts* 334.

²⁸² See s 24 of the Police and Criminal Evidence Act 1984; Witting *Street on torts* 335.

²⁸³ See s 24 of the Police and Criminal Evidence Act 1984; Witting *Street on torts* 335.

²⁸⁴ According to s 24 of the Police and Criminal Evidence Act 1984. See *Alanov v CC of Sussex Police* 2012 EWCA Civ 234; Witting *Street on torts* 335

²⁸⁵ See *McGrath v Chief Constable of the Royal Ulster Constabulary* 2001 2 AC 73; *Horsfield v Brown* 1932 1 KB 355, 369; Witting *Street on torts* 334 fn 117.

²⁸⁶ See para 2.4.3 above with regard to self-defence.

²⁸⁷ See *R v Self* 1992 3 All ER 476, 480.

²⁸⁸ See McBride and Bagshaw *Tort* 59-60 as well as other public law conditions referred to.

²⁸⁹ Giliker *Tort* 432-433.

If a person is detained longer than lawfully necessary in terms of a statute, then from the moment his detention is unnecessary and unlawful, the defendant's conduct will be considered unreasonable and unjustified. In *Roberts v Chief Constable of the Cheshire Constabulary*,²⁹⁰ the claimant was detained for approximately eight hours and twenty minutes on suspicion of conspiracy to commit burglary. Section 34(1) of the Police and Criminal Evidence Act²⁹¹ provides that a person must not be detained longer than six hours before his detention must be reviewed. In this case, the court held that during the additional two hours and twenty minutes, the defendant was falsely imprisoned.²⁹²

The influence of reasonableness on statutory authority or official authority is explicit. The statutes themselves expressly require the conduct of the defendant to be reasonable when impacting adversely upon the plaintiff's interests. The reasonableness of the conduct is judged both subjectively (*ex ante*) and objectively (*ex post facto*). The defendant's conduct will be justified only if he used reasonable necessary force and could not have avoided taking reasonable care. If he exceeds this boundary his conduct will be unreasonable and unjustified.

2.4.6 Discipline

The use of this defence is common concerning children and passengers on vessels and aircrafts.²⁹³ Persons in *loco parentis* may use reasonable corrective force to discipline the child.²⁹⁴ Parents and persons *in loco parentis* were previously, in terms of the common law, entitled to use reasonable force in disciplining children. Corporal punishment²⁹⁵ and causing bodily harm to a child while affecting such discipline is no longer allowed.²⁹⁶ Causing bodily harm to the child is considered unreasonable under the Children Act.²⁹⁷ However, detaining a child is allowed as long as such detention is

²⁹⁰ 1999 1 WLR 662.

²⁹¹ 1984.

²⁹² McBride and Bagshaw *Tort* 59.

²⁹³ Witting *Street on torts* 333.

²⁹⁴ *R v Hopley* 1860 2 F & F 202; *R v Woods* 1921 85 JP 272; *R v Rahman* 1985 81 Cr App R 349, 353; Murphy in Jones (gen ed) *Clerk and Lindsell on torts* 1165; Witting *Street on torts* 333.

²⁹⁵ S 548 of the Education Act 1996 prohibits corporal punishment.

²⁹⁶ Murphy in Jones (gen ed) *Clerk and Lindsell on torts* 1165; McBride and Bagshaw *Tort* 56.

²⁹⁷ 2004 ss 58(3) and (4).

reasonable and does not contravene Article 3 (relating to degrading and inhuman treatment) of the European Convention rights. Teachers and persons in charge of children in community homes²⁹⁸ or local authority foster care homes have very limited powers of discipline due to the provisions of the Education Act.²⁹⁹

The captain of a ship³⁰⁰ or aircraft³⁰¹ may use reasonable force against passengers where the captain believes that the safety of others on board the ship or flight may be at risk.³⁰² The captain must believe that the use of force is necessary to prevent harm.³⁰³

The influence of reasonableness on the defence of discipline is explicit particularly with regard to the requirement of using reasonable force.

2.4.7 Illegality³⁰⁴ (*ex turpi causa non oritur actio*)³⁰⁵

Illegality is a defence to all torts.³⁰⁶ It is considered:³⁰⁷

“a special rule of public policy. In its wider form, it is that you cannot recover compensation for loss which you have suffered in consequence of your own criminal act. In its narrower and more specific form, it is that you cannot recover for damage which flows from loss of liberty, a fine or other punishment lawfully imposed upon you in consequence of your own unlawful act. In such a case it is the law which, as a matter of penal policy, causes the damage and it would be inconsistent for the law to require you to be compensated for that damage”.

²⁹⁸ See Children’s Homes Regulations 1991, reg 8(2)(a) (SI 1991/1506); Witting *Street on torts* 334.

²⁹⁹ 1996 s 548. See Witting *Street on torts* 334.

³⁰⁰ See s 105 of the Merchant Shipping Act 1995; Murphy in Jones (gen ed) *Clerk and Lindsell on torts* 1166.

³⁰¹ See s 94 of the Civil Aviation Act 1982. See also Murphy in Jones (gen ed) *Clerk and Lindsell on torts* 1166; Witting *Street on torts* 334.

³⁰² Murphy in Jones (gen ed) *Clerk and Lindsell on torts* 1166; Witting *Street on torts* 334.

³⁰³ See *Hook v Cunard Steamship Co Ltd* 1953 1 WLR 682.

³⁰⁴ See in general the Law Commissions *Consultation Paper on the Illegality Defence in Tort* (LCCP 160, 2001), *The Illegality Defence: A Consultative Report* (LCCP 189, 2009); *The Illegality Defence* (Report No 320, 2010) – as of yet no legislation has been implemented. See also Steele *Tort* 285.

³⁰⁵ Which means that “no cause of action may be founded upon an immoral or illegal act” (*Revill v Newbery* 1996 QB 567, 576). See Witting *Street on torts* 204 fn 140.

³⁰⁶ In terms of common law. Illegality is also a defence under s 329 of the Criminal Justice Act 2003. See Peel and Goudkamp *Winfield and Jolowicz on tort* 805; McBride and Bagshaw *Tort* 749.

³⁰⁷ Stated by Lord Hoffman in *Gray v Thames Trains* 2009 1 AC 1339 [29]. See McBride and Bagshaw *Tort* 749-750.

Lunney and Oliphant³⁰⁸ point out that the narrow application of the defence refers to instances where the claimant tries to avoid the consequences of criminal sanctions imposed on him. The wider rule applies to prevent the claimant from recovering any compensation as a result of his own criminal conduct. Traditionally, prior to the recognition of a distinction between the narrow and wide application³⁰⁹ there were three types of common illegality cases arising in practice: (a) where both parties are involved in criminal activity and the defendant injures the claimant;³¹⁰ (b) where the claimant's conduct is deemed unlawful but independent of the defendant's tort;³¹¹ and (c) "sanction-shifting cases" (narrow application).³¹² According to the general requirements, there must be unlawful or grossly immoral conduct.³¹³ The illegal conduct must not be of a minor nature, it must be serious.³¹⁴ It can apply as a complete defence or deny certain heads of damages, such as loss of earnings.³¹⁵

³⁰⁸ Tort 320.

³⁰⁹ See Lunney and Oliphant *Tort* 323.

³¹⁰ See *Pitts v Hunt* 1991 1 QB 24; *Delaney v Pickett* 2012 1 WLR 2149; *Joyce v O'Brien* 2014 1 WLR 70; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 757; *Witting Street on torts* 206; Lunney and Oliphant *Tort* 315, 323-325.

³¹¹ See *Revill v Newbery* 1996 QB 567; *Vellino v Chief Constable of Greater Manchester* 2002 1 WLR 218 where the court held that the police did not owe the claimant a duty of care as the claimant was trying to escape from police custody. According to the third element of the three-fold test stemming from *Caparo Industries plc v Dickman* 1990 2 AC 605, it would not have been fair, just and reasonable to impose such duty on the police. See also Jones in Jones (gen ed) *Clerk and Lindsell on torts* 200-201; *Witting Street on torts* 206-208; Steele *Tort* 289-291; Lunney and Oliphant *Tort* 325-329.

³¹² Where the claimant alleges that a criminal sanction has been imposed on him because of the defendant's negligence and then sues the defendant. An example is that of *Grey v Thames Trains Ltd* 2009 1 AC 1339 where the claimant was injured in a train accident as a result of the defendant's negligence and thereafter suffered psychiatric injury. Almost two years after the train accident, he killed another person after an altercation. He was convicted of manslaughter whereafter he then sued the defendant for damages *inter alia* resulting from his conviction. The House of Lords denied the recovery of those losses stemming from the criminal sanction (as not to undermine the principles of criminal law and the integrity of the legal system) but allowed other losses stemming from the psychiatric injury. Sanction-shifting cases generally fail on grounds of illegality (see *Clunis v Camden & Islington HA* 1998 QB 978, *Worrall v British Railways Board* unreported CA Civil Division 29 April 1999). See also Jones in Jones (gen ed) *Clerk and Lindsell on torts* 192-193; *Witting Street on torts* 208; Lunney and Oliphant *Tort* 321-322.

³¹³ *Smith v Jenkins* 1970 119 CLR 397, 410; *Nayyar v Denton Wilde Sapte* 2009 EWHC 3218 QB in respect of a bribe; Peel and Goudkamp *Winfield and Jolowicz on tort* 805; *Witting Street on torts* 205; McBride and Bagshaw *Tort* 757.

³¹⁴ *Revill v Newbery* 1996 QB 567, 577, 579. See Peel and Goudkamp *Winfield and Jolowicz on tort* 805; *Witting Street on torts* 205.

³¹⁵ Peel and Goudkamp *Winfield and Jolowicz on tort* 805; *Witting Street on torts* 209.

In terms of the tort of negligence,³¹⁶ Witting³¹⁷ submits that illegality generally functions as a so-called absent element defence in that it negates the duty of care element,³¹⁸ whereas in the intentional torts it functions as a public policy defence.³¹⁹ For example, in *Pitts v Hunt*,³²⁰ the claimant was a pillion passenger on a motorcycle. The driver, a sixteen-year-old boy was uninsured, intoxicated, unlicensed and lost control of the vehicle colliding with another vehicle while taking a turn on the bend. The driver died. The claimant, who was also intoxicated at the time of the accident and aware that the driver was unlicensed and intoxicated, claimed against the estate of the deceased. The defences of *volenti non fit iniuria*, contributory negligence and illegality were raised. The appeal court dismissed the claim on grounds of illegality, holding that no duty of care was owed to the claimant as they were both involved in criminal activity. Furthermore, it was held that section 148(3) of the Road Traffic Act³²¹ denied the defence of *volenti non fit iniuria* and contributory negligence. The trial court's finding of one hundred percent contributory negligence was held to be incorrect as the Act did not provide for such a finding. In *Revill v Newberry*,³²² where the defendant (occupier of the property) shot the plaintiff (a burglar) in the arm and chest, the plaintiff claimed damages against the defendant for breach of a duty of care in terms of the Occupiers' Liability Act³²³ and in terms of the tort of negligence. The defendant submitted that it was an accident, raised illegality, self-defence and contributory negligence. The court denied the defence of illegality due to policy considerations in that it was clear that Parliament, by enacting section 1 of the Occupiers' Liability Act,³²⁴ did not intend for the burglar to be treated as an outlaw³²⁵ and that section 1(3)(b) of the Act in particular assisted in defining the scope of the duty of care owed in terms of common law to a trespasser. This section was relevant in establishing whether the defendant's conduct was reasonable. Thus the defendant used unreasonable force exceeding the limits

³¹⁶ See para 3 below.

³¹⁷ *Street on torts* 337.

³¹⁸ See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 186, 190-191.

³¹⁹ See *Gray v Thames Trains Ltd* 2009 1 AC 1339 [51]. Cf Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 777-779.

³²⁰ 1991 1 QB 24.

³²¹ 1988.

³²² 1996 2 WLR 239; 1996 QB 567. See para 2.4.3 above.

³²³ 1984.

³²⁴ 1984.

³²⁵ In medieval times an outlaw had no civil rights and no protection from the law. See McBride and Bagshaw *Tort* 749.

and the conduct was out of proportion to the threat posed to him by the claimant.³²⁶ In this case, the defendant did not fire a warning shot and even though he did not intend to shoot the plaintiff, the shot that was fired was likely to injure anyone near the door. The defendant thus owed the plaintiff a duty of care and breached such duty entitling him to compensation in respect of the harm and loss he sustained. The plaintiff's award of compensation was however reduced as a result of his contributory negligence.³²⁷ In *Cross v Kirkby*,³²⁸ where both self-defence and illegality were raised, the court found a link between the illegal conduct and the claimant's loss.³²⁹ In *Lane v Halloway*,³³⁰ the claimant also raised illegality where the defendant had retaliated with such force that the claimant was seriously injured. The court found the defendant's use of force unreasonable and out of proportion when compared to the provocation he endured. Witting³³¹ points out that from a study of the case law, it is clear that the defence will not succeed merely because the act was illegal. There must be a link between the illegal act and the harm. Furthermore, the offence relating to the illegality must be somewhat serious. The Law Commission³³² has considered the defence and in its report recommended that the courts should consider policy considerations (in preventing wrongful profiteering, deterring future unlawful acts, and uphold the dignity of the court) and continue developing the law. Legislation was thus not required.³³³

The influence of reasonableness on this defence too is explicit with regard to the requirements. It is unreasonable to benefit or obtain a remedy from the law when the cause of action stems from immoral, wrongful, unlawful, and unreasonable conduct which is against the law. Even public policy which may lead to a conclusion that a claim should be denied in such instances is reasonable, as clearly claiming in tort as a result of an illegal act is against public policy. Naturally, the illegal conduct must not be minor, as the consequences would lead to the claimant not being entitled to any remedy which may be out of proportion to the harm or loss suffered. For example, if a state employee damages a person's vehicle while parked in a zone requiring valid paid

³²⁶ McBride and Bagshaw *Tort* 753.

³²⁷ See Witting *Street on torts* 337. Cf Jones in Jones (gen ed) *Clerk and Lindsell on torts* 212-214.

³²⁸ 2000 All ER (D) 212. See para 2.4.3 above.

³²⁹ See Witting *Street on torts* 337-338.

³³⁰ 1968 1 QB 379. See para 2.4.3 above.

³³¹ *Street on torts* 338.

³³² See *The Illegality Defence*, Report 320 2010.

³³³ Witting *Street on torts* 209.

parking, it would be unreasonable for the state to deny the claimant's claim in respect of damage to the vehicle just because it was illegally parked.

In terms of negligence, the duty of care element is negated for reasons that a duty of care cannot be owed where there is illegal conduct between the parties such as in *Pitts v Hunt*.³³⁴ However, it may be argued that the claimant's conduct in accepting a lift with an unlicensed, intoxicated driver is unreasonable. In *Revill v Newberry*,³³⁵ where illegality succeeded on grounds of public policy, the conduct of the owner was also unreasonable because he exceeded his use of force in protecting his property. He did not fire a warning shot, and the burglar showed no outward signs of being a threat to his safety. In *Cross v Kirkby*,³³⁶ even though the claimant was harmed, the defendant's conduct was considered reasonable. The defendant raised self-defence and illegality. Whether a duty of care is negated in respect of the tort of negligence (discussed in the next paragraph) or public policy plays a role in denying a claim, the reasonableness of the conduct plays a pivotal role.

3. The tort of negligence

3.1. Introduction

The tort of negligence is recognised as the most important tort due to the large number of cases dealing with negligently inflicted harm³³⁷ that are brought before the courts.³³⁸ In English law, "negligence" is not only a factor to be taken into account in determining liability in the tort of negligence³³⁹ but is also known as a distinct tort protecting a number of interests.³⁴⁰ McBride and Bagshaw³⁴¹ submit that negligence focuses on

³³⁴ 1991 1 QB 24. See para 2.4.7 above.

³³⁵ 1996 2 WLR 239; 1996 QB 567. See para 2.4.3 above.

³³⁶ 2000 All ER (D) 212. See para 2.4.3 above.

³³⁷ Negligently inflicted harm does not always result in liability in negligence, for example negligent conduct with respect to use of land could result in nuisance liability (*Witting Street on torts* 26).

³³⁸ Peel and Goudkamp *Winfield and Jolowicz on tort* 78. See also *Witting Street on torts* 26.

³³⁹ It is an element of delictual liability in the terminology of the South African law of delict. See further McBride and Bagshaw *Tort* 94-95 who submit that even conduct committed deliberately or intentionally by the defendant may lead to liability in the tort of negligence.

³⁴⁰ The interests protected include property interests; public rights; economic interests and interests relating to physical and mental integrity as well as reputation (Jones in Jones (gen ed) *Clerk and Lindsell on torts* 439 fn 1).

³⁴¹ *Tort* 95.

what the defendant did and if the defendant acted unreasonably resulting in harm or loss to the claimant, then liability in negligence may follow, provided all the requirements have been met. Due to the fact that negligence protects a number of interests in contrast with other torts where one particular interest may be protected, there is sometimes some overlap.³⁴² For example, negligent interference with one's use and enjoyment of land could result in liability either in negligence or in nuisance.³⁴³

The elements required to succeed in a claim for negligence are: duty, breach, causation and damage or harm.³⁴⁴ Put differently, the questions that need to be answered are: will liability ensue in this type of situation, did the defendant owe the claimant a duty of care?; did the defendant fail to adhere to the required standard of care (breach)?; and did the claimant suffer harm or damage as a result of the defendant's conduct (causation and harm)?³⁴⁵

In respect of a *duty of care* owed by the defendant to the claimant;³⁴⁶ the claimant must prove that the defendant owed him a duty to take reasonable care and not inflict harm upon him.³⁴⁷ The duty of care concept is important as it relates to the legal obligation between the defendant and the claimant.³⁴⁸ Academic writers have different opinions on the role of the duty of care.³⁴⁹ However, Peel and Goudkamp³⁵⁰ point out that it is doubtful whether due to the mere fact that A is owed a duty of care by B means that A has a right against B. A in fact does not have a right that is good against

³⁴² Jones in Jones (gen ed) *Clerk and Lindsell on torts* 439-440.

³⁴³ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 440.

³⁴⁴ Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 99. Cf Jones in Jones (gen ed) *Clerk and Lindsell on torts* 441; Peel and Goudkamp *Winfield and Jolowicz on tort* 78; *Witting Street on torts* 25; *Steele Tort* 112.

³⁴⁵ Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 99.

³⁴⁶ A defendant will only be liable for negligent conduct if he had a *legal* duty to take care. Thus not all careless conduct by the defendant will lead to liability in negligence. Lord Esher MR in *Le Lievre v Gould* 1893 1 QB 491, 497 stated that "[a] man is entitled to be as negligent as he pleases to the whole world if he owes no duty to them". See Peel and Goudkamp *Winfield and Jolowicz on tort* 80; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 31.

³⁴⁷ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 441; *Witting Street on torts* 26.

³⁴⁸ *Witting Street on torts* 26-27.

³⁴⁹ See for example, Nolan 2013 *LQR* 561-566 who submits that the duty of care is strictly speaking not in actual fact a duty and it is misleading to speak of a duty in such context. Many of the issues dealt with under the "duty of care" concept could easily be dealt with under the other requirements relating to the tort of negligence. Hohfeld 1913 *Yale LJ* 32 is of the view that "[d]uty" and 'right' are correlative terms. When a right is invaded, a duty is violated". See Peel and Goudkamp *Winfield and Jolowicz on tort* 80-81, 99.

³⁵⁰ *Winfield and Jolowicz on tort* 81.

B until A acts unreasonably with regard to B's safety and causes harm to B.³⁵¹ Nevertheless, in spite of the uncertainty of the theoretical nature of the duty of care requirement, it is still recognised by the courts as an essential element in the tort of negligence.

The duty of care question is a preliminary question of law, demarcating "the range of people, relationships and interests that receive the protection of the law" as a result of negligent conduct.³⁵² In practice, the claimant need only prove the existence of the acknowledged duty of care category and the general test for duty will only be necessary in novel duty categories or in cases where there is doubt as to the presence of a particular duty category.³⁵³

With regard to the breach of that duty; it is described as a factual question as to whether the defendant's conduct strayed from the legally-required standard of care of the reasonable person (in other words, was his conduct negligent?).³⁵⁴

The defendant's breach of duty must have factually *caused* the harm or loss sustained by the claimant, and the loss must not be so unforeseeable or too remote³⁵⁵ (or must be within the scope of the duty).³⁵⁶ There must be damage for liability in negligence to follow.³⁵⁷

The elements are usually established in the above-mentioned order but need not be.³⁵⁸ Adjudicators do not always differentiate between the three elements of duty,

³⁵¹ This differs from the idea of subjective rights in the South African law of delict (see chapter 3 para 3.1.9). With regard to the doctrine of subjective rights, the right exists in any case but is only infringed by the unreasonable conduct of the defendant. Then there is an infringement of the right and hence wrongfulness. A legal duty on the part of the defendant always implies the existence of a correlative right on the part of the plaintiff, although this right may not yet have been jurisprudentially identified. See Neethling and Potgieter *Delict* 54-55.

³⁵² Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 102.

³⁵³ Witting *Street on torts* 27.

³⁵⁴ Witting *Street on torts* 26; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 31.

³⁵⁵ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 31.

³⁵⁶ The defendant may prove that a valid defence is applicable or that the damage suffered by the claimant is remote (Witting *Street on torts* 25).

³⁵⁷ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 31, 441; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 99.

³⁵⁸ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 441.

breach and causation.³⁵⁹ There is often an overlap³⁶⁰ with these elements due to the role of reasonable foreseeability³⁶¹ relevant to the inquiry in all three elements.³⁶² LJ Denning in *Roe v Minister of Health*³⁶³ stated that “you will find that the three questions, duty, causation, and remoteness, run continually into one another. It seems to me that they are simply three different ways of looking at one and the same problem”.³⁶⁴ All the elements must be present in order to ground liability in the tort of negligence and an applicable defence or absence of one of the elements³⁶⁵ could negate liability.³⁶⁶ Peel and Goudkamp³⁶⁷ refer to the importance of adjudicators establishing each of the separate elements of the tort negligence. They refer to the tendency of the courts occasionally stating that it is irrelevant which element is absent in grounding liability. They³⁶⁸ state:

“There are several reasons why actions are organised into elements: it is thought to aid understanding of the nature of the action, to help ensure that cases that are based on a given action are dealt with consistently and to act as a safeguard against the risk that judges will forget to address important questions.”

The influence of reasonableness on the specific elements of the tort of negligence will now be discussed in more detail.

³⁵⁹ See *Roe v Minister of Health* 1954 2 QB 66, 86; *Witting Street on torts* 26 fn 5; Peel and Goudkamp *Winfield and Jolowicz on tort* 78 fn 3.

³⁶⁰ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 31.

³⁶¹ See Peel and Goudkamp *Winfield and Jolowicz on tort* 79 who refer to the Australian case of *Neindorf v Junkovic* 2005 HCA 75; 80 ALJR 341 [55] where Kirby J stated that “each of the constituent elements of the tort of negligence – duty, breach and damage – considered *seriatim*, progressively increases the specificity of the inquiry into how the incident occurred and the way in which damage was sustained. The broadest and most general level of analysis occurs at the duty stage. Here, the inquiry is primarily concerned with whether injury to the plaintiff or a class of persons to whom the plaintiff belongs, was reasonably foreseeable. With respect to the breach element, the inquiry is directed, in part, to whether a reasonable person in the defendant’s position would have foreseen the risk of injury to the plaintiff. Finally, the damage element is the most specific. The issue here is whether the damage sustained as a result of the breach of duty was of a kind which was reasonably foreseeable. Attempts to force more content into the duty element, by defining the obligation created with greater specificity, turns the traditional analysis of the tort of negligence on its head. It blurs the distinction between its constituent elements. It may also lead to the decision as to breach being pre-empted. This Court should avoid such an error”.

³⁶² Peel and Goudkamp *Winfield and Jolowicz on tort* 78.

³⁶³ 1954 2 QB 66, 86.

³⁶⁴ See Peel and Goudkamp *Winfield and Jolowicz on tort* 78 fn 3.

³⁶⁵ For example, in *Vellino v Chief Constable of Greater Manchester Police* 2002 1 WLR 218, the Court of Appeal held that there was no duty of care owed to a prisoner (absent element) to prevent him from injuring himself after attempting to escape police custody by jumping from a building. See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 466.

³⁶⁶ Peel and Goudkamp *Winfield and Jolowicz on tort* 79.

³⁶⁷ *Winfield and Jolowicz on tort* 79-80.

³⁶⁸ Peel and Goudkamp *Winfield and Jolowicz on tort* 80.

3.2 Duty of care

3.2.1 Introduction

The requirement of “duty of care” is a distinct essential element owed particularly to the claimant.³⁶⁹ Lord MacMillan³⁷⁰ stated that “the categories of negligence are never closed”, thus the courts may create new duty situations when required.³⁷¹ Witting³⁷² submits that the duty of care element “signifies the presence of a legally-recognised relationship between the parties, which provides the court with jurisdiction to settle a dispute about the breach of that duty”. The duty of care concept delineates the interests protected and the boundaries of what is actionable in the tort of negligence.³⁷³ It also relates to justice between the parties and serves as a precedent for future similar cases.³⁷⁴ Even though it is a question of law whether the duty of care arises, it can only be ascertained from the facts of the particular case.³⁷⁵

There are instances where the law has denied the existence of a duty of care. For example, a landowner owes no duty of care to his neighbours when extracting water from his own land which may result in the loss of water to the neighbour’s land and subsequent collapse of such land.³⁷⁶ However, where a landowner extracts water leading to loss of adequate support to the neighbouring land, he may be held liable.³⁷⁷

The duty of care element has developed considerably over time and it is necessary to briefly refer to its historical development in order to understand its current application in grounding liability in the tort of negligence.

³⁶⁹ Peel and Goudkamp *Winfield and Jolowicz on tort* 80.

³⁷⁰ In *Donoghue v Stevenson* 1932 AC 562, 619.

³⁷¹ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 442; Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 109.

³⁷² *Street on torts* 25, 28.

³⁷³ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 32.

³⁷⁴ Peel and Goudkamp *Winfield and Jolowicz on tort* 82.

³⁷⁵ Peel and Goudkamp *Winfield and Jolowicz on tort* 83.

³⁷⁶ See *Langbrook Properties Ltd v Surrey CC* 1970 1 WLR 161; *Stephens v Anglian Water Authority* 1987 1 WLR 1381.

³⁷⁷ *Holbeck Hall Hotel v Scarborough BC* 2000 QB 836. See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 467-468; Witting *Street on torts* 28.

Prior³⁷⁸ to *Donoghue v Stevenson*³⁷⁹ (hereinafter referred to as “*Donoghue*”) in 1932 there was no recognition of a general approach to establishing a duty of care in negligence³⁸⁰ or a distinct tort of negligence for that matter.³⁸¹

In *Donoghue*,³⁸² the House of Lords found the manufacturer of a beverage (ginger beer) liable in negligence for harm suffered by a consumer of the beverage due to its defective contents. The claimant (consumer) alleged that the remains of a decomposed snail were in the bottle of ginger beer and that she had already consumed some of it before she caught sight of the decomposed snail remains. She alleged that she subsequently suffered gastroenteritis as a result of consuming the ginger beer. Besides recognising for the first time a manufacturer’s liability in tort to the consumer³⁸³ for a defective product, Lord Atkin formulated the well-known “neighbour principle” which integrated those situations in which liability for negligent conduct may be imposed.³⁸⁴ He stated:³⁸⁵

“in English law there must be, and is, some general conception of relations giving rise to a duty of care The liability for negligence, whether you style it such or treat it as in other systems as a species of ‘culpa,’ is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question”.

Lord Atkin pronounced that a duty of care would exist firstly, where the injury is reasonably foreseeable and secondly, that the duty was limited to persons closely and directly affected (neighbour) by the negligent conduct. The “neighbour principle”, also

³⁷⁸ However, attempts were made in *Heaven v Pender* 1883 11 QBD 503, 509 and *Le Lievre v Gould* 1893 1 QB 491, 497, 504 to establish a general approach to determining a duty of care. See *Donoghue v Stevenson* 1932 AC 562, 580.

³⁷⁹ 1932 AC 562.

³⁸⁰ There were a number of recognised single duty situations – see Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 100.

³⁸¹ See Steele *Tort* 145-146; Lunney and Oliphant *Tort* 105-107.

³⁸² *Donoghue v Stevenson* 1932 AC 562.

³⁸³ Previously a manufacturer’s liability to a person was only recognised in terms of a contractual relationship.

³⁸⁴ *Witting Street in torts* 28.

³⁸⁵ *Donoghue v Stevenson* 1932 AC 562, 580.

referred to as the proximity requirement, was intended as a guide to situations where a duty of care may be imposed.³⁸⁶ Under this principle, the tort of negligence was able to expand³⁸⁷ and new duty situations were easily acknowledged where the defendant failed to take reasonable care with regard to his “neighbour”.³⁸⁸ Prior to *Donoghue*,³⁸⁹ negligence was a factor considered in establishing liability but by the 1980s Lord Atkin’s “neighbour principle” was regarded as applicable in all cases “unless there [wa]s some justification or valid explanation for its exclusion”.³⁹⁰

The tendency towards generalising in the tort of negligence reached its zenith in the decision of *Anns v Merton London Borough Council*³⁹¹ (hereinafter referred to as *Anns*) where Lord Wilberforce enunciated a universal two-stage approach in effect building on the “neighbour principle”.

“Through the trilogy of cases in this House – *Donoghue v. Stevenson* ... *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd* ... and *Dorset Yacht Co. Ltd. v. Home Office* ..., the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.”

The two-stage test to novel duty of care situations entailed firstly, establishing whether the harm to the claimant was foreseeable and, if in the affirmative, it is presumed that

³⁸⁶ See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 447; *Witting Street on torts* 28.

³⁸⁷ *Witting Street on torts* 28.

³⁸⁸ *Witting Street on torts* 29.

³⁸⁹ *Donoghue v Stevenson* 1932 AC 562.

³⁹⁰ As stated by Lord Reid in *Home Office v Dorset Yacht Co Ltd* 1970 AC 1004, 1027 (this decision involved omissions and the responsibility for conduct of third parties). See Peel and Goudkamp *Winfield and Jolowicz on tort* 85; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 110-111; *Witting Street on torts* 29.

³⁹¹ 1978 AC 728, 751-752. In this decision, the question raised was whether a local authority whose statutory purpose was to approve building constructions owed a duty of care to a subsequent owner of such building. The court held that all local authorities overseeing building constructions according to statutory regulations owed a duty of care with respect to the quality of buildings. In *Murphy v Brentwood District Council* 1991 1 AC 398, the House of Lords reversed the decision in *Anns v Merton London Borough Council* 1978 AC 728. See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 111-112.

a *prima facie* duty of care was present. Secondly, whether there were any (policy) reasons why the duty of care should be limited or refused.³⁹²

In practice, the two-stage test expanded the duty of care categories between the 1970s and 1980s, and this expansion was of particular significance to instances of psychiatric injury and pure economic loss.³⁹³ In 1984, the courts retreated from the general approach in *Anns*³⁹⁴ and reverted to a more strict approach of imposing a duty of care in specific instances.³⁹⁵ The test in *Anns* was harshly criticised³⁹⁶ and the courts commenced with the retreat of the test in *Anns*³⁹⁷ in the decision of *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd*³⁹⁸ where Lord Keith³⁹⁹ stated that it is “material to take into consideration whether it is just and reasonable” to impose a duty of care on the defendant.⁴⁰⁰

3.2.2 Different approaches applied by the courts in determining a duty of care⁴⁰¹

There are currently three different approaches applied by the courts in determining whether the defendant owes the claimant a duty of care.

³⁹² As explained by Witting *Street on torts* 29; cf Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 112.

³⁹³ Witting *Street on torts* 30.

³⁹⁴ *Anns v Merton London Borough Council* 1978 AC 728.

³⁹⁵ Witting *Street on torts* 30.

³⁹⁶ See discussion by Steele *Tort* 149-152 who points out that the main problem was that the “neighbour” or “proximity” principle was seen as a function of reasonable foreseeability instead of being regarded as a separate criterion (aiding in limiting liability) as was referred to in *Donoghue v Stevenson* 1932 AC 562. Furthermore foreseeability of harm on its own as a general test is insufficient to establish a duty of care.

³⁹⁷ See Witting *Street on torts* 30-31. In Canada the test in *Anns v Merton London Borough Council* 1978 AC 728 was adopted by the Supreme Court of Canada in the decision of *City of Kamloops v Nielsen* 1984 2 SCR 2 and is the leading authority on duty of care but has been varied to some degree by *Cooper v Hobart* 2001 SCC 79 – see Steele *Tort* 148.

³⁹⁸ 1985 AC 210.

³⁹⁹ *Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* 1985 AC 210, 240.

⁴⁰⁰ Subsequent decisions opposing the test in *Anns v Merton London Borough Council* 1978 AC 728 include *Yuen Kun-Yeu v A-G of Hong Kong* 1988 AC 175 190-194; *Rowling v Takaro Properties Ltd* 1988 AC 473, 501; *Hill v CC of West Yorkshire* 1989 AC 53, 60. See *Caparo Industries plc v Dickman* 1990 2 AC 605, 617-618; Peel and Goudkamp *Winfield and Jolowicz on tort* 86.

⁴⁰¹ See *Customs and Excise Commissioners v Barclays Bank plc* 2007 1 AC 181,189-190; Peel and Goudkamp *Winfield and Jolowicz on tort* 87-89.

3.2.2.1 The three-fold test

In *Caparo Industries plc v Dickman*⁴⁰² (hereinafter referred to as “*Caparo*”), a case dealing with pure economic loss caused by alleged negligent misstatements, the court held⁴⁰³ that the test in *Anns*⁴⁰⁴ was no longer adequate. The three elements that must be established are: foreseeability of harm; proximity; and whether it is fair, just and reasonable to impose a duty of care.⁴⁰⁵ Steele⁴⁰⁶ points out that although it is common to refer to the test in *Caparo* as the three-stage test⁴⁰⁷ it does not apply in stages like the test in *Anns* and all the elements are of equal importance. It will from here on be referred to as the “three-fold test”. *Caparo* reinstated proximity as a separate element and the element relating to “policy” was recognised more widely instead of as a negative limiting factor. Furthermore a duty of care is no longer presumed. These three elements will now be considered in more detail.

(a) Foreseeability of harm

This question is a preliminary legal one – whether liability may be imputed to the defendant in the type of situation.⁴⁰⁸ The test is objective.⁴⁰⁹ The limit of foreseeability of harm is not higher than average and real possibilities as opposed to probabilities are considered.⁴¹⁰ Specific harm to the claimant need not be foreseeable and it is sufficient if the claimant falls within the category of persons that could be reasonably foreseen to be injured as a result of the defendant’s negligence.⁴¹¹ Whether a

⁴⁰² 1990 2 AC 605.

⁴⁰³ *Caparo Industries plc v Dickman* 1990 2 AC 605, 617-618, 632-633.

⁴⁰⁴ *Anns v Merton London Borough Council* 1978 AC 728.

⁴⁰⁵ The three-fold test as referred to by the courts enunciated in *Caparo Industries plc v Dickman* 1990 2 AC 605 was subsequently cited and approved by the courts – see *Marc Rich & Co v Bishop Rock Marine* 1996 AC 211, 235.

⁴⁰⁶ *Tort* 159-160.

⁴⁰⁷ For example, Jones in Jones (gen ed) *Clerk and Lindsell on torts* 448; Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 112 as well as Witting *Street on torts* 33 refer to the test in *Caparo Industries plc v Dickman* 1990 2 AC 605 as the three-stage test. Peel and Goudkamp *Winfield and Jolowicz on tort* 87 refer to the test as the tripartite test. The courts refer to it as the three-fold test.

⁴⁰⁸ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 442.

⁴⁰⁹ *Witting Street on torts* 36.

⁴¹⁰ *Witting Street on torts* 36.

⁴¹¹ See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 443-444; Peel and Goudkamp *Winfield and Jolowicz on tort* 91.

“notional” duty⁴¹² of care exists, a broader question of law must be distinguished from the narrower question of whether a duty is in fact owed to a particular claimant.⁴¹³ Deakin, Johnston and Markesinis⁴¹⁴ submit that in order to avoid confusion it is advisable to “regard duty as giving rise to a *general* ... question ... and to leave the issue of whether a *particular* claimant can recover against a particular defendant to the question of causation or remoteness of damage”.

Thus for example, in *Haley v London Electricity Board*⁴¹⁵ it was sufficient for the claimant to illustrate that he fell within the category of pedestrians (blind pedestrians) who might foreseeably be at risk of injury.⁴¹⁶ In this case, the defendants took steps to warn pedestrians with the sense of sight of a trench that had been dug along the pavement but did not take reasonable care as to the safety of blind people. Lord Reid⁴¹⁷ stated that it was reasonably foreseeable that a blind person may walk along a pavement.

“In deciding what is reasonably foreseeable one must have regard to common knowledge. We are all accustomed to meeting blind people walking alone with their white sticks on city pavements. ... There is evidence in this case about the number of blind people in London and ... the proportion in the whole country is near one in 500. By no means all are sufficiently skilled or confident to venture out alone but the number who habitually do so must be very large. I find it quite impossible to say that it is not reasonably foreseeable that a blind person may pass along a particular pavement on a particular day.”

Reasonable foreseeability of harm in respect of the “duty of care” element assists in understanding the risk of injury to possible claimants and if there is no such risk then no duty of care is owed and further investigation into liability is unnecessary.⁴¹⁸ Reasonable foreseeability of harm is one of the criteria used to establish the existence of a duty of care and is generally not problematic, although foreseeability of certain instances of non-physical harm, pure economic loss and psychiatric injury may be more problematic.⁴¹⁹

⁴¹² Jones in Jones (gen ed) *Clerk and Lindsell on torts* 442-443 make the distinction between notional and factual duty, in other words notional duty refers to the general duty which is a legal question and factual duty, whether the duty is owed to the particular claimant (dealing with remoteness).

⁴¹³ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 442-443.

⁴¹⁴ *Markesinis and Deakin's tort law* 104.

⁴¹⁵ 1965 AC 778. See *Witting Street on torts* 37.

⁴¹⁶ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 444.

⁴¹⁷ *Haley v London Electricity Board* 1965 AC 778, 791.

⁴¹⁸ See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 449; *Witting Street on torts* 37.

⁴¹⁹ See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 102-103; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 32; 445.

(b) Relationship of proximity between the parties (“neighbourhood principle” or “neighbour principle”)

This concept generally relates to a factual question which takes into consideration, positive fact-based elements of the relationship between the parties, but does also involve policy considerations.⁴²⁰ Lord Oliver in *Alcock v Chief Constable of South Yorkshire Police*⁴²¹ (hereinafter referred to as “*Alcock*”) stated that “the concept of ‘proximity’ is an artificial one which depends more upon the court’s perception of what is the reasonable area for the imposition of liability than upon any logical process of analogical deduction”. Witting⁴²² opines that policy considerations have “influenced the development of the proximity concept” and the most important policy consideration is that “parties who are proximate to each other usually ought to be careful because of the capacity to harm that such closeness brings with it”. The concept of “proximity” encompasses different forms of closeness including physical, assumed, causal and circumstantial.⁴²³ Its use varies depending on the particular case and source of harm.⁴²⁴ Deakin, Johnston and Markesinis⁴²⁵ submit that the “ambiguous term” of “proximity” generally refers to “a pre-tort relationship of some kind between the claimant and defendant arising *prior* to the infliction of damage.” Peel and Goudkamp⁴²⁶ refer to the often cited passage in the Australian decision, *Sutherland Shire Council v Heyman*,⁴²⁷ where Deane J stated:⁴²⁸

“The requirement of proximity is directed to the relationship between the parties in so far as it is relevant to the allegedly negligent act or omission of the defendant and the loss or injury sustained by the plaintiff. It involves the notion of nearness or closeness and embraces physical proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant, circumstantial proximity such as an overriding relationship of employer and employee or of a professional man and his client and what may (perhaps loosely) be referred to as causal proximity in the sense of the closeness or directness of the causal connexion or relationship between the particular act or course of conduct and the

⁴²⁰ Witting *Street on torts* 38-39.

⁴²¹ 1992 1 AC 310, 411.

⁴²² *Street on torts* 38.

⁴²³ This is evident from *Donoghue v Stevenson* 1932 AC 562 where the relationship of proximity extended from the manufacturer to the consumer. See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 447, 450.

⁴²⁴ Peel and Goudkamp *Winfield and Jolowicz on tort* 91-93.

⁴²⁵ *Markesinis and Deakin’s tort law* 113.

⁴²⁶ *Clerk and Lindsell on torts* 449-450.

⁴²⁷ *Sutherland Shire Council v Heyman* 1985 157 CLR 424.

⁴²⁸ 1985 157 CLR 424, 498-499.

loss or injury sustained. It may reflect an assumption by one party of a responsibility to take care to avoid or prevent injury, loss or damage to the person or property of another or reliance by one party upon such care being taken by the other in circumstances where the other party knew or ought to have known of that reliance. Both the identity and the relative importance of the factors which are determinative of an issue of proximity are likely to vary in different categories of case.”

Commonly recognised relationships include those between: doctor and patient; manufacturer and consumer; parent and child; police and prisoner; employer and employee; and a driver and other road users.⁴²⁹ There is no *numerus clausus*.⁴³⁰ It is evident that the presence of these relationships may indicate that a reasonable duty of care is owed. For example, due to the close nature of the relationship between a parent and child, it is reasonable to expect the parent to owe a duty of care to the child and *vice versa* when the parent has aged and can no longer fully take care of himself. It is reasonable to expect a policeman to take reasonable care of a prisoner in his charge, thus if any harm befalls the prisoner, depending on the circumstances, the police may be held liable. So too it is reasonable to expect an employer to provide safe and secure working conditions for his employee. Stemming from *Donoghue*,⁴³¹ it is reasonable to expect a manufacturer to owe a duty of care to the consumer.

(c) Whether it is fair, just and reasonable to impose a duty of care on the defendant

Jones⁴³² refers to this test as one of common sense, ordinary reason, and whether it is right for the court to impose a duty of care in a given case. It also refers to the “exercise of judicial pragmatism, which is the same as judicial policy”. In a narrow sense it relates to fairness and justice between the claimant and defendant. In a wider sense it relates to the *reasonableness* of imposing a duty of care based on *legal* (where the focus is on the legal system and principles) *social* and *public policy*.⁴³³

In what follows is a discussion of a few specific types of relationships between claimants and defendants commonly occurring in practice where policy considerations and the principles of fairness, justice and reasonableness have been used by the

⁴²⁹ Witting Street on torts 28.

⁴³⁰ Peel and Goudkamp *Winfield and Jolowicz on tort* 83.

⁴³¹ *Donoghue v Stevenson* 1932 AC 562.

⁴³² In Jones (gen ed) *Clerk and Lindsell on torts* 450.

⁴³³ See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 450-451; *Alcock v Chief Constable of South Yorkshire Police* 1992 1 AC 310, 365.

courts to reach a decision as to whether a duty of care should be imposed and whether a claim should be allowed. There is a relationship between a duty to take reasonable care and remoteness of damage, especially where there is a specific relationship between the claimants and defendants. As Viscount Simmonds stated in *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd*⁴³⁴ (hereinafter referred to as “the *Wagon Mound (No. 1)*”) “there is no such thing as negligence in the air, so there is no such thing as liability in the air”,⁴³⁵ that is negligence cannot exist on its own but only in relation to certain persons and with regard to certain types of harm.⁴³⁶

(i) Wrongful pregnancy, wrongful birth and wrongful life claims⁴³⁷

With regard to claims for wrongful pregnancy, where a healthy child is born, a duty of care may be recognised, but the mother is usually only entitled to damages resulting from the pregnancy.⁴³⁸ That is damages for: pain and suffering experienced during labour; maternity wear; hospital and medical related expenses; and economic loss resulting from taking time off work etcetera.⁴³⁹ She will generally not be entitled to damages for raising the child.⁴⁴⁰ This was held in *McFarlane v Tayside Health Board*⁴⁴¹ (hereinafter referred to as *McFarlane*) and *Rees v Darlington Memorial Hospital NHS Trust*⁴⁴² (hereinafter referred to as *Rees*). However, in *Rees*, the mother was entitled to a sum of money due to her disability (visual impairment). It was found to be “fair, just and reasonable for the parent who was disabled to recover by way of damages the additional costs attributable to her disability in bringing up the child”.⁴⁴³ In *McFarlane* and *Rees*, the House of Lords found it morally offensive on a number of

⁴³⁴ 1961 AC 388, 425.

⁴³⁵ See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 176.

⁴³⁶ See Hurd and Moore 2002 *Theoretical Inquiries in Law* 333 who refer to the debate over this famous quote – whether negligence is a relational concept, related to a person and harm, or if it is non-relational concept referring to negligence as a form of fault without any relation to a particular person or harm.

⁴³⁷ See chapter 3 para 7 with regard to the difference between wrongful conception, wrongful birth and wrongful life claims.

⁴³⁸ See McBride and Bagshaw *Tort* 358-359.

⁴³⁹ McBride and Bagshaw *Tort* 359.

⁴⁴⁰ McBride and Bagshaw *Tort* 359. However, in *Emeh v Kensington and Chelsea and Westminster Area Health Authority* 1985 QB 1012, the Court of Appeal found that it was not contrary to public policy, for the parents to recover compensation for the cost of the upbringing of the child. Cf McBride and Bagshaw *Tort* 358-359.

⁴⁴¹ *McFarlane v Tayside Health Board* 2000 2 AC 59.

⁴⁴² 2004 1 AC 309.

⁴⁴³ See *Rees v Darlington Memorial Hospital NHS Trust* 2004 1 AC 309, 309; McBride and Bagshaw *Tort* 360.

grounds for the mother to be compensated for the upbringing of the child who was born healthy. Lord Clyde⁴⁴⁴ in *McFarlane*, referred to the influence of reasonableness – that “reasonableness includes a consideration of the proportionality between the wrongdoing and the loss suffered thereby”. To make the defendant liable for the upbringing of the child is therefore out of proportion with respect to his fault.⁴⁴⁵ Lord Steyn⁴⁴⁶ referred to corrective justice and distributive justice. It was submitted that it would be “fair, just or reasonable” to take into account that the mother would also benefit from the son’s upbringing, which should be weighed against the cost of bringing up the son. In that case, the benefit of parenthood rule was held to cancel out the upbringing expenses.⁴⁴⁷

In the case of wrongful birth, where the child is born with a disability, the parents may be entitled to compensation not for the normal costs of upbringing but for the additional cost associated with bringing up a child with such disability. Thus in *Parkinson v St James and Seacroft University Hospital NHS Trust*,⁴⁴⁸ the Court of Appeal held that the “birth of a child with congenital abnormalities was a foreseeable consequence of the surgeon’s negligence”. In *McKay v Essex AHA*,⁴⁴⁹ a child born with disabilities as a result of the mother contracting German measles (rubella) while she was in her mother’s womb sued the medical practitioner for a wrongful life claim. It was alleged that the doctor negligently failed to detect that the mother had contracted rubella and should have advised her of the option of abortion. The Court of Appeal refused the claim in that it was against public policy in so far as it would constitute a violation of the sanctity of human life.⁴⁵⁰

(ii) Prisoners and patients

⁴⁴⁴ *McFarlane v Tayside Health Board* 2000 2 AC 59, 106.

⁴⁴⁵ *McFarlane v Tayside Health Board* 2000 2 AC 59, 91; *Rees v Darlington Memorial Hospital NHS Trust* 2004 1 AC 309, 319; McBride and Bagshaw *Tort* 360 fn 63.

⁴⁴⁶ *McFarlane v Tayside Health Board* 2000 2 AC 59, 82.

⁴⁴⁷ *McFarlane v Tayside Health Board* 2000 2 AC 59, 97; *Rees v Darlington Memorial Hospital NHS Trust* 2004 1 AC 309, 328; McBride and Bagshaw *Tort* 360 fn 62.

⁴⁴⁸ 2002 QB 266.

⁴⁴⁹ 1982 QB 1166.

⁴⁵⁰ In accordance with the Congenital Disabilities (Civil Liability) Act 1976, a child born (after the passing of this Act) cannot institute an action based on the “loss of a chance to die”. See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 462.

In *Vellino v Chief Constable of Greater Manchester Police*,⁴⁵¹ the Court of Appeal held that there was no duty of care owed to a prisoner to prevent him from injuring himself after attempting to escape police custody by jumping from a building. The judgment was based on the notion that it was not fair, just and reasonable, in terms of public policy, to impose such a duty of care in the circumstances. In *Meah v McCreamer (No. 2)*,⁴⁵² a road accident victim sustained a head injury which resulted in him experiencing a personality change. Due to the personality change he committed crimes. He was sentenced to life imprisonment. He succeeded in a claim for damages in that had it not been for the accident (applying the but-for test)⁴⁵³ he would not have committed such crimes. Two women sued him for damages they sustained stemming from the crimes and he tried to recover the claimed amounts from the defendant, the negligent driver who caused his injuries. The court held that the defendant was not liable to compensate the two women, as the damages were deemed too remote. In terms of public policy it would be unjust to not let the claimant be responsible for his actions.⁴⁵⁴

(iii) Rescuers

A duty of care may be owed under certain circumstances to foreseeable rescuers who make reasonable attempts to rescue victims as a result of the defendant's conduct. Due to reasons of public policy, it is considered fair, just and reasonable to impose a duty of care on a defendant who through his negligent conduct creates a situation in which he endangers a person's life.⁴⁵⁵

Witting⁴⁵⁶ points out that the third element of the three-fold test is sometimes used in a restrictive manner to limit the scope of duty of care.⁴⁵⁷ Alternatively, it may be used

⁴⁵¹ 2002 1 WLR 218.

⁴⁵² 1986 1 All ER 943.

⁴⁵³ See para 4.1 below with regard to the but-for test.

⁴⁵⁴ See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 245.

⁴⁵⁵ See *Haynes v Harwood* 1935 1KB 146; *Baker v TE Hopkins & Son Ltd* 1959 1 WLR 966; discussion by Jones in Jones (gen ed) *Clerk and Lindsell on torts* 462-465; Witting *Street on torts* 63-64. See paras 3.3.1, 3.5.3, and 4.2.

⁴⁵⁶ *Street on torts* 48-50.

⁴⁵⁷ In *McFarlane v Tayside Health Board* 2000 2 AC 59, the House of Lords refused a claim by the parents for the upbringing of a healthy child resulting from a failed vasectomy performed on the father of the child. Proximity was established as there was pre-tort relationship in respect of reliance by the parents on the skill of the surgeon in successfully performing the operation as well as assumption of responsibility by the doctor who gave the negligent advice. However, the duty of care was denied on grounds of fairness, justice and reasonableness. Lord Steyn (83)

in a positive manner, in recognising a duty where it was previously unrecognised or non-existent.

An example of the court using the “fair, just and reasonable” element in a restrictive manner is illustrated in *Marc Rich & Co AG v Bishop Rock Marine Co Ltd*.⁴⁵⁸ In this case, a ship carrying the claimants’ cargo sustained a crack while on voyage. The ship docked at a port. A surveyor was employed by a classification society charged with checking the safety of ships at sea. The surveyor, upon inspection, recommended that the ship continue with its voyage after some minor repairs. A couple of days later the ship sank. The claimants recovered a certain amount of their loss from the ship owner⁴⁵⁹ and tried to recover the remainder of the loss from the classification society “alleging breach of a duty of care owed by the society to the cargo owners to take reasonable care in the surveys undertaken and the recommendations made so as not to expose the cargo to risk of damage or loss”.⁴⁶⁰ The House of Lords found that reasonable foreseeability of harm as well as proximity was present but that it was not fair, just and reasonable to impose a duty of care on the defendant. In concluding that it was not fair, just and reasonable to impose liability on the classification society, the House of Lords held *inter alia* that: the imposition of duty of care may result in the classification societies refusing to inspect vessels which could result in compromising public safety at sea with detrimental consequences; increased litigation against such societies would occur and it would be a costly process diverting resources and men to the litigation process instead of focusing on the ships and saving lives; and that such recognition of a duty of care would be in conflict “with the international contractual structure” between ship and cargo owners.⁴⁶¹

stated “[i]n my view it is legitimate in the present case to take into account considerations of distributive justice. That does not mean that I would decide the case on grounds of public policy. On the contrary, I would avoid those quicksands. Relying on principles of distributive justice I am persuaded that our tort law does not permit parents of a healthy unwanted child to claim the costs of bringing up the child from a health authority or a doctor. If it were necessary to do so. I would say that the claim does not satisfy the requirement of being fair, just and reasonable.” See discussion of this decision by Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 114.

⁴⁵⁸ 1996 AC 211. See discussion of this case by Peel and Goudkamp *Winfield and Jolowicz on tort* 93-94, Jones in Jones (gen ed) *Clerk and Lindsell on torts* 455-456; Witting *Street on torts* 48-49.

⁴⁵⁹ The sum recoverable from the ship owner was limited by an international statute.

⁴⁶⁰ *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* 1996 AC 211, 211-212.

⁴⁶¹ *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* 1996 AC 211, 212, 242

An example of the court using the “fair, just and reasonable” element in a positive manner is illustrated in *White v Jones*.⁴⁶² In this case, a legal practitioner did not draw up a new will as requested by the testator before his death, resulting in the testator’s daughters not inheriting. The House of Lords held that a duty of care should be imposed in such instances⁴⁶³ based on fairness, reasonableness and justice. Lord Goff⁴⁶⁴ *inter alia* provided the following reasons: solicitors play an important role in discharging their professional duties relating to the testators intentions and if they act negligently in fulfilling their duties it is not unjust if such solicitor should be found liable, there is a lacuna in the law which needs to be filled; to deny a remedy to the disappointed beneficiary is unjust; the testator has a right to bequeath his assets to whom he pleases; and legacies are important in society.

Stapleton⁴⁶⁵ points out that most choices dealing with duty of care are policy choices.⁴⁶⁶ Robertson⁴⁶⁷ submits that policy considerations fall within two categories: justice between the parties; and justice taking into consideration the “community welfare” and any other “non-justice considerations”.⁴⁶⁸ The majority of the duty of care cases have been established by taking account of two broad types of policy issues: whether certain types of harm, such as pure economic loss and psychiatric injury, can ground liability in negligence; and whether the duty of care can be imposed with respect to certain types of conduct by for example, public authorities’ and professionals.⁴⁶⁹

Other policy factors considered under the element of whether it is fair, just and reasonable to impose a duty of care include: the fear of indeterminate liability or the opening of the floodgates argument; vulnerability (to risk) of the claimant;⁴⁷⁰ whether

⁴⁶² 1995 2 AC 207. See discussion of this case by Witting *Street on torts* 49-50.

⁴⁶³ Such duty was previously unrecognised.

⁴⁶⁴ *White v Jones* 1995 2 AC 207, 259-260.

⁴⁶⁵ 2003 *Aust Bar Rev* 136. See Witting *Street on torts* 46; Peel and Goudkamp *Winfield and Jolowicz on tort* 95 fn 101.

⁴⁶⁶ Beever *Negligence* 29-30 submits that this element is unnecessary as the presence of duty of care is based on fact. See Witting *Street on torts* 46-47. See chapter 5 para 4.2 with regard to Card’s views – the nature of a duty and whether it is a matter of law to be determined by the adjudicator or a matter of fact determined by the jury.

⁴⁶⁷ 2011 *LQR* 380.

⁴⁶⁸ See Witting *Street on torts* 47.

⁴⁶⁹ Peel and Goudkamp *Winfield and Jolowicz on tort* 49.

⁴⁷⁰ Peel and Goudkamp *Winfield and Jolowicz on tort* 95.

a duty of care would undermine an imperative public interest;⁴⁷¹ preference of protecting physical interests over pure economic loss or psychiatric injury; preference of protecting vulnerable victims such as the blind; the need to avoid conflict between claims in contract and in tort; the notion that people should be held accountable for their own actions; the desire to impose liability on primarily responsible parties such as regulatory authorities; and the notion that people should protect themselves from loss by taking out insurance or taking other precautionary measures.⁴⁷²

3.2.2.2 The incremental approach stemming from *Caparo*⁴⁷³

In *Caparo*, Lord Bridge⁴⁷⁴ stated:

“I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes. We must now, I think, recognise the wisdom of the words of Brennan J. in the High Court of Australia in *Sutherland Shire Council v. Heyman* (1985) 60 A.L.R. 1, 43–44, where he said:

‘It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable ‘considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.’

One of the most important distinctions always to be observed lies in the law's essentially different approach to the different kinds of damage which one party may have suffered in consequence of the acts or omissions of another. It is one thing to owe a duty of care to avoid causing injury to the person or property of others. It is quite another to avoid causing others to suffer purely economic loss.”

Lord Bridge was not encouraging the pre-*Donoghue* approach, but was rather contending that when dealing with a novel duty of care, existing authority must be considered and if there is a need for the law to extend, it should be extended incrementally resulting in a positive development.⁴⁷⁵ Witting⁴⁷⁶ points out that in the end the court will consider the principles of:

“justice and reasonableness in order to set the limits to what amounts to legitimate incrementalism. In doing so, they are effectively applying the very *Caparo* test to which incrementalism is said to be an alternative. ... [A]ll the court is doing is assuming that the

⁴⁷¹ Peel and Goudkamp *Winfield and Jolowicz on tort* 95-96.

⁴⁷² See Witting *Street on torts* 48.

⁴⁷³ *Caparo Industries plc v Dickman* 1990 2 AC 605.

⁴⁷⁴ *Caparo Industries plc v Dickman* 1990 2 AC 605, 618.

⁴⁷⁵ Witting *Street on torts* 34.

⁴⁷⁶ *Street on torts* 50.

proximity and foreseeability requirements are probably satisfied ... and simply asking whether it is fair, just, and reasonable to extend the duty of care by the marginal amount required in order to cover the particular facts of the case”.

3.2.2.3 Assumption of responsibility

Stemming from the decision of *Hedley Byrne & Co Ltd v Heller & Partners Ltd*⁴⁷⁷ (hereinafter referred to as “*Hedley Byrne*”), the House of Lords acknowledged liability in the tort of negligence where the defendant voluntarily assumes responsibility for the accuracy of a statement made to a claimant and where the claimant relies on such statement.⁴⁷⁸ The test for assumption of responsibility is objective in nature and does not depend on the actions or intentions of the defendant.⁴⁷⁹ The phrase simply means that the law recognises the duty of care and assumption of responsibility may really just indicate proximity. Where the assumption of responsibility is established, it is not necessary to consider the last element of the three-fold test as such a finding demonstrates the existence of a duty of care and the actual relationship between the parties makes it fair, just and reasonable to impose the duty of care.⁴⁸⁰

Lord Mance in *Customs and Excise Commissioners v Barclays Bank plc*⁴⁸¹ stated:

“This review of authority confirms that there is no single common denominator, even in cases of economic loss, by which liability may be determined. In my view the threefold test of foreseeability, proximity and fairness, justice and reasonableness provides a convenient general framework although it operates at a high level of abstraction. The concept of assumption of responsibility is particularly useful in the two core categories of case identified by Lord Browne-Wilkinson in *White v Jones* ... when it may electively subsume all aspects of the threefold approach. But if all that is meant by voluntary assumption of responsibility is the voluntary assumption of responsibility for a task, rather than of liability towards the defendant, then questions of foreseeability, proximity and fairness, reasonableness and justice may become very relevant. In *White v Jones* itself there was no doubt that the solicitor had voluntarily undertaken responsibility for a task, but it was the very fact that he had done so for the testator, not the disappointed beneficiaries, that gave rise to the stark division of opinion in the House. Incrementalism operates as an important cross-check on any other approach.”

Lord Roskill in *Caparo*⁴⁸² stated that:

“there is no simple formula or touchstone to which recourse can be had in order to provide in every case a ready answer to the questions whether, given certain facts, the law will or will not impose liability for negligence or in cases where such liability can be shown to exist, determine

⁴⁷⁷ 1964 AC 465. This was the first decision where the House of Lords recognised liability in the tort of negligence for financial loss as a result of a negligent misstatement.

⁴⁷⁸ Referred to by Witting *Street on torts* 51.

⁴⁷⁹ See *Customs and Excise Commissioners v Barclays Bank plc* 2007 1 AC 181, 190-191.

⁴⁸⁰ *Customs and Excise Commissioners v Barclays Bank plc* 2007 1 AC 181, 199.

⁴⁸¹ *Customs and Excise Commissioners v Barclays Bank plc* 2007 1 AC 181, 216.

⁴⁸² *Caparo Industries plc v Dickman* 1990 2 AC 605, 628.

the extent of that liability. Phrases such as 'foreseeability,' 'proximity,' 'neighbourhood,' 'just and reasonable,' 'fairness,' 'voluntary acceptance of risk,' or 'voluntary assumption of responsibility' will be found used from time to time in the different cases. But, ... such phrases are not precise definitions. At best they are but labels or phrases descriptive of the very different factual situations which can exist in particular cases and which must be carefully examined in each case before it can be pragmatically determined whether a duty of care exists and, if so, what is the scope and extent of that duty".

All these three approaches were considered in *Customs and Excise Commissioners v Barclays Bank plc*⁴⁸³ dealing with pure economic loss where the court confirmed that the three-fold test may be combined with the incremental approach together with reference also to the assumption of responsibility approach.⁴⁸⁴ However, the three-fold test is the most favoured.⁴⁸⁵ In *Marc Rich & Co AG v Bishop Rock Marine Co Ltd*,⁴⁸⁶ Lord Steyn⁴⁸⁷ stated that the three-fold test was acknowledged as having universal application and no matter what the type of harm or loss, the court must consider the foreseeability of harm, the relationship between the parties and whether it is fair, just and reasonable to impose a duty of care.⁴⁸⁸

3.2.2.4 Conclusion

Although the courts were at one stage very liberal in recognising different categories of duties of care which aided in developing the tort of negligence, they have been

⁴⁸³ 2007 1 AC 181.

⁴⁸⁴ *Customs and Excise Commissioners v Barclays Bank plc* 2007 1 AC 181, 189-192. See Witting *Street on torts* 50 fn 139.

⁴⁸⁵ See *Van Colle v Chief Constable of the Hertfordshire Police* 2009 1 AC 225, 260-261.

⁴⁸⁶ 1996 AC 211.

⁴⁸⁷ Stated (235-236): "since the decision in *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004 it has been settled law that the elements of foreseeability and proximity as well as considerations of fairness, justice and reasonableness are relevant to all cases whatever the nature of the harm sustained by the plaintiff. Saville L.J. explained, at p. 1077: 'whatever the nature of the harm sustained by the plaintiff, it is necessary to consider the matter not only by inquiring about foreseeability but also by considering the nature of the relationship between the parties; and to be satisfied that in all the circumstances it is fair, just and reasonable to impose a duty of care. Of course . . . these three matters overlap with each other and are really facets of the same thing. For example, the relationship between the parties may be such that it is obvious that a lack of care will create a risk of harm and that as a matter of common sense and justice a duty should be imposed. . . . Again in most cases of the direct infliction of physical loss or injury through carelessness, it is self-evident that a civilised system of law should hold that a duty of care has been broken, whereas the infliction of financial harm may well pose a more difficult problem. Thus the three so-called requirements for a duty of care are not to be treated as wholly separate and distinct requirements but rather as convenient and helpful approaches to the pragmatic question whether a duty should be imposed in any given case. In the end whether the law does impose a duty in any particular circumstances depends upon those circumstances . . .' That seems to me a correct summary of the law as it now stands. It follows that I would reject the first argument of counsel for the cargo owners".

⁴⁸⁸ See Witting *Street on torts* 32-33.

trying to limit the situations in which a duty of care is owed.⁴⁸⁹ As demonstrated, the courts have shown flexibility and have adopted a pragmatic approach to determining a duty of care. The development of the three-fold test stemming from *Caparo*⁴⁹⁰ was monumental and as demonstrated, the most widely used approach. It is a flexible test enabling a value judgment as to whether the defendant owes the claimant a duty to take reasonable care. It allows the courts to rely on policy as well principles of fairness, justice and reasonableness to exclude or extend a category of duty of care in the tort of negligence.

The influence of reasonableness on the element of “duty of care” is generally explicit. It is explicit on the element of the three-fold test relating to reasonable foreseeability of harm to the type of claimant. Reasonableness applies in this instance as a yardstick for the type of claimant that falls within the category of persons that could be entitled to a claim in the tort of negligence. Here, reasonableness operates to delineate the type of claimant who ought to be owed a reasonable duty of care. The element of “reasonable foreseeability of harm” applies in determining whether the risk of injury was reasonably foreseeable to the possible type of claimant who may be entitled to claim in negligence. Thus, if the risk of injury is not reasonably foreseeable to the type of claimant, then there is no duty of care owed. The test applied with respect to foreseeability of harm to the type of claimant is that of the “reasonable person” in the position of the defendant. It is an *ex ante* objective approach based on the criterion of the “reasonable person”. The influence of reasonableness on the element of “proximity” which refers to the relationship between the parties is implicit in that if the relationship falls within one of the recognised categories of relationships; a duty of reasonable care may be owed to the claimant and expected of the defendant. It would depend on the nature of the relationship. If the relationship does not fall within a recognised category then it is reasonable to take into consideration other factors relating to physical, assumed, causal, or circumstantial closeness. This may assist in determining whether there is a relationship in which a duty of care is owed and expected. In the South African law of delict, the notion of proximity does not receive express recognition and the adoption of a complex system of proximity rules is not

⁴⁸⁹ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 32.

⁴⁹⁰ *Caparo Industries plc v Dickman* 1990 2 AC 605.

needed or desirable, but aspects of proximity arguably underlie some delictual principles.⁴⁹¹

The influence of reasonableness is explicit in respect of whether it is fair, just and reasonable to impose a duty of care. Reasonableness as a concept is applied with the concepts of fairness and justice. It also takes into account public policy and policy considerations. The way in which this element is applied is similar to the recent approach to determining wrongfulness in South African law.⁴⁹² In English law, it is applied as a safety net to either recognise a duty of care or not. It is applied as part of the enquiry into whether a duty of care is owed and it is considered in reaching a final conclusion as to whether a duty of care is owed. The South African courts have been applying this approach in a similar way recently as part of the wrongfulness enquiry and in reaching a conclusion as to whether wrongfulness is present and in turn delictual liability.⁴⁹³ This third element is useful both in borderline and novel cases where it is difficult to conclude whether a duty of care is owed. All three elements of the three-fold test seem to be policy-based enquiries and the duty of care principle is used as a control mechanism which allows the courts to either exclude or ground liability in negligence.⁴⁹⁴

“Assumption of responsibility” seems to be an application of the proximity requirement where it may be reasonable to find that a duty of care is owed to the claimant and expected of the defendant because of the relationship between them. Policy considerations apply in the sense that due to the nature of the relationship with regard

⁴⁹¹ Insofar as proximity relates to a special relationship between parties, it may be of relevance to the element of wrongfulness in South African law. Thus a special relationship may give rise to a legal duty in certain instances of omission, but such a relationship is not an indispensable requirement for the existence of a legal duty (see Neethling and Potgieter *Delict* 69-71; chapter 3 paras 3.1.10-3.1.11). In respect of negligence, the reasonable person is more likely to foresee and prevent harm to proximate parties in many instances. Insofar as proximity relates to causal proximity, it may influence the flexible approach to legal causation. See chapter 3 para 5.2 with regard to the flexible approach applied to determining legal causation. See also Ahmed and Steynberg 2015 *THRHR* 196-197 on the idea of proximity in determining legal causation with regard to secondary emotional shock.

⁴⁹² See chapter 3 para 3.2.

⁴⁹³ See chapter 3 para 3.2.

⁴⁹⁴ Cf Fleming 1953 *Can B Rev* 471; Peel and Goudkamp *Winfield and Jolowicz on tort* 81.

to the concept of “closeness”, it may be reasonable⁴⁹⁵ or not to conclude that a duty of care is owed.

With respect to the incremental approach, the influence of reasonableness is implicit in that it is reasonable that the duty of care categories should be recognised and developed carefully and meaningfully within the existing legal framework. It is submitted that adopting an approach to develop the law incrementally is a policy consideration. There is a fair amount of overlap between the three approaches due to the influence of reasonableness, fairness, justice, public policy and policy considerations.

3.3 Recognised categories of duty of care

The courts have been faced with novel and problematic cases such as in cases dealing with pure economic loss, psychiatric injury and liability for omissions which require further discussion.⁴⁹⁶

⁴⁹⁵ As in the decision of *White v Jones* 1995 2 AC 207. See discussion of this case by Witting *Street on torts* 49-50.

⁴⁹⁶ See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 102-103; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 32.

3.3.1 Omissions

In English law, there is generally no duty to act positively,⁴⁹⁷ on private persons or public authorities,⁴⁹⁸ in preventing harm to another⁴⁹⁹ or rescuing a person from peril⁵⁰⁰

⁴⁹⁷ There are exceptions where the law imposes a positive duty on a person to act. For example, an occupier of land is subject to a number of duties of care owed to a visitor or trespasser and if such occupier breaches those duties of care either in terms of the tort of negligence or under the Occupiers' liability Act 1957, he may be held liable. For purposes of this study the Occupiers' liability Act 1957 will not be discussed and all that will be pointed out is that under the above-mentioned act, an occupier generally owes a duty to: visitors to take reasonable steps to ensure that the premises or land is reasonably safe for the purposes of the visit (see *Everett v Comjo Ltd* 2012 1 WLR 150); and to trespassers, a duty to take reasonable steps to safeguard such trespasser from any danger or harm emanating from the land. In the same vein, a landlord owes certain duties to a tenant, such as a duty to take reasonable steps to ensure that the tenant is reasonably safe from damage caused or personal harm caused by a defect in the property. The landlord is required to repair any defect in the property in terms of the Defective Premises Act 1972 (which for purposes of this study will also not be discussed, see Peel and Goudkamp *Winfield and Jolowicz on tort* 103, 106; McBride and Bagshaw *Tort* 245-247). Another example of an exception where the law imposes a positive duty on a person to act is the duty of the employer to ensure the safety of employees while working (see *Connor v Surrey County Council* 2011 QB 328; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 178; Steele *Tort* 424).

⁴⁹⁸ See *Sutradhar v National Environment Research Council* 2006 4 All ER 490 where the British Government employed the British Geological Survey (as part of an international aid programme) to test the water in wells in Bangladesh but had failed to detect arsenic. The drinking water was contaminated and the claimant who drank the contaminated water suffered symptoms associated with arsenic poisoning. However, the claimant was not successful in claiming damages as the House of Lords dismissed the claim stating there was no duty owed by the British Geological Survey to the Bangladesh people or the UK government. See Lunney and Oliphant *Tort* 445.

⁴⁹⁹ *Home Office v Dorset Yacht Ltd* 1970 AC 1004, 1060. In *Smith v Littlewoods Organisation* 1987 AC 241, the owners of a vacant disused cinema (defendants') intended to redevelop it. The contractors working on the redevelopment left it in a secure condition while not working on it but vandals broke into the building causing a fire which subsequently spread to the plaintiff's neighbouring property. The plaintiff's sued the defendants' submitting that they owed them a duty of care to prevent the damage caused by the vandals. The court held that there was no breach of a duty and that the defendants did not act unreasonably (there was no fault on their part) in the circumstances as they were unaware of the vandals on the premises. It was not reasonably foreseeable that a fire would start causing damage to the neighbouring property. The damage was caused by third parties. Lord Goff (247) stated that the "common law does not impose liability for ... pure omissions". In *Lamb v Camden LBC* 1981 QB 625, the damage caused by the third parties (vagrants) was seen as too remote a consequence in relation to the defendant's breach. See also *Barrett v Ministry of Defence* 1995 3 All ER 87 where the court held that military authorities did not owe a duty of care to monitor a naval airman who drank alcohol excessively but did owe him a duty of care from the point they put him to bed. He subsequently died as a result of ingesting his own vomit. The wife was entitled to damages but reduced due to contributory negligence. See Peel and Goudkamp *Winfield and Jolowicz on tort* 103, 106; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 472-473; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 180-181; Lunney and Oliphant *Tort* 464-467, 481-489.

⁵⁰⁰ In English law, a rescuer is not obliged to rescue someone he does not know if he did not initially put him in a position of danger, no matter what the circumstances, that is, even if it is easy and does not cost the rescuer anything. Furthermore the defendant cannot raise the defence of *volenti non fit iniuria* and the rescuer's actions will not usually break the casual link. See *Ogwo v Taylor* 1988 AC 431 where the defendant was held liable for negligently causing a fire leading to the injury of a fireman and *volenti non fit iniuria* was not applicable; *Baker v TE*

in cases of pure omissions.⁵⁰¹ There are however exceptions to the general rule where a duty to act may be imposed. The following categories of circumstances⁵⁰² may indicate the duty to take reasonable steps to prevent harm:⁵⁰³ where there is a relationship of care, in that one party is responsible for the care of the other party (from here on this factor will be referred to as a “special relationship” for convenience);⁵⁰⁴

Hopkins 1959 1 WLR 966 where the rescuer, a doctor tried to assist two other people but unfortunately they all died due to carbon monoxide poisoning. The defendant raised *volenti non fit injuria* and submitted that the conduct of the doctor constituted a *novus actus interveniens*. The court held that the doctor’s actions were not unreasonable and it was foreseeable that a person may come to the rescue of others. Thus the doctor’s conduct was not a *novus actus interveniens* and *volenti non fit iniuria* was not applicable as he did not freely and voluntarily accept the risk of harm - one of the requirements for the defence. A duty of care was owed to the doctor even if there was no relationship between the defendant and the primary victim whom the doctor attempted to rescue. See Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 195-196; McBride and Bagshaw *Tort* 217.

⁵⁰¹ See *Smith v Littlewoods Organisation Ltd* 1987 2 AC 241, 271; *Stovin v Wise* 1996 AC 923, 943-944; Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 178-179.

⁵⁰² Or as referred to in South African law of delict, “factors” indicating a legal duty to act in preventing harm, where the *boni mores* would expect the defendant to take positive steps in preventing harm - see chapter 3 para 3.1.11.

⁵⁰³ See Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 179. It is evident that proximity is the required connecting element.

⁵⁰⁴ There are a number of special relationships where a common law duty of care is recognised generally conferring a positive duty on one person to prevent harm to another. Examples of the relationships include: an occupier of a property to a visitor or trespasser (see fn 498 above); an employer to his employee (see fn 498 above); a carrier to his passenger, school to a child (see *Barnes v Hampshire CC* 1969 1 WLR 1563 where the school was held liable when a young child was allowed to go home earlier than usual, the child was injured while crossing the road. The court reasoned that if the child would have been let off at the usual time, her mother would have been there to collect her and the injury could have been avoided. Thus a pre-existing relationship and proximity was present. In *Carmarthenshire County Council v Lewis* 1956 AC 549 involving negligence on the part of the school, a young child wandered out of the school onto a busy road. The plaintiff’s husband swerved to avoid hitting him and in that crashed into a tree and died. The council was held liable for the conduct of the child, stemming from the failure to keep the children in school during school hours.); prison authority to the prisoner, (see *Reeves v Commissioner of Police of the Metropolis* 2000 1 AC 360 and *Kirkham v Chief Constable of Manchester* 1990 2 QB where the police were held responsible for the failure to inform the prison authorities of the suicidal tendencies of the prisoner who subsequently committed suicide. In *Home Office v Dorset Yacht Ltd* 1970 AC 1004, the defendants’ were held liable due to the control over and the relationship they had with the young boys who had caused damage to the plaintiff’s boat. The court held that the Borstal officers owed a duty to take reasonable steps to ensure that the boys did not escape). See Peel and Goudkamp *Winfield and Jolowicz on tort* 101-106; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 476-477; Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 182-184; Witting *Street on torts* 43-44; McBride and Bagshaw *Tort* 243-244. Cf Lunney and Oliphant *Tort* 467-479 and the authority they refer to.

assumption of responsibility;⁵⁰⁵ control over a dangerous person or thing;⁵⁰⁶ creation of danger;⁵⁰⁷ and prior conduct.⁵⁰⁸ There is no *numerus clausus* with regard to factors that may indicate a duty to take reasonable steps to prevent harm. It is possible that there may be more than one factor present simultaneously. For example, a special relationship between the parties and an assumption of responsibility may be present

⁵⁰⁵ See *Stansbie v Troman* 1948 2 KB 48 where a decorator assumed responsibility for looking after the claimant's house, there was also a special (pre-tort) relationship between the claimant and the decorator but proximity was present. The decorator failed to secure the claimant's property. Thieves then stole some valuables and the court found the decorator liable for the loss to the claimant due to assumption of responsibility and a pre-tort relationship. See also Jones in Jones (gen ed) *Clerk and Lindsell on torts* 477-481.

⁵⁰⁶ Where X is in control over a dangerous person, thing or situation and it is reasonably foreseeable that another person, Y, may be harmed or suffer loss by such person, thing or situation and if X loses control (whether negligently or not) over the dangerous person, thing or situation, then X may be held liable for the loss or harm suffered by Y. The basis for liability lies in that X owed Y a duty to take reasonable steps to keep the person, thing or situation under control (McBride and Bagshaw *Tort* 243). The leading authority relating to control over a dangerous situation is *Goldman v Hargrave* 1967 1 AC 645 (dealing with liability for the tort of "nuisance"). In this case, the defendant's tree caught fire as a result of lightning. The tree was cut down but a section of the wood was still smouldering and the defendant failed to extinguish it. Thereafter due to the weather conditions the wood reignited and the fire spread to his neighbour's land. The general rule is that a person does not have a duty to protect his neighbour from harm resulting from a third person's tortious acts even if such harm was foreseeable and preventable (see also *Weld-Blundell v Stephens* 1920 AC 956, 986; *Glaister v Appelby-in-Westmorland Town Council* 2010 PIQR P6, 45). The Privy Council however, held that the defendant was liable, as the resultant consequence was reasonably foreseeable, he was aware of the danger and failed to take reasonable steps which he could easily have taken to extinguish the fire. There was a special relationship between the parties, they were neighbours. The principles in *Goldman v Hargrave* were followed in *Leakey v National Trust* 1980 QB 485 (Jones in Jones (gen ed) *Clerk and Lindsell on torts* 476; *Witting Street on torts* 42-43).

⁵⁰⁷ Where X (whether wrongfully or not) creates a source of danger or puts Y in a potentially dangerous position which then materialises causing harm to Y. Y may sue X for the harm or loss suffered. X may be liable either on the basis of the initial wrongful act or on the basis that X owed Y a duty to take reasonable steps to prevent the harm or loss. This factor was applied in *Haynes v Harwood* 1935 1 KB 146 where the defendants left horses unattended in the street. A stone was thrown at the horses, causing them to bolt. The plaintiff, a policeman, tried to save others from being harmed by the horses but sustained injury himself. Leaving the horses unattended was considered as creating a source of danger and the defendants were held liable for the plaintiff's damage. In *Yetkin v Mahmood* 2010 EWCA Civ 776, the public authority in charge of highways planted shrubs which obscured the view for pedestrians, thereby creating danger. See in general McBride and Bagshaw *Tort* 233-239 as well as the authority referred to by Steele *Tort* 425 fn 58. Cf Jones in Jones (gen ed) *Clerk and Lindsell on torts* 473.

⁵⁰⁸ Where a prior act creates a duty to take care and the defendant fails in such duty he may be held liable. For example, *Witting Street on torts* 41 refers to a doctor who accepts responsibility to treat a patient (prior act). If the doctor subsequently neglects or refuses to treat the patient, he may be held liable in terms of common law and in terms of the National Health Service (General Medical Services Contracts) Regulations SI No: 2004/291, Part V reg 15 – see Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 179 fn 486. However, a doctor who comes across a road accident where people are injured may not be obliged to treat anyone unless there is an assumption of responsibility (there is no relationship between the doctor and injured, proximity is lacking). See *Capital & Counties Plc v Hampshire CC* 1997 QB 1004, 1060; Peel and Goudkamp *Winfield and Jolowicz on tort* 101; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 474; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 179; Lunney and Oliphant *Tort* 458-461.

at the same time.⁵⁰⁹ In South African law, conduct in the form of an omission is still regarded as conduct which may lead to liability in delict if the remaining required elements are also present.⁵¹⁰ In English law, the term “misfeasance” refers to affirmative or positive action, synonymous with the term “commission” used in South African law, while “nonfeasance” refers to a failure to act in English law, synonymous with the term “omission” used in South African Law.⁵¹¹

Lord Hoffman in *Stovin v Wise*⁵¹² provided the following reasons why liability is generally not imposed in cases of pure omissions.

“One can put the matter in political, moral or economic terms. In political terms it is less of an invasion of an individual’s freedom for the law to require him to consider the safety of others in his actions than to impose upon him a duty to rescue or protect. A moral version of this point may be called the ‘why pick on me?’ argument. A duty to prevent harm to others or to render assistance to a person in danger or distress may apply to a large and indeterminate class of people who happen to be able to do something. Why should one be held liable rather than another? In economic terms, the efficient allocation of resources usually requires an activity should bear its own costs. If it benefits from being able to impose some of its costs on other people (what economists call ‘externalities,’) the market is distorted because the activity appears cheaper than it really is. So liability to pay compensation for loss caused by negligent conduct acts as a deterrent against increasing the cost of the activity to the community and reduces externalities. But there is no similar justification for requiring a person who is not doing anything to spend money on behalf of someone else. Except in special cases (such as marine salvage) English law does not reward someone who voluntarily confers a benefit on another. So there must be some special reason why he should have to put his hand in his pocket.”

Public authorities, such as the local authorities, public schools, hospitals, ambulance services etcetera are as a matter of policy treated differently, especially where their power stems from legislation.⁵¹³ Claims against them are limited based on policy considerations. Emergency or any other services offering aid or rescue services,⁵¹⁴

⁵⁰⁹ See McBride and Bagshaw *Tort* 212-213; Lunney and Oliphant *Tort* 458.

⁵¹⁰ See chapter 3 para 2.

⁵¹¹ See Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 178; Witting *Street on torts* 40.

⁵¹² 1996 AC 923, 931-932, 943-944. See Lunney and Oliphant *Tort* 453-454.

⁵¹³ Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 186.

⁵¹⁴ See *East Suffolk Rivers Catchment Board v Kent* 1941 AC 74 where the Board under no obligation tried to assist the claimant by repairing a breach in the seawall. The Board’s repair work was done in a negligent manner and the claimant’s land was still flooded for some time. The House of Lords however did not hold the Board liable and found that there was no difference in the Board completely omitting to assist and assisting but failing to repair the wall properly. See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 474; Steele *Tort* 396-399.

such as, the police,⁵¹⁵ fire brigades⁵¹⁶ and coast guards,⁵¹⁷ are under no obligation to come to the aid of a member of the public.⁵¹⁸ There is no obligation on a person to give a warning either. Thus there is no liability on “one who sees another about to walk over a cliff with his head in the air, and forbears to shout a warning”.⁵¹⁹

Some of the policy considerations include that: it is not in the general public interest to pay compensation to a minority of the public; liability against public authorities should be excluded because they need the freedom to operate without being too cautious in their practices;⁵²⁰ and claims against the various public entities could lead to the undermining of the framework of public protection offered by certain legislation.⁵²¹

The differential treatment prevalent with respect to public authorities is more prominent when dealing with omissions as opposed to commissions.⁵²² The courts will generally not find a public authority liable in negligence for failing to “perform a *duty* imposed upon them by legislation” or “failing to exercise a statutory *power*”.⁵²³ To succeed with

⁵¹⁵ See *Michael v Chief Constable of South Wales Police* 2015 UKSC 2, where a woman afraid for her life contacted the police requesting assistance. The police as a result of miscommunication between the different police departments did not attend to her call for help immediately and by the time they did arrive at her house she had already been stabbed to death. The UK Supreme Court, following the decision in *Hill v Chief Constable of West Yorkshire* 1989 1 AC 53 found that no duty of care was owed to the woman. See discussion of this case by McBride and Bagshaw *Tort* 225-227 who submit that the approach taken by the court was a *Diceyan* approach, ie, if a private person would not owe the claimant a duty in this situation than neither should the public body. Cf *Lunney and Oliphant Tort* 463-464.

⁵¹⁶ See *Capital and Counties plc v Hampshire CC* 1997 QB 1004; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 180 fn 491; McBride and Bagshaw *Tort* 220.

⁵¹⁷ See *OLL Ltd v Secretary of State for Transport* 1997 3 All ER 897 where the coast guard sent a rescue team to search and assist a teacher and children in distress. The rescue team went to a different area of the sea, not to where the children and teacher were situated, thereby failing to reach them in time. Four children subsequently died and the teacher and the other children suffered from hypothermia. The court held that the coast guard did not owe a duty of care to the teacher and children to take reasonable steps to rescue them. See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 475; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 180 fn 490; McBride and Bagshaw *Tort* 242; *Lunney and Oliphant Tort* 461. Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 179-180.

⁵¹⁸ *Yuen Kun Yeu v Attorney-General of Hong Kong* 1988 AC 175, 192. See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 181. Cf Peel and Goudkamp *Winfield and Jolowicz on tort* 108.

⁵¹⁹ Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 116.

⁵²⁰ See *Yeun kun-Yeu v Attorney General of Hong Kong* 1988 AC 175, 198; *X (Minors) v Bedfordshire County Council* 1995 2 AC 633, 750; Giliker *Tort* 54.

⁵²¹ Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 186.

⁵²² Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 186. See *Stovin v Wise* 1996 AC 923, 949 where the court held that the presence of a statutory power does not in itself automatically indicate that there is a duty to act; *X (Minors) v Bedfordshire CC* 1995 2 AC 633, where Sir Thomas Bingham MR stated that “very potent considerations of public policy” were

imposing liability on the public authority in negligence, in cases of omissions, either a separate common law duty must be established or a private action for breach of such duty must be established when interpreting the legislation.⁵²⁴ For example, a common law duty of care may be more easily established in respect of public schools where there is an assumption of responsibility over the children⁵²⁵ or where there is an undertaking by a public authority to do something.⁵²⁶

The public authority may however be held liable for “making matters worse” when it intervenes in a situation.⁵²⁷ The effect of this is that emergency services will not be held liable for failing to respond to a call for assistance but if the emergency service responds, there is an “assumption of responsibility”⁵²⁸ and they may be held liable.⁵²⁹ Authorities in charge of highways and roads generally do not have a common law duty to maintain such roads.⁵³⁰ In the 2008 Consultation Paper *Administrative Redress*:

required in order to sue a public entity. See also McBride and Bagshaw *Tort* 222-223; Steele *Tort* 418-423.

⁵²⁴ Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 186.

⁵²⁵ See *Barrett v Enfield LBC* 2001 2 AC 550; *Phelps v Hillingdon LBC* 2001 2 AC 619; *D v East Berkshire Community NHS Trust* 2005 2 AC 373; *Carty v Croydon LBC* 2005 1 WLR 2312; Peel and Goudkamp *Winfield and Jolowicz on tort* 124; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 187-188; McBride and Bagshaw *Tort* 251-253.

⁵²⁶ Such as in *Swinney v Chief Constable of the Northumbria Police* 1997 QB 464 where an informant was assured by the police that his identity would be kept secret. The person he informed on found out his identity and threatened him resulting in him sustaining psychiatric injury. It was held that the police owed the informant a duty of care to keep his identity a secret (they gave an undertaking). See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 477; McBride and Bagshaw *Tort* 230; Giliker *Tort* 67. See also *An Informer v A Chief Constable* 2013 QB 579 where the Court of Appeal thought that the police assumed responsibility to the claimant but did not find that the police owed the claimant a duty of care to ensure that he was not prosecuted as it would interfere with the police's functions and ability to investigate suspected criminals (McBride and Bagshaw *Tort* 186-187).

⁵²⁷ See *Corringe v Calderdale MBC* 2004 1 WLR 1057, 1067; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 186.

⁵²⁸ In *Kent v Griffiths* 2001 QB 36, the ambulance service on three occasions told the doctor and the claimant's husband that the ambulance would arrive shortly, but in actual fact it took longer than expected resulting in the claimant suffering respiratory failure subsequently leading to her miss-carrying her baby, sustaining a personality change and impaired memory. The Court of Appeal found that the ambulance service owed the claimant a duty of care (on acceptance of the call) to “take reasonable steps to get her to hospital reasonably quickly”. See Peel and Goudkamp *Winfield and Jolowicz on tort* 106-107; McBride and Bagshaw *Tort* 231-232. Cf Steele *Tort* 423; Lunney and Oliphant *Tort* 461-464.

⁵²⁹ See *Capital & Counties Plc v Hampshire CC* 1997 QB 1004, 1035; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 186; McBride and Bagshaw *Tort* 232.

⁵³⁰ See *Stovin v Wise* 1996 AC 923 where it was held that the public authority does not owe a duty of care to motorists to flatten a bank of earth ensuring visibility of traffic at a junction; *Corringe v Calderdale MBC* 2004 1 WLR 1057 where it was held that the public authority does not owe a duty of care to motorists to inform them to slow down when encountering the crest of a country road; *Goodes v East Sussex CC* 2000 1 WLR 1356 where it was held that the authority does not owe a duty of care to motorists to remove snow and ice. See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 187 fn 530; McBride and Bagshaw *Tort* 223-224.

Public Bodies and the Citizen, the Law Commission did indeed propose that under certain circumstances a public authority should be held liable for harm or loss caused by positive conduct or failing to prevent harm where the public authority acts unlawfully or is at fault. The paper was widely criticised and there is no indication if the proposals will be implemented.⁵³¹

When interpreting legislation, the class of persons to whom a duty of care is owed may be limited.⁵³² In establishing a common law duty of care and extending liability, the courts are cautious and ensure that they do not interfere with the functions of public authorities and statutory bodies.⁵³³ For example, in *Hill v Chief Constable of West Yorkshire*⁵³⁴ (hereinafter referred to as “*Hill*”) the mother of the last victim of an infamous serial killer, known as the “Yorkshire Ripper”, sued the police in negligence for failing to find and arrest the serial killer. The House of Lords held that there was no duty of care owed by the police to the victim in detecting crime and the claim was dismissed on *inter alia* lack of proximity and various policy grounds.⁵³⁵ It was held that the police could not be held liable in negligence while still investigating and trying to combat crime. It would affect the way they investigate crimes. Funds and resources would be wasted in resolving issues and as a matter of policy it will interfere with their functions and may open the floodgates to litigation.⁵³⁶

In *X (Minors) v Bedfordshire County Council*⁵³⁷ involving five related appeals, (hereinafter referred to as “*X (Minors)*”), the first two appeals dealt with children who were neglected and abused by their parents. The Council was aware of this and failed to do something about it, that is, they failed to take reasonable steps to prevent such

⁵³¹ See McBride and Bagshaw *Tort* 254.

⁵³² Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 187.

⁵³³ Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 188.

⁵³⁴ 1989 1 AC 53. See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 189; McBride and Bagshaw *Tort* 221-222.

⁵³⁵ See *Hill v Chief Constable of West Yorkshire* 1989 1 AC 53 where Lord Keith 62-63 concluded that the police “were immune from an action of this kind”.

⁵³⁶ See *Hill v Chief Constable of West Yorkshire* 1989 1 AC 53, 63. The principle in *Hill* was followed in *Brookes v Commissioner of Police* 2005 1 WLR 1495 (where similar policy considerations as in *Hill* was referred to) and *Van Colle v Chief Constable of Hertfordshire and Smith v Chief Constable of Sussex* 2009 1 AC 225. An appeal to the European Court of Human Rights brought by Van Colle's parents was also rejected in *Van Colle v United Kingdom* 56 EHRR 23. See Giliker *Tort* 69.

⁵³⁷ 1995 2 AC 633. See discussion of this case by Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law*; Steele *Tort* 400-405.

abuse from occurring and failed to take the children in their care. It was submitted that they had breached statutory duties in terms of child care legislation and were negligent. The House of Lords held that the Council did not owe a duty of care to the children. In essence, this decision is authority for the view that a child, who is factually in the care of its parents but who is neglected or abused by them, cannot sue a public authority in tort law on the grounds that the public authority failed to discharge their statutory duty or were negligent. The statute must clearly provide for a private right of action which may entitle a certain class of persons to some remedy and compensation. If such provisions are lacking then there is no right of action against the local authority. It was held that it was not fair, just or reasonable to impose a duty of care on the public authority for a number of reasons which included *inter alia* that: if it were to be enforced against one body it would be unfair and if it were to be enforced against all bodies it would lead to “almost impossible problems of disentangling as between the respective bodies the liability, both primary and by way of contribution, of each for reaching a decision found to be negligent”;⁵³⁸ and by imposing a duty of reasonable care, the public authority may have to employ “defensive tactics which would be harmful to the broad body of children at risk”.⁵³⁹

Some of the unsuccessful claimants (four siblings abused by their mother) in *X (Minors)*⁵⁴⁰ took the matter to the European Court of Human Rights (at the time the Human Rights Act was not applicable) in *Z v United Kingdom*.⁵⁴¹ The European Court of Human Rights acknowledged that two articles of the European Convention on Human Rights⁵⁴² had been violated but that the contravention of the Convention rights need not result in a remedy in the tort of negligence.⁵⁴³ In an earlier decision of the European Court of Human Rights, *Osman v United Kingdom*,⁵⁴⁴ the court held that Article 6 (right of access to court) of the European Convention on Human Rights had been violated, in that English law failed to acknowledge an action against the police who were aware of eminent danger to a pupil and his family. They failed to heed

⁵³⁸ *X (Minors) v Bedfordshire County Council* 1995 2 AC 633, 750.

⁵³⁹ Peel and Goudkamp *Winfield and Jolowicz on tort* 124.

⁵⁴⁰ *X (Minors) v Bedfordshire County Council* 1995 2 AC 633.

⁵⁴¹ 2002 34 EHRR 3.

⁵⁴² Articles 3 and 13, relating to “inhuman and degrading treatment” and a right to relief in respect of the treatment they endured.

⁵⁴³ Giliker *Tort* 61.

⁵⁴⁴ 1998 29 EHRR 245. See criticism of this decision by Gearty 2001 *MLR* 159; Steele *Tort* 432-433.

warnings and ultimately failed to protect the pupil and his family. The pupil was seriously injured and the father was shot and killed. The court *a quo* and the Court of Appeal following the policy considerations in *Hill*⁵⁴⁵ did not acknowledge that a duty of care was owed to the pupil and his family. The European Court of Human Rights, concluded that the police were entitled to immunity in certain actions in negligence in English law although in *Z v United Kingdom*,⁵⁴⁶ the court acknowledged that they had made a mistake regarding this aspect and that Article 6 was not violated. The court however, did not overrule the decision, as Article 6 relates to and is limited to procedural and not substantive issues.⁵⁴⁷

Nevertheless, the decision of European Court of Human Rights has had an impact on later English decisions in that the English courts became hesitant to dismiss actions due to policy considerations.⁵⁴⁸ In *D v East Berkshire NHS Trust*,⁵⁴⁹ the House of Lords affirmed the Court of Appeal's decision that a duty of care to children was owed by the public authority in charge of child welfare. In *Phelps v Hillingdon London Borough Council*,⁵⁵⁰ the House of Lords held the Council liable in negligence on the facts of the case, in that the educational psychologist owed the student with special needs a duty of care to provide educational support for the student (assumption of responsibility) and take reasonable steps to ensure that the student is not disadvantaged as a result of his learning difficulties. Negligence claims may result in compensation for the damage, loss or harm caused, while human rights claims may vindicate rights and upholds certain norms of behaviour⁵⁵¹ as submitted by Giliker.⁵⁵²

⁵⁴⁵ *Hill v Chief Constable of West Yorkshire* 1989 1 AC 53.

⁵⁴⁶ 2002 34 EHRR 3. See Steele *Tort* 406, 408-409.

⁵⁴⁷ See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 116-121.

⁵⁴⁸ See *Barrett v Enfield* 2001 2 AC 550, 560; Steele *Tort* 406-407.

⁵⁴⁹ 2005 2 AC 373. See Peel and Goudkamp *Winfield and Jolowicz on tort* 125.

⁵⁵⁰ 2001 2 AC 619 also followed in *Carty v Croyden LBC* 2005 1 WLR 2312. See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 188; Steele *Tort* 413-416.

⁵⁵¹ *Van Colle v Chief Constable of Hertfordshire and Smith v Chief Constable of Sussex* 2008 UKHL 50 [56]. See Giliker *Tort* 69-72,

⁵⁵² *Tort* 63 with reference to *Jain v Trent Strategic Health Authority* 2009 1 AC 853; *Rabone v Pennine Care NHS Foundation Trust* 2012 2 AC 72.

3.3.1.1 Conclusion

It seems that generally, liability will not follow as a result of a failure to act, even if acting positively to prevent harm may not cost anything and be considered *reasonable* in the instances. Due to policy considerations, a duty of care may not be recognised and liability may be excluded. English tort law does not follow the generalising approach followed in the South Africa law of delict where all the required elements must be present to ground delictual liability and even a failure to act in principle may lead to liability, as it is considered a form of conduct. The influence of reasonableness is partly implicit and partly explicit in respect of the exceptional instances where a duty of care is recognised in cases of omissions, or rather there is a duty to take reasonable steps to prevent harm where: there is a special relationship; assumption of responsibility; control over a dangerous person or thing; creation of danger; and prior conduct. Incidentally in the South African law of delict these instances indicate the presence of a legal duty to act positively in preventing harm. It is thus considered reasonable to expect the defendant to act positively in preventing the harm. Wrongfulness is established in the breach of a legal duty to prevent harm. Thus the presence of any factor or circumstance mentioned above may result in the finding of a breach of a legal duty which may be considered wrongful and unreasonable.⁵⁵³

In respect of the recent departure of the English courts from their approach of *not* holding the state liable for omissions in *D v East Berkshire NHS Trust*⁵⁵⁴ and *Phelps v Hillingdon London Borough Council*,⁵⁵⁵ it seems that the courts from a theoretical point of view are still relying on the exceptional instances of a special relationship between the parties or assumption of responsibility. The courts are however, interpreting these factors more widely than they had in the past. Both these instances also relate to the element of proximity where the influence of reasonableness is implicit. It may be presumed that English law in future will more readily recognise claims in the tort of negligence in respect of omissions. It will apply a broader approach to proximity or try and ensure that an exceptional instance is applicable indicating a duty of care. Alternatively the policy considerations will have to be in favour of concluding that it is

⁵⁵³ See chapter 3 paras 3.1.10-3.1.11.

⁵⁵⁴ 2005 2 AC 373.

⁵⁵⁵ 2001 2 AC 619.

fair, just and reasonable to impose a duty of care. The decisions of the European Court of Human Rights no doubt has also influenced the English courts recognising liability of the state, particularly in cases of omissions. There have been “mutterings about abolishing the Human Rights Act”⁵⁵⁶ and replacing it with a “British Bill of Rights”.⁵⁵⁷ With the repercussions of Brexit⁵⁵⁸ and the possible abolition of the Human Rights Act, there may be an overall negative effect on the protection of human rights in the United Kingdom. When the United Kingdom formally breaks ties with the European Union (hereinafter referred to as the “EU”),⁵⁵⁹ the Charter of Fundamental Rights of the EU will not be applicable in the United Kingdom. The European Convention on Human Rights (hereinafter referred to as the “ECHR”) is however a different entity from the EU. The rights under the ECHR are safeguarded by the Human Rights Act but as mentioned this act may be repealed.⁵⁶⁰ Brexit does not affect the protected rights under the ECHR.⁵⁶¹ The draft Bill⁵⁶² dealing with the United Kingdom leaving the EU proposes that the Charter of Fundamental Rights will not be applicable. The effect of this is that “some rights which are not in the Human Rights Act, for example on the rights of children and general right to non-discrimination” may be weakened. Thus a combination of the effect of Brexit and the possibility of the government of the United Kingdom repealing and replacing the Human Rights Act, may cause the protection of human rights to be weakened “below the standard of EU law rights”.⁵⁶³ It is therefore also uncertain if the English law will further develop tort liability of the state or if state immunity from liability will be perpetuated and strengthened.

South African law is markedly different because the common law (the law of delict) and any legislation may be tested against the Constitution⁵⁶⁴ which is the Supreme

⁵⁵⁶ See <https://www.theguardian.com/commentisfree/2017/jul/14/british-citizens-human-rights-brexit> (Date of use: 7 November 2017).

⁵⁵⁷ See <http://ukandeu.ac.uk/explainers/brexit-and-a-british-bill-of-rights-four-scenarios-for-human-rights/> Date of use: 7 November 2017).

⁵⁵⁸ See <https://www.equalityhumanrights.com/en/our-human-rights-work/what-does-brexit-mean-equality-and-human-rights-uk> (Date of use: 7 November 2017).

⁵⁵⁹ See the European Union (Withdrawal) Bill published on 13 July 2017.

⁵⁶⁰ See para 1 above.

⁵⁶¹ See <https://www.equalityhumanrights.com/en/our-human-rights-work/what-does-brexit-mean-equality-and-human-rights-uk> (Date of use: 7 November 2017).

⁵⁶² The Repeal Bill: White published on 30 March 2017.

⁵⁶³ See <https://www.equalityhumanrights.com/en/our-human-rights-work/what-does-brexit-mean-equality-and-human-rights-uk> (Date of use: 7 November 2017).

⁵⁶⁴ The Constitution of the Republic of South Africa, 1996.

law. In *Carmichele*⁵⁶⁵ the Constitutional Court referred to American⁵⁶⁶ and English decisions⁵⁶⁷ where the courts declined to hold the government authority liable for an omission. The Constitutional Court found that Article 2(1) of the European Convention on Human Rights relating to the right to life corresponds with the fundamental right to life found in the Constitution of the Republic of South Africa⁵⁶⁸ deserving protection of the law.⁵⁶⁹ The court⁵⁷⁰ referred to *Barrett v Enfield London Borough Council*⁵⁷¹ where the House of Lords held the local authority liable. Lord Browne-Wilkinson⁵⁷² stated:

“It is a prerequisite to there being any liability in negligence at all that as a matter of policy it is fair, just and reasonable in those circumstances to impose liability in negligence. ... In a wide range of cases public policy has led to the decision that the imposition of liability would not be fair and reasonable in the circumstances, eg some activities of financial regulators, building inspectors, ship surveyors, social workers dealing with sex abuse cases. In all these cases and many others the view has been taken that the proper performance of the defendant’s primary functions for the benefit of society as a whole will be inhibited if they are required to look over their shoulder to avoid liability in negligence. In English law the decision as to whether it is fair, just and reasonable to impose a liability in negligence on a particular class of would-be defendants depends on weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would-be plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered. ... In English law, questions of public policy and the question whether it is fair and reasonable to impose liability in negligence are decided as questions of law. Once the decision is taken that, say, company auditors though liable to shareholders for negligent auditing are not liable to those proposing to invest in the company (see *Caparo* ...), that decision will apply to all future cases of the same kind. The decision does not depend on weighing the balance between the extent of the damage to the plaintiff and the damage to the public in each particular case.”

⁵⁶⁵ *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 957-960.

⁵⁶⁶ *DeShaney v Winnebago County Department of Social Services* 489 US 189 1988.

⁵⁶⁷ In *Hill v Chief Constable of West Yorkshire* 1989 1 AC 53 where it was considered necessary to protect the police from claims based on the premise that the interests of the community would be better served by police not being diverted from their primary duties, and *X (Minors)*. See *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 958 fn 34.

⁵⁶⁸ 1996.

⁵⁶⁹ *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 957-958.

⁵⁷⁰ *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 958-959.

⁵⁷¹ 1999 3 All ER 193.

⁵⁷² *Barrett v Enfield London Borough Council* 1999 3 All ER 193,199.

The court in *Carmichele*⁵⁷³ referred to *Osman v United Kingdom*⁵⁷⁴ where the European Court of Human Rights stated that “Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.” The Constitutional Court⁵⁷⁵ with approval referred to both *Osman* and *Z v United Kingdom*⁵⁷⁶ where the European Court of Human Rights did not approve of the public policy approach of “immunity” of the police from liability in negligence. The Constitutional Court stated:⁵⁷⁷

“Fears expressed about the chilling effect such delictual liability might have on the proper exercise of duties by public servants are sufficiently met by the proportionality exercise which must be carried out and also by the requirements of foreseeability and proximity. This exercise in appropriate cases will establish limits to the delictual liability of public officials. A public interest immunity excusing the respondents from liability that they might otherwise have in the circumstances of the present case, would be inconsistent with our Constitution and its values. Liability in this case must thus be determined on the basis of the law and its application to the facts of the case, and not because of an immunity against such claims granted to the respondents.”

3.3.2 Negligently inflicted psychiatric injury

Lord Steyn in *White v Chief Constable of the South Yorkshire Police*⁵⁷⁸ (hereinafter referred to as “*White*”) stated that:

“[n]owadays courts accept that there is no rigid distinction between body and mind. Courts accept that a recognisable psychiatric illness results from an impact on the central nervous system. In this sense therefore there is no qualitative difference between physical harm and psychiatric harm. And psychiatric harm may be far more debilitating than physical harm”.

⁵⁷³ *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 958.

⁵⁷⁴ 29 EHHR 245, 305.

⁵⁷⁵ In *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 959.

⁵⁷⁶ 2002 34 EHRR 3. See Steele *Tort* 406, 408-409.

⁵⁷⁷ In *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 959-960.

⁵⁷⁸ 1999 2 AC 455, 492.

It is accepted that psychiatric injury caused by the defendant's negligence is compensable.⁵⁷⁹ Psychiatric injury is generally regarded as a type of personal injury⁵⁸⁰ but is assessed more restrictively due to policy considerations compared with other forms of personal injury.⁵⁸¹ According to the courts, psychiatric injury⁵⁸² may be induced by *inter alia* mental injury, shock, nervous shock,⁵⁸³ stress,⁵⁸⁴ or emotional trauma.⁵⁸⁵ In order to obtain compensation, the claimant must prove that he sustained some form of recognisable psychiatric injury as mere mental distress, grief, fear or other emotions are not sufficient.⁵⁸⁶ Successful claims have been made for post-traumatic stress disorder;⁵⁸⁷ chronic fatigue syndrome;⁵⁸⁸ hysterical personality disorder;⁵⁸⁹ pathological grief disorder;⁵⁹⁰ and morbid depression.⁵⁹¹ It is also settled that psychiatric injury need not be accompanied by physical injury.⁵⁹²

There is a distinction between primary victims, who were in some way directly involved in the accident in so far as they were either physically harmed or in danger of harm

⁵⁷⁹ See *Page v Smith* 1996 AC 155, 190. Psychiatric injury however is not yet regarded as important as physical bodily injury – Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 124.

⁵⁸⁰ *Page v Smith* 1996 AC 155, 190; Peel and Goudkamp *Winfield and Jolowicz on tort* 129-130.

⁵⁸¹ Lunney and Oliphant *Tort* 338.

⁵⁸² "Psychiatric injury" is a term used more recently. Previously reference was made to "nervous shock". The term psychiatric injury has not been clearly defined and there is no general consensus on a definition. See *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455, 470; Steele *Tort* 302.

⁵⁸³ "Nervous shock" refers to "a reaction to an immediate and horrifying impact, resulting in some recognisable psychiatric illness. There must be some serious mental disturbance outside the range of normal human experience, not merely the ordinary emotions of anxiety, grief or fear" – see *Alcock v Chief Constable of South Yorkshire Police* 1992 1 AC 310, 407; *Page v Smith* 1996 AC 155, 167.

⁵⁸⁴ *Walker v Northumberland County Council* 1995 1 All ER 737.

⁵⁸⁵ See Peel and Goudkamp *Winfield and Jolowicz on tort* 129-131; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 124-125.

⁵⁸⁶ See *McLoughlin v O'Brian* 1983 AC 410, 431; *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455, 465, 491; *Winfield and Jolowicz on tort* 130-131; Deakin Johnston and Markesinis *Markesinis and Deakin's tort law* 124; *Witting Street on torts* 65.

⁵⁸⁷ See *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455.

⁵⁸⁸ *Page v Smith* 1996 AC 155. In this case, the plaintiff did not sustain any physical injury but a few hours after the accident from which his claim arose, he felt exhausted and the exhaustion continued thereafter.

⁵⁸⁹ *Brice v Brown* 1984 1 All ER 997.

⁵⁹⁰ *Vernon v Bosley* 1997 1 All ER 577.

⁵⁹¹ *Hinz v Berry* 1970 2 QB 40. See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 485.

⁵⁹² See *Page v Smith* 1996 AC 155; Peel and Goudkamp *Winfield and Jolowicz on tort* 130; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 485.

and within the range of foreseeable harm;⁵⁹³ and secondary victims,⁵⁹⁴ who were not directly involved in the accident, but sustained psychiatric injury as a result of witnessing injury to another, hearing of an injury to another, or witnessing the “immediate aftermath” of an accident.⁵⁹⁵ The award of compensation particularly with regard to secondary victims depends on policy considerations.⁵⁹⁶ There is no doubt of the potential for liability for psychiatric injury. This may be illustrated by referring to *Alcock*⁵⁹⁷ and *White*⁵⁹⁸ where potential claimants ranged from persons sustaining psychiatric injury as a result of direct involvement in the incident, to those who sustained such injury while hearing or watching television footage of the disaster.

In respect of primary victims, the requirement of reasonable foreseeability of physical injury or endangerment is considered sufficient as a control mechanism whereas with regard to secondary victims, additional control mechanisms are imposed by the courts in order to limit claims.⁵⁹⁹

It is important to distinguish between primary and secondary victims because with regard to secondary victims certain control mechanisms are applied “in order to limit the number of potential claimants” which do not apply to the primary victim.⁶⁰⁰ The distinction between who qualifies as a primary and secondary victim is sometimes

⁵⁹³ See *Page v Smith* 1996 AC 155, 184; *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455, 455; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 487. In *Alcock v Chief Constable of South Yorkshire Police* 1992 1 AC 310, 407, Lord Oliver referred to the primary victim as one who is “involved, either mediately or immediately as a participant”. In *Page v Smith* 1996 AC 155, 184, however, Lord Lloyd referred to the primary victim as a participant directly involved in the accident, *and well within the range of foreseeable physical injury (the italicised words led to confusion)*.

⁵⁹⁴ See *Alcock v Chief Constable of South Yorkshire Police* 1992 1 AC 310, 407, 410-411 where Lord Oliver referred to these two categories of victims.

⁵⁹⁵ See *McLoughlin v O'Brian* 1983 1 AC 410, 422; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 127.

⁵⁹⁶ See *Alcock v Chief Constable of South Yorkshire Police* 1992 1 AC 310, 407; *Page v Smith* 1996 AC 155, 189.

⁵⁹⁷ *Alcock v Chief Constable of South Yorkshire Police* 1992 1 AC 310.

⁵⁹⁸ *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455.

⁵⁹⁹ See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 492.

⁶⁰⁰ *Page v Smith* 1996 AC 155, 156.

difficult⁶⁰¹ as illustrated in *White*⁶⁰² (discussed below) and the courts have not been consistent in their distinction or definitions.⁶⁰³

There have been instances where claims for psychiatric injury not related to personal injury succeeded, illustrating that the courts have adopted a flexible approach in developing the law relating to psychiatric injury in general. For example, in *Attia v British Gas Plc*,⁶⁰⁴ the claimant succeeded in her claim for psychiatric injury as a result of witnessing her property being destroyed by fire. It may be argued that the defendants owed the claimant a duty of care to protect the claimant's property and ensure that it did not catch fire.⁶⁰⁵ In 1998, the Law Commission reviewed liability for psychiatric injury⁶⁰⁶ and acknowledged that this area of the law is controversial in both the medical and legal fields. It has however not developed enough for complete codification. The report in general recommended minimalistic reform to the common law and provided a draft bill, mainly aimed at remedying the law relating to secondary victims who suffer psychiatric injury stemming from the injury or death of a loved one. As of yet no legislation has been promulgated and the courts are at liberty to continue developing the law relating to psychiatric injury.⁶⁰⁷

3.3.2.1 Primary victims

Liability for psychiatric injury in respect of primary victims was recognised as early as 1901, in *Dulieu v White & Sons*.⁶⁰⁸ In this case, the plaintiff sustained shock as a result of seeing a horse and cart being driven negligently into her place of employment. She

⁶⁰¹ The Law Commission in the report on psychiatric illness para 5.51 (Liability for Psychiatric Illness, Law Com No. 249) noted that there were inconsistencies present in case law and that the distinction between primary and secondary victims was "more of a hindrance than a help".

⁶⁰² *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455.

⁶⁰³ See Matthews, Morgan and O'Connell *Tort* 144-145 who point out that Lord Oliver in *Alcock v Chief Constable of South Yorkshire Police* 1992 1 AC 310 referred to participant and non-participant. In *Page v Smith* 1996 AC 155, Lord Lloyd referred to direct involvement and range of foreseeability with regard to the primary victim, while in *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455 reference was made to physical endangerment or reasonable fear for one's physical safety.

⁶⁰⁴ 1988 QB 304. In *Owens v Liverpool Corporation* 1939 1 KB 394, the relatives of the deceased succeeded in a claim for psychiatric injury as a result of seeing the hearse carrying the coffin crash and overturn. See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 485, 502.

⁶⁰⁵ See McBride and Bagshaw *Tort* 354.

⁶⁰⁶ Liability for Psychiatric Illness, Law Com No. 249.

⁶⁰⁷ See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 485-486.

⁶⁰⁸ 1901 2 KB 669. See also Peel and Goudkamp *Winfield and Jolowicz on tort* 131.

subsequently gave birth to her child prematurely and was able to recover damages for the nervous shock she sustained. Kennedy J stated⁶⁰⁹ that the shock “must be a shock which arises from a reasonable fear of personal injury to oneself”.⁶¹⁰ In *Hambrook v Stokes Bros*,⁶¹¹ Lord Atkin dismissed Kennedy J’s restriction in succeeding in a claim for shock when one fears injury to oneself (primary victim). He stated⁶¹² “it would result in a state of the law in which a mother, shocked by fright for herself, would recover, while a mother shocked by her child being killed before her eyes, could not”. In effect the court recognised the claim for shock of a secondary victim. In this case, a mother succeeded in a claim for nervous shock sustained when she witnessed a runaway lorry veer towards the place where she had just left her children. She was subsequently informed of injury to her child.

The decision of *Page v Smith*⁶¹³ (hereinafter referred to as “*Page*”), although criticised⁶¹⁴ remains authoritative with regard to extending liability regarding primary victims and differentiating between the requirements for primary and secondary victim claims. In this case, the claimant, a victim of a motor vehicle accident⁶¹⁵ did not sustain any physical injury but was frightened by the experience and suffered nervous shock. Approximately three hours after the accident he suffered from severe chronic fatigue syndrome as a result of the nervous shock. The plaintiff had been suffering from this condition⁶¹⁶ of a mild nature on and off for over twenty years prior to the accident. He alleged that as a result of the accident his pre-existing condition “had become chronic and permanent and that it was unlikely that he would be able to take full-time employment again”.⁶¹⁷

⁶⁰⁹ *Dulieu v White & Sons* 1901 2 KB 669, 675.

⁶¹⁰ See Lunney and Oliphant *Tort* 331; Steele *Tort* 305-306.

⁶¹¹ 1925 1 KB 141.

⁶¹² *Hambrook v Stokes Bros* 1925 1 KB 141, 157.

⁶¹³ 1966 AC 155.

⁶¹⁴ The decision of *Page v Smith* 1966 AC 155 has been criticised by academic writers and by Lord Goff (in *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455, 474-480). See Bailey and Nolan 2010 *CLJ* 495; Mullany 1995 *Journal of Law and Medicine* 112; Handford 1996 *Tort L Rev* 5; Tan 1995 *Singapore Journal of Legal Studies* 649; Trindade 1996 *LQR* 22; Sprince 1995 *Professional negligence* 124; Witting *Street on torts* 68; Steele *Tort* 307-308. See para 3.3.2.3 below.

⁶¹⁵ Due to the negligent driving of a motor vehicle driven by the defendant.

⁶¹⁶ Myalgic Encephalomyelitis, post-viral fatigue syndrome or chronic fatigue syndrome.

⁶¹⁷ *Page v Smith* 1966 AC 155, 165.

Of importance, the House of Lords in this case extended liability for psychiatric injury of primary victims to include victims with inherent susceptibilities, that is the application of the “thin-skull” rule⁶¹⁸ and held that in respect of primary victims, the exact type of psychiatric injury need not be reasonably foreseeable, whereas for secondary victims it is necessary.⁶¹⁹ Regarding primary victims, it is sufficient if physical injury is reasonably foreseeable although such physical injury need not actually occur.⁶²⁰ With regard to personal injury, there is no need to regard physical injury and psychiatric injury as different types of injury.⁶²¹ A claim for psychiatric injury by a primary victim depends on what was reasonably foreseeable by the defendant *ex ante* (before the event) but *ex post facto* (taking into account the surrounding circumstances and what actually transpired with hindsight) in respect of a claim for psychiatric injury by a secondary victim. The question is whether the reasonable person would have foreseen that the secondary victim might suffer psychiatric injury taking into account what transpired in the circumstances.⁶²²

Lord Browne-Wilkinson opined:⁶²³

“any driver of a car should reasonably foresee that, if he drives carelessly, he will be liable to cause injury, either physical or psychiatric or both, to other users of the highway who become involved in an accident. Therefore he owes to such persons a duty of care to avoid such injury. In the present case the defendant could not foresee the exact type of psychiatric damage in fact suffered by the plaintiff who, due to his M.E., was ‘an eggshell personality.’ But that is of no significance since the defendant did owe a duty of care to prevent foreseeable damage, including psychiatric damage. Once such duty of care is established, the defendant must take the plaintiff as he finds him”.

There are a number of examples in case law where the limits have been tested as to who qualifies as a primary victim and the categories of primary victim claims continue to expand.⁶²⁴ Of significance, the primary victim must sustain psychiatric injury from a reasonable fear of harm or belief of harm to himself. The claimant need not actually

⁶¹⁸ *Page v Smith* 1996 AC 155, 182; see also Peel and Goudkamp *Winfield and Jolowicz on tort* 131-133; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 486.

⁶¹⁹ *Page v Smith* 1996 AC 155, 190.

⁶²⁰ *Page v Smith* 1996 AC 155, 190. See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 486.

⁶²¹ *Page v Smith* 1996 AC 155, 190.

⁶²² *Page v Smith* 1996 AC 155, 188-189. Lord Lloyd in support of his submission referred to *Bourhill v Young* 1943 AC 92, 110 and *McLoughlin v O'Brian* 1983 1 AC 410, 420, 432 where an *ex post facto* approach was eluded to but stated that it was applicable to claims of secondary victims and did not make sense applied to primary victims.

⁶²³ *Page v Smith* 1996 AC 155, 182.

⁶²⁴ Steele *Tort* 300.

be in danger though due to the defendant's negligence.⁶²⁵ If physical injury to the claimant is foreseeable, he is entitled to recover compensation for physical and or recognised psychiatric injury.⁶²⁶

A discussion of a few cases will suffice in order to illustrate the explicit influence of reasonableness with regard to the criterion of reasonable foreseeability of harm in recognising a duty of care to primary victims. In *White*,⁶²⁷ the claimants (police officers) who rescued the victims at a football stadium were not regarded as primary victims because they were not within the reasonable foreseeable range of harm.⁶²⁸ Furthermore, they did not qualify as secondary victims as the close tie of love and affection was missing. They were seen as claimants on a status no better than that of bystanders.⁶²⁹ The court acknowledged that it was part of a policeman's job to assist citizens and during their employment would come across such dangerous incidents.⁶³⁰ It seems as if a rescuer would only be regarded as a primary victim if exposed to physical danger.⁶³¹ In *White*,⁶³² the policemen attending to and *rescuing* victims at the disaster were denied claims for psychiatric injury. The House of Lords was influenced by a policy decision that it would not be just to compensate the policemen while denying claims brought by the relatives in *Alcock*.⁶³³ In *Cullin v London Fire & Civil Defence Authority*,⁶³⁴ the claimants (firefighters) succeeded in their claims for psychiatric injury after attending to fires where their colleagues were killed. It has been

⁶²⁵ Peel and Goudkamp *Winfield and Jolowicz on tort* 131; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 485.

⁶²⁶ *Witting Street on torts* 68.

⁶²⁷ *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455.

⁶²⁸ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 488.

⁶²⁹ See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 135; *Witting Street on torts* 72.

⁶³⁰ See *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455, 511. In some jurisdictions in the USA, it is referred to as the "fireman's rule". According to this rule, a fireman as part of his job may come across dangerous and horrific incidents. Therefore as a professional he cannot claim for psychiatric injury. See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 135.

⁶³¹ See *Chadwick v British Railways Board* 1967 1 WLR 912 where a wife succeeded in a claim for damages for psychiatric injury sustained by her deceased husband as a result of rescuing and comforting victims of the Lewisham Railway disaster. Waller J (921) stated that "shock was foreseeable and ... rescue was foreseeable". See also Jones in Jones (gen ed) *Clerk and Lindsell on torts* 488.

⁶³² *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455.

⁶³³ *Alcock v Chief Constable of South Yorkshire Police* 1992 1 AC 310. See *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455, 495; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 135.

⁶³⁴ 1999 PIQR 314 referred to by Jones in Jones (gen ed) *Clerk and Lindsell on torts* 488.

argued that the approach of the courts with respect to claims of rescuers where firefighters and policemen may fall in this category is arbitrary and it seems that the main concern is to limit liability.⁶³⁵

A crane driver in *Dooley v Crammell Laird*⁶³⁶ succeeded in claiming compensation for psychiatric injuries after witnessing a defective sling on the crane snapping and causing the crane to drop its load onto the hold of the ship where he and his colleagues were working. Even though no one was injured, the claimant who was directly involved was considered a participant. He suffered psychiatric injury as a result of thinking he was about to cause injury or death to another. In *Farrell v Avon HA*,⁶³⁷ the father of a new-born baby was incorrectly told by the hospital staff that his new born son had died and was given a corpse to hold. His son was in fact alive but the father alleged that he sustained shock and subsequently developed post-traumatic stress disorder. The father “asserted that since grief at the death of a child was a reasonably foreseeable occurrence, he was entitled to recover damages for a reasonably unforeseeable but recognised psychiatric disorder if this subsequently developed”.⁶³⁸ It was held that the father was a primary victim and “the relevant test was whether [the defendant] ought reasonably to have foreseen that its conduct would expose [the father] to the risk of a recognised psychiatric disorder”.⁶³⁹ The father had proven that his post-traumatic stress disorder (even though it manifested at a later stage) had been caused by the incident at the hospital.⁶⁴⁰

In *Rothwell v Chemical and Insulating Co Ltd*,⁶⁴¹ a primary victim had been exposed to asbestos dust for about eight years and over time developed plural plaques. Even though his physical health was not affected, he developed anxiety neurosis from fear that he may in future contract a disease stemming from the pleural plaques present in his body. The claimant was informed by his doctor about thirty years after the exposure that there was a risk of developing an asbestos-related disease in future. The court

⁶³⁵ See Todd 1999 *LQR* 347; Lunney and Oliphant *Tort* 353.

⁶³⁶ 1951 WL 11458. See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 489; Peel and Goudkamp *Winfield and Jolowicz on tort* 137-138.

⁶³⁷ 2001 Lloyd's Rep Med 458. See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 490, 505.

⁶³⁸ *Farrell v Avon HA* 2001 Lloyd's Rep Med 458.

⁶³⁹ The court in *Farrell v Avon HA* 2001 Lloyd's Rep Med 458 applied the test referred to in *McLoughlin v O'Brian* 1983 1 AC 410 and the principles in *Page v Smith* 1996 AC 155.

⁶⁴⁰ *Farrell v Avon HA* 2001 Lloyd's Rep Med 458.

⁶⁴¹ 2008 1 AC 281.

found that the risk of the disease materialising or the psychiatric injury caused in expecting the disease to materialise was not actionable based on the notion that a person of reasonable fortitude would not react in the manner in which the claimant did. Academic writers⁶⁴² highlight the reference to the person of reasonable fortitude in this case which is a departure from the extension of liability offered to the primary victim with the “thin skull” in *Page*.⁶⁴³ It may be argued that in this case the chain of causation was stretched rather far as compared to that of *Page*. Perhaps the court would have reached a different conclusion if the pleural plaques did indeed affect the primary victim’s physical health.

In *Walker v Northumberland County Council*,⁶⁴⁴ a social services officer suffered a nervous breakdown from stress (psychiatric injury not induced by shock) as a result of being overburdened with work.⁶⁴⁵ He took three months leave and before his return to work was assured by his employer that assistance would be provided to ease his work load. According to the facts he was provided with limited assistance and subsequently suffered a second breakdown whereafter he left work. Coleman J⁶⁴⁶ stated:

“It is clear law that an employer has a duty to provide his employee with a reasonably safe system of work and to take reasonable steps to protect him from risks which are reasonably foreseeable. Whereas the law on the extent of this duty has developed almost exclusively in cases involving physical injury to the employer as distinct from injury to his mental health, there is no logical reason why risk of psychiatric damage should be excluded from the scope of an employer's duty of care or from the co-extensive implied term in the contract of employment. That said, there can be no doubt that the circumstances in which claims based on such damage are likely to arise will often give rise to extremely difficult evidential problems of foreseeability and causation.”

Coleman J found the employer liable in that such employer owed a duty to take reasonable steps to avoid exposing the employee to a workload which endangered his health. The duty was not breached at the first nervous breakdown which was unforeseeable but at the second breakdown.⁶⁴⁷

⁶⁴² See discussion of this case by Peel and Goudkamp *Winfield and Jolowicz on tort* 133-134, Jones in Jones (gen ed) *Clerk and Lindsell on torts* 503-504 and Steele *Tort* 308-311.

⁶⁴³ *Page v Smith* 1996 AC 155.

⁶⁴⁴ 1995 PIQR 521.

⁶⁴⁵ Hale LJ in *Hatton v Sutherland* 2002 All ER 1 approved of the approach in *Walker v Northumberland County Council* 1995 PIQR 521 stating that the question to be asked is whether a reaction to stress resulting in harm was reasonably foreseeable in the particular employee.

⁶⁴⁶ *Walker v Northumberland County Council* 1995 PIQR 521, 532.

⁶⁴⁷ See Steele *Tort* 311-314. See also discussion of cases dealing with stress resulting in psychiatric injuries by Lunney and Oliphant *Tort* 354-362.

3.3.2.2 Secondary victims

Lord Steyn in *White*⁶⁴⁸ acknowledged that policy considerations have influenced the law relating to compensation for pure psychiatric injury⁶⁴⁹ relevant to secondary victims and referred to the following four factors: deciding what falls within the ambit of recognisable psychiatric injury is complex and “classification of emotional injury is often controversial” requiring expert medical evidence which is time-consuming and costly; the opening of the floodgates to potential numerous claims; the risk of “litigation is sometimes an unconscious disincentive to rehabilitation”; and the imposition of liability for pure psychiatric injury “may result in a burden of liability on defendants which may be disproportionate to tortious conduct involving perhaps momentary lapses of concentration, e.g. in a motor car accident”.⁶⁵⁰

A secondary victim will have to meet the following requirements in order to succeed in a claim for pure psychiatric injury:⁶⁵¹ the claimant must fall within the class of persons whose claim should be recognised;⁶⁵² proximity must be present – “not only proximity to the event in time and space, but also proximity of relationship between the primary and secondary victim”;⁶⁵³ the psychiatric injury must be induced by shock;⁶⁵⁴ there must be foreseeability of psychiatric injury to the claimant of normal fortitude by the defendant and the thin skull rule is not applicable.⁶⁵⁵

In respect of the proximity requirement of the relationship – there must be a close relationship of love and affection between the secondary victim and the endangered person. Therefore a bystander with no close relationship of love and affection with the

⁶⁴⁸ *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455, 493-494.

⁶⁴⁹ Where physical injury does not accompany the psychiatric injury.

⁶⁵⁰ See *Witting Street on tort* 129 who is not convinced with Lord Steyn’s reasons referring to counter arguments for the four reasons.

⁶⁵¹ See in general Peel and Goudkamp *Winfield and Jolowicz on tort* 134-136; Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 129-139.

⁶⁵² Peel and Goudkamp *Winfield and Jolowicz on tort* 134.

⁶⁵³ See *Page v Smith* 1996 AC 155, 189.

⁶⁵⁴ See Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 129-130.

⁶⁵⁵ See *McLoughlin v O’Brian* 1983 1 AC 410, 418-419, 422; *Alcock v Chief Constable of South Yorkshire Police* 1992 1 AC 310, 402, 419-420; *Page v Smith* 1996 AC 155, 187, 189.

victim would not have a claim for psychiatric injury.⁶⁵⁶ The type of relationships are not limited to for example familial relationships, it is presumed that there is a close relationship of love and affection between spouses, and children and parents, but this may be rebutted with evidence to the contrary. Such presumption does not apply to other relationships, including siblings.⁶⁵⁷ There are numerous relationships where there is a close relationship of love and affection as explained by Lord Wilberforce in *McLoughlin v O'Brian*:⁶⁵⁸

“[T]he possible range is between the closest of family ties – of parent and child, or husband and wife – and the ordinary bystander. Existing law recognises the claims of the first: it denies that of the second, either on the basis that such persons must be assumed to be possessed of fortitude sufficient to enable them to endure the calamities of modern life, or that defendants cannot be expected to compensate the world at large. ... it should follow that other cases involving less close relationships must be very carefully scrutinised. I cannot say that they should never be admitted. The closer the tie (not merely in relationship, but in care) the greater the claim for consideration.”

And by Lord Keith in *Alcock*:⁶⁵⁹

“As regards the class of persons to whom a duty may be owed to take reasonable care to avoid inflicting psychiatric illness through nervous shock sustained by reason of physical injury or peril to another, I think it sufficient that reasonable foreseeability should be the guide. I would not seek to limit the class by reference to particular relationships such as husband and wife or parent and child. The kinds of relationship which may involve close ties of love and affection are numerous, and it is the existence of such ties which leads to mental disturbance when the loved one suffers a catastrophe. They may be present in family relationships or those of close

⁶⁵⁶ For example in *Bourhill v Young* 1943 AC 92, a woman heard an accident occur and immediately went to the scene of the accident subsequently sustaining nervous shock which allegedly led to the loss of her baby. On claiming for the loss due to the shock, the court denied compensation due to the fact that she was not related to the deceased and that it was not reasonably foreseeable that a person with normal susceptibilities would have suffered shock. In *McFarlane v EE Caledonia Ltd* 1994 2 All ER 1, the court denied a claim for psychiatric injury sustained by a claimant who was on a vessel, the *Tharos* that attended to the Piper Alpha oil rig where an explosion and fire took place. The claimant alleged that his life was in danger, that he witnessed men in distress, on fire, and jumping into the sea. According to the facts, the vessel he was on was not in any danger and no one on the vessel sustained personal or psychiatric injuries. The court held that the bystander did not meet the criteria pronounced in *Alcock v Chief Constable of South Yorkshire Police* 1992 1 AC 310 and that harm was not reasonably foreseeable to a person of normal susceptibilities. There was insufficient proximity with regard to time and place as well as the close relationship of love and affection (14). See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 494; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 134; Lunney and Oliphant *Tort* 331.

⁶⁵⁷ For example, in *Alcock v Chief Constable of South Yorkshire Police* 1992 1 AC 310, one of the appellants, Harrison who was present at the stadium where he witnessed the tragedy and lost two of his brothers did not succeed in a claim for psychiatric injury. The court held that there was no evidence of “close ties of love or affection”. Lord Ackner (406) stated “[t]he quality of brotherly love is well known to differ widely – from Cain and Abel to David and Jonathan”. See Lunney and Oliphant *Tort* 338-339; Steele *Tort* 324.

⁶⁵⁸ 1983 1 AC 410, 422.

⁶⁵⁹ *Alcock v Chief Constable of South Yorkshire Police* 1992 1 AC 310, 397. See also Peel and Goudkamp *Winfield and Jolowicz on tort* 134-135.

friendship, and may be stronger in the case of engaged couples than in that of persons who have been married to each other for many years. It is common knowledge that such ties exist, and reasonably foreseeable that those bound by them may in certain circumstances be at real risk of psychiatric illness if the loved one is injured or put in peril.”

With regard to sufficient proximity in time and space between the event and the resulting psychiatric injury, the limits of this requirement can be gleaned from referring to two cases on opposing ends. For example in *Taylor v A Novo (UK) Ltd*,⁶⁶⁰ a daughter claimed compensation for psychiatric injury sustained as a result of witnessing her mother collapse and die. The mother was injured a few weeks prior to her death and the court held that the relevant event causing the injury was the accident and not the death of the mother. The daughter did not witness the incident which led to her mother’s injury nor the immediate aftermath. Therefore the requirement of proximity was not satisfied. In *McLoughlin v O’Brian*,⁶⁶¹ the plaintiff heard about the accident in which her husband and children were injured. Upon arrival at the hospital, approximately two hours after the accident, the plaintiff was informed that her youngest daughter had been killed and saw the extent of injuries to her children and husband. The proximity requirement was satisfied as the plaintiff’s hearing of and seeing her injured children and husband upon arrival at the hospital qualified as the “immediate aftermath” of the accident.⁶⁶² The House of Lords⁶⁶³ held that the nervous shock suffered by the plaintiff “had been the reasonably foreseeable result of the injuries to her family caused by the defendants’ negligence; that policy considerations should not inhibit a decision in her favour; and that, accordingly, she was entitled to recover damages”. In *Alcock*, Lord Jauncey⁶⁶⁴ held that the act of a relative identifying a body in a mortuary approximately nine hours later did not qualify as falling within the ambit of the immediate aftermath.⁶⁶⁵ In *W v Essex County Council*,⁶⁶⁶ where claims were instituted by parents who took in a foster child who thereupon sexually abused their children was denied a claim for psychiatric injury because the parents were informed of the sexual abuse and did not witness such abuse or its immediate aftermath.

⁶⁶⁰ 2014 QB 150. See Peel and Goudkamp *Winfield and Jolowicz on tort* 135; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 497.

⁶⁶¹ 1983 1 AC 410.

⁶⁶² Peel and Goudkamp *Winfield and Jolowicz on tort* 135-136.

⁶⁶³ *McLoughlin v O’Brian* 1983 1 AC 410, 411.

⁶⁶⁴ *Alcock v Chief Constable of South Yorkshire Police* 1992 1 AC 310, 423-424.

⁶⁶⁵ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 495.

⁶⁶⁶ 2001 2 AC 592. Lunney and Oliphant *Tort* 340 submit that on the facts of this case a duty could have been more easily recognised by referring to the Council’s assumption of responsibility to the parents by placing the foster child (with a history of sexual abuse) in their home “without diluting the general requirement of proximity of perception”.

The secondary victim claims in both *Alcock*⁶⁶⁷ and *White*⁶⁶⁸ arose out of the Hillsborough Football Stadium disaster which occurred in Sheffield on 15 April 1989. Many people were either physically or psychologically affected. A football match was scheduled to take place that day between the Liverpool and Nottingham Forest Football clubs. The South Yorkshire Police was in charge of controlling the spectators at the match. An excessively large number of spectators were allowed to enter the grounds at a certain section causing overcrowding and cramming which subsequently resulted in people being crushed. Just under one hundred people were killed and hundreds of people were physically injured. Footage of what was taking place at the stadium was broadcast live on the television, but the broadcasts did not show injury to specific victims as this would have been in breach of applicable broadcasting legislation. The Chief Constable of South Yorkshire admitted liability with regard to the deaths and physical injuries. Claims for nervous shock resulting in psychiatric injury were instituted against the Chief Constable.⁶⁶⁹ In *White*,⁶⁷⁰ the claims were instituted by affected police officers who were not in any physical danger, but assisted victims at the stadium, while in *Alcock*⁶⁷¹ claims were instituted by family members, and in one instance a fiancé of the spectators who were killed or injured.⁶⁷² The claim by the fiancé was allowed, the claim by a grandmother who brought up the child was not disbarred, while claims by brothers, brothers-in-law and sisters were denied in *Alcock*.⁶⁷³ In *Alcock* the limits were tested against a variety of claims, where some stemmed from plaintiffs who witnessed the disaster from neighbouring stands, some relatives witnessed the events on the television, and some heard of the disaster on the radio. One of the plaintiffs saw the events of the disaster on the television and then rushed to the stadium to find out whether his son was injured only to find out that his son had indeed been injured and killed.⁶⁷⁴ The claims in both *Alcock*⁶⁷⁵ and *White*,⁶⁷⁶ except those claims relating to police officers who were involved in the immediate

⁶⁶⁷ *Alcock v Chief Constable of South Yorkshire Police* 1992 1 AC 310.

⁶⁶⁸ *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455.

⁶⁶⁹ See Lunney and Oliphant *Tort* 340; Witting *Street on torts* 69.

⁶⁷⁰ *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455.

⁶⁷¹ *Alcock v Chief Constable of South Yorkshire Police* 1992 1 AC 310.

⁶⁷² See Lunney and Oliphant *Tort* 340; Witting *Street on torts* 69.

⁶⁷³ See Witting *Street on torts* 69.

⁶⁷⁴ See Lunney and Oliphant *Tort* 340.

⁶⁷⁵ *Alcock v Chief Constable of South Yorkshire Police* 1992 1 AC 310.

⁶⁷⁶ *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455.

vicinity where the deaths and injuries occurred, failed for fear of the floodgates opening to potential numerous claims. The reasoning of the court has been criticised by Deakin, Johnston and Markesinis.⁶⁷⁷ They state that the House of Lords could have dealt with the claims differently by: requesting proof of seriousness of the medical conditions; considering that the relaying of the news could be considered a *novus actus interveniens*; finding that the damage that occurred was too remote; or that the medium of communication via the television applied in “removing the claimant from the category of ‘proximate’ persons”.

3.3.2.3 Conclusion

The influence of reasonableness in determining a duty of care relating to claims for psychiatric injury in the tort of negligence is explicit. It is evident that psychiatric injury or at least general harm must be reasonably foreseeable. Policy considerations play a vital role with respect to secondary victim claims for psychiatric injury in limiting claims. In other words, the question is whether it is fair, just and reasonable to impose a duty of care on secondary victims of psychiatric injury based on policy considerations (the third element of the three-fold test). Naturally, there may be numerous claims emanating from people who watch or hear of an accident or disturbing incident. It would be unreasonable for the defendant to be held liable for all such claims, indeed liability may be indeterminate. Therefore it would be unreasonable to impose a duty of care. Turning to the standard of the reasonable person, it is applied *ex post facto* where specific reasonable foreseeability of psychiatric injury is required in respect of secondary victims and *ex ante* in respect of primary victims based on the harm which would have been foreseen by the reasonable person. A primary victim must sustain psychiatric injury from a reasonable fear or belief of harm. The fact that a primary victim with inherent susceptibilities is entitled to claim compensation while a secondary victim with inherent susceptibilities is not, may seem unreasonable and arbitrary. Also the fact that the standard of the reasonable person is applied *ex post facto* to secondary victims while *ex ante* in respect of primary victims may also seem unreasonable, in that the same standard should be applied to all victims. It is evident that this does not sit well with a number of academic writers. For example, as

⁶⁷⁷ Markesinis and Deakin's tort law 132.

mentioned⁶⁷⁸ the decision of *Page*⁶⁷⁹ has endured severe criticism by academic writers and by Lord Goff in *White*⁶⁸⁰ mainly due to: the departure from the requirement of reasonable foreseeability of psychiatric injury in a person of ordinary fortitude on the part of a primary victim; conflation of the different forms of damage; the distinction drawn between primary and secondary victims; the misunderstanding of the thin skull rule which extends liability to primary victims with inherent infirmities; the *ex ante* approach applied to the primary victim whereas the *ex post facto* approach applied to the secondary victim; and having the effect of limiting the definition of the primary victim to one who was in physical danger.⁶⁸¹ Nevertheless, the rules of proximity play an important role in limiting secondary victims' claims and these rules seem reasonable in respect of imputing liability for psychiatric injury on a defendant.

In the South African law of delict, the rules of proximity as applied in English law to determine a duty of care are not applicable but legal causation would sufficiently address claims of secondary victims where policy considerations based on reasonableness, fairness and justice would apply. If the psychiatric injury is considered too remote, in the instance of a secondary victim seeing the incident on television and where such victim did not have a close relationship with the primary victim, then it would be considered too remote. Therefore it is unfair, unjust and unreasonable for the defendant to be held liable for the psychiatric injury sustained by the secondary victim.⁶⁸² Deakin, Johnston and Markesinis,⁶⁸³ refer to the possibility of a break in the causal link and Lord Steyn in *White*⁶⁸⁴ stated:

“the law on the recovery of compensation for pure psychiatric harm is a patchwork quilt of distinctions which are difficult to justify. There are two theoretical solutions. The first is to wipe out recovery in tort for pure psychiatric injury. ... argued by Professor Stapleton. But that would be contrary to precedent and, in any event, highly controversial. Only Parliament could take such a step. The second solution is to abolish all the special limiting rules applicable to psychiatric harm. That appears to be the course advocated by Mullany and Handford, Tort

⁶⁷⁸ See para 3.3.2.1 above.

⁶⁷⁹ *Page v Smith* 1996 AC 155.

⁶⁸⁰ *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 455, 474-480.

⁶⁸¹ See Bailey and Nolan 2010 *CLJ* 495; Mullany 1995 *Journal of Law and Medicine* 112; Handford 1996 *Tort L Rev* 5; Tan 1995 *Singapore Journal of Legal Studies* 649; Trindade 1996 *LQR* 22; Sprince 1995 *Professional negligence* 124; Witting *Street on torts* 68; Steele *Tort* 307-308.

⁶⁸² See chapter 3 para 8.

⁶⁸³ *Markesinis and Deakin's tort law* 132.

⁶⁸⁴ *White v Chief Constable of the South Yorkshire Police* 1999 2 AC 45, 500.

Liability for Psychiatric Damage. They would allow claims for pure psychiatric damage by mere bystanders: see (1997) 113 L.Q.R. 410, 415. Precedent rules out this course and, in any event, there are cogent policy considerations against such a bold innovation. In my view the only sensible general strategy for the courts is to say thus far and no further. The only prudent course is to treat the pragmatic categories as reflected in authoritative decisions such as ... *Alcock* ... and *Page* ... as settled for the time being but by and large to leave any expansion or development in this corner of the law to Parliament. In reality there are no refined analytical tools which will enable the courts to draw lines by way of compromise solution in a way which is coherent and morally defensible. It must be left to Parliament to undertake the task of radical law reform”.

The Law Commission recommended a third option; to keep the requirement relating to secondary victims in respect of the close tie of love and affection and to eliminate the rest of the requirements.⁶⁸⁵ This does indeed seem like a reasonable option which would result in a fair outcome with respect to secondary victims claims as the closer the relationship between the primary and secondary victim, the more reasonably foreseeable the harm would be.

As stated, no legislation has yet been promulgated and in 2007, the government rejected the Law Commissions reform proposal⁶⁸⁶ giving the courts the flexibility to develop the law.⁶⁸⁷ Lunney and Oliphant⁶⁸⁸ recommend that claims for psychiatric injury should be treated in the same manner as physical injury. They argue that reasonable foreseeability of psychiatric injury is sufficient and submit that the special proximity requirements should be eliminated.

Lord Oliver in *Alcock*⁶⁸⁹ stated “in the end, it has to be accepted that the concept of “proximity” is an artificial one which depends more upon the court’s perception of what is the reasonable area for the imposition of liability than upon any logical process of analogical deduction”.

⁶⁸⁵ See *Witting Street on torts* 75.

⁶⁸⁶ In the Department of Constitutional Affairs consultation Paper “*The law on Damages*” CP 9/07. In Australia claims for negligently inflicted psychiatric injury in most jurisdictions are regulated by legislation. See Lunney and Oliphant *Tort* 367-368.

⁶⁸⁷ See Lunney and Oliphant *Tort* 367-368.

⁶⁸⁸ *Tort* 363.

⁶⁸⁹ *Alcock v Chief Constable of South Yorkshire Police* 1992 1 AC 310, 411.

Nevertheless, the influence of reasonableness is explicit in determining a duty of care with regard to psychiatric injury. The standard of the reasonable person is applied and reasonable foreseeability of harm is applicable to all three elements of the tort of negligence, that is, the duty of care, breach and causation.

3.3.3 Pure economic loss

In the tort of negligence, the courts are more reluctant to acknowledge a duty of care when dealing with pure economic loss than when dealing with personal injury and damage to property.⁶⁹⁰ Witting⁶⁹¹ points out that pure economic loss is not concerned with “physical damage or injury to intellectual property rights or reputation”, but loss resulting from “such things as money expended and opportunities to profit forgone as a result of the defendant’s failure to take care”.⁶⁹² Different requirements are applied when dealing with economic loss caused negligently and intentionally.⁶⁹³ Consequential or relational economic loss differs from pure economic loss in that consequential loss refers to financial loss resulting directly from personal injury or damage to property.⁶⁹⁴ The courts more readily award compensation for consequential economic loss than pure economic loss unless economic loss results from negligent misstatements (where the *Hedley Byrne* principle discussed below is applied) or “negligent provision of services” (where the extended *Hedley Byrne* principle

⁶⁹⁰ See *Murphy v Brentwood District Council* 1991 1 AC 398, 487; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 511; Witting *Street on torts* 81; Giliker *Tort* 89; Lunney and Oliphant *Tort* 369. Cf Peel and Goudkamp *Winfield and Jolowicz on tort* 115; Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 141.

⁶⁹¹ *Street on torts* 81. Cf Giliker *Tort* 89.

⁶⁹² See also Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 140-141; Steele *Tort* 333.

⁶⁹³ There are generally three economic torts where intention is required all with their own specific requirements commonly referred to as: breach of contract; causing of economic loss by unlawful means; and conspiracy. See Giliker *Tort* 89, 457-458.

⁶⁹⁴ Giliker *Tort* 90-91 illustrates the difference between the different types of damage by referring to *Spartan Steel & Co Ltd v Martin* 1973 1 QB 27 where the defendants negligently cut a cable which supplied the plaintiffs factory with power. As a result of the lost power supply, the plaintiffs sustained the following damage: melt metal which was in the furnace at the time of the power cut had to be discarded in order to avoid causing damage to the furnace (the metal was damaged property); loss of profits which would have emanated from the future sale of the melt (metal) which was discarded (consequential loss); and loss of profits on four other melts which would have been processed during the time of the power cut (pure economic loss). The court allowed the claims for the damage to the property and consequential loss but not for the pure economic loss. See also *Muirhead v Industrial Tank Specialities* 1986 QB 507; *Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd* 1986 AC1. Cf Peel and Goudkamp *Winfield and Jolowicz on tort* 116-117; McBride & Bagshaw *Tort* 175-176; Lunney and Oliphant *Tort* 372-373.

discussed below is applied).⁶⁹⁵ Claims for pure economic loss resulting from defective products do not usually succeed.⁶⁹⁶

Some of the reasons for not acknowledging the duty of care in instances of pure economic loss or allowing such claims in negligence⁶⁹⁷ which include policy considerations are: the possible indeterminate and disproportionate liability; the possible opening of the floodgates to litigation;⁶⁹⁸ the loss is difficult to ascertain and prove;⁶⁹⁹ and that tort law should not encroach upon the spheres of the law such as

⁶⁹⁵ In *Weller & Co v Foot and Mouth Disease Research Institute* 1966 1 QB 569, the institute had allowed a virus to escape which affected cows in the vicinity. The UK Minister of Agriculture was forced to order the closure of the cattle markets. The auctioneers lost out on trade on the cattle market and sued for pure economic loss. The court held that the institute may be liable for the damage to the property (cows) but it could not be held liable to auctioneers who did not have a proprietary interest in the cows that were affected (this principle was set out in *Cattle v Stockton Waterworks* 1875 LR 10 QB 453 and followed in *Weller, Spartan Steel & Co Ltd v Martin* 1973 1 QB 27, *Leigh and Sullivan Ltd v Aliakmon Shipping Co Ltd* 1986 AC 785, and *Candlewood Navigation Corp Ltd v Mitsui O.S.K Lines* 1986 AC 1). See Jones in Jones (gen ed) *Clerk and Lindsell Torts* 546-549; Deakin Johnston and Markesinis *Markesinis and Deakin's tort law* 165-166; Witting *Street on torts* 94-96; Giliker *Tort* 93-94, 106-107; Steele *Tort* 337-347; chapter 3 para 5.2.

⁶⁹⁶ In *Anns v Merton LBC* 1978 AC 728, a claim stemming from loss (incorrectly referred to as "material physical damage") resulting from defective buildings was allowed, however, this was overturned in *Murphy v Brentwood District Council* 1991 1 AC 398, dealing with pure economic loss resulting from defective buildings. See also *Muirhead v Industrial Tank Specialities Ltd* 1986 QB 507, where damage was not recoverable for a defective pump or rather a pump unsuitable for the purposes required. Thus the claimant usually has a contractual claim with the supplier. The Defective Premises Act 1972 now regulates building work in that statutory claims are possible if the work is not conducted in a professional manner which may be stricter than the standard of negligence. See Peel and Goudkamp *Winfield and Jolowicz on tort* 119-121; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 540-542; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 160-162; Steele *Tort* 349-358; Lunney and Oliphant *Tort* 377-392.

⁶⁹⁷ In other Commonwealth jurisdictions such as Australia, New Zealand and Canada, the courts have been more liberal in allowing claims for economic loss even where the claimant only has a contractual interest in the property that was subsequently damaged (Giliker *Tort* 129). See Peel and Goudkamp *Winfield and Jolowicz on tort* 119 and Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 142-143, 149-150 who are not convinced with the reasons put forward for the reluctance of the courts for allowing claims for pure economic loss. They point out that these reasons are not backed by scientific and empirical evidence which should be discouraged.

⁶⁹⁸ See *Spartan Steel & Co Ltd v Martin* 1973 1 QB 27, 36, 38-39.

⁶⁹⁹ See Witting *Street on torts* 81.

the law of contract⁷⁰⁰ thereby undermining the principles regulating the law of contract⁷⁰¹ and the law regulating companies.⁷⁰²

For example, in *Caparo*,⁷⁰³ the House of Lords excluded liability by stating that proximity, in respect of a duty of care, was absent and applied the requirement strictly.⁷⁰⁴ In this case, the plaintiffs' (Caparo Industries plc) bought shares and succeeded in taking over Fidelity plc. The plaintiffs' alleged that it took this action as a result of relying on financial accounts prepared by auditors acting for Fidelity plc which showed that the company had made a sizeable pre-tax profit when in fact it made a loss. The plaintiffs' sued the auditors alleging that they were negligent in conducting the audit and making the report. The House of Lords, influenced by policy considerations,⁷⁰⁵ found that no duty of care was owed by the auditors to prospective investors or to an existing shareholder who would rely on the accounts. Their reasons included *inter alia* that proximity was lacking. Lord Bridge⁷⁰⁶ stated that in order for liability for economic loss to succeed in respect of negligent misstatements, the defendant must know "that his statement would be communicated to the plaintiff, either as an individual or as a member of an identifiable class, specifically in connection with a particular transaction or transactions ... and that the plaintiff would be very likely to rely on it for the purposes of deciding whether or not to enter upon that transaction".⁷⁰⁷

Prior to *Hedley Byrne*,⁷⁰⁸ English law did not recognise that a party may be owed a duty of care by the maker of a statement to take reasonable care not to cause pure

⁷⁰⁰ In the law of contract, claims for pure economic loss are not problematic and the recovery thereof is not as restrictive as it is in the tort of negligence (Peel and Goudkamp *Winfield and Jolowicz on tort* 115).

⁷⁰¹ See *Greater Nottingham Co-operative Society v Cementation Piling Ltd* 1989 QB 71; *Simaan General Contracting v Pilkington Glass Ltd (No 2)* 1988 2WLR 761; *Pacific Associates v Baxter* 1990 1 QB 993; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 168-173; Giliker *Tort* 91-93, 98-101.

⁷⁰² See *Williams and Reid v Natural Life Health Foods Ltd and Mistlin* 1998 1 WLR 830.

⁷⁰³ 1990 2 AC 605.

⁷⁰⁴ See Giliker *Tort* 122-123.

⁷⁰⁵ Some of the policy considerations excluding liability included that accounting firms would undertake "defensive accounting", accountancy firms would cease to operate and there would be high "liability insurance premiums" (Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 149).

⁷⁰⁶ *Caparo Industries plc v Dickman* 1990 2 AC 605, 621.

⁷⁰⁷ See Giliker *Tort* 125-126 who in detail discusses the factors which influence the court in finding a duty of care in cases of pure economic loss stemming from *Caparo Industries plc v Dickman* 1990 2 AC 605. Cf Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 147-148.

⁷⁰⁸ *Hedley Byrne & Co Ltd v Heller & Partners* 1964 AC 465.

economic loss resulting from such negligent misstatement, where such person relied on the statement. A remedy was possible only in the law of contract. In *Hedley Byrne*, the House of Lords recognised liability for pure economic loss based on the premise that the maker of the statement had assumed responsibility towards the plaintiff by undertaking to deliver a specific performance.⁷⁰⁹ In this case, a firm of advertising agents wanted to check the creditworthiness of one of its client's as it was placing a large order on its client's behalf and would be responsible for the costs of the order. The advertising firm requested its bank to ask the client's bank (the defendants) about the client's creditworthiness. The defendants replied with a favourable comment via a letter which included a disclaimer to liability. The client subsequently went into liquidation and the advertising agency lost a large amount of money by placing the orders on the client's behalf. The advertising agency then sued the defendants for the negligent misstatement alleging that they had relied on the information. The House of Lords dismissed the claim only because of the disclaimer to liability⁷¹⁰ but made it clear that had there been no disclaimer, the defendants would have owed the advertising agency a duty of care not to mislead them about the client's creditworthiness. The court held that the defendants would have assumed responsibility⁷¹¹ towards the advertising agency in respect of the statement that was relied upon and thus a duty of care was owed.⁷¹²

⁷⁰⁹ See Peel and Goudkamp *Winfield and Jolowicz on tort* 108; Steele *Tort* 358-364.

⁷¹⁰ See *Smith v Eric Bush* 1990 1 AC 831 where the House of Lords held that the disclaimer was invalid under s 2 of the Unfair Contract Terms Act 1977 in that it did not satisfy the requirement of "reasonableness" in s11 (3)). It would be unreasonable for the valuer of a property to invoke the disclaimer and the valuer assumed responsibility to the buyer. The House of Lords however, for fear of opening the floodgates to litigation stated that their decision was limited to buyers of private modest houses. The facts of *Smith* are similar to the facts of *Caparo Industries plc v Dickman* 1990 2 AC 605 except that in *Smith*, the surveyor's report was paid for whereas in *Caparo* no fee was paid to the bank for the information. The difference between this case and *Caparo* lies in the relationship between the parties and the nature of the transactions. In *Smith*, the claimant was wealthy, buying the most expensive investment in his life while in *Caparo*, an entrepreneur was taking risks in a commercial context. This decision was followed in *Merrett v Babb* 2001 QB 1174, where the court held that the surveyor had assumed responsibility to the claimant for the accuracy of the valuation report. See also *Harris v Wyre Forest DC* 1990 1 AC 831; *Yianni v Edwin Evans & Sons* 1982 QB 438; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 150-151; Gilker *Tort* 119-120; Steele *Tort* 364-367; Lunney and Oliphant *Tort* 407-421.

⁷¹¹ See *Hedley Byrne* according to Lord Reid 486, Lord Morris 494, and Lord Devlin 528-530.

⁷¹² See McBride and Bagshaw *Tort* 176-179.

Stemming from *Hedley Byrne*,⁷¹³ two requirements must be met in order to establish a duty of care with respect to negligent misstatements: a special relationship between the parties⁷¹⁴ where the defendant assumes responsibility;⁷¹⁵ and “reasonable reliance” by the claimant. The first requirement relates to proximity and these two requirements together are commonly referred to as the “*Hedley Byrne* principle”.⁷¹⁶ In respect of the assumption of responsibility⁷¹⁷ and reliance, it must be determined objectively on the facts of the case whether the claimant’s reliance on such advice was reasonable or if there was reasonable reliance by the claimant on the defendant to exercise reasonable care.⁷¹⁸ For example, in *Caparo*⁷¹⁹ the plaintiff’s reliance on the auditor’s accounts was considered unreasonable as the reports were not intended to be relied upon for the purpose of investment but for complying with other statutory requirements.⁷²⁰ In *Reeman v Department of Transport*,⁷²¹ the Court of Appeal, following *Caparo*, held that it was not reasonable for the plaintiff to rely on a certificate pertaining to the seaworthiness of a boat as evidence of the boat’s financial value. The purpose of the certificate was to promote safety at sea.⁷²² A claimant must prove that he relied on the advice given “or acts reasonably in assuming” that the statement was made by the defendant.⁷²³ Lord Reid⁷²⁴ stated:

“A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought: or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or enquiry which a careful answer would require: or he could simply answer without any such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the enquirer which requires him to exercise such care as the circumstances require.”

⁷¹³ *Hedley Byrne & Co Ltd v Heller & Partners* 1964 AC 465.

⁷¹⁴ See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 511-512; Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 144.

⁷¹⁵ See *Henderson v Merrett Syndicates Ltd* 1995 2 AC 145,181; *Williams v Natural Life Foods Ltd* 1998 1 WLR 830, 835; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 514-515.

⁷¹⁶ Giliker *Tort* 112.

⁷¹⁷ See Peel and Goudkamp *Winfield and Jolowicz on tort* 110.

⁷¹⁸ See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 525-527.

⁷¹⁹ *Caparo Industries plc v Dickman* 1990 2 AC 605.

⁷²⁰ See Giliker *Tort* 126-127.

⁷²¹ 1997 2 Lloyd’s Rep 648.

⁷²² See Giliker *Tort* 127.

⁷²³ See *Customs & Excise Commissioners v Barclays Bank plc* 2007 1 AC 181 (where it was held that it could not be said that the customs officials relied on the bank to protect their interests; *Abbott v Strong* 1998 2 BCLC 420; Giliker *Tort* 126-127.

⁷²⁴ *Hedley Byrne & Co Ltd v Heller & Partners* 1964 AC 465, 486.

Lord Reid⁷²⁵ stated that the special relationship in a business and not a social context⁷²⁶ is one where “the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave information or advice when he knew or ought to have known that the inquirer was relying on him”.

In *Spring v Guardian Assurance Plc*,⁷²⁷ Lord Goff stated that in instances where the “plaintiff entrusts the defendant with the conduct of his affairs to perform a task with reasonable care and skill, in general or in particular, the defendant may have assumed responsibility to the plaintiff”. Thus the *Hedley Byrne* principle which was previously applied to advice was extended to instances where services are rendered.⁷²⁸ This is commonly known as the extended “*Hedley Byrne* principle”.⁷²⁹ Thus a doctor or dentist is expected to treat his patient with the care and skill that a reasonably competent doctor or dentist would exercise. This principle applies to all professionals whether a legal practitioner, engineer, referee, or accountant etcetera.⁷³⁰ The extended *Hedley Byrne* principle has even been applied to instances where providers of financial services provided negligent advice to the deceased regarding pension schemes, which adversely affected the dependants.⁷³¹ A legal practitioner tasked with the preparation of a will for the testator must give effect to the testator’s intentions and prepare such will timeously, failing which he may be held liable to the beneficiaries for financial loss intended to be bequeathed by the testator. A duty of reasonable care

⁷²⁵ *Hedley Byrne* 534.

⁷²⁶ Thus reliance on advice given in a social context will not ground liability unless such advisor explicitly assures the advisee that his advice can be relied upon, such as in *Chaudry v Prabhakar* 1989 1 WLR 29. See Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 145; McBride and Bagshaw *Tort* 180-181; Giliker *Tort* 115.

⁷²⁷ 1995 2 AC 296, 318.

⁷²⁸ See McBride and Bagshaw *Tort* 184; Giliker *Tort* 116.

⁷²⁹ The extended *Hedley Byrne* principle was applied in *Henderson v Merrett Syndicates Ltd* 1995 2 AC 145, *White v Jones* 1995 2 AC 207, *Welton v North Cornwall DC* 1997 1 WLR 570, *Williams v Natural Life Health Foods Ltd* 1998 1 WLR 830 as well as other cases - see Peel and Goudkamp *Winfield and Jolowicz on tort* 108-109; Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 153-154; Witting *Street on torts* 88; Giliker *Tort* 116 fn 82; Steele *Tort* 370-382; Lunney and Oliphant *Tort* 422-439. Cf McBride and Bagshaw *Tort* 180, 188-191, 193-194.

⁷³⁰ See McBride and Bagshaw *Tort* 185 as well as all the authority referred to.

⁷³¹ See *Gorham v British Telecommunications Plc* 2000 1 WLR 2129. See also *Weldon v GRE Linked Life Assurance Ltd* 2000 2 All ER (Comm) 914; Giliker *Tort* 117.

and skill is owed in ensuring that the will of the testator is affected and a duty of care is also owed to the beneficiaries in preventing them from sustaining financial loss.⁷³²

There are some instances where claims have succeeded for pure economic loss in the tort of negligence, which do not fall under the *Hedley Byrne* principles but under the general principles of recovery following *Murphy v Brentwood District Council*.⁷³³ For example, in *Ministry of Housing and Local Government v Sharp*,⁷³⁴ a clerk at a local authority registry neglected to charge fees over certain land. The Ministry lost financially as a result of not receiving the fees over the property and sued the local authority for such loss. The Court of Appeal held that the Ministry was entitled to recover compensation for pure economic loss from the local authority.⁷³⁵

To some adjudicators and academic writers,⁷³⁶ “assumption of responsibility is not particularly a “helpful or realistic test It can only have real meaning if it is understood as referring to the circumstances in which the law will deem the maker of the statement to have assumed responsibility to the person who acts upon the advice”.⁷³⁷ Lord Slynn⁷³⁸ opined that the “phrase ... means simply that the law recognises that there is a duty of care. It is not so much that responsibility is assumed as that it is recognised or imposed by law”. On the other hand, other adjudicators and academic writers,⁷³⁹ like Lord Goff⁷⁴⁰ and Lord Steyn⁷⁴¹ are of the opinion that it is a useful concept providing “practical justice”. Lord Bingham⁷⁴² and Lord Hoffman⁷⁴³ too

⁷³² See *Ross v Caunters* 1980 Ch 297; *White v Jones* 1995 2 AC 207 where the House of Lords in terms of policy considerations held that the legal practitioners had assumed responsibility to the beneficiaries. See also Peel and Goudkamp *Winfield and Jolowicz on tort* 111-114; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 154; Witting *Street on torts* 89-91; Giliker *Tort* 107-110. Cf McBride and Bagshaw *Tort* 196.

⁷³³ 1991 1 AC 398.

⁷³⁴ 1970 2 QB 223.

⁷³⁵ See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 152; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 520.

⁷³⁶ See Barker 1993 *LQR* 461, Hepple 1997 *CLP* 88 and Cane *Tort law and economic interests* 177, 200 who criticise the use of the concept as a fiction used to justify the existence of a duty of care; Giliker *Tort* 118 fn 86.

⁷³⁷ According to Lord Griffiths in *Smith v Eric Bush* 1990 1 AC 831, 862.

⁷³⁸ In *Phelps v Hillingdon LBC* 2001 2 AC 619, 654.

⁷³⁹ See McBride & Bagshaw *Tort* 177-178.

⁷⁴⁰ *White v Jones* 1995 2 AC 207, 268.

⁷⁴¹ In *Williams and Reid v Natural Life Health Foods Ltd* 1998 1 WLR 830, 837.

⁷⁴² *Customs and Excise Commissioners v Barclays Bank plc* 2007 1 AC 181 [4].

⁷⁴³ *Customs and Excise Commissioners v Barclays Bank plc* 2007 1 AC 181 [35]. See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 515.

are of the opinion that there are instances where one party can assume responsibility for another.

In the Australian decision of *Perre v Apnand Pty Ltd*,⁷⁴⁴ the defendant negligently supplied potato seeds, which when planted produced a diseased crop. A quarantine was imposed on all farmers within a twenty kilometre radius of the diseased crop. The surrounding farmers, the claimants', suffered loss as a result of not growing and processing crops. McHugh J,⁷⁴⁵ stated that "reliance and assumption of responsibility are merely indicators of the claimant's vulnerability to harm from the defendant's conduct" and that the concept of "vulnerability" is the "most relevant criterion for determining whether a duty of care exists". In other words vulnerability to harm is the most relevant criterion in order to decide whether a duty of care should be imposed. He opined that the reasons for economic loss stemmed from indeterminacy, autonomy, vulnerability and knowledge. In this case, he found that the claimant was vulnerable as he had no remedy in contract law. There was slight risk of indeterminacy. The defendant had knowledge of the risks in supplying the seeds and the defendant's autonomy was limited as he was already liable for the physical damage. Thus McHugh J suggested that the law should be developed incrementally and the duty of care was imposed. He referred to *White v Jones*⁷⁴⁶ where it could be stated that the claimants were vulnerable and dependant on the defendant (legal practitioner) who had control over their rights and expected inheritance. Jones⁷⁴⁷ points out that this analysis formed part of a "broader thesis that the reasons for upholding or denying a duty in particular cases should be regarded as the principles to be applied in determining whether a duty exists in cases within that category". Jones⁷⁴⁸ refer to examples of vulnerability and dependence in the cases of *Smith v Bush*⁷⁴⁹ where the purchaser paid for a valuation and depended on the report in which any defects should have been detected; and *Gorham v British Telecommunications Plc*⁷⁵⁰ where the court imposed a duty of care on the advisor who negligently advised the deceased about pension schemes subsequently adversely affecting the dependants. This policy consideration of

⁷⁴⁴ 164 ALR 606, referred to by Jones in Jones (gen ed) *Clerk and Lindsell on torts* 550.

⁷⁴⁵ *Perre v Apnand Pty Ltd* 164 ALR 606, 639.

⁷⁴⁶ 1995 2 AC 207.

⁷⁴⁷ In Jones (gen ed) *Clerk and Lindsell on torts* 529.

⁷⁴⁸ In Jones (gen ed) *Clerk and Lindsell on torts* 529.

⁷⁴⁹ 1990 1 AC 831.

⁷⁵⁰ 2000 1 WLR 2129.

vulnerability to risk has also been increasingly used by South African courts with regard to claims for pure economic loss.⁷⁵¹

3.3.3.1 Conclusion

Academic writers⁷⁵² have different views under what circumstances claims for pure economic loss should be actionable. The courts are influenced by policy considerations and although the approach is acceptable, Stapleton⁷⁵³ points out those policy considerations were not applied consistently but on a pocket approach to liability, dividing case law. She points out that the influence of the policy considerations varied unjustifiably between the various pockets.⁷⁵⁴ The pockets she identified⁷⁵⁵ related to negligent misstatements dealing with words;⁷⁵⁶ defective property⁷⁵⁷ and damage to property of a third party.⁷⁵⁸ Thus any claim for pure economic loss had to fall within one of the pockets. She⁷⁵⁹ explains that in *Smith v Eric S Bush*⁷⁶⁰ concerning a defect in property, a pure economic loss claim was allowed where a surveyor negligently failed to discover the defect in a property dealt with under the *Hedley Byrne* principle, whereas in *D & F Estates Ltd v Church Commissioners*,⁷⁶¹ a claim for pure economic loss was not allowed where a builder was responsible for a defect in property because it was dealt with under the principles in *Murphy v Brentwood District Council*.⁷⁶² In both claims there was no issue of indeterminate liability and neither was the amount indeterminable.⁷⁶³

⁷⁵¹ See chapter 3 para 9.

⁷⁵² See Lunney and Oliphant *Tort* 449-452 who refer to the differing approaches of various academics such as Beever (who prefers a rights based approach as opposed to the loss-based model) and Stapleton and Giliker who accept the policy considerations approach of the court but provide their own approaches to dealing with the policy considerations.

⁷⁵³ 1991 *LQR* 249ff.

⁷⁵⁴ Lunney and Oliphant *Tort* 451.

⁷⁵⁵ At the time of writing the contribution.

⁷⁵⁶ Stapleton 1991 *LQR* 259-263 refers to the *Hedley Byrne* principle and the extended *Hedley Byrne* principal (which now covers actions).

⁷⁵⁷ As in *Murphy v Brentwood District Council* 1991 1 AC 398. See Stapleton 1991 *LQR* 267-277.

⁷⁵⁸ As in *Spartan Steel & Co Ltd v Martin* 1973 1 QB 27. See Stapleton 1991 *LQR* 263-266.

⁷⁵⁹ Stapleton 1991 *LQR* 277-283. See Lunney and Oliphant *Tort* 451.

⁷⁶⁰ 1990 1 AC 831.

⁷⁶¹ 1989 AC 177.

⁷⁶² 1991 1 AC 398.

⁷⁶³ See Lunney and Oliphant *Tort* 451.

The influence of reasonableness is predominantly explicit with regard to claims for pure economic loss. With regard to the duty of care, the influence of reasonableness is explicit in respect of the criterion of reasonable foreseeability of pure economic loss. In respect of proximity the influence is implicit and proximity serves to limit claims only to those instances where there is a special relationship between the parties. The principles of proximity however, are criticised as not being applicable in all instances, so policy considerations are relied upon. The influence of reasonableness is explicit in concluding whether it is fair, just and reasonable to impose a duty of care. In respect of the criterion of the reasonable person, the influence of reasonableness is explicit whether applied to the conduct of the defendant or the reliance on the statement or advice on the part of the plaintiff. If we consider the *Hedley Byrne* principle or extended *Hedley Byrne* principle, with respect to the plaintiff, the question asked is whether the reasonable person would have relied on the statement or advice or if there was reasonable reliance on the defendant's exercise of reasonable care. Thus in judging whether the reliance was reasonable under the circumstances and whether the plaintiff's interests, with regard to the pure economic loss, was infringed unreasonably – objective, subjective, *ex ante* and *ex post facto* approaches are applied. From a South African perspective this includes the enquiry into wrongfulness and fault. The influence of reasonableness is explicit once again in respect of causation, where the criterion of reasonable foreseeability of harm is applicable with respect to whether the pure economic loss was remote or not.

3.4 Breach of a duty of care

Assuming that a duty of care is owed to the claimant by the defendant, the question then is whether “the risk of harm to the claimant was reasonably foreseeable by the hypothetical person in the position of the defendant”.⁷⁶⁴ The conduct of the defendant is judged against the conduct of the reasonable person and an *ex ante*⁷⁶⁵ approach as opposed to an *ex post facto* approach is applied.⁷⁶⁶ The focus is now on the content of the duty as opposed to whether it exists.⁷⁶⁷ Thus if a motorist drives recklessly but

⁷⁶⁴ Witting *Street on torts* 116.

⁷⁶⁵ See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 563; Witting *Street on torts* 116.

⁷⁶⁶ See *Marks and Spencer Plc v Palmer* 2001 EWCA Civ 1528 [27]; Peel and Goudkamp *Winfield and Jolowicz on tort* 155 fn 91.

⁷⁶⁷ Lunney and Oliphant *Tort* 152.

does not cause an accident, his conduct is still careless *ex ante*. In essence, the reasonableness of the defendant's conduct is considered.⁷⁶⁸ Jones⁷⁶⁹ points out that "[n]egligence presupposes unreasonable behaviour in the face of the foreseeable likelihood that harm may occur".⁷⁷⁰ The question of whether the defendant acted reasonably or with reasonable care in the circumstances is said to be a question of fact.⁷⁷¹ The claimant bears the onus of establishing on a balance of probabilities that the defendant's conduct fell short of the required standard.⁷⁷²

The test for whether the defendant has breached his duty of care, and therefore acted negligently, towards the claimant was set out by Baron Alderson in *Blyth v Birmingham Waterworks Co.*⁷⁷³

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man would not do."

Therefore a defendant will be liable if he takes less care than that of the hypothetical reasonable person.⁷⁷⁴ The concept of reasonableness is flexible, capable of being adapted depending on the circumstances of the case and the courts try not to develop the required standard into a set of rules.⁷⁷⁵ What is considered as reasonable and unreasonable conduct in specific cases serves merely as useful guidelines.⁷⁷⁶

Sometimes the standard of care is incorrectly viewed in terms of a legal duty, such as a driver's duty to give a signal when turning.⁷⁷⁷ Even though there are similar factual situations that may arise for adjudication in practice, especially with regard to motor vehicle accidents, adjudicators may refer to prior decisions as a guide to establishing

⁷⁶⁸ Steele *Tort* 133.

⁷⁶⁹ In Jones (gen ed) *Clerk and Lindsell on torts* 563.

⁷⁷⁰ Cf Steele *Tort* 133.

⁷⁷¹ Peel and Goudkamp *Winfield and Jolowicz on tort* 156.

⁷⁷² Peel and Goudkamp *Winfield and Jolowicz on tort* 156; cf Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 215.

⁷⁷³ 1856 11 Ex 781, 784. See also *Hazell v British Transport Commission* 1958 1 WLP 169,171; Peel and Goudkamp *Winfield and Jolowicz on tort* 143; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 551; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 198; *Witting Street on torts* 116; chapter 5 para 3.3.

⁷⁷⁴ Peel and Goudkamp *Winfield and Jolowicz on tort* 143; *Witting Street on torts* 116; Steele *Tort* 113-114.

⁷⁷⁵ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 551-552.

⁷⁷⁶ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 552.

⁷⁷⁷ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 552.

what reasonable conduct is. However, it is not encouraged to refer to the conduct as inflexible legal duties.⁷⁷⁸ The correct approach is to consider what would be reasonable in light of all the surrounding circumstances.⁷⁷⁹ The duty of care relates to the relationship between the parties and whether there should be a duty of care in that relationship.⁷⁸⁰ Jones⁷⁸¹ submits that both duty of care and the required standard:

“turn on reasonableness but in the case of duty, the question is whether the nature of the relationship reasonably requires that care be taken; whilst in the case of standard, the question is what conduct is reasonably required in the particular circumstances The level of care that will be reasonably required in any particular circumstance is the product of three sets of criteria each of which contains tensions and requires a balancing exercise.”

The three criteria relate to: the objective qualities of the reasonable person, a question of law; weighing the cost and benefit, which focus on how much care the reasonable person would have taken; and common practices and expectations which set the benchmark of conduct. The last criterion is the most problematic. The question is – did the defendant take less care than the reasonable person? ⁷⁸²

The standard of care is generally tested objectively against the reasonable person,⁷⁸³ also referred to as the ordinary man or woman on the “Clapham omnibus”.⁷⁸⁴ The reasonable person is not exceptionally skilled or inexperienced,⁷⁸⁵ nor is he extraordinary careful and vigilant.⁷⁸⁶ Lord Macmillan in *Glasgow Corporation v Muir*⁷⁸⁷ stated that the standard “eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question”. It should be noted that the same standard is applicable in instances of contributory negligence.⁷⁸⁸

⁷⁷⁸ Witting *Street on torts* 133.

⁷⁷⁹ See *Foskett v Mistry* 1984 RTR1; Witting *Street on torts* 133; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 552.

⁷⁸⁰ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 552-553.

⁷⁸¹ In Jones (gen ed) *Clerk and Lindsell on torts* 553.

⁷⁸² Peel and Goudkamp *Winfield and Jolowicz on tort* 144; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 553.

⁷⁸³ Peel and Goudkamp *Winfield and Jolowicz on tort* 143; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 553.

⁷⁸⁴ Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 198.

⁷⁸⁵ Peel and Goudkamp *Winfield and Jolowicz on tort* 145, 146.

⁷⁸⁶ Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 201.

⁷⁸⁷ 1943 AC 488, 457.

⁷⁸⁸ See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 562-563.

The courts place the reasonable person in the position of the defendant at the time⁷⁸⁹ of the alleged breach of duty.⁷⁹⁰ Therefore, if the defendant is a football player, then the question asked is how much care would the reasonable football player have taken at the time of the alleged breach of duty?⁷⁹¹ Witting⁷⁹² points out that even though the standard is objective, considering the “circumstances” the defendant was in at the time of the alleged breach of duty must inevitably be considered. Thus the test is subjective as well as objective.

The standard of care varies with certain types of defendants such as *inter alia* children, those that are vulnerable or disabled, as well as professionals. In respect of professionals, such as doctors, the standard applied is the reasonable skilled competent professional doctor.⁷⁹³ In assessing the standard of reasonableness with regard to professionals, unrealistic standards, knowledge or skill must not be expected of them.⁷⁹⁴ *Bolam v Friern Hospital*⁷⁹⁵ (hereinafter referred to as “*Bolam*”) is authority⁷⁹⁶ for the applicable approach applied to professionals, which is the “standard of the ordinary skilled man exercising and professing to have that special skill”. In this case, it was stated that “a doctor who had acted in accordance with a practice accepted at the time as proper by a responsible body of medical opinion skilled in the particular form of treatment in question was not guilty of negligence merely because there was a body of competent professional opinion which might adopt a different technique”.⁷⁹⁷ Therefore, a professional who acts in accordance with the practice accepted by a responsible body of persons experienced and skilled in that particular profession, may not be held negligent. This is commonly referred to as the “*Bolam* principle”.⁷⁹⁸ Furthermore, where there are almost equally compelling professional

⁷⁸⁹ Lord Denning in *Roe v Minister of Health* 1954 2 QB 66, 84 stated “[w]e must not look at the 1947 accident with 1954 spectacles”. See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 563; Lunney and Oliphant *Tort* 175-177.

⁷⁹⁰ Peel and Goudkamp *Winfield and Jolowicz on tort* 146.

⁷⁹¹ Peel and Goudkamp *Winfield and Jolowicz on tort* 146.

⁷⁹² *Streets on tort* 125.

⁷⁹³ Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 198.

⁷⁹⁴ Witting *Street on torts* 136-137.

⁷⁹⁵ 1957 1 WLR 582, 586.

⁷⁹⁶ See *Maynard v West Midlands RHA* 1984 1 WLR 634; *Sidaway v Bethlem Royal Hospital* 1985 AC 871; *Steele Tort* 127.

⁷⁹⁷ *Bolam v Friem Hospital* 1957 1 WLR 582, 587.

⁷⁹⁸ See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 205; Peel & Goudkamp *Winfield and Jolowicz on tort* 157.

opinions, or where such opinion is divided, the professional will not be held liable.⁷⁹⁹ In *Sidaway v Bethlem Royal Hospital*,⁸⁰⁰ a patient was not informed of a slight inherent risk of one to two percent that an operation could result in damage to the spinal column resulting in her being paralysed. The court applied the *Bolam* principle and confirmed that the neurosurgeon, in refraining from informing the patient of the inherent slight risks, was indeed following the practice “which in 1974 would have been accepted as proper by a responsible body of skilled and experienced neuro-surgeons”.⁸⁰¹ The court did not find the neurosurgeon negligent for not informing the patient of the risks of the operation. Thus according to the *Bolam* principle, a professional will be judged based on the knowledge of the ordinary professional at the time of the alleged tort and not on future developments in his field.⁸⁰² In *Bolitho v City and Hackney Health Authority*,⁸⁰³ Lord Browne-Wilkinson⁸⁰⁴ stated:

“The use of these adjectives - responsible, reasonable and respectable - all show that the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis. In particular in cases involving, as they so often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter.”

Thus in effect the court has the final say.⁸⁰⁵

The standard of the reasonable person is adjusted depending on the circumstances. For example, in *Wells v Cooper*,⁸⁰⁶ the defendant had negligently fitted a door handle himself. The plaintiff was injured when the door handle came loose from the door. The

⁷⁹⁹ Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 206; Peel & Goudkamp *Winfield and Jolowicz on tort* 157. In *Medi-Clinic Ltd v Vermeulen* 2015 (1) SA 241 (SCA) 243-245, the South African Supreme Court of Appeal when faced with two conflicting medical opinions referred to the *Bolam* principle as well as the two English decisions of *Bolitho v City Hackney Health Authority* 1998 AC 232 (243-244) and *Roe v Minister of Health* 1954 2 QB 66 (252) with approval. The court concluded that the hospital was not negligent in failing to ensure that a patient did not develop bed sores in the circumstance which lead to him eventually being paralysed and wheelchair bound.

⁸⁰⁰ 1985 AC 871; see Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 206-207; *Steele Tort* 127.

⁸⁰¹ *Sidaway v Bethlem Royal Hospital* 1985 AC 871, 872.

⁸⁰² See *Roe v Minister of Health* 1954 2 QB 66; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 206.

⁸⁰³ 1998 AC 232. See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 207-208; *Witting Street on torts* 136.

⁸⁰⁴ *Bolitho v City and Hackney Health Authority* 1998 AC 232, 242-242.

⁸⁰⁵ *Steele Tort* 129.

⁸⁰⁶ 1958 2 QB 265.

Court of Appeal was faced with the question of what standard of care should be applied in such an instance. The court held that the standard should not be that of the reasonable competent carpenter but that of the reasonably skilled amateur carpenter.⁸⁰⁷ In *Philips v William Whitely Ltd*,⁸⁰⁸ a jeweller pierced the plaintiff's ears and it appeared that he took steps to disinfect the pierced ears but an abscess subsequently developed which could have been avoided had it been done by a medical practitioner. The court held that the jeweller took reasonable steps to avoid infection and only needed to show the skill required of a jeweller and not a surgeon.⁸⁰⁹

Objectivity applies to the conduct and not the actor which "gives the reasonable expectations of the claimant priority over those of the defendant".⁸¹⁰ In respect of defendants with exceptional skills, the subjective level of skill of the defendant is not taken into account and all that is required is the standard expected of the reasonably skilled person.⁸¹¹ If a defendant however professes to have a particular acquired skill or experience, such person will be held to a reasonable degree, to such skill or expertise.⁸¹²

Sometimes the courts do consider the subjective qualities of the defendant.⁸¹³ For example in *Goldman v Hargrave*,⁸¹⁴ a gum tree on the defendant's land caught fire when struck by lightning. The defendant failed to extinguish a fire which subsequently spread to neighbouring land. The Privy Council stated that the defendant was able to act in extinguishing the fire and was therefore liable. He was aware of the risk of danger and failed to act reasonably "in his individual circumstances".⁸¹⁵ In the South African law of delict, control over the dangerous object (fire) or prior conduct (starting of the fire) would point towards the existence of a legal duty to prevent harm, a question of wrongfulness judged *ex post facto*. In respect of the test for negligence,

⁸⁰⁷ Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 201.

⁸⁰⁸ 1938 1 All ER 566.

⁸⁰⁹ *Witting Street on torts* 128.

⁸¹⁰ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 553.

⁸¹¹ Peel and Goudkamp *Winfield and Jolowicz on tort* 144; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 556.

⁸¹² *Woolridge v Sumner* 1963 2 QB 43; *Witting Street on Torts* 126.

⁸¹³ Peel and Goudkamp *Winfield and Jolowicz on tort* 146.

⁸¹⁴ 1967 1 AC 645.

⁸¹⁵ *Goldman v Hargrave* 1967 1 AC 645, 663. See Peel and Goudkamp *Winfield and Jolowicz on tort* 146-147; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 213.

the question is whether the defendant would have foreseen the harm and taken steps to prevent it judged *ex ante* against the standard of the reasonable person, although strictly speaking it is really a subjective-objective approach. The expectation of taking steps to prevent the harm by the defendant is relevant to both the test for wrongfulness and negligence. Both tests relate to whether the defendant acted reasonably albeit objectively *ex post facto* in terms of wrongfulness or *ex ante* subjectively-objectively in terms of negligence.⁸¹⁶ The difference is that with respect to wrongfulness, the reasonableness of the conduct is tested against the *boni mores*, while in respect of negligence, the reasonableness of the defendant's conduct is judged against the standard of the reasonable person. This however assists in understanding that in the English tort of negligence, there is no conceptual differentiation between wrongfulness and negligence. The reasonableness of the defendant's conduct is judged objectively in light of all circumstances also taking subjective factors of the defendant into account when tested against the reasonable person. Breach of a duty explicitly refers to the whether the defendant acted reasonably which is relevant to wrongfulness and negligence in the South African law of delict.⁸¹⁷

If a defendant is lacking in experience or skill in comparison to the reasonable person, such defendant may still be held liable in spite of his incompetence.⁸¹⁸ For example, in *Nettleship v Weston*,⁸¹⁹ the Court of Appeal held that a learner driver who collided with a lamppost causing injury to her instructor was liable based on the standard of the reasonable experienced driver.⁸²⁰ Although it may be argued that the conduct of the learner driver was something that could be expected, the court was influenced by *inter alia* the fact that she had previously been convicted of driving without due care and had insurance.⁸²¹

⁸¹⁶ See chapter paras 3.1.10-3.1.11, 4.3.

⁸¹⁷ See chapter 3 paras 3 and 4.3.

⁸¹⁸ Peel and Goudkamp *Winfield and Jolowicz on tort* 143.

⁸¹⁹ 1971 2 QB 691. In *Wilsher v Essex Area Health Authority* 1987 QB 730, the fact that the defendant was lacking experience in that he was a junior doctor was not taken into account. See Peel and Goudkamp *Winfield and Jolowicz on tort* 146-147; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 554; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 205; Witting *Street on torts* 135; Steele *Tort* 126-127.

⁸²⁰ See *Cook v Cook* 1986 68 ALR 353 where the High Court of Australia took into account the inexperience of the learner driver. However, the same approach was not followed in *McNeilly v Imbree* 2008 HCA 40. See also Steele *Tort* 116-118.

⁸²¹ *Nettleship v Weston* 1971 2 QB 691, 699. See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 200; Steele *Tort* 114-116.

The courts do take into account the circumstances the defendant was faced with at the time, whether it is in an instance of sudden emergency or any other predicament.⁸²² A few cases may be referred to in order to illustrate what the courts consider as reasonable conduct. For example, in *Parkinson v Liverpool Corp*,⁸²³ a bus driver suddenly braked in order to avoid hitting a dog which appeared in his path of travel. As a result of the driver braking, a passenger fell to the floor of the bus. The court held that the driver acted reasonably when faced with an emergency. In *Wilks v Cheltenham Cycle Club*,⁸²⁴ a motorcyclist lost control of his motorcycle which subsequently hit a spectator. The court compared the conduct of the motorcyclist with that of a reasonable competitor, finding him not negligent. In *Wooldridge v Sumner*,⁸²⁵ the Court of Appeal held that a horse rider was not liable with regard to a spectator who was injured by the defendant's horse at a horserace. The Court of Appeal held *inter alia* that the defendant did not owe a duty of care to the plaintiff, the plaintiff had accepted the risks involved in being a spectator; and that the participant did not show reckless disregard for the spectator's safety.⁸²⁶ A reasonable participant would be expected to concentrate on winning the race and not on the spectator. In the course of a competition such as horse racing which is fast-paced, it is expected that a participant may make errors of judgment. The horse rider did not cause harm in a reckless or deliberate manner. Therefore the court held that there was no breach of a duty by the participant and no liability.⁸²⁷

In *Condon v Basi*,⁸²⁸ as a result of a football tackle, a soccer player (defendant) injured another player (claimant) breaking his leg during a match. Even though the tackle was considered a dangerous foul and in breach of the rules of the game, the court held that that alone may not lead to a conclusion of negligence. However, based on the test of reasonableness with respect to sporting activities, the court found the defendant's conduct unreasonable in that he showed "reckless disregard" of his opponent's safety.

⁸²² Peel and Goudkamp *Winfield and Jolowicz on tort* 148.

⁸²³ 1950 1 All ER 367. See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 556 fn 688.

⁸²⁴ 1971 1 WLR 668. See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 558.

⁸²⁵ 1963 2 QB 43. See discussion of this case by Steele *Tort* 120-122 who also refers to other academic writers' views.

⁸²⁶ *Wooldridge v Sumner* 1963 2 QB 43, 67-68.

⁸²⁷ See discussion of this case by Lunney and Oliphant *Tort* 177-179.

⁸²⁸ 1985 1 WLR 866. See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 558; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 203; Witting *Streets on tort* 129.

Here again, from a South African perspective, the reasonableness of the player's conduct is relevant to both wrongfulness determined objectively, *ex post facto*, as well as negligence, determined *ex ante*, with an objective-subjective approach. It refers to conduct expected of the defendant as a participant in the course of a game, whether the interests of the plaintiff were unreasonably infringed and whether the defendant's conduct strayed from that of the reasonable person under the circumstances. English tort law does not distinguish between wrongfulness and negligence but rather in a sense combines it when considering the reasonableness of the defendant's conduct.

In *Harris v Perry*,⁸²⁹ parents of triplets were hosting a birthday party and had hired a jumping castle. A child was seriously injured while somersaulting in the jumping castle. The parents hosting the party were subsequently sued as a result of the injury to the child. The court had to decide "whether a reasonably careful parent could have acted in the same way as the defendant" with the court placing itself "in the shoes of the defendant". Lord Phillips⁸³⁰ stated that the way in which the defendant "was supervising activities on the bouncy castle and the bungee run accorded with the demands of reasonable care for the children using them. The accident was a freak and tragic accident. It occurred without fault." The parent was not expected to undertake continuous surveillance of the children playing in the bouncy castle.⁸³¹

In respect of a child defendant, the test is varied to that of the reasonable child of the same age.⁸³² It has not been settled in English tort law whether the child's subjective maturity, mental ability or experience should be considered.⁸³³ However, in exceptional circumstances where a child partakes in activities normally undertaken by an adult, the reasonable person test will apply.⁸³⁴

⁸²⁹ 2009 1 WLR 19, 24.

⁸³⁰ *Harris v Perry* 2009 1 WLR 19, 33. See *Witting Street on Torts* 127.

⁸³¹ See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 204; Steele *Tort* 123-124.

⁸³² See *Mullin v Richards* 1998 1 WLR 1304, 1308-1309 where the standard applied was that of "an ordinarily prudent and reasonable fifteen-year old schoolgirl in the defendant's situation"; *Blake v Galloway* 2004 1 WLR 284; *Orchard v Lee* 2009 PIQR P16; Peel and Goudkamp *Winfield and Jolowicz on tort* 146; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 562-563; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 198, 203-204; Steele *Tort* 119-120.

⁸³³ *Witting Street on torts* 125-126.

⁸³⁴ Peel and Goudkamp *Winfield and Jolowicz on tort* 148.

Moran⁸³⁵ refers to the Australian decision *McHale v Watson*⁸³⁶ where a twelve-year-old boy threw a metal rod which struck a nine-year-old girl's right eye rendering her blind in that eye. The standard applied was that of an ordinary child of a similar age.⁸³⁷ Moran⁸³⁸ explains how content was given to the standard, that is, whether the young boy behaved reasonably in the circumstances? In respect of foreseeability, it was held that the child did not have knowledge or appreciation of the risk of throwing the rod;⁸³⁹ he did not reasonably foresee that when the rod was thrown it would taper off and strike the girl.⁸⁴⁰ The boy's age limited his ability to foresee harm but also his ability to act prudently.⁸⁴¹ He was found not culpable because his "capacity for foresight or prudence" was "characteristic of humanity at his stage of development and in that sense normal".⁸⁴² Moran highlights that the court found the boy's conduct normal, natural, and not an idiosyncrasy.⁸⁴³ Kitko J⁸⁴⁴ concluded "that boys of twelve may behave as boys of twelve and that, sometimes, is a risk indeed". Moran⁸⁴⁵ submits that the majority of judges had empathy for the boy. They referred to the nostalgia of their own childhood and they could not find liability for "boyish imprudence". Moran explains that after surveying cases⁸⁴⁶ involving children almost "all of the child defendants are boys".⁸⁴⁷ Moran⁸⁴⁸ refers to *Michaud v Dupuis*⁸⁴⁹ where the court found an eleven-year-old boy who threw a rock at a four-year-old girl rendering her blind in an eye, negligent. The court⁸⁵⁰ found his conduct "reckless ... with complete disregard for the safety of other people". Moran⁸⁵¹ points out that there was no mutual play, there was a larger age difference between them and the boy's conduct was close to intentional infliction of harm. In *Pollock v Lipkowitz*,⁸⁵² a thirteen-year-old boy was found liable for

835 *Reasonable person* 60-83.
836 1966 115 CLR 199 (Aust HC).
837 Moran *Reasonable person* 63, 215.
838 Moran *Reasonable person* 64.
839 *McHale v Watson* 1966 115 CLR 199 (Aust HC) 214-215.
840 *McHale v Watson* 1966 115 CLR 199 (Aust HC) 215-216.
841 *McHale v Watson* 1966 115 CLR 199 (Aust HC) 215.
842 *McHale v Watson* 1966 115 CLR 199 (Aust HC) 213.
843 Moran *Reasonable person* 77.
844 *McHale v Watson* 1966 115 CLR 199 (Aust HC) 216.
845 Moran *Reasonable person* 79-82.
846 At the time of writing the book.
847 Moran *Reasonable person* 86.
848 Moran *Reasonable person* 86.
849 1977 20 NBR (2d) 305 (SC).
850 *Michaud v Dupuis* 1977 20 NBR (2d) 305 (QB) 308.
851 Moran *Reasonable person* 86.
852 1970 17 DLR (3d) 766 (Man QB). See Moran *Reasonable person* 86.

his “senseless act of folly”⁸⁵³ when he threw nitric acid at an eleven-year-old girl. Thus the latter two cases illustrate abnormal behaviour.⁸⁵⁴ In *Mullin v Richards*,⁸⁵⁵ where two fifteen-year-old schoolgirls were playing sword-fighting with rulers, the ruler snapped and a fragment of the plastic struck Mullins eye rendering her blind in that eye. The appeal court held that both the girls conduct was not excessively or inappropriately violent. Their conduct was commonplace in school and neither of them foresaw the risk of harm.⁸⁵⁶ Butler-Sloss LJ concluded that “girls of 15 playing together may play as somewhat irresponsible girls of 15”.⁸⁵⁷ Moran⁸⁵⁸ submits that the objective standard of reasonableness relates to ordinariness and normalcy with regard to the commonness of sword-fighting and lack of foreseeability of harm. Moran⁸⁵⁹ refers to the application of the doctrine of allurements. According to this doctrine children are often naturally tempted and attracted to play with dangerous things but are unaware of the reality of the danger. They are generally not held liable because it is considered natural.⁸⁶⁰

In situations where a person suffers some kind of disability, for example suffers a heart attack,⁸⁶¹ loss of consciousness as a result of hypoglycaemia⁸⁶² or a sudden blackout, not caused by his own fault, such person will not be held liable. In South African law,

⁸⁵³ 1970 17 DLR (3d) 766 (Man QB) 768.

⁸⁵⁴ Moran *Reasonable person* 86-87.

⁸⁵⁵ 1998 1 All ER 920 (CA). See Moran *Reasonable person* 88-89.

⁸⁵⁶ *Mullin v Richards* 1998 1 All ER 920 (CA) 927.

⁸⁵⁷ *Mullin v Richards* 1998 1 All ER 920 (CA) 928.

⁸⁵⁸ Moran *Reasonable person* 89-90, 94, 129, 131.

⁸⁵⁹ Moran *Reasonable person* 97-98, 114.

⁸⁶⁰ Moran *Reasonable person* (104, 107, 126-128) refers to *Gough v National Coal Board* 1953 2 All ER 1283 (CA) 1293 where it was stated the boy was “extremely likely to succumb to the temptation” and boys have been behaving in such manner since “time immemorial”; *Cooke v Midland Great Western Railway of Ireland* 1909 AC 229 (HL) 237 where unguarded vehicles and machines were considered “calculated to attract or allure”; *Lengyel v Manitoba Power Commission* 1957 12 DLR (2d) 126 (Man CA) 133 where the court held that the device was “calculated to attract small boys, to arouse their curiosity”; *Coley v CPR* 1906 29 Que SC 285 where it was held that a turntable was an allurements to children. In this case a nine-year-old girl was playing on a turntable and seriously injured resulting in the amputation of her foot. See further cases referred to by Moran *Reasonable person* 104-107.

⁸⁶¹ See *Roberts v Ramsbottom* 1980 1 WLR 823 where the defendant who was unaware that he suffered a stroke resulting in an accident, but admitted to feeling dizzy before driving, was found negligent. The court held that the plaintiff continued to drive when he should have been aware that he was unfit and would only escape liability if his actions were entirely beyond his control. *Witting Street on torts* 129-130.

⁸⁶² In *Mansfield v Weetabix Ltd* 1998 1 WLR 1263, 1268 Leggatt LJ held that the standard of care applicable to the driver who suffered from hypoglycaemia of which he was unaware was judged according to “that which is to be expected of a reasonably competent driver unaware that he is or may be suffering” from such condition. The Appeal Court found the driver not liable. See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 561; *Witting Street on torts* 130.

the elements of conduct and fault may be absent; whereas in English law it is considered that the reasonable person with the same condition would have acted the way the debilitated person would have.⁸⁶³ English law does not differentiate between conduct and fault. If the defendant through fault on his own part forgets to take his medication thereby leading to a blackout, the principle of “prior fault” applies and the defendant may be held liable.⁸⁶⁴

The second criterion of determining a breach of a duty focuses *firstly* on whether the defendant foresaw the risk of injury that materialised.⁸⁶⁵ The courts usually do not experience difficulty in finding risks, even if uncommon, which are reasonably foreseeable.⁸⁶⁶ There must at the very least be a reasonable expectation of a risk and adjudicators may reach different findings on whether the risk was reasonably foreseeable.⁸⁶⁷ Furthermore, all that is required is the reasonable foreseeability of the general risk, not the exact risk of harm that eventuated.⁸⁶⁸ It can be that at times, it is reasonable for the defendant to not act at all, discontinue the conduct, or provide a warning of a risk of harm.⁸⁶⁹ In *Haley v London Electricity Board*,⁸⁷⁰ the court held that it is reasonably foreseeable that blind people may walk along the streets unaccompanied and steps should have been taken to warn blind people of the trench dug along the pavement. The risk of harm was thus reasonably foreseeable.⁸⁷¹

Secondly how much reasonable care the defendant should take under the circumstances is based on the following four factors: magnitude of the risk; gravity or seriousness of the risk; the social utility of the defendant's conduct; weighed against the cost of preventative measures.⁸⁷²

⁸⁶³ Peel and Goudkamp *Winfield and Jolowicz on tort* 148.

⁸⁶⁴ Peel and Goudkamp *Winfield and Jolowicz on tort* 149. See chapter 3 para 2.

⁸⁶⁵ Peel and Goudkamp *Winfield and Jolowicz on tort* 150.

⁸⁶⁶ Peel and Goudkamp *Winfield and Jolowicz on tort* 150.

⁸⁶⁷ Peel and Goudkamp *Winfield and Jolowicz on tort* 151.

⁸⁶⁸ *Alexis v Newham LBC* 2009 EWHC 1323 QB 99-100. See Peel and Goudkamp *Winfield and Jolowicz on tort* 151.

⁸⁶⁹ Peel and Goudkamp *Winfield and Jolowicz on tort* 151-152.

⁸⁷⁰ 1965 AC 778. See para 3.2.2.1 above.

⁸⁷¹ See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 211.

⁸⁷² Peel and Goudkamp *Winfield and Jolowicz on tort* 151; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 56.

With respect to the magnitude or extent of the risk, it depends on the likelihood of the risk of harm occurring. The higher the risk, the more likely the reasonable person would be expected to do something. In contrast the lower the risk, the less likely the reasonable person would be expected to do something.⁸⁷³ This may be illustrated by considering a few contrasting cases. In *Bolton v Stone*,⁸⁷⁴ the claimant was struck on the head with a ball whilst standing on a road adjacent to the defendant's cricket ground. The court found that it was reasonably foreseeable that a ball would be hit out of the ground. According to the facts, balls were hit out of the ground six times over the last thirty years, but the court found that the chances of a ball hitting a person in the claimant's position were slight.⁸⁷⁵ Therefore there was no breach of duty and the cricket club need not have taken further precautions.⁸⁷⁶ In *Hilder v Associated Portland Cement Manufacturers Ltd*,⁸⁷⁷ a motorcyclist was riding along a road when a ball rolled into his path of travel causing him to lose control of his vehicle resulting in an accident. The likelihood of harm to passers-by was considered high and the defendants were held liable for allowing children to play football on their land without taking further precautions.⁸⁷⁸ In *Miller v Jackson*,⁸⁷⁹ balls were hit out of the ground often, up to nine times per season, as a result of which the claimant's property was damaged. The defendants were found negligent because the likelihood of harm was great.

In respect of seriousness of the harm or risk thereof, the more serious a consequence, the greater the care required.⁸⁸⁰ In *Paris v Stepney BC*,⁸⁸¹ the claimant, who had sight in one eye only, was employed in a garage under conditions where there was some risk of injury to the eye. The employers were aware of the claimant's condition and did not provide him with goggles. The claimant was subsequently injured while working, rendering him completely blind. The court held that the employer should have taken

⁸⁷³ In *Overseas Tankship (UK) Ltd v The Miller Steamship Co (Wagon Mound (No.2))* 1967 1AC 617, 642 Lord Reid stated in reference to *Bolton v Stone* 1951 AC 850 that "the risk was so small that in the circumstances a reasonable man would have been justified in disregarding it and taking no steps to eliminate it". See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 211; Peel and Goudkamp *Winfield and Jolowicz on tort* 152.

⁸⁷⁴ 1951 AC 850.

⁸⁷⁵ Peel and Goudkamp *Winfield and Jolowicz on tort* 152; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 565; Lunney and Oliphant *Tort* 153-156.

⁸⁷⁶ See *Witting Street on torts* 118-119.

⁸⁷⁷ 1961 1 WLR 1434.

⁸⁷⁸ See Peel and Goudkamp *Winfield and Jolowicz on tort* 152.

⁸⁷⁹ 1977 QB 966. Jones in Jones (gen ed) *Clerk and Lindsell on torts* 565

⁸⁸⁰ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 566.

⁸⁸¹ 1951 AC 367.

reasonable care of the employer by providing him with goggles as the risk of injury to him was greater than to that of a person with sight in both eyes doing the same job.⁸⁸² It should be noted that the “thin skull rule” is applied after the breach of duty is established taking into account the claimant’s inherent infirmities even if they are not reasonably foreseeable or known.⁸⁸³

Utility of the defendant’s conduct involves, as Witting⁸⁸⁴ puts it, “a determination of the general public interest so that matters other than merely those in dispute between the claimant and defendant can be taken into account in assessing the standard of care required of the defendant”. It is submitted that this is a more objective approach to determining the reasonableness of the defendant’s conduct. Taking into account the public interest is similar to the approach in determining wrongfulness in delict in South African law where the reasonableness of the defendant’s conduct is tested against the *boni mores*.⁸⁸⁵

In *Watt v Hertfordshire County Council*,⁸⁸⁶ a fireman sustained injury when a jack used in cases where people become trapped in motor vehicles during accidents, slipped on the back of a lorry. A particular lorry was usually required in order to transport the jack but at the time, the lorry was unavailable. A substitute vehicle was used. While on route to the scene of the accident in which a woman was trapped, the driver made a stop in emergency circumstances resulting in the jack moving forward and injuring the fireman. It was found that there was no breach of a duty by the local authority, given the emergency and short amount of time within which the fire service had to act. Denning LJ stated:⁸⁸⁷

“in measuring due care you must balance the risk against the measures necessary to eliminate the risk. To that proposition there ought to be added this: you must balance the risk against the end to be achieved. If this accident had occurred in a commercial enterprise without any emergency there could be no doubt that the servant would succeed. But the commercial end

⁸⁸² See Peel and Goudkamp *Winfield and Jolowicz on tort* 152-153; Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 119; Lunney and Oliphant *Tort* 164-166.

⁸⁸³ Lunney and Oliphant *Tort* 166.

⁸⁸⁴ *Deakin, Johnston and Markesinis Markesinis and Deakin’s tort law* 119.

⁸⁸⁵ See chapter 3 para 3.1.4.

⁸⁸⁶ *Watt v Hertfordshire County Council* 1954 1 WLR 835. See Lunney and Oliphant *Tort* 169-170.

⁸⁸⁷ 1954 1 WLR 835, 838.

to make profit is very different from the human end to save life or limb. The saving of life or limb justifies taking considerable risk".⁸⁸⁸

In *Tomlinson v Congleton BC*,⁸⁸⁹ the claimant was severely injured when he dived into a body of shallow water in a lake. The Council prohibited swimming there, regarding it as dangerous and displayed notices. Lord Hoffman referred to utility in the sense of social benefit of the activities which would be lost if the required preventative steps were taken. That is, preventing people from making a choice in taking risks and placing reeds to physically prevent people from reaching the water.⁸⁹⁰

"[T]he balance between risk on the one hand and individual autonomy on the other is not a matter of expert opinion. It is a judgment which the courts must make and which in England reflects the individualist values of the common law ... local authorities and other occupiers of land are ordinarily under no duty to incur such social and financial costs to protect a minority (or even a majority) against obvious dangers."

The House of Lords concluded that there was no breach of duty.

The cost or inconvenience⁸⁹¹ of taking preventative measures must be considered in determining the standard of care.⁸⁹² In weighing the cost and benefit, also referred to as the cost-benefit analysis, the question is whether it is reasonable for the defendant to bear the cost weighed against the benefit to the claimant.⁸⁹³ The courts at times do consider whether a party is insured when deciding whether to impose liability on the defendant.⁸⁹⁴ The courts consider what is common practice and this is balanced against reasonable expectations.⁸⁹⁵ According to the "Hand Formula", discussed in the next chapter dealing with negligence in American law,⁸⁹⁶ the standard of care depends on three variables: the likelihood that the defendant's conduct will lead to harm; the magnitude or seriousness of the harm; weighed against the cost of

⁸⁸⁸ See for example *Ward v London County Council* 1938 2 All ER 341 where the driver of a fire engine was found negligent after driving through a red traffic light. The court stated that taking some extra time to stop at the traffic lights will not make a difference in cases of emergency and there was no reason to put others in harm's way.

⁸⁸⁹ 2004 1 AC 46. See Peel and Goudkamp *Winfield and Jolowicz on tort* 154-155; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 571-572; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 211; Lunney and Oliphant *Tort* 170-172.

⁸⁹⁰ *Tomlinson v Congleton BC* 2004 1 AC 46, 85-86.

⁸⁹¹ *Yorkshire Traction Co Ltd v Searby* 2003 EWCA Civ 1856. See Peel and Goudkamp *Winfield and Jolowicz on tort* 154 fn 80.

⁸⁹² See *Hartlepool Steam Navigation Co* 1956 AC 552, 574; Peel and Goudkamp *Winfield and Jolowicz on tort* 154.

⁸⁹³ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 553.

⁸⁹⁴ Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 200.

⁸⁹⁵ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 553.

⁸⁹⁶ The Hand Formula is discussed in more detail in chapter 5 para 3.3.

preventing such harm. Although the algebraic Hand Formula has been criticised as encouraging a mathematical approach which is not followed by the English courts,⁸⁹⁷ Deakin, Johnston and Markesinis⁸⁹⁸ submit that two of the above-mentioned variables are followed by English courts but it is unclear whether the third variable, the “cost of prevention” is considered by the English Courts. It is submitted that the above mentioned variables are factors often considered by the courts in determining negligence as a form of fault, not in a strict mathematical way but in an informal manner based on value judgments. Economic concerns are at times considered by adjudicators in making value judgments. This is also linked to the economic reasoning approach to tort law.⁸⁹⁹ Lord Denning in *Spartan Steel and Alloys Ltd v Martin & Co (Contractors) Ltd* opined:⁹⁰⁰

“The more I think about these cases, the more difficult I find it to put each into its proper pigeon-hole. Sometimes I say: ‘There was no duty.’ In others I say: ‘The damage was too remote.’ So much so that I think the time has come to discard those tests which have proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not, as a matter of policy, economic loss should be recoverable, or not”.

A brief discussion of a few cases will suffice in order to illustrate the courts’ approach to determining the factor of or inconvenience of taking preventative measures.

In *Latimer v AEC Ltd*,⁹⁰¹ a factory was flooded. The floor became slippery with water and oil. The defendants took steps to clear away the water and damp, but one of the workers slipped on the floor resulting in injury. The worker submitted that the factory should have been closed to clean out the floor. The court held that the defendants did all that they reasonably could and did not need to close the factory.⁹⁰² The cost of closing the factory for both the employer and employees as a result of lost wages

⁸⁹⁷ See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 576; Steele *Tort* 135-136. Cf Lunney and Oliphant *Tort* 163.

⁸⁹⁸ *Markesinis and Deakin’s tort law* 199. The authors refer to *Glasgow v Muir* 1943 AC 448, 456 and *Paris v Stepney Borough Council* 1951 AC 367, 375. Posner *Economic analyses of law* 194 refers to the English decision of *Blyth v Birmingham Water Works* 11 Exch 781, 156 Eng Rep 1047 (1856) where these factors were considered. See chapter 5 para 3.3 where it is discussed in more detail.

⁸⁹⁹ Lord Hoffman in *Stovin v Wise* 1996 AC 923, 943-944 referred to economic reasons in limiting a duty of care in cases of omissions. See discussion by Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 32-42.

⁹⁰⁰ 1973 1 QB 27, 37. See Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 108.

⁹⁰¹ 1953 AC 643.

⁹⁰² See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 566; Witting *Street on torts* 121. Cf Lunney and Oliphant *Tort* 166-169.

outweighed the possible risk as the plaintiff was the only person who was injured.⁹⁰³ In *B (A Child) v London Borough of Camden*,⁹⁰⁴ a baby sustained serious burns to his face when he fell from a bed and became trapped against hot central heating pipes. It was submitted that “the pipes were capable of reaching such high temperatures that they should have been boxed in, lagged or otherwise protected so as to prevent accidental contact causing injury”.⁹⁰⁵ The claim was dismissed based on *inter alia* the following grounds:

“a local authority could reasonably assume that the parents of a small baby able to crawl would take reasonable care to protect that baby from injury from the pipes. ... the risk is so slight, even though an injury if sustained might be serious, that they need not take the step of protecting the pipework in their properties. In addition, they could properly take into account the fact the cost of so protecting the pipework would be very substantial indeed compared with their annual budget for heating, even if only the pipework itself as opposed to the radiators was to be protected. This is a factor which they can properly weigh in the balance. In addition, it is proper to take into account the fact that no British Standard or Code of Practice required pipes to be protected, nor does any British Standard or Code of Practice make that recommendation where the pipework forms part of the useful heating surface in the room”.⁹⁰⁶

In contrast, in *Overseas Tankship (UK) Ltd v The Miller Steamship Co*⁹⁰⁷ (hereinafter referred to as “*the Wagon Mound (No.2)*”), where a vessel caught fire as a result of oil being spilt negligently on the surface of the water, the Privy Council submitted that even though a vessel catching fire could happen “in very exceptional circumstances ... it does not mean that a reasonable man would dismiss such a risk from his mind and do nothing when it was so easy to prevent it. If it is clear that the reasonable man would have realised or foreseen and prevented the risk, then it must follow that the appellant is liable in damages”.⁹⁰⁸ According to the facts, the initial spillage of oil could have been easily prevented. It “involved no disadvantage and required no expense”, therefore there was a breach of the duty of care.⁹⁰⁹

⁹⁰³ See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 212.

⁹⁰⁴ 2001 PIQR P143.

⁹⁰⁵ *B (A Child) v London Borough of Camden* 2001 PIQR P 143 [1].

⁹⁰⁶ *B (A Child) v London Borough of Camden* 2001 PIQR P 143 [96]-[97]. See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 566-567.

⁹⁰⁷ 1967 1 AC 617.

⁹⁰⁸ *Overseas Tankship (UK) Ltd v The Miller Steamship Co (Wagon Mound (No.2))* 1967 1AC 617, 644.

⁹⁰⁹ *Overseas Tankship (UK) Ltd v The Miller Steamship Co (Wagon Mound (No.2))* 1967 1AC 617, 643-644. See Lunney and Oliphant *Tort* 158-163 who discuss this case in detail.

In the private sector, a defendant cannot state that he lacks the resources to minimise or limit the potential risk of harm to others, he is expected to stop the conduct if he cannot continue conducting it with reasonable care.⁹¹⁰

3.4.1 Conclusion

The influence of reasonableness on the element of breach of a duty care is explicit. Jones⁹¹¹ states that in the cost-benefit analyses, “fairness between the parties should be the overriding criterion; fairness from the perspective of the claimant’s reasonable expectations as much as from the cost/benefit of the defendant. The fair and reasonable man should reflect the community’s values as much as those of the calculating utilitarian. These values will be reflected in both the common practice of those engaged in an activity and the expectations of those affected by it.”

Breach of a duty of care as pointed out above, refers to the reasonableness of the defendant’s conduct from an objective and subjective point of view. It seems that in the tort of negligence, the reasonableness of the defendant’s conduct is judged objectively especially where reasonable expectations of the claimant and the public interest are considered. A more subjective approach is taken when the standard of the reasonable person is varied taking into account more of the defendant’s qualities. Lunney and Oliphant⁹¹² refer to Moran’s⁹¹³ valid arguments *inter alia* that the idea of “reasonable care” in a sense conflates the difference between “proper” and “ordinary” behaviour “as the reasonable person is invested with more and more of the defendant’s own characteristics and attributes”. Normality is a contested concept.

English tort law does not specifically recognise the element of conduct. However, in respect of the test for breach of a duty of care, in *Blyth v Birmingham Waterworks Co*,⁹¹⁴ reference is made to negligence as the omission to do something which a reasonable man would do, or alternatively do something which a reasonable man would not do. In fact the element of conduct is subsumed under the element of a

⁹¹⁰ Witting *Street on torts* 122.

⁹¹¹ In Jones (gen ed) *Clerk and Lindsell on Torts* 576.

⁹¹² *Tort* 183.

⁹¹³ *Reasonable person* 301-302.

⁹¹⁴ 1856 11 Ex 781, 784.

breach of a duty and tested against the standard of the reasonable person both objectively and subjectively.

In the South African law of delict, reasonable foreseeability of harm is a factor in establishing whether there is a legal duty to prevent harm in cases of omissions. The defendant is expected to act positively and reasonably in terms of the *boni mores* tested objectively where the harm is reasonably foreseeable.⁹¹⁵ In the English tort of negligence, the criterion of reasonable foreseeability of harm is relevant in all the elements of determining liability in the tort of negligence. It is relevant in determining a duty of care, breach of a duty and whether there is a causal link between the act and consequence (which is discussed further on).⁹¹⁶ In the tort of negligence, reasonable preventability of harm is a criterion applied in determining a breach of a duty. In the South African law of delict, reasonable foreseeability of harm as well as reasonable preventability of harm are factors in determining both wrongfulness and negligence but as stated an *ex post facto* objective approach is applied in determining wrongfulness while an objective-subjective *ex ante* approach is applied in determining negligence. Furthermore reasonable foreseeability of harm may be applied as a criterion in determining legal causation.⁹¹⁷

3.5 Defences to the tort of negligence

Peel and Goudkamp⁹¹⁸ classify the defences to the tort of negligence into “public policy defences” and “justifications”. Justifications are generally applicable when the defendant’s conduct is deemed reasonable and therefore no liability or limited liability, as a result of contributory fault on the part of the claimant, in the tort will ensue. In respect of public policy defences, a tort may have been committed on the face of it, but is excused by reasons of public policy. For example, the defence of “immunity”

⁹¹⁵ See chapter 3 paras 3.1.10- 3.1.11 and para 3.2.

⁹¹⁶ See para 4 below.

⁹¹⁷ See chapter 3 para 4.4.

⁹¹⁸ *Winfield and Jolowicz on tort* 782. They also refer to another category labelled “denials” where consent and *volenti non fit iniuria* would apply denying an element of the tort and are not really considered as defences. Witting *Street on torts* 316-317 (see para 2.4 above) agrees with this different way of categorising the defences from how they were traditionally viewed and classified. See *contra* McBride and Bagshaw *Tort* 735 fn 1 who do not agree with the usefulness of the rigorous classification of all the defences in English tort law.

may not lead to liability.⁹¹⁹ The defendant's conduct may result in liability in a number of torts and so too may a number of defences be raised.⁹²⁰ Generally, the onus of proving the defence rests with the defendant.⁹²¹ In this section, consent will not be discussed as it is more appropriate to discuss it as a defence under the torts of trespass to the person.⁹²² Illegality which is applicable to the tort of negligence and trespass to the person is discussed as a defence under the torts of trespass to the person.⁹²³ The influence of reasonableness on the defences, unfair contract terms, contributory negligence and *volenti non fit iniuria* will now be discussed briefly.

3.5.1 Unfair contract terms

The Unfair Contract Terms Act 1977 regulates terms in contracts relating to exemption or limitation of liability in tort,⁹²⁴ but applies only to "business liability".⁹²⁵ Business liability in this context refers to acting in the course of a business or where one occupies a business premises.⁹²⁶ Generally, any term in a contract or notice relating to exemption of liability must be reasonable.⁹²⁷ In terms of the Act, a defendant will therefore not escape liability in negligence where death or personal injury occurs to a claimant, while acting in the course of a business or occupying a business premises, in spite of the presence of a notice or contractual term excluding liability.⁹²⁸ Whether a term in a contract or notice is reasonable, is not always a simple question.⁹²⁹ In *Smith v Eric S Bush*,⁹³⁰ a disclaimer exempting surveyors from liability relating to the accuracy of their report on a property the claimant was intending to purchase, was considered unreasonable by the House of Lords. The surveyors were negligent in not reporting structural defects resulting in the claimant suffering serious financial loss.⁹³¹

⁹¹⁹ Peel and Goudkamp *Winfield and Jolowicz on tort* 783.

⁹²⁰ Peel and Goudkamp *Winfield and Jolowicz on tort* 783.

⁹²¹ Peel and Goudkamp *Winfield and Jolowicz on tort* 783.

⁹²² See para 2.4.1 above.

⁹²³ See para 2.4.7 above.

⁹²⁴ Where contributory fault may be applicable.

⁹²⁵ Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 770.

⁹²⁶ S 1(3) of the Unfair Contract Terms Act 1977.

⁹²⁷ S 2(2) of the Unfair Contract Terms Act 1977. See Peel and Goudkamp *Winfield and Jolowicz on tort* 786; *Witting Street on torts* 203.

⁹²⁸ According to s 2(1) of the Unfair Contract Terms Act 1977. See Peel and Goudkamp *Winfield and Jolowicz on Tort* 786; *Witting Street on torts* 203.

⁹²⁹ Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 773.

⁹³⁰ 1990 1 AC 831. See fn 711 below.

⁹³¹ See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 771.

Lord Griffiths⁹³² considered the following factors in respect of the reasonableness test: whether the parties had equal bargaining power; the impact of striking out the disclaimer; the practicality of expecting the claimant to get another opinion, advice or report; and how difficult the task was in relation to the disclaimer.⁹³³ Peel and Goudkamp⁹³⁴ submit that entering into a valid contract where the defendant is exempt from liability is best considered as a denial of an element in respect of the claimant's cause of action.

The influence of reasonableness on unfair contract terms is explicit. In instances where a term or clause is viewed as unreasonable, it may be struck out. In considering whether a term or clause is unreasonable and unfair, a number of factors depending on the circumstances of the case must be taken into account and weighed.

3.5.2 Contributory negligence

As mentioned in the previous chapter, contributory negligence will not be discussed in detail for the purposes of this thesis,⁹³⁵ save to point out briefly the influence of reasonableness, which is explicit in that the claimant's conduct is judged according to the standard of the reasonable person expressed as a percentage serving to reduce his award of damages. In practice "contributory negligence" is one of the most important defences to the tort of negligence.⁹³⁶ Because it currently⁹³⁷ provides more equitable results by limiting liability in apportioning the responsibility for the plaintiff's damages between both parties involved in the matter, it does affect the appeal and applicability of the defences such as consent which apply to completely exclude liability.⁹³⁸ Contributory negligence refers to the fault on the part of the claimant who

⁹³² *Smith v Eric S Bush* 1990 1 AC 831, 858-859.

⁹³³ See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 273-274; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 773; *Witting Street on torts* 203.

⁹³⁴ *Winfield and Jolowicz on tort* 786.

⁹³⁵ See chapter 3 para 4.3.

⁹³⁶ See *Witting Street on torts* 184.

⁹³⁷ Prior to the Law Reform (Contributory Negligence) Act 1945 "contributory negligence" applied as a complete defence in English common law. The doctrine of "common employment" previously limited liability where an employee was said to have assumed the risk of injury if such injuries were caused by the negligence of a co-employee. This doctrine was abolished by the Law Reform (Personal Injuries) Act 1948. See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 749.

⁹³⁸ *Witting Street on torts* 197.

materially contributed to his own loss or damage.⁹³⁹ Section 1 of the Law Reform (Contributory Negligence) Act⁹⁴⁰ provides for the claimant's damages to be reduced as the court deems "just and equitable" under the circumstances taking into account the claimant's contributory fault. "Fault" is defined in section 4 as "negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence". A claimant in this context will be negligent "if he failed to take as much care as the reasonable person in his position would have taken for his own safety".⁹⁴¹ The defendant need not show that the claimant owed him or another person a duty of care.⁹⁴² The following instances are some examples of where the courts found the claimant contributorily negligent:⁹⁴³ a passenger failed to wear his seatbelt;⁹⁴⁴ an employee who had been exposed to asbestos leading to him contracting cancer, thereafter materially contributed to making his condition worse by smoking cigarettes;⁹⁴⁵ a motorcyclist failed to wear a helmet;⁹⁴⁶ and where a driver had consumed alcohol knowing that his ability to drive carefully was affected.⁹⁴⁷ The standard of care required of the claimant is generally "what is reasonable in the circumstances"⁹⁴⁸ and is usually the same standard as that required by the defendant based on the reasonable person test which may be varied according to the circumstances.⁹⁴⁹ It depends on whether the claimant acted reasonably in taking care of himself compared with the conduct of the hypothetical reasonable person in similar circumstances.⁹⁵⁰ Thus wearing a seatbelt is a practical sensible thing to do even though the risk of an accident may be slight. The potential gravity of the harm that may occur can be great, while the cost of

⁹³⁹ Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 749; Steele *Tort* 271.

⁹⁴⁰ 1945.

⁹⁴¹ Witting *Street on torts* 185. Cf Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 754.

⁹⁴² See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 754; authority cited by Witting *Street on torts* 185 fn 11.

⁹⁴³ See Witting *Street on torts* 186.

⁹⁴⁴ See *Froom v Butcher* 1976 QB 286.

⁹⁴⁵ See *Badger v Ministry of Defence* 2005 EWHC 2941.

⁹⁴⁶ *O'Connell v Jackson* 1972 1 QB 270; *Capps v Miller* 1989 1 WLR 839.

⁹⁴⁷ *Owens v Brimmell* 1977 QB 859.

⁹⁴⁸ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 234.

⁹⁴⁹ See *Yachuck v Oliver Blais Co Ltd* 1949 AC 386; *Gogh v Thorne* 1966 1WLR 1387 (generally a child's conduct will be judged according to the standard of a reasonable child); *Daly v Liverpool Corporation* 1939 2 All ER 142. See also Jones *Clerk and Lindsell on Torts* 236-239; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 754; Witting *Street on torts* 186-187; McBride and Bagshaw *Tort* 793; para 3.4 above with regard to the principles applied in respect of the standard of the reasonable person as well as in respect of children.

⁹⁵⁰ Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 755.

avoiding such risk by wearing a seatbelt is minimal.⁹⁵¹ Furthermore, as Deakin, Johnston and Markesinis⁹⁵² point out, the fact that legislation provides that it is compulsory for a person to wear a seatbelt and a helmet is a useful indication but not necessarily a conclusive one, that it is “reasonable” to wear a helmet or safety belt.

However, Witting⁹⁵³ submits that the courts seem to be more lenient with the standard of the care applied to claimants with inherent infirmities.⁹⁵⁴ For example, in *Condon v Condon*,⁹⁵⁵ the claimant, a passenger, was injured in a motor vehicle accident and did not wear her seatbelt due to a phobia. It was held that in failing to wear the seatbelt, she did not fail to take reasonable care for her own safety. Witting⁹⁵⁶ submits that it is unlikely that the same leniency will be afforded to the defendant. The same goes for an insane person, where a defendant will be judged according to the standard of a reasonable insane person, but in the context of contributory negligence the claimant’s insanity will be considered in establishing how the reasonable person in the position would have acted. If a claimant is faced with an emergency due to the defendant’s negligent act, it will not necessarily lead to a finding of contributory negligence.⁹⁵⁷ It all depends on whether the claimant acted reasonably in the circumstances. Rescuers are also treated more leniently and the courts will not easily find contributory negligence on the part of rescuer⁹⁵⁸ unless such rescuer acted unreasonably⁹⁵⁹ with “reckless disregard” for his own safety.⁹⁶⁰ A claimant is entitled to assume that other persons owe them a duty to take “reasonable precautions for their safety” which would include for example, the claimant assuming that another driver will stop at a red robot.⁹⁶¹ If a claimant intentionally harms himself while of sound mind such as in the

⁹⁵¹ Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 755.

⁹⁵² *Markesinis and Deakin’s tort law* 755.

⁹⁵³ *Street on torts* 187-188.

⁹⁵⁴ Witting *Street on torts* 187.

⁹⁵⁵ 1978 RTR 483.

⁹⁵⁶ *Street on torts* 187.

⁹⁵⁷ See *Jones v Boyce* 171 ER 450; *Moore v Hotelplan Ltd* 2010 EWHC 276 QB; Witting *Street on Torts* 188.

⁹⁵⁸ What risks a rescuer should reasonably take should not be judged too harshly. See *Tolley v Carr* 2010 EWHC 2191 QB [23]; *Watt v Hertfordshire CC* 1954 1 WLR 835; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 24.

⁹⁵⁹ See *Harrison v British Railways Board* 1981 3 All ER 679; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 243.

⁹⁶⁰ Witting *Street on torts* 189.

⁹⁶¹ See *Granr v Sun Shipping Co Ltd* 1948 AC 549. However in *Purdue v Devon Fire and Rescue Services* 2002 EWCA Civ 1538, the claimant was found contributorily negligent in that even though the fire engine did not stop at the red robot, the court found that the reasonable person

case of *Reeves v Commissioner of Police of the Metropolis*,⁹⁶² he may be found contributorily negligent.⁹⁶³ The claimant's fault must be causally connected to the damage he suffers.⁹⁶⁴ If a claimant is deemed solely at fault for the damages he sustained, then the issue of contributory negligence should not arise.⁹⁶⁵ It seems that contributory negligence may not be an applicable defence in instances where a defendant intended to harm the claimant.⁹⁶⁶

The influence of reasonableness on contributory negligence is explicit in that the reasonableness of the plaintiff's conduct has an effect on whether his award for proven damages should be reduced or not. The reasonableness of both the claimant's and defendant's conduct is judged according to the standard of the reasonable person. It is reasonable to consider both the claimant's and defendant's conduct in determining the defendant's liability. It is reasonable to vary the standard of the reasonable person applied to the claimant as the standard is also varied in respect of the defendant taking into account subjective qualities of the person. In instances where a claimant has inherent susceptibilities or some legal disability for example, where the claimant is a minor or insane, it is reasonable to vary the standard to the reasonable child or reasonable insane person.

in the claimant's position would have noticed the fire engine and proceeded with caution. *Witting Street on torts* 189.

⁹⁶² 2000 1 AC 360. See para 3.3.1 above.

⁹⁶³ See *Corr v IBC Vehicles Ltd* 2008 1 AC 884 where the House of Lords were divided as to whether damages should be reduced due to the contributory negligence on the part of the deceased who committed suicide. No reduction was however applied. See also Jones in Jones (gen ed) *Clerk and Lindsell on torts* 229-230; *Witting Street on torts* 190; *Steele Tort* 272.

⁹⁶⁴ See *Lertora v Finzi* 1973 RTR 161 where the defendant was unable to prove that the other driver's injuries would have been less severe had he worn a seatbelt; *Condon v Condon* 1978 RTR 483; *Stanton v Collinson* 2009 EWHC 342 QB. See *contra*, *Jones v Livox Quarries Ltd* 1952 2 QB 608. Cf *Witting Street on torts* 191.

⁹⁶⁵ See *Pitts v Hunt* 1991 1 QB 24, 28; *Anderson v Newham College of Higher Education* 2003 ICR 212, 219; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 757; *Witting Street on torts* 195; Lunney and Oliphant *Tort* 305 .

⁹⁶⁶ See *Standard Chartered Bank v Pakistan National Shipping Corporation (Nos 2 and 4)* 2003 1 AC 959 [45]; *Pritchard v Co-operative Group Ltd* 2012 QB 320 [62] where Aikens LJ disapproved of contributory negligence in principle being used to reduce the claimant's damages in claims relating to battery or assault. See *contra* *Murphy v Culhane* 1977 QB 94, 98-99. See also McBride and Bagshaw *Tort* 793; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 228-229.

3.5.3 *Volenti non fit iniuria*

Volenti non fit iniuria refers to consent to injury or consent to the risk of injury.⁹⁶⁷ Consent to injury is discussed above as a defence to the intentional torts.⁹⁶⁸ Consent to the risk of injury in the tort of negligence may negate the element of breach of a duty of care, excluding liability in negligence.⁹⁶⁹ It would depend though on whether the defendant's conduct is considered reasonable.⁹⁷⁰ The question is whether the claimant had agreed, whether expressly or impliedly, to the risk of injury that materialised as a result of the defendant's lack of reasonable care.⁹⁷¹ The elements⁹⁷² required in respect of this defence are: a claimant must have knowledge⁹⁷³ of the nature and extent of the risk of injury that ensues, which is a subjective test;⁹⁷⁴ and the claimant must voluntarily⁹⁷⁵ agree to the risk of injury thereof, whether express or implied.⁹⁷⁶

Volenti non fit iniuria is rarely successful in excluding liability. It has been severely restricted mainly due to the fact that the requirements are applied strictly and that contributory negligence is a more appealing defence.⁹⁷⁷ It seems to apply in extreme

⁹⁶⁷ No harm is done to one who consents. See *Smith v Baker* 1891 AC 325, 350; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 250-251; *Witting Street on Torts* 196; McBride and Bagshaw *Tort* 744; Lunney and Oliphant *Tort* 280.

⁹⁶⁸ See para 2.4.1 above.

⁹⁶⁹ See *Thomas v Quartermaine* 1887 LR 18 QBD 685, 697-698; *Dann v Hamilton* 1939 1KB 509, 512; *Geary v JD Wetherspoon Plc* 2011 EWHC 1506 QB [46]; Peel and Goudkamp *Winfield and Jolowicz on tort* 787; *Witting Street on torts* 197 fn 100.

⁹⁷⁰ Peel and Goudkamp *Winfield and Jolowicz on tort* 787.

⁹⁷¹ *Woolridge v Sumner* 1963 2 QB 43, 69-70; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 763.

⁹⁷² See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 253.

⁹⁷³ Knowledge of the risk "must be full and complete" (Jones in Jones (gen ed) *Clerk and Lindsell on torts* 260).

⁹⁷⁴ In *Neeson v Acheson* 2008 NIQB 12, the claimant put her face in close proximity to her neighbour's dog who subsequently bit her. The court found that the defence of consent to the risk of injury was not applicable because she was unaware that the dog was dangerous and did not expect it to bite her, causing injury. In *Poppleton v Trustees of the Portsmouth Youth Activities Committee* 2007 EWHC 1567 QB, the claimant was held not to have consented to the risk of injury when he jumped from a height off an artificial climbing wall onto a mat on the floor. He broke his neck. It was held that he did not have full knowledge of the harm that could occur from his jump and that the flooring gave the false impression that it was safe to jump. See Peel and Goudkamp *Winfield and Jolowicz on tort* 788-789; *Witting Street on torts* 198-199.

⁹⁷⁵ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 258-259.

⁹⁷⁶ See Peel and Goudkamp *Winfield and Jolowicz on tort* 788; *Witting Street on torts* 199.

⁹⁷⁷ See *Nettleship v Weston* 1971 2 QB 691, 701; Peel and Goudkamp *Winfield and Jolowicz on tort* 788; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 253; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 765-766; *Witting Street on torts* 197; Steele *Tort* 279-281.

cases. A few cases will be considered to illustrate that the claimant's conduct must be clearly unreasonable with at least voluntary prior intentional conduct. In *Morris v Murray*,⁹⁷⁸ the claimant, after having numerous drinks with the defendant, agreed to take a joy ride with him on a light aircraft. The defendant had drunk a substantial amount of alcohol, approximately seventeen measures of whisky. The defendant piloted the aircraft which subsequently crashed soon after take-off. The claimant was severely injured and the defendant died. The claimant sued the defendant's estate in negligence and the legal representatives for the estate pleaded *volenti non fit iniuria* which was upheld by the court. The claimant's conduct of accepting a ride in the light aircraft with a pilot who had drunk so much alcohol, was considered dangerous.⁹⁷⁹ In *Freeman v Higher Park Farm*,⁹⁸⁰ the claimant, an experienced horse rider, wanted to have an exciting ride. She chose the horse and was aware that the horse had a tendency to buck but still wanted to ride it. While she was riding the horse, it did indeed buck causing her to fall. She sustained serious injuries and sued the owner of the stables for damages. The defendant raised voluntary assumption of risk which the court upheld.⁹⁸¹ In *Murray v Haringway Arena Ltd*,⁹⁸² a six-year-old child was injured by a puck while watching a game of ice hockey. The owner of the ice rink was not held liable in negligence. The court *inter alia* referred to factors in determining fault such as: the impracticality of taking reasonable steps to prevent the pucks from escaping; that there was not a huge risk of a person being injured by a puck; and that it was not a common occurrence of pucks being hit out of the rink.⁹⁸³ The child was held to have assumed the risk of injury. This decision has been criticised due to the court's conflation of the test of breach of a duty and the requirements relating to voluntary assumption of risk.⁹⁸⁴

⁹⁷⁸ 1991 2 QB 6.

⁹⁷⁹ See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 766-767; Witting Street on torts 197; Steele *Tort* 283; Lunney and Oliphant *Tort* 282-286.

⁹⁸⁰ 2009 EWCA Civ 1185.

⁹⁸¹ See Witting Street on torts 198.

⁹⁸² 1951 2 KB 529.

⁹⁸³ See also *Bolton v Stone* 1951 AC 850.

⁹⁸⁴ See Peel and Goudkamp *Winfield and Jolowicz on tort* 787-789 who do not agree with the court's reference to the tests of the reasonable person related to fault being conflated with "language of voluntary assumption of risk". They suggest that if the test of the reasonable person is employed especially when reference is made to preventative measures, then the courts should not refer to voluntary assumption of risk. See also Witting Street on torts 199.

The agreement requirement subsumes the knowledge requirement as it is argued that a person cannot agree to the risk of injury unless he knows about it.⁹⁸⁵ For example in *Dann v Hamilton*,⁹⁸⁶ the plaintiff accepted a lift with the defendant whom she knew was intoxicated. An accident occurred, the defendant died and the plaintiff was injured. When she sued for damages, the defence of *volenti non fit iniuria* was raised but the court held that she had not voluntarily assumed the risk of harm as she had not consented to the risk of injury. One must agree to the risk of injury with full and complete knowledge of the risk. In rescue cases it may also be difficult to meet the agreement and knowledge element.⁹⁸⁷ Voluntary assumption of risk is usually not applicable in the context of employment as it is difficult to prove that the employee, though aware of the risk of injury, agreed to it.⁹⁸⁸ However, in *Imperial Chemical Industries Ltd v Shatwell*,⁹⁸⁹ the defence succeeded where the claimant, a miner, with his brother agreed to detonate explosives which were deemed dangerous. They did not adhere to safety rules and regulations and merely wanted to get the job done quicker. It was held that they were fully aware of the risks involved yet deliberately disregarded all safety measures.⁹⁹⁰ Often when *volenti non fit iniuria* is raised, contributory negligence is also raised as a defence.⁹⁹¹ Section 149 of the Road Traffic Act⁹⁹² excludes *volenti non fit iniuria* from being pleaded by a driver who alleges that the plaintiff as a passenger consented to the risk of injury.⁹⁹³

It seems that *volenti non fit iniuria* is applicable when the claimant's conduct is clearly unreasonable. In South African law, consent to injury or to the risk of injury must not be *contra bonos mores*. Thus one cannot consent to murder or serious bodily injury

⁹⁸⁵ See *Bowater v Rowley Regis Corp* 1944 KB 476, 479; *Slater v Clay Cross Co Ltd* 1956; Peel and Goudkamp *Winfield and Jolowicz on tort* 788; *Witting Street on torts* 199; McBride and Bagshaw *Tort* 745.

⁹⁸⁶ 1939 1 KB 509.

⁹⁸⁷ See *Haynes v Harwood* 1935 1 KB 146; *Baker v TE Hopkins & Son Ltd* 1959 3 All ER 225; Peel and Goudkamp *Winfield and Jolowicz on tort* 790; *Witting Street on torts* 199-200; McBride and Bagshaw *Tort* 745.

⁹⁸⁸ See *Smith v Charles Baker & Sons* 1891 AC 325, 355; *Bowater v Rowley Regis Corp* 1944 KB 476, 480-481; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 1988 764-765; *Witting Street on torts* 200-201.

⁹⁸⁹ 1965 AC 656.

⁹⁹⁰ *Imperial Chemical Industries Ltd v Shatwell* 1965 AC 656, 672. See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 266-267; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 767; Steele *Tort* 283-284; Lunney and Oliphant *Tort* 287-290.

⁹⁹¹ Peel and Goudkamp *Winfield and Jolowicz on tort* 790-791.

⁹⁹² 1988.

⁹⁹³ See *Pitts v Hunt* 1991 1 QB 24; McBride and Bagshaw *Tort* 746.

as it would be regarded as *contra bonos mores* and unreasonable. In such instances *volenti non fit iniuria* cannot succeed as a defence but contributory fault (contributory intent or contributory negligence) may be applicable.⁹⁹⁴ The influence of reasonableness on *volenti non fit iniuria* is partially implicit and partially explicit. The influence of reasonableness is explicit with regard to the reasonableness of conduct and consciousness of the unreasonableness of conduct. In *Murray v Harringway Arena Ltd*,⁹⁹⁵ the reasonableness of the defendant's conduct was the deciding factor which resulted in the dismissal of the defence. In considering the reasonableness of the claimant's conduct, prior voluntary deliberate or reckless conduct may have a bearing. *Volenti non fit iniuria* may be applied even when the consent to the risk of injury may be considered unreasonable as in *Morris v Murray*,⁹⁹⁶ *Freeman v Higher Park Farm*,⁹⁹⁷ and *Imperial Chemical Industries Ltd v Shatwell*.⁹⁹⁸ However, even though conduct may be considered unreasonable as in *Dann v Hamilton*,⁹⁹⁹ the requirement of agreeing to the risk of injury or having full and complete knowledge of the risk of injury is difficult to prove. This seems to be the main reason why the defence has not been successfully applied in many cases.

4. Causation

The inquiry into causation is generally applicable to all torts where the same rules and principles apply.¹⁰⁰⁰ The basic question is – did the defendant's wrongful conduct *cause* harm or loss to the claimant and if so, whether the defendant ought to be held liable for the damage sustained.¹⁰⁰¹ Although causation is relevant to all torts, most of the case law dealing with causation concerns the tort of negligence. Therefore for convenience, it is discussed here under the tort of negligence. The test for causation

⁹⁹⁴ See chapter 3 para 3.4.1.

⁹⁹⁵ 1951 2 KB 529.

⁹⁹⁶ 1991 2 QB.

⁹⁹⁷ 2009 EWCA Civ 1185.

⁹⁹⁸ 1965 AC 656.

⁹⁹⁹ 1939 1 KB 509.

¹⁰⁰⁰ Peel and Goudkamp *Winfield and Jolowicz on tort* 161; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 56; Witting *Street on torts* 147; McBride and Bagshaw *Tort* 284.

¹⁰⁰¹ Witting *Street on torts* 147.

is traditionally¹⁰⁰² dependant on two components: “cause in fact” and “cause in law” or “remoteness”.

4.1 Factual causation

Firstly, there must be a causal link between the harm or loss suffered by the claimant, and the defendant’s conduct. This is referred to as “causation in fact”¹⁰⁰³ or “factual causation” (commonly used in South African law, from here on the term “factual causation” which is preferred will used). Although there are other relevant theories to establishing factual causation,¹⁰⁰⁴ the “but for test” – but for the defendant’s conduct would the harm or loss have occurred, is generally used by the courts.¹⁰⁰⁵ Thus if factual causation is absent, liability in negligence will not follow.

This is illustrated in *Barnett v Chelsea and Kensington Hospital Management Committee*.¹⁰⁰⁶ In this case, the plaintiff’s husband died of arsenic poisoning. He experienced vomiting after drinking tea and went to the casualty department of the hospital early in the morning, whereafter he was advised to go home without treatment and consult his own doctor later on. Although the hospital was in breach of a duty of care owed to the deceased, it was not the factual cause of his death as even if further examination and treatment were undertaken at the hospital he would have still died. In other words, the deceased died irrespective of the defendant’s negligence, the defendant’s conduct was not the cause of the claimant’s death.¹⁰⁰⁷ Nield J¹⁰⁰⁸ held that the wife failed to establish that the death of her husband was due to the negligence of the hospital on a balance of probabilities. The claimant must generally on a balance

¹⁰⁰² Some academic writers are of the view that there is only one question relating to causation, whilst others submit that there are more than two questions. The courts enquiry into causation however is still generally dependant on finding factual and legal causation. See MacBride and Bagshaw *Tort* 329-327 who refer to some alternative approaches to establishing causation. See also Steele *Tort* 167-172, 217-218.

¹⁰⁰³ See Peel and Goudkamp *Winfield and Jolowicz on tort* 162.

¹⁰⁰⁴ See the alternative approaches to the but-for test proposed by other academic writers mentioned in MacBride and Bagshaw *Tort* 329-337.

¹⁰⁰⁵ Peel and Goudkamp *Winfield and Jolowicz on tort* 165; Steele *Tort* 172.

¹⁰⁰⁶ 1969 1 QB 428.

¹⁰⁰⁷ See Peel and Goudkamp *Winfield and Jolowicz on tort* 165; Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 223; Witting *Street on torts* 149; McBride and Bagshaw *Tort* 288; Steele *Tort* 173; Lunney and Oliphant *Tort* 206-207.

¹⁰⁰⁸ *Barnett v Chelsea and Kensington Hospital Management Committee* 1969 1 QB 428, 433-434.

of probabilities, “more likely than not” prove that the harm or loss would have occurred as a result of the defendant’s conduct.¹⁰⁰⁹

There are indeed instances where the facts are complicated and there is uncertainty as to the causal link between the defendant’s conduct and harm suffered by the claimant. Jones¹⁰¹⁰ points out that uncertainty in establishing factual causation may broadly be divided into two categories. The first involves trying to establish what happened as a matter of “historical fact”, which may be complicated because hypothetical conduct of the claimant,¹⁰¹¹ defendant¹⁰¹² or third parties¹⁰¹³ is considered

¹⁰⁰⁹ Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 223; Steele *Tort* 172.

¹⁰¹⁰ In Jones (gen ed) *Clerk and Lindsell on torts* 63-64.

¹⁰¹¹ In *Chester v Ashfar* 2005 1 AC 134, the claimant had suffered back pain for a number of years. Her neurosurgeon advised her to have surgery which carried a 1-2% risk of nerve damage. The neurosurgeon however, failed to warn her of this risk. The claimant agreed to surgery which was carried out with due care and skill but resulted in nerve damage leaving her partially paralysed. She sued the neurosurgeon. At the trial, the court found that the neurosurgeon had breached his duty of care in not warning her of the risk, even though it was slight. However, the question to be considered was – if he would have told her about the risk what would have happened? It was established that she would not have had the operation on the day she did have it as she would have taken some time to consider the effect of the risks. The court held that had she had the surgery on another day it was more likely than not that she would not have suffered nerve damage and partial paralysis. The neurosurgeon subsequently appealed to the House of Lords submitting that she was likely to have consented to the operation and that even if it had been on a different occasion it carried the same risk. Lord Hope (163) stated that “[o]n policy grounds therefore I would hold that the test of causation is satisfied in this case. The injury was intimately involved with the duty to warn. The duty was owed by the doctor who performed the surgery that [the claimant] consented to. It was the product of the very risk that she should have been warned about when she gave her consent. So I would hold that it can be regarded as having been caused, in the legal sense, by the breach of that duty”. See discussion of this case in Jones in Jones (gen ed) *Clerk and Lindsell on torts* 67-70; Witting *Street on torts* 153-155; MacBride and Bagshaw *Tort* 294; Steele *Tort* 173-175.

¹⁰¹² For example, in *Bolitho v City and Hackney HA* 1998 AC 232 a child was suffering from a respiratory infection. While in hospital, the attending staff failed to attend to the child who thereafter sustained respiratory and cardiac arrest, brain damage, and eventually after a period of time died. Even though there was negligence, the issue of causation remained. The relevant question was – what would the doctor have done had she attended to the child? The expert evidence showed that if the child would have been intubated, cardiac arrest would not have occurred. However, the doctor submitted that if she would have attended to the child she would not have intubated him. The *locus classicus* test for the standard of care required of a doctor (239-240) enunciated in *Bolam v Friern Hospital Management Committee* 1957 1 WLR 583, 587 was considered relevant to causation in asking the question if the doctor did not act, would the omission be negligent? That is, in accordance with the practice accepted by a responsible body of medical professionals. The view of one particular medical specialist was relied upon in concluding that the hypothetical failure not to intubate the child was the correct course of action. Intubation would not have been the logical and reasonable choice (243)). Thus the child’s parents failed in their claim for compensation. See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 73-75; Steele *Tort* 175-176.

¹⁰¹³ The court may consider the hypothetical conduct of how a third party would have acted in the circumstances in trying to avoid the loss sustained by the claimant – see *Allied Maples Group Ltd v Simmons (A Firm)* 1995 1 WLR 1602 referred to by Jones in Jones (gen ed) *Clerk and Lindsell on torts* 75 as well as authority referred to by Steele *Tort* 176-178.

and there is “scientific uncertainty about the causal mechanism”.¹⁰¹⁴ An example of where hypothetical conduct was considered is *McWilliams v Sir William Arroll & Co Ltd*.¹⁰¹⁵ In this case, the deceased employee, a steel erector, fell from a height of seventy feet to his death. At the time of the fall he was not wearing a safety harness and it transpired that he often did not wear it save on two occasions. The wife claimed damages for breach of a duty of care as well as for breach of a statutory provision.¹⁰¹⁶ The defendants submitted that even if they would have provided the safety gear, the deceased would not have worn it. Thus the claim brought by the wife failed in that she was unable to show that but-for the employer’s conduct the deceased would not have died because in all probability he would not have worn the safety harness. Hypothetical unreasonable conduct of the deceased was inserted, leading to no factual causation in respect of a dependant’s claim.¹⁰¹⁷

In the second category, which mainly deals with claims for personal injury, there is evidential uncertainty due to lack of scientific knowledge about the aetiology of a medical condition which becomes more complicated where there are multiple causes of tortious and non-tortious contributing factors to the claimant’s condition.¹⁰¹⁸ In such instances a strict application of the but-for test is not applied as it would produce unjust or absurd results.¹⁰¹⁹

For example, the but-for test due to policy considerations is varied in instances where there is more than one cause to the claimant’s injury or more than one wrongdoer¹⁰²⁰

¹⁰¹⁴ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 63.

¹⁰¹⁵ 1962 1 WLR 295.

¹⁰¹⁶ S 36(2) of the Factories Act 1937 required employers to provide such safety gear.

¹⁰¹⁷ See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 65; *Witting Street on torts* 153; *McBride and Bagshaw Tort* 288.

¹⁰¹⁸ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 64.

¹⁰¹⁹ *Steele Tort* 175.

¹⁰²⁰ In *Fitzgerald v Lane* 1987 QB 781, the plaintiff, a pedestrian was struck first by a motor vehicle driven by the first defendant and then again by a motor vehicle driven by the second defendant travelling in the opposite direction. The plaintiff sustained partial tetraplegia. The Court of Appeal held both of the drivers equally liable on the grounds that they both materially increased the risk of injury to the plaintiff. In *Cook v Lewis* 1951 SCR 830 two hunters simultaneously shot at the plaintiff. The plaintiff was injured by one of the shots but it could not be proven which of the two defendant’s shots caused the injury. It was reasonably foreseeable that both hunters’ conduct would result in injury to someone like the plaintiff and they each breached the duty of care. The Canadian Supreme Court advised that where the injured person is unable to prove which of the two defendants caused his injury the but-for test would result in an unjust outcome. The onus falls on the defendants to disprove liability and if they fail, they will both be liable to compensate the injured person. In *Fairchild v Glenhaven Funeral Services* 2003 1 AC 32, Lord

who either independently or simultaneously caused harm to the claimant.¹⁰²¹ In instances where the harm or loss suffered by the claimant is a result of the defendant's conduct and some other natural or innocent cause, factual causation will be present if the defendant's conduct is considered a "material contribution" to the loss or injury, entitling the claimant to recover compensation.¹⁰²² This is seen as an exception to the but-for test.¹⁰²³

In cases where the defendant's breach of duty increased the risk of harm to the claimant, factual causation is difficult to prove using the but-for test, but the courts have stated that it is sufficient for the claimant only to prove the "material increase" in risk of harm in order to establish causation.¹⁰²⁴ The courts take into account *inter alia*

Nicholls (69-70) agreed with the Canadian Supreme Court's reasoning, stating that "good policy reasons exist for departing from the usual threshold 'but for' test of causal connection" (70). See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 92-93; Deakin Johnston and Markesinis *Markesinis and Deakin's tort law* 224; MacBride and Bagshaw *Tort* 297.

¹⁰²¹ There are a number of reported cases dealing with successive torts and successive causes but it will suffice for the purpose of this study to mention a few in order to illustrate the strict application or variation of the but-for test. In *Baker v Willoughby* 1970 AC 467, the plaintiff sustained an injury to his left leg as a result of being involved in a motor vehicle accident. Before his trial, he sustained gunshot wounds to the same leg during a robbery (separate tort) and his leg was subsequently amputated (a case of consecutive torts). The amputation superseded the initial injury. The defendant submitted that he was liable only for the loss suffered to the plaintiff prior to the robbery. The House of Lords rejected the defendant's argument holding him fully liable in respect of the damage caused despite the occurrence of the second incident. Thus a strict application of the but-for test would have resulted in the plaintiff only recovering a portion of his loss resulting from two independent acts. The House of Lords opined that it would be an injustice to the claimant. See however, *contra Jobling v Associated Dairies Ltd* 1982 AC 794 where the House of Lords held the defendant liable for damages only up to the point of the effects of the second independent (non-tortious) incident. A strict application of the but-for test was applied. In *Grey v Thomas Trains* 2009 UKHL 33, the House of Lords followed the approach in *Jobling v Associated Dairies Ltd* 1982 AC 794 also taking into account policy considerations. See Peel and Goudkamp *Winfield and Jolowicz on tort* 168-170; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 132-135; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 234-238; Witting *Street on torts* 167-168; Steele 178-179; Lunney and Oliphant *Tort* 244-253.

¹⁰²² In *Bonnington Castings Ltd v Wardlaw* 1956 AC 613, the claimant contracted pneumoconiosis as a result of inhaling air containing silica while in the course and scope of employment. The dust had come from two sources, one "natural" and one deemed "tortious". There was no evidence showing the proportions of the natural and tortious dust inhaled. Thus the but-for test could not be applied. Nevertheless, the House of Lords held that the claimant only need prove that the tortious dust had made a material contribution to the disease he contracted. See also *Bailey v Ministry of Defence* 2009 1 WLR 1052; *Dickins v O2 Plc* 2008 EWCA Civ 1144; Peel and Goudkamp *Winfield and Jolowicz on tort* 166; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 79-80, 83-84; Witting *Street on torts* 155-156; McBride and Bagshaw *Tort* 292 fn 19; Steele *Tort* 219-220, 247-250; Lunney and Oliphant *Tort* 222-226.

¹⁰²³ See *Sienkiewicz v Grief (UK) Ltd* 2011 2 AC 229, 269-270; Peel and Goudkamp *Winfield and Jolowicz on tort* 167 fn 41; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 57; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 221.

¹⁰²⁴ For example, in *McGhee v National Coal Board* 1973 1 WLR 1, the claimant contracted dermatitis as a result of brick dust settling on sweaty skin. His job involved working in a brick

policy considerations in order to reach a fair and just outcome.¹⁰²⁵ MacBride and Bagshaw¹⁰²⁶ submit that “[i]t seems ... that inquiries into causation are neither exclusively a matter of fact nor exhaustively a matter of policy. They are, at base, inquiries into questions of fact – but the courts will adjust the outcome of those inquiries where they threaten to work injustice, or harm public interest”.

For example, in the well-known case of *Fairchild v Glenhaven Funeral Services Ltd*¹⁰²⁷ (hereinafter referred to as “*Fairchild*”, which dealt with combined appeals), three claimants had been exposed to asbestos during their employment at a number of different sites and under a number of different employers. They had developed a type of lung cancer called mesothelioma as a result of exposure to asbestos. According to the evidence, the condition can be caused by a single fibre of asbestos and once settled in the lung can lay dormant for up to forty years till a tumour develops and symptoms appear. The claimants were unable to prove through medical evidence which employer exposed them to the fibre. Lord Bingham, referring to policy considerations, stated:¹⁰²⁸

“There is a strong policy argument in favour of compensating those who have suffered grave harm, at the expense of their employers who owed them a duty to protect them against that very harm and failed to do so, when the harm can only have been caused by breach of that duty and when science does not permit the victim accurately to attribute, as between several

kiln. The court did not find the defendant in breach of a duty because the plaintiff was exposed to such dust but found the defendant in breach of duty for not providing washing facilities which would have allowed him to wash off the brick dust immediately after working. Instead he was forced to endure the brick dust on his skin until he was able to wash it off at home. Medical evidence could only prove that the dermatitis was caused from the brick dust and it was uncertain whether the plaintiff would have contracted the dermatitis anyway due to exposure to the dust. Causation was thus difficult to prove using the but-for test due to lack of evidence. The court held that the claimant only had to prove that the exposure to the dust increased the risk of him contracting dermatitis. The principle in *McGhee* was followed in *Fairchild v Glenhaven Funeral Services* 2003 1 AC 32 (discussed above) and *Barker v Chorus UK Ltd* 2006 2 AC 572 (a case dealing with the increased risk of contracting mesothelioma, the court introduced proportional liability between several wrongdoers but the Compensation Act 2006 negated the effect of this decision reinstating joint and several liability between joint wrongdoers). See *Durham v BAI (Run Off) Ltd (Employers' Liability Insurance 'Trigger' Litigation)* 2012 1 WLR 867 and *Sienkiewicz v Grief (UK) Ltd* 2011 2 AC 229. See also the discussion of the above mentioned cases by Peel and Goudkamp *Winfield and Jolowicz on tort* 171- 179; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 88-89; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 225-233; Witting *Street on torts* 156-164; MacBride and Bagshaw *Tort* 297-304; Steele *Tort* 220-230, 232-242; Lunney and Oliphant *Tort* 226-244. See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 230; MacBride and Bagshaw *Tort* 337-339.

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Tort 339.

2003 1 AC 32.

Fairchild v Glenhaven Funeral Services 2003 1 AC 32, 67.

employers, the precise responsibility for the harm he has suffered. I am of opinion that such injustice as may be involved in imposing liability on a duty-breaking employer in these circumstances is heavily outweighed by the injustice of denying redress to a victim.”

Lord Hoffman¹⁰²⁹ opined that “it would be both inconsistent with the policy of the law imposing the duty and morally wrong for [the other Lords] to impose causal requirements which exclude liability”. Lord Nicholls¹⁰³⁰ too stated that “[a]ny other outcome would be deeply offensive to instinctive notions of what justice requires and fairness demands”.¹⁰³¹ Thus the but-for test was relaxed and the House of Lords held, following the principle laid out in *McGhee v National Coal Board*¹⁰³² that the test to be applied was whether the defendant had materially increased the risk of harm toward the plaintiff.¹⁰³³ The burden of proof was reversed and the employers were held jointly and severally liable.¹⁰³⁴ If the loss is divisible, the defendant may only be held liable for the portion of loss that he caused.¹⁰³⁵ If the loss is indivisible then each wrongdoer is in principle fully liable for the damage caused to the claimant save where there is contributory fault on the part of the claimant.¹⁰³⁶

The “loss of chance” principle has been considered in establishing causation where there is evidential uncertainty. However, statistical evidence and hypothetical outcomes considered in instances where the claimant was deprived of the chance to gain a benefit and or avoid a loss have been debated in a number of jurisdictions.¹⁰³⁷

¹⁰²⁹ *Fairchild v Glenhaven Funeral Services* 2003 1 AC 32, 75.

¹⁰³⁰ *Fairchild v Glenhaven Funeral Services* 2003 1 AC 32, 59.

¹⁰³¹ See Peel and Goudkamp *Winfield and Jolowicz on tort* 172.

¹⁰³² 1973 1 WLR 1.

¹⁰³³ See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 108-112 who discuss in detail under which circumstances a claimant may rely on a “material increase” in risk in order to establish causation stemming from *McGhee* and *Fairchild v Glenhaven Funeral Services* 2003 1 AC 32.

¹⁰³⁴ See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 93-98; McBride and Bagshaw *Tort* 297-304.

¹⁰³⁵ In *Thompson v Smiths Shiprepairers (North Shields) Ltd* 1984 QB 405, the defendants’ were only held liable for the further damage caused by the breach of duty of care in respect of the claimant’s hearing and not the initial damage (the claimant’s hearing was initially impaired). In *Holtby v Brigham Cowan (Hull) Ltd* 2000 3 All ER 421, the claimant worked for different employees over a period of forty years. He developed asbestosis and sued one of the employees for the full damage relying on the principle established in *Bonnington Castings Ltd v Wardlaw* 1956 AC 613. The court held that the defendants’ were liable only for that proportion of time that the claimant was exposed to the asbestos dust while employed by them. See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 81-83; Peel and Goudkamp *Winfield and Jolowicz on tort* 166; McBride and Bagshaw *Tort* 291-292; Steele *Tort* 231-232.

¹⁰³⁶ *McGhee v National Coal Board* 1973 1 WLR 1 is an example of a situation where the harm suffered was indivisible. See also Steele *Tort* 178; McBride and Bagshaw *Tort* 292-293.

¹⁰³⁷ This is evident in English law and American law (see chapter 5 para 4). However in the French law of delict, the loss of chance principle is more readily applied, see chapter 6 para 3.1.

English law, like American law, is divided.¹⁰³⁸ In *Hotson v East Berkshire Area Authority*,¹⁰³⁹ a boy fell from a tree injuring his hip. He was taken to hospital but they failed to diagnose a fracture and sent him home. Five days later he was taken back to hospital where the x-ray confirmed the fracture. He underwent treatment and suffered avascular necrosis due to the failure of blood supply reaching the injured hip. According to the evidence, there was a seventy-five percent chance that he would in any event have developed the condition and a twenty-five percent chance that it was due to the delay in diagnosis. The trial judge held the hospital liable for the loss of the twenty-five percent chance that the condition could have been averted. The House of Lords subsequently held that the claimant did not establish on a balance of probabilities that the hospital's breach of a duty caused the avascular necrosis, because there was a seventy-five percent chance that it was due to the fall. The claimant was not entitled to any compensation for loss of chance of recovery. Although this decision was criticised,¹⁰⁴⁰ it was followed in *Gregg v Scott*.¹⁰⁴¹ However, in *Allied Maples Group Ltd v Simmons and Simmons*,¹⁰⁴² the "loss of chance" succeeded in respect of a negligent omission resulting in economic loss. The courts seem generally reluctant to allow claims based on the loss of chance of avoiding personal injury.¹⁰⁴³ The courts also seem generally reluctant to rely solely on statistical evidence. MacBride and Bagshaw¹⁰⁴⁴ point out that in *Sienkiewicz v Grief (UK) Ltd*,¹⁰⁴⁵ the "Supreme Court Justices ... were hostile to the use of *general* statistical information to establish that *a particular event actually happened*".

Adjudicators have referred to a common sense approach over the philosophical and scientific approach to establishing causation.¹⁰⁴⁶ Alternatively adjudicators use the

¹⁰³⁸ See Peel and Goudkamp *Winfield and Jolowicz on tort* 182-184.

¹⁰³⁹ 1987 AC 750.

¹⁰⁴⁰ See MacBride and Bagshaw *Tort* 306 fn 65 who refer to academic writers' views.

¹⁰⁴¹ 2005 2 AC 176.

¹⁰⁴² 1995 1 WLR 1602.

¹⁰⁴³ For purposes of this study, cases dealing with the "loss of chance" will not be discussed in detail, for an in depth discussion on this topic see Peel and Goudkamp *Winfield and Jolowicz on tort* 180-184; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 112-128; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 238-241; Street *Tort* 150-153, 253-268; MacBride and Bagshaw *Tort* 304-312; Lunney and Oliphant *Tort* 207-221.

¹⁰⁴⁴ *Tort* 296.

¹⁰⁴⁵ 2011 2 AC 229.

¹⁰⁴⁶ See *Alphacell v Woodward* 1972 AC 824, 847; *Environment Agency v Empress Car Co (Abertillery) Ltd* 1999 2 AC 22, 29; Jones in Jones (gen ed) *Clerk and Lindsell on torts*; Steele *Tort* 170; Lunney and Oliphant *Tort* 253-255.

language and terminology relating to causation to decide on questions of policy on for example which party should take the loss or which result will lead to preventing future loss.¹⁰⁴⁷ Hart and Honoré¹⁰⁴⁸ submit that responsibility for consequences of one's conduct in addition to public policy is considered in many judgments and there is a common sense approach to establishing causation.

4.1.1 Conclusion

In respect of factual causation, the but-for test is the general test applied. However, as illustrated through the discussion of the English case law where there is a lack of evidence, uncertainty as to the facts relating to the causing of harm, or where the test produces unjust or absurd results, the test is relaxed or may not apply. To fill in this gap or ensure that unjust results are not reached, policy considerations are referred to and the principles of fairness and justice are applied. The common sense approach in any event relates to reasonableness, fairness and justice.

Where there is a lack of evidence and uncertainty about the cause of harm suffered by the claimant or where there are multiple causes to the claimant's harm or loss suffered, it may be reasonable to hold, if applicable, joint wrongdoers jointly liable. Finding factual causation by using the test of "material contribution" or that the defendant's conduct materially increased the risk of harm toward the plaintiff, leads to a reasonable, fair and just result. If the loss is divisible it is reasonable that the defendant should be held liable only for that portion of the loss he caused. Naturally, if there is contributory fault on the part of the claimant, it is reasonable that contributory fault should be considered in reducing his claim.

The influence of reasonableness of factual causation is implicit in the sense that without factual causation in the particular tort, the defendant cannot be held liable. In respect of the but-for test, even though references to reasonable and unreasonable conduct may occur, it is submitted that the but-for test remains mostly value-neutral and that the influence of reasonableness here is usually implicit. In cases such as that

¹⁰⁴⁷ Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 219.

¹⁰⁴⁸ *Causation in the law* 1 referred to by Steele *Tort* 170-171. See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 219.

of *Fairchild*¹⁰⁴⁹ where the but-for test is relaxed, in actual fact the but-for test is applied to the combined conduct of all the defendants.¹⁰⁵⁰ Therefore but-for the combined conduct of the defendants', the harm to the plaintiffs' would not have occurred. The burden of proving the causal link is reversed and is placed upon the defendants, thus in terms of policy it is fair and reasonable in such circumstances to find a causal link. The claimant as the innocent person should not bear his own loss and be without redress. In English law, it is evident that factual causation is not always purely factual as in South African law,¹⁰⁵¹ policy considerations, and the concepts of reasonableness, fairness and justice are considered. Where these considerations are given effect the influence of reasonableness is explicit.

4.2 Remoteness of damage (legal causation)

Once factual causation has been established, the claimant must then prove that the loss suffered is not too remote a consequence of the defendant's conduct.¹⁰⁵² The term "remoteness of damage" is commonly used to refer to what is considered as "legal causation" in South African law. In American law the terms "proximate cause" or "scope of liability"¹⁰⁵³ are commonly used.¹⁰⁵⁴ Peel and Goudkamp¹⁰⁵⁵ refer to the question as: "is it within the range of that for which it is just to make the defendant responsible". The question of remoteness of damage in a strict sense¹⁰⁵⁶ deals with limiting liability, involving legal policy,¹⁰⁵⁷ and principles of fairness,¹⁰⁵⁸ justice and

¹⁰⁴⁹ *Fairchild v Glenhaven Funeral Services* 2003 1 AC 32.

¹⁰⁵⁰ See Restatement Third of Torts (Liability for Physical and Emotional Harm) § 27 cmt f (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 324; chapter 5 para 4.1.

¹⁰⁵¹ See chapter 3 para 5.1.

¹⁰⁵² Jones in Jones (gen ed) *Clerk and Lindsell on torts* 56.

¹⁰⁵³ See Stapleton 2003 *LQR* 388. Peel and Goudkamp *Winfield and Jolowicz on tort* 164 also prefer the term "scope of liability" in that it "conveys the idea that we are concerned with setting limits to the defendant's responsibility after the first stage has passed" (i.e factual causation has been established). Steele *Tort* 168 points out that although this manner of questing is simpler, it can lead to an "open enquiry and many factors could, in principle, be relevant".

¹⁰⁵⁴ See Peel and Goudkamp *Winfield and Jolowicz on tort* 163-164.

¹⁰⁵⁵ *Winfield and Jolowicz on tort* 161. See also Jones in Jones (gen ed) *Clerk and Lindsell on torts* 58.

¹⁰⁵⁶ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 156 point out that the notion of remoteness of damage does not strictly deal with causation (except when the direct consequences test is applied which relates to causation) but rather with attributing liability.

¹⁰⁵⁷ See *Gregg v Scott* 2005 AC 176,197 where Lord Hoffmann referred to policy considerations; *Fairchild v Glenhaven Funeral Services Ltd* 2002 All ER 305; *Barker v Corus UK Ltd* 2006 2 AC 572.

¹⁰⁵⁸ Peel and Goudkamp *Winfield and Jolowicz on tort* 163; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 5.

reasonableness.¹⁰⁵⁹ “Remoteness of damage” deals with “attributing responsibility”¹⁰⁶⁰ to someone or imputing liability which is a normative enquiry involving a value judgment.¹⁰⁶¹ From here on for the sake of convenience, the term “legal causation” will be used as opposed to “remoteness of damage” or “cause in law”.

With respect to the tort of negligence,¹⁰⁶² the criterion applied to establish legal causation is currently the reasonable foreseeability of harm. Thus the defendant will only be held liable for harm or loss of a kind which a reasonable person should have foreseen at the time of the breach.¹⁰⁶³ From 1921 stemming from *Re Polemis and Furness, Withy & Co Ltd*¹⁰⁶⁴ up until the decision of the *Wagon Mound (No. 1)*,¹⁰⁶⁵ the test for legal causation was based on the direct consequences theory. In the *Wagon Mound (No. 1)* the Privy Council dismissed the direct consequences theory stating¹⁰⁶⁶ that:

“it does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage the actor should be liable for all consequences however unforeseeable and however grave, so long as they can be said to be ‘direct’”.¹⁰⁶⁷

In the *Wagon Mound (No. 1)*, the Privy Council found that the defendants were not liable for the damage caused because the type of damage, in that case damage caused by fire, was unforeseeable. Thus the Privy Council enunciated that the test for

¹⁰⁵⁹ Peel and Goudkamp *Winfield and Jolowicz on tort* 193-194.

¹⁰⁶⁰ See *Environment Agency v Empress Car Co (Abertillery) Ltd* 1999 2 AC 22, 29 according to Lord Hoffmann. Cf Peel and Goudkamp *Winfield and Jolowicz on tort* 164; Witting *Street on torts* 148.

¹⁰⁶¹ See Lunney and Oliphant *Tort* 205 in reference to Stapleton 2003 119 *LQR* 388.

¹⁰⁶² As well as public nuisance – see Peel and Goudkamp *Winfield and Jolowicz on tort* 160.

¹⁰⁶³ See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 162. Steele *Tort* 187 who points out that by adopting foreseeability in this sense illustrates that “remoteness is aligned with duty and breach, rather than being guided by ‘causal’ ideas”.

¹⁰⁶⁴ 1921 3 KB 560.

¹⁰⁶⁵ *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* 1961 AC 388.

¹⁰⁶⁶ 1961 AC 388, 422.

¹⁰⁶⁷ This reasoning and justification for the preference of using the reasonable foreseeability of harm test in establishing remoteness of damage as opposed to the direct consequences tests has not convinced some academic writers. For example, Peel and Goudkamp *Winfield and Jolowicz on tort* 187 point out that with regard to negligence there is “unreasonable risk of causing some foreseeable” harm to the claimant and that there may be greater injustice in applying the reasonable foreseeability of harm test than the direct consequences test. Jones in Jones (gen ed) *Clerk and Lindsell on torts* 162-163 also point out that the reference to the moral and justice basis of the test are not convincing and that in practice the reasonable foreseeability test is not that different from the direct consequence test. Steele *Tort* 187 points out that some harm which was not foreseeable will indeed be recovered if it is the right kind of harm.

legal causation was the reasonable foreseeability¹⁰⁶⁸ of the type of harm.¹⁰⁶⁹ The precise manner in which the harm occurred and the extent of the harm need not be foreseeable.¹⁰⁷⁰ The defendant should not be held liable for unforeseeable consequences or loss beyond the scope of his responsibility.¹⁰⁷¹

Witting¹⁰⁷² points out that since the decision of the *Wagon Mound (No. 1)*,¹⁰⁷³ courts at all levels have followed the principle that “the harm suffered must be of a kind, type, or class that was reasonably foreseeable as a result of the defendant’s negligence”. The courts have been flexible and with their interpretation of what kind of injury could have been reasonably foreseeable depending on the circumstances of the case. At times a liberal approach is applied while at times a more narrow approach is applied leading to different results in concluding whether there is legal causation. A discussion of a few cases¹⁰⁷⁴ will suffice in illustrating this point.

In *Hughes v Lord Advocate*,¹⁰⁷⁵ a liberal interpretation was applied. A paraffin lamp exploded causing injury to a boy. It was unforeseeable that the lamp would explode causing injury but the defendant was held liable. The court held that the Post Office employees had breached their duty by leaving a manhole unattended where they had left the lamps and that the employees should have foreseen *inter alia* that someone like the boy may fall in the manhole or suffer a burn from the lamp. The harm was considered not too remote and the type of damage was reasonably foreseeable, irrespective of the manner in which the damage occurred or the extent of the harm.

¹⁰⁶⁸ See Peel and Goudkamp *Winfield and Jolowicz on tort* 185-186; Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 221.

¹⁰⁶⁹ There has been much academic debate over how to interpret the type or kind of harm reasonably foreseeable and it seems that a wider interpretation is applied in cases of personal injury while a more narrow approach is applied in cases of pure economic loss and damage to property (see discussion by Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 222, 249-250).

¹⁰⁷⁰ See *Jolly v Sutton* LBC 2000 1 WLR 1082, 1090; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 162; McBride and Bagshaw *Tort* 343.

¹⁰⁷¹ Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 221.

¹⁰⁷² *Street on torts* 175. See also cases discussed by Witting *Street on torts* 175-176.

¹⁰⁷³ *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* 1961 AC 388.

¹⁰⁷⁴ See discussion of the cases by Peel and Goudkamp *Winfield and Jolowicz on tort* 188, 191; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 164-166; Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 250-251; Witting *Street on torts* 175-177; McBride and Bagshaw *Tort* 343-346; Steele *Tort* 190-194.

¹⁰⁷⁵ 1963 AC 837.

Lord Pearce¹⁰⁷⁶ stated that “to demand too great precision in the test of foreseeability would be unfair ... since the facets of misadventure are innumerable”. Lord Morris stated:¹⁰⁷⁷

“The circumstances that an explosion as such would not have been contemplated does not alter the fact that it could reasonably have been foreseen that a boy who played in and about the canvas shelter and played with the things that were thereabouts might get hurt and might in some way burn himself. That is just what happened. The [boy] did burn himself, though his burns were more grave than would have been expected. The fact that the features or developments of an accident may not reasonably have been foreseen does not mean that the accident itself was not foreseeable. The [boy] was, in my view, injured as a result of the type or kind of accident or occurrence that could reasonably have been foreseen.”¹⁰⁷⁸

In *Tremain v Pike*¹⁰⁷⁹ a narrow interpretation was applied. A worker contracted Weil's disease as a result of coming into contact with substances which rats had urinated on. The court held that the contracting of Weil's disease was unforeseeable in comparison to contracting a disease from a rat bite or food poisoning from food or drink contaminated by rats, which was foreseeable. Whilst it was foreseeable that he may contract a disease by a rat bite, Weil's disease did not fall within the foreseeable kind or class of diseases that could be contracted.

In *Jolley v Sutton LBC*,¹⁰⁸⁰ the defendants omitted to remove a boat from their property. Two boys worked on the boat in an attempt to repair it but unfortunately one of them sustained severe injuries as a result of the rotting boat falling on his back. In the Court of Appeal it was held that it was not foreseeable that the boys would try to repair the boat and sustain the injury sustained by the injured boy. This decision was appealed and the House of Lords took a broad approach in interpreting the reasonable foreseeability of the type of harm, holding that the type of harm included injury as a result of meddling with an abandoned boat.

¹⁰⁷⁶ *Hughes v Lord Advocate* 1963 AC 837, 853. See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 164.

¹⁰⁷⁷ *Hughes v Lord Advocate* 1963 AC 837, 852.

¹⁰⁷⁸ See *contra Doughty v Turner Manufacturing Co Ltd* 1964 1 QB 518 where the court did not follow the same liberal interpretation as in *Hughes v Lord Advocate* 1963 AC 837. Quite the opposite, the court held that the manner and extent of the injuries suffered by the victim as a result of an explosion were not reasonably foreseeable.

¹⁰⁷⁹ 1969 1 WLR 1556.

¹⁰⁸⁰ 2000 1 WLR 1082.

In spite of the general notion that the defendant may be held liable for the foreseeable harm, it does not necessarily mean as stated by Lord Rodger¹⁰⁸¹ that the defendant will be liable “for all damage that was reasonably foreseeable: depending on the circumstances, the defender may not be liable for damage caused by a novus actus interveniens or unreasonable conduct on the part of the pursuer, even if it was reasonably foreseeable”. At times a court will not attribute liability on a defendant based on policy considerations in that it is not reasonable or appropriate to impute such liability.¹⁰⁸²

The decision of the *Wagon Mound (No. 1)*¹⁰⁸³ has not affected the thin-skull principle, thus all that is relevant is that the kind of damage must be reasonably foreseeable, once that is established, the magnitude of the loss is irrelevant and the defendant will be liable for the full loss, taking his victim as he finds him.¹⁰⁸⁴ For example, in *Smith v Leech Brain & Co Ltd*¹⁰⁸⁵ a fleck of molten metal splashed onto an employee’s lip. The employer had not taken adequate steps to protect the employee. The burn on the lip caused the tissue to become cancerous resulting in his death. The employee thus had a pre-existing condition, that is, pre-malignant cancerous cells in the lip which became malignant as a result of the burn he sustained. The burn was a reasonably foreseeable consequence of the defendant’s negligence and it was not necessary to prove that the development of cancer was foreseeable or that the ordinary person would not have died. The thin-skull rule applied and the defendant was held liable for the employee’s death.¹⁰⁸⁶

¹⁰⁸¹ In *British Steel Plc v Simmons* 2004 ICR 585, 607. See also Peel and Goudkamp *Winfield and Jolowicz on tort* 193.

¹⁰⁸² Peel and Goudkamp *Winfield and Jolowicz on tort* 193-194.

¹⁰⁸³ *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* 1961 AC 388.

¹⁰⁸⁴ Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 247.

¹⁰⁸⁵ 1962 2 QB 405.

¹⁰⁸⁶ See also *Robinson v Post Office* 1974 2 All ER 737; Peel and Goudkamp *Winfield and Jolowicz on tort* 189-190; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 170-172; Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 249; Witting *Street on torts* 178-180; McBride and Bagshaw *Tort* 346-347; Steele *Tort* 187-189 who refers to a number of other cases.

In respect of the intentional torts,¹⁰⁸⁷ the reasonable foreseeability test in establishing legal causation does not seem to apply.¹⁰⁸⁸ Instead, the direct consequences test applies – the harm or loss suffered by the claimant will not be considered a remote consequence if it was a “direct consequence” of the intended tort.¹⁰⁸⁹ For example, in respect of the torts of trespass to the person, the reasonable foreseeability of harm test is not applied; the test applied in establishing legal causation is “directness of the consequence”.¹⁰⁹⁰ The intention to harm “disposes of any question of remoteness”.¹⁰⁹¹ A defendant who intended to harm the claimant may, therefore not only be liable for the intended direct consequences but also for the reasonably foreseeable consequences,¹⁰⁹² and unforeseeable, consequences.¹⁰⁹³

Lord Rodger in *Simmons v British Steel plc*¹⁰⁹⁴ in summarising the authority with respect to the test for remoteness stated:

“the ultimate test is whether the damage was reasonably foreseeable ... once liability is established, any question of the remoteness of damage is to be approached along the following lines which may, of course, be open to refinement and development. (1) The starting point is that a defender is not liable for a consequence of a kind which is not reasonably foreseeable (2) While a defender is not liable for damage that was not reasonably foreseeable, it does not follow that he is liable for all damage that was reasonably foreseeable: depending on the circumstances, the defender may not be liable for damage caused by a *novus actus interveniens* or unreasonable conduct on the part of the pursuer, even if it was reasonably foreseeable (3) Subject to the qualification in (2), if the pursuer's injury is of a kind that was foreseeable, the defender is liable, even if the damage is greater in extent than was foreseeable or it was caused in a way that could not have been foreseen (4) The defender must take his victim as he finds him (5) Subject again to the qualification in (2), where personal injury to the pursuer was reasonably foreseeable, the defender is liable for any personal injury, whether physical or psychiatric, which the pursuer suffers as a result of his wrongdoing”.

¹⁰⁸⁷ It seems that the same remoteness principle applicable to intentional torts may be applicable to intentionally committed non-intentional torts. See discussion by McBride and Bagshaw *Tort* 350-351 as well as the cases referred to.

¹⁰⁸⁸ For example, in respect of defamation, the question of remoteness of damage is not applicable and it rarely arises in cases of breach of a statutory duty. See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 157; McBride and Bagshaw *Tort* 349-350.

¹⁰⁸⁹ McBride and Bagshaw *Tort* 350.

¹⁰⁹⁰ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 157.

¹⁰⁹¹ *Quinn v Leatham* 1901 AC 495, 537.

¹⁰⁹² See *Scott v Shepherd* 1773 2 WBI 892 also referred to by Peel and Goudkamp *Winfield and Jolowicz on tort* 194 and Jones in Jones (gen ed) *Clerk and Lindsell on torts* 159-160.

¹⁰⁹³ See Peel and Goudkamp *Winfield and Jolowicz on tort* 194; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 159-160; McBride and Bagshaw *Tort* 341.

¹⁰⁹⁴ 2004 SC 94, 115.

The *novus actus interveniens* may manifest itself in: an act of nature;¹⁰⁹⁵ conduct by a third party; or conduct by the claimant, and is generally applicable if it was not reasonably foreseeable.¹⁰⁹⁶ Reasonable foreseeability of harm however is not the decisive test, as common sense¹⁰⁹⁷ fairness, policy considerations and other factors¹⁰⁹⁸ pertinent to the case may be considered.¹⁰⁹⁹ Jones¹¹⁰⁰ points out that although “common sense may point the way, the language of causation tends to obscure the evaluative nature of the decisions that the courts must inevitably make”.

Depending on the circumstances of the case the act of the claimant could either result in a break in the causal link or the claimant may be found contributorily negligent resulting in apportionment of liability.¹¹⁰¹ It is evident that it depends on whether the claimant’s conduct is considered reasonable and in some cases the relationship between the claimant and defendant as well as reasonable foreseeability of harm where a duty of care has been established. For example, in *Reeves v Commissioner of Police of the Metropolis*,¹¹⁰² a prisoner committed suicide. He had attempted to commit suicide before and had been recognised as a “suicide risk”. The Court of Appeal held that the police had a duty to prevent him from committing suicide and that his suicide was not a *novus actus interveniens* as suicide was reasonably

¹⁰⁹⁵ See *Carslogie Steamship Co v Royal Norwegian Government* 1952 AC 292, where the intervening act was a storm at sea which caused damage to the ship. Cf Peel and Goudkamp *Winfield and Jolowicz on tort* 195; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 137; Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 242; Witting Street on torts 71.

¹⁰⁹⁶ Witting Street on torts 169.

¹⁰⁹⁷ See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 135-136.

¹⁰⁹⁸ For example, the relationship between the plaintiff and the defendant where there is a duty of care may influence whether there is a break in the casual link, see *Stansbie v Troman* 1948 2 KB 48 and *Reeves v Commissioner of Police of the Metropolis* 2000 1 AC 360.

¹⁰⁹⁹ See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 135; Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 242-243, 245.

¹¹⁰⁰ In Jones (gen ed) *Clerk and Lindsell on torts* 136.

¹¹⁰¹ Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 242.

¹¹⁰² 2000 1 AC 360. See paras 3.3.1 and 3.5.2

foreseeable.¹¹⁰³ The Commissioner was held liable.¹¹⁰⁴ In *Mckew v Holland & Hannen & Cubitts (Scotland) Ltd*,¹¹⁰⁵ the claimant initially sustained an injury to his leg as a result of the defendants' breach of duty. While he was still recovering from the first injury he tried to climb down a steep staircase without the aid of a handrail when his leg gave way. He subsequently jumped to the bottom of the stairs fracturing his ankle which resulted in permanent disability. The court found his act of climbing down the stairs unaided knowing that his leg might give way was unreasonable and amounted to a *novus actus interveniens* even though it was foreseeable.¹¹⁰⁶ Thus the defendants were held liable only for the initial injury.¹¹⁰⁷ If a claimant suffers an initial injury and exercises ordinary care but suffers a subsequent injury, such claimant will not usually be liable for the subsequent injury as transpired in *Wieland v Cyril Lord Carpets Ltd*.¹¹⁰⁸ The reason is that the subsequent injury falls within the risk created by the defendant in the initial injury and the claimant did not "deliberately or unreasonably" expose herself to harm.¹¹⁰⁹ As Witting¹¹¹⁰ points out, establishing which conduct is reasonable and unreasonable is not an easy task "where a moral dimension is present". He¹¹¹¹ refers to *Emeh v Kensington, Chelsea and Westminster AHA*,¹¹¹² where the claimant underwent sterilisation which was not successful leading to her falling pregnant. Although the defendant admitted negligence, he denied liability for the cost of

¹¹⁰³ In *Corr v IBC Vehicles Ltd* 2008 AC 884, the defendants were held liable where a person was injured in an accident and thereafter suffered depression and committed suicide. The suicide was not considered to be a *novus actus interveniens*, furthermore the thin-skull rule applied. In *Kirkham v Chief Constable of Greater Manchester Police* 1990 2 QB 283, the court held that the suicide of a clinically depressed prisoner was also not considered a *novus actus interveniens*, the police owed a duty to the prisoner to prevent him from committing suicide. See Peel and Goudkamp *Winfield and Jolowicz on tort* 202; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 154; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 244; Witting *Street on torts* 171; Steele *Tort* 205; Lunney and Oliphant *Tort* 261.

¹¹⁰⁴ However, the damages were reduced by 50% in terms of the Contributory Negligence Act 1945. See Peel and Goudkamp *Winfield and Jolowicz on tort* 201; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 154; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 245; MacBride and Bagshaw *Tort* 328.

¹¹⁰⁵ 1969 3 All ER 1621.

¹¹⁰⁶ *Mckew v Holland & Hannen & Cubitts (Scotland) Ltd* 1969 3 All ER 1621, 1623.

¹¹⁰⁷ See Peel and Goudkamp *Winfield and Jolowicz on tort* 200; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 146-147; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 244; Witting *Street on torts* 171; MacBride and Bagshaw *Tort* 325-326; Lunney and Oliphant *Tort* 260.

¹¹⁰⁸ 1969 3 All ER 1006.

¹¹⁰⁹ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 147.

¹¹¹⁰ *Street on torts* 172.

¹¹¹¹ *Street on torts* 171-172. Cf Peel and Goudkamp *Winfield and Jolowicz on tort* 201; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 151-152; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 245.

¹¹¹² 1985 QB 1012.

maintaining the child. The defendant submitted that her intention to keep the child was an unreasonable decision as abortion was an option. The court *a quo* agreed with the defendant but on appeal the Court of Appeal held that it was not unreasonable for her to refuse a late abortion as she found out she was pregnant in her second trimester. Her refusal to have an abortion did not break the causal link between the child's birth and the negligent conduct of the defendant.¹¹¹³ In *Spencer v Wincanton Holdings Ltd*,¹¹¹⁴ Sedley LJ¹¹¹⁵ opined that unreasonable conduct need not constitute a *novus actus interveniens* and it may be fair to apportion the damages in finding the claimant contributorily negligent.¹¹¹⁶ Sedley LJ discussed at length the influence of reasonableness, fairness and justice.

“[U]nreasonable’ is a protean adjective. Its nuances run from irrationality to simple incaution or unwisdom. It is helpful to locate its correct position on the scale of meanings by recalling that its purpose in this context is to determine the point at which the law regards a consequence as too remote. ... As Lord Bingham ... went on to explain ... , ‘the rationale of the principle that a *novus actus interveniens* breaks the chain of causation is fairness’ Lord Nicholls [stated] ... the commonly accepted approach that the extent of a defendant’s liability for the plaintiff’s loss calls for a twofold inquiry: whether the wrongful conduct causally contributed to the loss and, if it did, what is the extent of the loss for which the defendant ought to be held liable. The first of these inquiries, widely undertaken as a simple ‘but for’ test, is predominately a factual inquiry. ...

The second inquiry, although this is not always openly acknowledged by the courts, involves a value judgment (‘*ought* to be held liable’). Written large the second inquiry concerns the extent of the loss for which the defendant ought fairly or reasonably or justly to be held liable (the epithets are unchangeable). To adapt the language of Jane Stapleton in her article ‘Unpacking ‘Causation’ in Relating to Responsibility, ed Cane and Gardner (2001), p 168, the inquiry is whether the plaintiff’s harm or loss should be within the scope of the defendant’s liability, given the reasons why the law has recognised the cause of action in question. The law has to set a limit to the causally connected losses for which a defendant is to be held responsible. In the ordinary language of lawyers, losses outside the limit may bear one of several labels. They may be described as too remote because the wrongful conduct was not a substantial or proximate cause or because the loss was the product of an intervening cause. The defendants’ responsibility may be excluded because the plaintiff failed to mitigate his loss. Familiar principles, such as foreseeability, assist in promoting some consistency of general approach. These are guidelines, some more helpful than others, but they are never more than this.

Fairness, baldly stated, might be thought to take things little further than reasonableness. But what it does is acknowledge that a succession of consequences which in fact and in logic is infinite will be halted by the law when it becomes unfair to let it continue. In relation to tortious liability for personal injury, this point is reached when (though not only when) the claimant suffers a further injury which, while it would not have happened without the initial injury, has been in substance brought about by the claimant and not the tortfeasor”.

¹¹¹³ See also *MacFarlane v Tayside Health Board* 2000 2 AC 59.

¹¹¹⁴ 2010 PIQR P8. See discussion of the case by Jones in Jones (gen ed) *Clerk and Lindsell on torts* 147-149; Steele *Tort* 205-206; Lunney and Oliphant *Tort* 260.

¹¹¹⁵ P11-P15.

¹¹¹⁶ In *Sayers v Harlow UDC* 1958 1 WLR 623 a similar approach was taken. See also Lunney and Oliphant *Tort* 261.

Steele¹¹¹⁷ submits that foreseeability is not the most suitable criterion for establishing a *novus actus interveniens*, common sense may be more suitable considering which events are “normal” and “abnormal” and a viable alternative may be to consider whether there was a *novus actus* in terms of “the purpose and scope of duty of care”.

Witting¹¹¹⁸ submits that with respect to acts of third parties, two concepts are influential; reasonableness¹¹¹⁹ and foreseeability. When these concepts are combined difficulty may arise in considering whether conduct may be considered a *novus actus interveniens*. “[U]nforeseeable and unreasonable premeditated” conduct by a third party will be considered a *novus actus interveniens*.¹¹²⁰ The task is not so simple though when dealing with “unforeseeable reasonable acts” and foreseeable unreasonable acts”. However, the more unreasonable, deliberate, negligent, unforeseeable, positive the conduct is the more likely it will be considered a *novus actus interveniens*.¹¹²¹ A look at a few cases will illustrate this point.

In *The Oropesa*¹¹²² a ship named the Oropesa collided at sea with another ship, the Manchester Regiment. The captain of the Manchester Regiment boarded a lifeboat with some crew members, while the sea was rough, in an attempt to meet with the captain of the Oropesa in order to discuss salvaging the ship. Before the lifeboat reached the Oropesa, it capsized and a number of the members of the crew on board the boat died, one of which was the claimant’s son. The question was whether the claimant’s son died as a result of the actions of the captain of the Oropesa, or whether the actions of the captain of the Manchester Regiment in ordering the members of the crew to board the lifeboat while the sea was rough, constituted a *novus actus interveniens*. The sequence of events was unforeseeable and the court found that the order of the captain of the Manchester Regiment to the crew members to board the

¹¹¹⁷ Tort 206.

¹¹¹⁸ Street on torts 173.

¹¹¹⁹ Jones in Jones (gen ed) Clerk and Lindsell on torts 136 submit that the causation approach questions whether the *novus actus interveniens* was “reasonable” as opposed to the fault approach which questions whether the *novus actus interveniens* was “foreseeable”.

¹¹²⁰ See *Weld-Blundell v Stephens* 1920 AC 956, 986 (Jones in Jones (gen ed) Clerk and Lindsell on torts 139).

¹¹²¹ See *Knightley v Johns* 1982 1 WLR 349, 366; Jones in Jones (gen ed) Clerk and Lindsell on torts 139.

¹¹²² 1943 P32.

boat was reasonable, not breaking the chain of causation. Lord Wright¹¹²³ stated that to constitute a *novus actus interveniens*, the conduct must be “something ... which can be described as unreasonable or extraneous or extrinsic”. The defendants in charge of the *Oropesa* were found fully liable for the death of the claimant’s son.¹¹²⁴

In *Knightley v Johns*,¹¹²⁵ the defendant negligently drove his vehicle causing it to overturn in a tunnel. A senior police officer at the scene ordered a constable on his motorcycle, the claimant, to ride to the other side of the tunnel against the traffic and close the entrance to the tunnel. The constable was subsequently involved in a collision with another vehicle. The court held that the senior police officer’s deliberate conduct was unreasonable and the defendant was not held liable for the second incident causing harm to the claimant. The second incident was considered to be a *novus actus interveniens*.¹¹²⁶ In this case, the intervening act of the third party was not readily foreseeable or considered tortious.¹¹²⁷ In reaching a decision, Stephenson LJ¹¹²⁸ took a “common sense” approach.

In *Lamb v Camden LBC*,¹¹²⁹ concerning intervening wilful acts of third parties, the defendant allowed the claimant’s house to become damaged and the house was not fit for occupation. The defendant did not undertake repairs and squatters subsequently occupied the house causing further damage to the house. The claimant eventually arranged for repairs herself and billed the defendant for the repairs which included the repairs for the damage done by the squatters. The court held that the defendant was not liable for the damage done by the squatters even though squatting was reasonably foreseeable. Jones¹¹³⁰ points out how the adjudicators struggled to justify their reasons with principles *in casu* where Lord Denning¹¹³¹ and Lord Oliver¹¹³² referred to

¹¹²³ *The Oropesa* 1943 P32, 37.

¹¹²⁴ See *Philco Radio and Television Corp of Great Britain Ltd v J Spurling Ltd* 1949 2 All ER 882; Peel and Goudkamp *Winfield and Jolowicz on tort* 196; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 138.

¹¹²⁵ 1982 1 WLR 349.

¹¹²⁶ See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 138; Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 243-244; MacBride and Bagshaw *Tort* 325.

¹¹²⁷ Peel and Goudkamp *Winfield and Jolowicz on tort* 197-198.

¹¹²⁸ *Knightley v Johns* 1982 1 WLR 349, 367. See also Lunney and Oliphant *Tort* 256-259.

¹¹²⁹ 1981 QB 625. See Peel and Goudkamp *Winfield and Jolowicz on tort* 199.

¹¹³⁰ In Jones (gen ed) *Clerk and Lindsell on torts* 141.

¹¹³¹ *Lamb v Camden LBC* 1981 QB 625, 637.

¹¹³² 644.

policy,¹¹³³ while Watkin LJ¹¹³⁴ referred to his instinct that the squatters' damage was too remote even though it was "reasonably foreseeable". However in *Ward v Cannock Chase*,¹¹³⁵ the court on similar facts, found the defendants liable for the further damage although they deliberately delayed undertaking repairs. In *Stansbie v Troman*,¹¹³⁶ an interior decorator stepped out of the house and did not close the front door. A thief entered and stole some items. The interior decorator was under a duty to take care of the claimant's property against the thief's wilful wrongdoing. The interior decorator was held liable for the claimant's loss.

Cases often come before the courts where an initial injury occurred and the intervening medical treatment results in some form of medical malpractice. Here the question raised is whether the intervening act breaks the causal link between the initial injury and the intervening act. It seems that inappropriate intervening medical treatment may break the causal link as was found in *Hogan v Bentinck West Hartley Collieries (Owners) Ltd*.¹¹³⁷ However, intervening negligent advice¹¹³⁸ or treatment may not necessarily break the causal link, the reason being that the initial injury may carry "some risk that medical treatment might be negligently given".¹¹³⁹ For example, in *Rahman v Arearose*,¹¹⁴⁰ the claimant was assaulted and suffered an injury to his eye as a result of his employees failing in their duty to take reasonable care in reducing the risk of assault at his place of employment. Thereafter a surgeon negligently performed an operation on the eye leaving him permanently blind. He developed psychiatric injuries which included *inter alia* depression and post-traumatic stress disorder which was partially due to the initial assault and partially as a result of the loss of sight in his right eye. Laws LJ¹¹⁴¹ held that the second incident of negligence

¹¹³³ See also Steele *Tort* 197-198.

¹¹³⁴ *Lamb v Camden LBC* 1981 QB 625, 647.

¹¹³⁵ DC 1986 Ch 546. See Peel and Goudkamp *Winfield and Jolowicz on tort* 199.

¹¹³⁶ 1948 2 KB 48. See Peel and Goudkamp *Winfield and Jolowicz on tort* 199-201; MacBride and Bagshaw *Tort* 328; Steele *Tort* 196-197.

¹¹³⁷ 1949 1 All ER 588 – referred to by Jones in Jones (gen ed) *Clerk and Lindsell on torts* 142-143.

¹¹³⁸ See *Webb v Barclays Bank Plc and Portsmouth Hospitals NHS Trust* 2002 PIQR P8 where negligent advice was given to amputate the claimant's knee and not considered a *novus actus interveniens*. In *Wright v Cambridge Medical Group* 2011 EWCA Civ 669, the defendant was responsible for the delay in treatment increasing the risk of her not obtaining treatment which did not constitute a *novus actus interveniens*. See also Jones in Jones (gen ed) *Clerk and Lindsell on torts* 144; Steele *Tort* 200.

¹¹³⁹ Jones in Jones (gen ed) *Clerk and Lindsell on torts* 144.

¹¹⁴⁰ Ltd 2001 QB 351. See criticism of this decision by Weir 2001 *CLJ* 237.

¹¹⁴¹ *Rahman v Arearose Ltd* 2001 QB 351, 366.

did not extinguish the “causative potency of the earlier tort. According to law every wrongdoer “should compensate the ... claimant in respect of that loss and damage for which he should justly be held responsible”. He¹¹⁴² preferred to leave aside the thin-skull rule and *novus actus interveniens* in favour of a “sensible finding that while the second defendant obviously (and exclusively) caused the right-eye blindness, thereafter each tort had its part to play in the claimant’s suffering”.¹¹⁴³

Where a person voluntarily acts in a situation of emergency created by the defendant’s wrongdoing or attempts a rescue where such reaction is reasonably foreseeable, the intervening act will not usually constitute a *novus actus interveniens*.¹¹⁴⁴

In *South Australia Asset Management Corp v York Montague Ltd*¹¹⁴⁵ (hereinafter referred to as “SAAMCO”), involving three joint appeals, the defendants, valuers, negligently breached their professional duty to exercise reasonable care and skill in supplying estimates of market values of properties. This resulted in the bank lending money to clients over and above its real market value. Added to this, the property market fell. When the borrowers, the clients of the bank, defaulted on their loans, the bank sold the properties in order to recover amounts lent but suffered huge economic loss when they were unable to recover the amounts loaned.¹¹⁴⁶ The question before the House of Lords was whether the defendants should be held liable for losses resulting from incorrect information with regard to the inflated property valuations, as well as the additional losses due to the fall in the property market. The House of Lords in determining what the claimants could claim, held that the extent of the defendants’ liability was limited to the foreseeable consequences of the incorrect information given and not losses resulting from the unforeseeable drop in the property market. The principle applied in SAAMCO (hereinafter referred to as the “SAAMCO principle”) translates to this: a defendant should be held liable for harm and loss that are not only

¹¹⁴² 368.

¹¹⁴³ As pointed out by Jones in Jones (gen ed) *Clerk and Lindsell on torts* 143.

¹¹⁴⁴ See *Haynes v Harwood* 1935 1 KB 146; *Baker v TE Hopkins & Sons Ltd* 1959 3 All ER 225; *Videan v BTC* 1963 2 QB 650; *Scott v Shepherd* 1773 3 Wils 403; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 149-150; *Witting Street on torts* 169-170; *Steele Tort* 198-200.

¹¹⁴⁵ 1997 AC 191. See discussion of this case by Jones in Jones (gen ed) *Clerk and Lindsell on torts* 177-183; *Steele Tort* 207-214.

¹¹⁴⁶ See McBride and Bagshaw *Tort* 354.

reasonably foreseeable but also within the scope of the duty owed.¹¹⁴⁷ Lord Hoffman¹¹⁴⁸ who formulated the SAAMCO principle provided the following hypothetical example of how the principle could apply:

“A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee.

On the Court of Appeal’s principle, the doctor is responsible for the injury suffered by the mountaineer because it is damage which would not have occurred if he had been given correct information about his knee. He would not have gone on the expedition and would have suffered no injury. On what I have suggested is the more usual principle, the doctor is not liable. The injury has not been caused by the doctor’s bad advice because it would have occurred even if the advice had been correct.”

Thus the injury to the mountaineer is not related to the knee; therefore according to the SAAMCO principle, the doctor is not liable.¹¹⁴⁹ In spite of this example, the courts have not found it easy to apply the SAAMCO principle in practice.¹¹⁵⁰ It is also important to note that the SAAMCO principle applies to pure economic loss where there is an assumption of responsibility, not in cases of personal injury or damage to property where there is not usually an assumption of responsibility.¹¹⁵¹

4.2.1 Conclusion

Both the concepts of duty of care and causation limit the scope of the tort of negligence, where the courts have slowly moved away from general concepts and been guided by criteria such as policy.¹¹⁵² However, it may be argued that even the breach of duty limits the scope of the tort of negligence as it is based on what is

¹¹⁴⁷ See in general Peel and Goudkamp *Winfield and Jolowicz on tort* 202-206; Witting *Street on torts* 180-182; Lunney and Oliphant *Tort* 273-279.

¹¹⁴⁸ 1997 AC 191, 213.

¹¹⁴⁹ McBride and Bagshaw *Tort* 355.

¹¹⁵⁰ See McBride and Bagshaw *Tort* 354-355 fn 46 who refer to the following two cases where the courts experienced difficulty in applying the SAAMCO principle (enunciated in *South Australia Asset Management Corp v York Montague* 1997 AC 191, 213): *Platform Home Loans v Oysten Shipways Ltd* 2000 2 AC 190 and *Aneco Reinsurance Underwriting Ltd v Johnson & Higgins Ltd* 2001 UKHL 51.

¹¹⁵¹ See Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 253-254. Cf Jones in Jones (gen ed) *Clerk and Lindsell on torts* 176.

¹¹⁵² Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 255.

deemed “reasonable conduct” which is also policy-based. Deakin, Johnston and Markesinis¹¹⁵³ point out that the courts have of late referred to:

“arguments based on insurability, the deterrent effects of liability, the possibilities of loss shifting, and the dangers of unwelcome or ‘defensive’ reactions to extensions of the duty concept ...[t]he overall result is a mixed one, with tort law in general and negligence in particular brimming with antithetic decisions reflecting different philosophies. ... On a conceptual level, it is clear that the issues involved in setting boundaries to liability are too complex to be adequately captured by such open-ended terms as ‘proximity’, ‘foreseeability’, and, worst of all, the ‘fair, just and reasonable’ test”.

The direct consequences and reasonable foreseeability of harm theories are the predominant theories applied in establishing legal causation. Reasonable foreseeability of harm is the criterion used in determining legal causation in the tort of negligence. Thus the defendant will generally not be held liable for harm or loss which would not have been reasonably foreseen, this would exclude legal causation. It seems as though when the courts want to exclude legal causation, they may refer to specific harm as in *Tremain v Pike*¹¹⁵⁴ as opposed to general harm. Even if harm is reasonably foreseeable by a reasonable person, legal causation may still be absent or limited if there is a *novus actus interveniens* whether by an act of nature, act of the claimant, or a third party, or if the claimant’s conduct was unreasonable (where there is contributory fault). In considering whether conduct by a third party may be considered a *novus actus interveniens*, unforeseeable, unreasonable conduct will be considered a *novus actus interveniens* but not necessarily “unforeseeable reasonable acts” and “foreseeable unreasonable acts”. Naturally the more intentional as opposed to negligent, positive act as opposed to an omission, foreseeable as opposed to unforeseeable and unreasonable as opposed to reasonable the conduct, the more likely it will be considered a *novus actus interveniens*.

Another way of excluding legal causation would be to apply policy considerations in light of whether it is fair, just and reasonable to hold the defendant liable for the factually caused consequences. This is the flexible approach followed in the South African law of delict in determining legal causation where the theories of reasonable

¹¹⁵³ Markesinis and Deakin’s tort law 255.

¹¹⁵⁴ 1969 1 WLR 1556.

foreseeability of harm and direct consequences play a subsidiary role in determining legal causation.¹¹⁵⁵

The thin-skull rule may be considered a reasonable rule where the defendant is held liable for foreseeable harm to a claimant with inherent susceptibilities. This in effect relates to unforeseeable harm as one may not know of the claimants susceptibilities at the time of the tort or the effect of such susceptibilities with regard to the final totality of the harm. Each person has his own inherent susceptibilities. The question is whether it is reasonable to hold the defendant liable for the consequences of his act in respect of the particular claimant with inherent susceptibilities.

The direct consequences theory is used in determining legal causation in intentional torts. The intention to harm may hold the defendant liable for the intended direct consequences whether they are reasonably foreseeable consequences or not. Generally causation is not an issue in the intentional torts.

Lunney and Oliphant¹¹⁵⁶ refer to the problematic use of reasonable foreseeability when dealing with the enquiry in the duty of care stage as well as the remoteness stage. They refer to Harris, Campbell and Halson,¹¹⁵⁷ who distinguish between the uses of the criteria at the duty and remoteness stage in that it is “based on different sets of data” taken at different time periods during the occurrence of the tort. At the duty stage, the reasonable foreseeability of harm or loss is in a sense general, non-specific, referring to the possible harm or loss before the conduct is evaluated. Foresight is required and an *ex ante* approach is applied. Whereas the reasonable foreseeability of consequences at the remoteness stage is tested with hindsight, *ex post facto*, after the conduct, taking into account what transpired and also what consequences are foreseeable by the reasonable person in the defendant’s position. As Lunney and Oliphant¹¹⁵⁸ explain the above authors’ views – at the duty stage, the question is: whether the “law should impose an obligation on the defendant to act carefully But at the remoteness stage, the court focuses upon what actually occurred ... and ...

¹¹⁵⁵ See chapter 3 para 5.2.

¹¹⁵⁶ *Tort* 269-270.

¹¹⁵⁷ *Remedies in contract and tort* 315-316.

¹¹⁵⁸ *Tort* 270-271.

whether injury to the claimant was of a type that was a foreseeable consequence of the defendant's (actual) negligence". As mentioned, at the breach of duty stage the question is whether, judged subjectively and objectively, the defendant acted reasonably as well as whether the claimant acted reasonably where contributory fault, or other defences, may be applicable. The influence of reasonableness on all the elements of the tort of negligence is predominantly explicit in that reasonable foreseeability of harm is applicable at all stages as well as the criterion of the "reasonable person" albeit they are applied differently at each stage with a different focus, except maybe for causation in fact where the but-for test is used. At the duty stage reasonableness plays a role in deciding whether the relationship between the claimant and defendant is one where a duty of care is required. In other words, does the relationship reasonably require a duty of care to be imposed on the defendant? At the breach of the duty stage, the reasonableness of the conduct of both the claimant and defendant is considered. At the "remoteness" stage, the question is whether the defendant should be held liable for the factually caused consequences which were reasonably foreseeable; or alternatively, taking all considerations into account, whether it is fair, just and reasonable to hold the defendant liable for all the factually caused consequences in relation to his conduct. It is submitted that the use of the criterion of the reasonable person at all stages applies as an objective criterion. However, the criterion at the breach of the duty stage may be varied to take into account subjective qualities of the defendant. The way that the objective criterion of the reasonable person is used in English tort law is similar to the *boni mores* or public policy which is also reflected in the *boni mores* in South African law. However, it applies subtly and is never highlighted in the way that the South African law of delict specifically refers to the *boni mores* or public policy.

Furthermore, the concept of reasonableness is explicit where other concepts are considered simultaneously with fairness and justice. This is more apparent when considering whether it is fair, just and reasonable to impose a duty of care as well as whether it is fair, just and reasonable to conclude whether the consequences were too remote and for which factually caused consequences the defendant should be held liable. It is only reasonable to hold the defendant liable in the tort of negligence if legal causation is present and harmful consequences are accordingly not too remote.

With the tort of negligence, damage is required and will now be discussed in the next paragraph.

5. Harm, loss or damage¹¹⁵⁹

The focus under this paragraph is not on whether the defendant is liable for damages, but the type of damages he is entitled to and how the types of damages are assessed. It is not necessary to prove damage in all torts, that is, some torts are actionable without proof of damage, such as the tort of assault and false imprisonment. The “tort itself is regarded as harmful and the plaintiff is always entitled to recover at least “nominal damages”.¹¹⁶⁰ However, in the tort of “negligence” damage must be proven.¹¹⁶¹ This is a fundamental difference with the South African law of delict where some type of harm, loss or damage is required in order to ground delictual liability.¹¹⁶² In the torts of trespass to a person even though proof of damage is not required, the harm suffered must be serious and not trivial.¹¹⁶³ Thus harm is assumed and not explicitly required.

The different possible types of damages recoverable in English law include: compensatory damages;¹¹⁶⁴ nominal damages;¹¹⁶⁵ punitive or exemplary

¹¹⁵⁹ Is the main remedy sought in tort law (Giliker *Tort* 603).

¹¹⁶⁰ Dobbs, Hayden and Bublick *Hornbook on torts* 851.

¹¹⁶¹ Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 793.

¹¹⁶² See chapter 3 para 1.

¹¹⁶³ See para 2 above.

¹¹⁶⁴ Which are the main damages awarded in practice for actionable losses. They include pecuniary and non-pecuniary loss.

¹¹⁶⁵ The court acknowledges that the claimant's right has been violated but no real damage has occurred. This head of damage is usually awarded (currently for the sum of between £1 and £5) where proof of damage is not required such as in cases of trespass and libel. The court could deny the claimant his costs and even order him to pay the defendant's costs. See *R on the application of WL (Congo) v Secretary of State for the Home Department* 2011 2 WLR 671; *Grobbelaar v News Group Newspapers Ltd* 2002 1 WLR 3024. See also Peel and Goudkamp in *Winfield and Jolowicz on Tort* 690; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 794-795; Witting *Street on torts* 673; McBride and Bagshaw *Tort* 769-772; Giliker *Tort* 606-607; Lunney and Oliphant *Tort* 858-859.

damages;¹¹⁶⁶ contemptuous damages;¹¹⁶⁷ aggravated damages;¹¹⁶⁸ and gain based or restitutionary damages.^{1169 1170} There is much to be said about damages in general in English law. The theories, functions¹¹⁷¹ and principles that apply to assessing the different heads of damage require a study of its own,¹¹⁷² but for purposes of this study the focus in this section will be on the influence of reasonableness in the general assessment of some heads of damages.

¹¹⁶⁶ Are aimed at punishing the defendant and also serve to deter him and others from participating in similar conduct in the future. In *Rookes v Barnard* 1964 AC 1129 (followed in *Cassell & Co Ltd v Broome* 1972 AC 1027), it was held that punitive damages should be awarded under the following instances: where there is arbitrary, oppressive and unconstitutional actions by the government servants; where it is expressly authorised by statute; and where the defendant committed a tort with the deliberate intention of making a profit from it (frequently occurring in libel). See in general Peel and Goudkamp *Winfield and Jolowicz on tort* 693-697; Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2091-2094; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 797-803; Witting *Street on torts* 676-679; McBride and Bagshaw *Tort* 814-823; Giliker *Tort* 608-613; Steele *Tort* 532-541; Lunney and Oliphant *Tort* 848-857.

¹¹⁶⁷ This is a derisory award currently one penny (usually awarded in cases of libel). The court acknowledges that the claimant does have a claim but is not impressed with the claimant's conduct or it has formed a low opinion of the claimant's claim. The court could possibly deny the claimant his costs and order him to pay his own costs. See Peel and Goudkamp *Winfield and Jolowicz on tort* 690; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 795; Witting *Street on torts* 673; Giliker *Tort* 606; Lunney and Oliphant *Tort* 859.

¹¹⁶⁸ Usually awarded as an additional amount to a claimant in respect of offending his dignity, hurting his feelings, or causing mental distress in an intentional, high-handed, malicious, offensive or repressive manner. The award is made based on the motives of the defendant or manner the harm was caused. It is usually awarded for trespass (see *Appleton v Garrett* 1996 PIQR P1) and libel (*John v MGN Ltd* 1997 QB 586, 607) but not in the tort of negligence. See in general Peel and Goudkamp *Winfield and Jolowicz on tort* 697-699; Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2089-2091; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 795-797; Witting *Street on torts* 674-676; McBride and Bagshaw *Tort* 808-813; Giliker *Tort* 607; Steele *Tort* 533; Lunney and Oliphant *Tort* 857-858.

¹¹⁶⁹ Are damages awarded with the aim of depriving the defendant of gains he made from the tort he committed at the claimant's expense (usually awarded in respect of trespass to land and goods – "property torts"). There are generally two types of gain based damages. Namely "licence-fee damage" which should reflect the reasonable fee for the tortious use of the claimant's property by the defendant, and "disgorgement damages", where the defendant may be ordered to surrender the profit he made as a result of committing the tort. See in general Peel and Goudkamp *Winfield and Jolowicz on tort* 699-701; Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2101-2103; McBride and Bagshaw *Tort* 824-837; Giliker *Tort* 614; Steele *Tort* 5545-548.

¹¹⁷⁰ Although "vindicatory damages" is not recognised as a head of damage in English tort law (see *R (Lumba v Secretary of State for the Home Department)* 2012 1 AC 245) there is some academic support that this may be a head of damage in its own right which is similar to "constitutional damages" in other jurisdictions. See discussion by Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2094; McBride and Bagshaw *Tort* 837-850; Steele *Tort* 541-545. This head of damage is aimed at making the defendant pay for violating the claimant's right in terms of human rights.

¹¹⁷¹ The function of damages which include punishment compensation, averting wrongful unlawful gain and vindicating rights may all be considered as reasonable aims.

¹¹⁷² In general see McGregor *Damages*.

In respect of compensatory damages which are, in practice, the main damages awarded and are therefore discussed in more detail than the other heads of damages, the aim is to put the claimant in the position he would have been in had the tort not been committed.¹¹⁷³ The aim is *restitutio in integrum*, full compensation. However, strictly speaking, this may not be possible particularly in respect of non-pecuniary loss.¹¹⁷⁴ Even though it may not be possible to put the claimant in his pre-tort position, the idea is “to come up with an amount which is ‘fair, reasonable and just’” *in lieu* of his loss or harm.¹¹⁷⁵ Deakin, Johnston and Markesinis¹¹⁷⁶ point out that although the principles of fairness, justice and reasonableness are applied in establishing a duty of care in the tort of negligence, when applied to quantifying damages, the adjudicators are in contrast more precise and strive for certainty by using tariffs and scales. The influence of reasonableness in deciding how much the claimant should be awarded with respect to compensatory damages is explicit as will be shown.

Compensatory damages are divided into pecuniary loss and non-pecuniary loss.¹¹⁷⁷ General damage refers to non-pecuniary loss and future pecuniary loss, whereas special damage refers to pre-trial pecuniary loss.¹¹⁷⁸ In respect of personal injury both pecuniary and non-pecuniary loss may be recovered.¹¹⁷⁹

¹¹⁷³ *Livingston v Raywards Coal Co* 1880 5 App Cas 25,39; *Lim v Camden & Islington Area Health Authority* 1980 AC 174, 187; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 803; Giliker *Tort* 604-605; Lunney and Oliphant *Tort* 847.

¹¹⁷⁴ Where compensation is awarded to provide the claimant with some solace (“sorry money”) in respect of his misfortunes. See Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2009; Steele *Tort* 489.

¹¹⁷⁵ Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 803. See also Giliker *Tort* 605

¹¹⁷⁶ *Markesinis and Deakin's tort law* 803-804.

¹¹⁷⁷ Peel and Goudkamp in *Winfield & Jolowicz on Tort* 712.

¹¹⁷⁸ See *Jefford v Gee* 1970 2 QB 130 CA, but Lord Bingham in *R v Secretary of State for the Home Department Ex parte Greenfield* 2005 UKHL 14 [11]-[12] referred to “special damages” as “pecuniary loss” and “general damages” as “non-pecuniary loss”. See Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2009 fn 33.

¹¹⁷⁹ Peel and Goudkamp *Winfield and Jolowicz on tort* 712.

5.1 Pecuniary loss

Pecuniary loss encompasses: loss of earnings up to the date of the trial; loss of future earnings; medical expenses; care expenses; and any other out of pocket expenses.¹¹⁸⁰

With regard to future loss of earnings, there is much uncertainty and the courts make use of the multiplier method of calculation: the multiplier (number of working years¹¹⁸¹ where the loss will take place)¹¹⁸² multiplied by the multiplicand (net annual loss after deducting income tax and national insurance)¹¹⁸³ equals loss of earnings.¹¹⁸⁴ Deductions are then made reducing the award. One of the factors influencing the court's decision in making deductions is that even though the claimant should be compensated fully, the defendant should not pay for "more than has been lost".¹¹⁸⁵ Naturally this is only fair and reasonable. The court may adopt any of these approaches based on "reasonableness", "justice" and "public policy":¹¹⁸⁶ by making the defendant liable only for actual loss suffered by deducting benefits received from insurance companies, the state, and the employer; not deducting the benefits and making the defendant fully liable; holding the defendant liable for the actual losses sustained by the claimant as well as liable to those who supported the claimant prior to the hearing of the matter.¹¹⁸⁷

¹¹⁸⁰ Peel and Goudkamp *Winfield and Jolowicz on tort* 715; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 827; Witting *Street on Torts* 704.

¹¹⁸¹ Low multipliers are applied in respect of children.

¹¹⁸² The Ogden Tables, prepared by actuaries', project expected periods of employment till retirement.

¹¹⁸³ In considering the net annual loss of earnings at the time of the accident, promotion prospects as well as the likelihood of him having done overtime work will be considered in increasing the award. See Peel and Goudkamp *Winfield and Jolowicz on tort* 715; Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2025; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 839; Giliker *Tort* 619; Steele *Tort* 490-491.

¹¹⁸⁴ See *Taylor v O'Connor* 1971 AC 115, 144 in respect of the courts preference with regard to the multiplier method; Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2025; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 836-839; Witting *Street on torts* 705; Giliker *Tort* 619; Steele *Tort* 490-491.

¹¹⁸⁵ Steele *Tort* 506. See also *Parry v Cleaver* 1970 AC 1, 30,47; *Hussain v New Taplow Mills Ltd* 1988 AC 514, 527; *Hunt v Severs* 1994 2 AC 350, 357-358; Burrows in Jones (gen ed) *Clerk and Lindsell on tort* 2035; Giliker *Tort* 624.

¹¹⁸⁶ See *Parry v Cleaver* 1970 AC 1, 13.

¹¹⁸⁷ Giliker *Tort* 624.

The courts were previously¹¹⁸⁸ reluctant to consider evidence in the form of actuarial calculations in assessing future financial loss but have recently considered the value of such evidence in a more favourable light, in that, it should be used as a starting point to check values and be referred to.¹¹⁸⁹ The courts will consider the possibility of unemployment and any other factors which may reduce a person's loss of future income.¹¹⁹⁰ The courts generally deduct collateral benefits received by the claimant as a result of the tort except voluntary gratuitous (*ex gratia*) payments received from third parties¹¹⁹¹ and insurance payments from policies where it is considered unjust and unreasonable to penalise the claimant for being prudent in taking out insurance.¹¹⁹² Contributory pension payments which the claimant is entitled to resulting from the tort are not deductible from loss of earnings,¹¹⁹³ but other benefits received are deducted, such as: any voluntary payments or items received from the defendant¹¹⁹⁴ and sick pay.¹¹⁹⁵ The state, in terms of policy considerations must not subsidise the defendant's liability in tort as this would be unfair and unreasonable. Thus Section 6 of the Social Security (Recovery of Benefits) Act¹¹⁹⁶ currently provides that certain social security

¹¹⁸⁸ See *Auty v National Coal Board* 1985 1 All ER 930, 939; Giliker *Tort* 618.

¹¹⁸⁹ See *Wells v Wells* 1999 1 AC 345,379. Reference is made to the Ogden Tables (actuarial tables) for use in cases of fatal accidents and personal injury. See Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2029-2030; Giliker *Tort* 618-619; Steele *Tort* 492-493.

¹¹⁹⁰ Giliker *Tort* 619.

¹¹⁹¹ See *Parry v Cleaver* 1970 AC 1, 14 where Lord Reid stated "it would be revolting to the ordinary man's sense of justice, and therefore contrary to public policy" that the claimant's damages should be reduced by benefits received from "his friends or relations or the public at large, and that the only gainer would be the wrongdoer"; *Hussain v New Taplow Paper Mills Ltd* 1988 AC 514; Peel and Goudkamp *Winfield and Jolowicz on tort* 721; Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2036; Giliker *Tort* 625; Steele *Tort* 506; Lunney and Oliphant *Tort* 894-895.

¹¹⁹² See *Bradburn v Great Western Rail Co* 1874 LR 10 Exch 1, 3; *Parry v Cleaver* 1970 AC 1, 14; Peel and Goudkamp *Winfield and Jolowicz on tort* 721; Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2036; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 808-810; Giliker *Tort* 625; Steele *Tort* 506-507.

¹¹⁹³ See *Parry v Cleaver* 1970 AC 1 and *Smoker v London Fire and Civil Defence Authority* 1991 2 AC 502, 543 even where the defendant is a contributor to the pension. A disablement pension will be deducted not from loss of earnings but from the part of the award dealing with loss of pension (see *Longden v British Coal Company* 1997 3 WLR 1336). See also Peel and Goudkamp *Winfield and Jolowicz on tort* 722; Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2037; Steele *Tort* 506.

¹¹⁹⁴ See *Williams v BOC Gases Ltd* 2000 1CR 1181; *Gaca v Pirelli General plc* 2004 1 WLR 2683; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 812; Giliker *Tort* 625; Steele *Tort* 508.

¹¹⁹⁵ See *Hussain v New Taplow Paper Mills Ltd* 1988 AC 514, 532 where it was held that payment by an employer for long-term sickness was deemed sick-pay and therefore deductible from loss of earnings; Peel and Goudkamp *Winfield and Jolowicz on tort* 722; Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2039; *Witting Street on torts* 711-712; Steele *Tort* 506.

¹¹⁹⁶ 1997.

benefits¹¹⁹⁷ paid out to the claimant for a certain period of time¹¹⁹⁸ by the state as a result of the injury or accident, are recovered in full from the defendant which in most instances, is his insurer. The reason is to recompense the Secretary of the State.¹¹⁹⁹ There is no double recovery then by the claimant from the state and the defendant¹²⁰⁰ which is also only fair and reasonable.

In assessing future loss of earnings that were made from any unlawful conduct, future loss of earnings will generally not be recoverable.¹²⁰¹ This also applies to loss of support claims where the claimant was supported by the deceased from proceeds of criminal activity.¹²⁰² This may be regarded as a reasonable policy decision as criminal or illegal activity should not be encouraged.

Loss of life expectancy was abolished by the Administration of Justice Act¹²⁰³ but claimants may claim for loss of earnings for “lost years”.¹²⁰⁴ The claimant would have been able to work but is unable due to his shortened life resulting from the tort.¹²⁰⁵

Where the claimant has incurred medical and similar related expenses, such as hospital, nursing costs and so on, or will incur such expenses as a result of the injury; such claimant may recover costs that he “has reasonably incurred or will reasonably

¹¹⁹⁷ Relating to loss of earnings, care costs and loss of mobility. See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 814.

¹¹⁹⁸ Till payment has been made in discharge of the claim or if earlier, a period of five years from the date of accident or injury. No reduction is applied stemming from a finding of contributory negligence. See Steele *Tort* 530.

¹¹⁹⁹ See Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2032-2035; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 813- 815; Witting *Street on torts* 710-711; McBride and Bagshaw *Tort* 787; Giliker *Tort* 627-629.

¹²⁰⁰ See Peel and Goudkamp *Winfield and Jolowicz on tort* 723-724.

¹²⁰¹ See *Burns v Edman* 1970 2 QB 541; *Hunter v Butler* 1996 RTR 396; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 839.

¹²⁰² See *Burns v Edman* 1970 2 QB 541; McBride and Bagshaw *Tort* 869.

¹²⁰³ S 1(1)(a) of Administration of Justice Act 1982.

¹²⁰⁴ In assessing this award, the court still looks at the claimant's life expectancy prior to the accident and deducts the amount the claimant would have spent on living expenses as he would not have living expenses during the “lost years” (see *Pickett v British Rail Engineering Ltd* 1980 AC 136). In the case of a young child, the court will in all probability not award any damages (*Croke v Wiseman* 1982 1 WLR 71). See Peel and Goudkamp in *Winfield and Jolowicz on Tort* 716; Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2026-2027; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 846-847; Giliker *Tort* 623; Steele *Tort* 499-501; Lunney and Oliphant *Tort* 880-885.

¹²⁰⁵ See *Pickett v British Rail Engineering Ltd* 1980 AC 136; Giliker *Tort* 623.

incur”.¹²⁰⁶ Section 2(4) of the Law Reform (Personal Injuries) Act¹²⁰⁷ entitles the claimant to use either public or private medical service providers and need not choose public health care by making use of the National Health Service in order to comply with the requirement of incurring reasonable medical and similar related costs.¹²⁰⁸ If the claimant opts to undergo treatment in a state institution then he cannot claim the costs for treatment in a private institution.¹²⁰⁹ Undergoing treatment in New York instead of in London has been held to be reasonable.¹²¹⁰ Also it has been considered reasonable to allow a claimant to be treated at home which would work out cheaper than treating the claimant in an institution – it depends on what is necessary to meet the reasonable needs of the claimant.¹²¹¹ If the claimant uses the National Health Service, the costs of the treatment in the public institution may be recovered by the National Health Service from the defendant if the claimant was injured in a motor vehicle accident which occurred on a public road.¹²¹² Reasonable transport costs: to and from the hospital or other medical providers; immediate relatives’ travelling costs to and from the hospital to visit the claimant; or where it is necessary for a relative to accompany the claimant to the hospital or other medical appointments; and increased transport costs where due to the injury the claimant needs to use some other form of transport such as a taxi instead of public transport if reasonably necessary, may be recovered.¹²¹³ In the case of disabilities where a claimant’s car or house needs to be modified, reasonable necessary costs can be recovered but are limited by what assistance may be provided by the government “Mobility Scheme”.¹²¹⁴ Reasonable

¹²⁰⁶ Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2020. See also Witting *Street on torts* 707; Peel and Goudkamp *Winfield and Jolowicz on tort* 716.

¹²⁰⁷ 1948.

¹²⁰⁸ See also *Godbold v Mahmood* 2005 EWHC 1002, 2006 PIQR Q1; *Peters v East Midlands Strategic Health Authority* 2010 QB 48; Peel and Goudkamp in *Winfield & Jolowicz on Tort* 716-717; Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 829; Steele *Tort* 490; Lunney and Oliphant *Tort* 886.

¹²⁰⁹ Lunney and Oliphant *Tort* 886.

¹²¹⁰ *Winkworth v Hubbard* 1960 1 Lloyd’s Rep 150; Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 829.

¹²¹¹ See *Sowden v Lodge* 2004 EWCA Civ 1370; Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 829.

¹²¹² In terms of s 157 of the Road Traffic Act 1988 and the Health and Social Care (Community Standards) Act 2003. See Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 830; Steele *Tort* 531-532.

¹²¹³ Proof from medical experts verifying this may be required. See Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 833.

¹²¹⁴ Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 834.

costs of a carer,¹²¹⁵ reasonable costs of employing someone to do household tasks, garden or handy work around the house which the claimant previously did and is now unable to do,¹²¹⁶ as well as any increased living expenses may be claimed.¹²¹⁷

In respect of future medical treatment, the courts will be guided by what treatment in the future is reasonably required in respect of the claimant.¹²¹⁸ The claimant must prove the future required treatment.¹²¹⁹ Here too, the courts make use of the multiplier-multiplicand approach in assessing future medical expenses.¹²²⁰

In English law, loss of a pecuniary benefit commonly referred to as loss of maintenance or loss of support in South African law is largely regulated by the Law Reform (Miscellaneous Provisions Act)¹²²¹ and the Fatal Accidents Act.¹²²² A detailed discussion of these statutes falls outside the scope of the study but brief mention will be made of the influence of reasonableness in finding that there is a pecuniary loss or

¹²¹⁵ A carer in this context refers to family members, spouses or partners etc, non-professional carers who should be reasonably compensated. The family or relative does not charge any fee for providing the care to the claimant but in many cases they do give up paid employment, even if it is temporarily, which leads to a financial loss for them. Any reasonable costs claimed for a carer usually falls under the claimant's claim (see *Donnelly v Joyce* 1974 QB 454 but in *Hunt v Severs* 1994 2 AC 350 costs of the carer were deemed a loss by the carer and not allowed due to the unique circumstances of the case where the carer was also the defendant. The court wanted to avoid being unfair to the defendant by making him pay twice by offering the care and for paying for it. The Law Commission according to the Consultation Paper on *Damages for Personal Injury: Medical, Nursing and Other expenses* LCCP144, 1996 is of the view that the decision of *Hunt v Severs* should be reversed by legislation). In many instances family members assist the claimant out of love and care. The court will then calculate the commercial cost of the care and usually applies a 25% discount. See *Evans v Pontypridd Roofing Ltd* 2001 EWCA Civ 1657; Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2022-2023; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 831-832; 843-846; Peel and Goudkamp *Winfield and Jolowicz on tort* 718; Giliker *Tort* 630; Steele *Tort* 502-504.

¹²¹⁶ See *Daly v General Steam Navigation Co Ltd* 1981 1 WLR 120; *Shaw v Wirral HA* 1993 4 Med. LR 275; Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2021-2022; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 831; Giliker *Tort* 631 fn 157. Cf Peel and Goudkamp *Winfield and Jolowicz on tort* 719.

¹²¹⁷ See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 833; Giliker *Tort* 629.

¹²¹⁸ In *Sowden v Lodge*; *Crookdale v Drury* 2005 1 WLR 2129, the court pointed out that future medical treatment in a private institution may be quite costly whereas the reasonable needs of the claimant may be met at a provincial institution with the option of a "top up", but in *Peters v East Midlands Strategic Health Authority* 2009 EWCA Civ 145, the court relayed the general principle that a claimant can choose whether he wants to be treated at a private or public institution in the future. See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 841; Steele *Tort* 504-506.

¹²¹⁹ *Woodrup v Nicol* 1993 PIQR Q104; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 841.

¹²²⁰ Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 841.

¹²²¹ 1934.

¹²²² 1976. See McBride and Bagshaw *Tort* 744; Steele *Tort* 512.

benefit sustained by the dependant entitling them to claim damages.¹²²³ The common law rules will of course remain applicable in cases not covered by the statutes regulating pecuniary loss by dependants. In terms of the Fatal Accident Act,¹²²⁴ dependants¹²²⁵ of a victim who died as a result of a tort committed by the defendant may claim the following from the defendant: pecuniary loss (expected pecuniary benefit) sustained by the dependant; bereavement damages where the dependant lost a spouse or minor who was the victim of the tort; and funeral costs that were paid by the dependant.¹²²⁶

Loss of support is calculated from date of death.¹²²⁷ A dependant must show “that there was a reasonable prospect that had the deceased not died, the dependant would have obtained some kind of financial benefit from the deceased in the future” and such “dependant would have obtained that benefit by virtue of the fact that he was a dependant of the deceased”.¹²²⁸ In assessing compensation to be awarded to a widow in respect of the death of her husband, remarriage prospects of a widow are not considered.¹²²⁹ Thus the effect of this is that a widow may continue to receive support as a result of a deceased husband and may be supported by a second husband.¹²³⁰ The period of dependency must be calculated.¹²³¹ The multiplier method is also used in assessing the dependant’s loss.¹²³² A discussion of a few cases illustrate the way the courts interpret the reasonable prospect of being entitled to support had the deceased not died.

For example, in *Franklin v South Eastern Railway Company*¹²³³ it was held that there was a reasonable prospect that the deceased son would have in future assisted his

¹²²³ See in general discussion by Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2054-2077; Steele *Tort* 512-523, 516-523.

¹²²⁴ 1976.

¹²²⁵ See s 1(3) in respect of the list of dependants entitled to claim loss of support.

¹²²⁶ McBride and Bagshaw *Tort* 866.

¹²²⁷ *Cookson v Knowles* 1979 AC 556, *Graham v Dodds* 1983 1 WLR 808; Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 863.

¹²²⁸ McBride and Bagshaw *Tort* 867.

¹²²⁹ S 3(3) of the Fatal Accidents Act 1976. See Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 853-863; McBride and Bagshaw *Tort* 870-871.

¹²³⁰ Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2067; Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 862-863.

¹²³¹ Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 863.

¹²³² See Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2068-2073.

¹²³³ 1853 3 H & N 211.

father financially, as he was getting older and weaker. Thus the father was entitled to claim loss of support from the defendant.¹²³⁴ In *Taff Vale Railway Co v Jenkins*,¹²³⁵ the parents of a sixteen-year-old girl who had almost completed her dressmaker's apprenticeship was also entitled to claim pecuniary loss (loss of support) based on the premise that it was reasonable that she would have in future conferred on her parents a pecuniary benefit even though she had at the time of her death not yet earned any income. In *Davies v Taylor*,¹²³⁶ the husband and wife were separated and the husband was in the process of divorcing the wife due to her adultery. The husband died as a result of the defendant's negligence stemming from a motor vehicle accident. The wife claimed loss of support from the defendant but the claim was dismissed because the wife could not show the reasonable prospect that had her husband not died he would have continued to spend money on her. If they had reconciled then there was a reasonable prospect of the husband supporting her financially.¹²³⁷ In *Berry v Humm*¹²³⁸ the claimant's wife was killed due to the defendant's negligence. The wife had been a housewife attending to all domestic chores around the house which equated to a financial benefit for the husband. Thus the husband was entitled to claim pecuniary loss from the defendant as a result of that lost financial benefit.¹²³⁹ In *Reeves v Commissioner of Police of the Metropolis*,¹²⁴⁰ it was held that the claimant's claim in terms of the Fatal Accidents Act¹²⁴¹ was not barred. The House of Lords found the police negligent in failing to prevent the suicide but the award of damages was reduced by fifty percent. In *Corr v IBC Vehicles Ltd*¹²⁴² a wife was entitled to claim loss of support under the Fatal Accidents Act¹²⁴³ where her husband committed suicide resulting from severe depression caused by the defendant's negligence. The court held that the suicide was reasonably foreseeable and the chain of causation was not broken. In this case the award of damages was not reduced due to contributory negligence.

¹²³⁴ McBride and Bagshaw *Tort* 868.

¹²³⁵ 1913 AC 1. See Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2065.

¹²³⁶ 1974 AC 207.

¹²³⁷ See McBride and Bagshaw *Tort* 868; Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2065.

¹²³⁸ 1915 1 KB 627.

¹²³⁹ McBride and Bagshaw *Tort* 868.

¹²⁴⁰ 2000 1 AC 360. See Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2061.

¹²⁴¹ 1976.

¹²⁴² 2008 1 AC 884. See Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2061.

¹²⁴³ 1976.

Compensation may be awarded to a spouse or parent for “bereavement” in respect of the loss of a spouse or a parent but the amount is capped.¹²⁴⁴ Only reasonable funeral expenses may be claimed such as the cost of the headstone.¹²⁴⁵

5.2 Non-pecuniary loss

Under non-pecuniary loss, claimants can claim loss of amenities and pain and suffering.¹²⁴⁶ It is difficult to assess non-pecuniary loss and there is no exact scientific or mathematical calculation adhered to in assessing the awards. The award for pain and suffering is based on the claimant’s subjective experience,¹²⁴⁷ while loss of amenities is based on the loss itself, it is partly objectively assessed.¹²⁴⁸ Under pain and suffering, claims for shock and psychiatric injury may be claimed but not for grief and sorrow.¹²⁴⁹ The courts make reference to previous awards and tariffs¹²⁵⁰ as guidelines¹²⁵¹ in ensuring uniformity when assessing non pecuniary loss.¹²⁵² The guidelines fix a bracket for general damages in respect of many types of injuries but cannot provide a bracket for every combination of injury that may occur in practice.¹²⁵³ The adjudicator in the end must make an assessment taking all the evidence into account and make an award that is reasonable, fair and just.¹²⁵⁴

¹²⁴⁴ See s (1A) of the Fatal Accidents Act 1976; Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 851, 860-861.

¹²⁴⁵ In *Jones v Royal Devon & Exeter NHS Foundation Trust* 2008 EWHC 558 QB only £2000 of the £4000 cost of the headstone was recoverable and not the cost of a wake. Also the cost of a memorial monument will not be recoverable – see *Hart v Griffiths-Jones* 1948 2 All ER 729; *Gammell v Wilson* 1982 AC 27. See also Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 855 fn 342.

¹²⁴⁶ In practice these two heads of damages are claimed as a global amount. See Peel and Goudkamp *Winfield and Jolowicz on tort* 699; *Witting Street on torts* 704; *Steele Tort* 508.

¹²⁴⁷ See checklist provided by Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 848.

¹²⁴⁸ *Lim Poh Choo v Camden & Islington AHA* 1980 AC 174, 188; Peel and Goudkamp *Winfield and Jolowicz on tort* 713; *Steele Tort* 509; Lunney and Oliphant *Tort* 870.

¹²⁴⁹ See *Hinz v Berry* 1970 2 QB 40; Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 848.

¹²⁵⁰ See *Heil v Rankin* 2001 QB 272; Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 847.

¹²⁵¹ From the Judicial Studies Board entitled *Guidelines for the Assessment of General Damages in Personal Injury Cases* (now in its 12 ed last updated in 2013). See Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2042-2043; *Steele Tort* 508.

¹²⁵² Peel and Goudkamp *Winfield and Jolowicz on tort* 714.

¹²⁵³ Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 847.

¹²⁵⁴ See *Rowley v London and North Western Ry Co* 1873 LR 8 Exch 221, 231; *Pickett v British Rail Engineering Ltd* 1980 AC 136, 168; *Lim Poh Choo v Camden and Islington AHA* 1980 AC 174, 187; *Heil v Rankin* 2001 QB 272 CA; Burrows in Jones (gen ed) *Clerk and Lindsell on torts*

5.3 Damage to property

In respect of damage to property, the influence of reasonableness is explicit. An example of a motor vehicle will be used. In order to illustrate what may be claimed by the claimant where the motor vehicle was completely damaged, the market value of the vehicle at the time of tort “or soon thereafter as is reasonable” as well as any consequential loss may be recovered by the claimant.¹²⁵⁵ This may include the reasonable costs of hiring a car until such time as the damaged vehicle is replaced.¹²⁵⁶ If the vehicle is not completely damaged and can be reasonably repaired, then usually the reasonable costs of repairs may be claimed.¹²⁵⁷ Costs of repairs do not mean “meticulous restoration”.¹²⁵⁸ If the claimant decides to sell the damaged property without repairing it, then the claimant will be entitled to the diminution in the value of the property.¹²⁵⁹ Consequential costs made such as hiring a vehicle while repairs are done may be claimed.¹²⁶⁰

5.4 Principles applicable to pecuniary and non-pecuniary loss

The “once and for all rule” is generally applicable to claims in tort.¹²⁶¹ Damages are usually awarded as a lump sum at the end of the matter,¹²⁶² in which case discounting

2009-2010, 2042; Witting *Street on torts* 713; Giliker *Tort* 633-634. Cf Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 827; McBride and Bagshaw *Tort* 778.

¹²⁵⁵ See *Liesbosch Dredger v SS Edison* 1933 AC 449; Peel and Goudkamp *Winfield and Jolowicz on tort* 729; Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2077-2078.

¹²⁵⁶ See *Moore v DER Ltd* 1971 1 WLR 1476; Peel and Goudkamp in *Winfield & Jolowicz on Tort* 729; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 869; Giliker *Tort* 651.

¹²⁵⁷ This is based on the loss of diminution in value and the repair costs are proof of such diminution in value of the property. See *London Corporation* 1935 P 70, 77; *Coles v Hetherington* 2014 3 All ER 377; Peel and Goudkamp *Winfield and Jolowicz on tort* 730; Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2079; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 867; Giliker *Tort* 651-652.

¹²⁵⁸ See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 867; *Martindale v Duncan* 1973 1 WLR 574.

¹²⁵⁹ Giliker *Tort* 652.

¹²⁶⁰ See *Lagden v O'Connor* 2004 1 AC 1067 [2]-[171]; *W v Veolia Environment Services (UK) Plc* 2011 EWHC 2020 QB; *Coles v Hetherington* 2013 EWCA Civ 1704 [46]; Peel and Goudkamp *Winfield and Jolowicz on tort* 732 fn 321; Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2013; Giliker *Tort* 652.

¹²⁶¹ See *Fetter v Beale* 1697 1 Ld Raym 339, 91 ER 1122; *Fitter v Veal* 1701 12 Mod 542; Peel and Goudkamp *Winfield and Jolowicz on tort* 688; Witting *Street on torts* 703.

¹²⁶² However in personal injury claims, periodical payments may be made according to s 2(1) of the Damages Act 1996. See Peel and Goudkamp *Winfield and Jolowicz on tort* 726; Giliker *Tort* 605; Lunney and Oliphant *Tort* 859-867.

takes place.¹²⁶³ However, interim payments,¹²⁶⁴ provisional damages¹²⁶⁵ and periodical payments¹²⁶⁶ are sometimes awarded.¹²⁶⁷ It is also possible for an award to be made in terms of currency other than in sterling.¹²⁶⁸ Interest on pecuniary and non-pecuniary loss is usually calculated from date of cause of action till the date of trial and awarded to the claimant, or in cases where compensation is paid before judgment, then interest will be calculated till the date of payment.¹²⁶⁹

There is a general duty¹²⁷⁰ upon the claimant to mitigate his loss after the tort¹²⁷¹ which he could have reasonably avoided.¹²⁷² It is based on an objective test – what the reasonable person would have done in the claimant’s position.¹²⁷³ Again here, the reasonable person criterion is used in an objective manner. Thus if the claimant’s loss could be reduced by him undergoing reasonable medical treatment which may reduce his loss or increase his chances of employment then he will be expected to undergo

¹²⁶³ When a lump sum is awarded, it is assumed that it will be invested in order to earn interest. Discounting refers to a deduction that will take place because future financial loss is paid up front. See *Wells v Wells* 1999 AC 345; *Steele Tort* 493-497.

¹²⁶⁴ An interim payment is applied for in terms of the Rules of Court (s 32 of the Senior Courts Act 1981 and s 50 of the County Courts Act 1984): usually when judgment has been obtained against the defendant; liability has been admitted by the defendant; or it is likely that the claimant would succeed against the defendant at trial. The court may order amounts it deems just under the circumstances of the case. See Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2050-2051.

¹²⁶⁵ May be awarded in claims for personal injury where it is proven that at some time in the future, the claimant is likely to develop either a serious disease or deterioration in his mental or physical condition. The court assesses the claimant’s damages as if the claimant will not suffer the disease or experience deterioration in his condition but may award additional damages at a future date when the disease or deterioration does occur. See Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2007, 2051-2052.

¹²⁶⁶ In respect of future pecuniary loss in cases of personal injury and death claims. See Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2007, 2053-2054.

¹²⁶⁷ In terms of s 32A of the Senior Courts Act 1981 and s 2 of the Damages Act 1996. See McBride and Bagshaw *Tort* 776-777; *Steele Tort* 524-530.

¹²⁶⁸ For pecuniary loss. Non-pecuniary loss in personal injury claims is awarded in sterling. See authority referred to by Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2008 fn 27.

¹²⁶⁹ See in general Peel and Goudkamp *Winfield and Jolowicz on tort* 724-724, Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2047-2050; Giliker *Tort* 634-635 with regard to rules currently applicable to the award of interest as well as the authority cited therein.

¹²⁷⁰ Although the term duty is used, in a strict sense it is not a legal duty as it cannot be enforced but a failure to mitigate one’s loss can lead to a reduction in the damages awarded. See *Darbishire v Warren* 1963 1 WLR 1067, 1075; Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2011 fn 50.

¹²⁷¹ *Jamal v Moolla, Dawood Co* 1916 AC 175, 179; Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2011.

¹²⁷² Peel and Goudkamp *Winfield and Jolowicz on tort* 711; Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2011-2012; *Witting Street on torts* 680; Giliker *Tort* 605.

¹²⁷³ Peel and Goudkamp *Winfield and Jolowicz on tort* 711.

such treatment.¹²⁷⁴ If the proposed medical treatment involves a significant risk then the claimant will not be expected to undergo the treatment in order to mitigate his loss.¹²⁷⁵ He may also be expected to undertake alternative employment in order to minimise his loss.¹²⁷⁶ It would be prudent for a claimant who tries to find employment and is turned down to provide the court with proof of his attempts.¹²⁷⁷ According to case law it is not expected of a claimant to: undertake litigation against a third party where the outcome is uncertain;¹²⁷⁸ to undertake any action which results in destruction to his property;¹²⁷⁹ put his capital at risk;¹²⁸⁰ or put his “good public relations” at risk.¹²⁸¹ What falls under the ambit of reasonable will depend on the facts and circumstances of each case.¹²⁸² However, the standard of reasonableness required by the court is not high.¹²⁸³ Costs incurred by the claimant in mitigating his loss may be recovered from the defendant.¹²⁸⁴ The onus is on the defendant to prove that the claimant failed to mitigate his loss.¹²⁸⁵

It is possible that a continuing act for example in trespass¹²⁸⁶ or nuisance¹²⁸⁷ could give rise to a new cause of action from day to day.

¹²⁷⁴ *McAuley v London Transport Executive* 1957 2 Lloyd's Rep 500 CA; *Morgan v Wallis* 1974 1 Lloyd' Rep 165; Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2012; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 826.

¹²⁷⁵ See *Savage v Wallis* 1966 1 Lloyd's Rep 357; *Emeh v Kensington AHA* 1985 QB 1012 [28]-[59] where a mother was not expected to undergo an abortion to mitigate loss; Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2012.

¹²⁷⁶ Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 826.

¹²⁷⁷ Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 840.

¹²⁷⁸ See *Pilkington v Wood* 1953 Ch 770; Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2012.

¹²⁷⁹ *Elliott Steam Tug Co v Shipping Controller* 1922 1 KB 127,140; Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2013.

¹²⁸⁰ In some kind of speculative venture. See *Jewelowski v Propp* 1944 KB 510; Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2013.

¹²⁸¹ See *London and South of England Building Society v Stone* 1983 1 WLR 1242; Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2013.

¹²⁸² See *Payzu Ltd v Saunders* 1919 2 KB 581,588-589; *Copley v Lawn* 2009 EWCA Civ 580; Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2012; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 826.

¹²⁸³ See *Banco de Portugal v Waterlow* 1932 AC 452, 506; Peel and Goudkamp *Winfield and Jolowicz on tort* 711.

¹²⁸⁴ Peel and Goudkamp in *Winfield and Jolowicz on Tort* 711.

¹²⁸⁵ See authority referred to by Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2012 fn 57.

¹²⁸⁶ *Hudson v Nicholson* 1839 5 M & W 437; *Konskier v B Goodman Ltd* 1928 1 KB 421; Peel and Goudkamp *Winfield and Jolowicz on tort* 688-689

¹²⁸⁷ *Darley Main Colliery Co v Mitchell* 1886 11 App Cas 127; *Phonographic Performance Ltd v DTI* 2004 1 WLR 2893; Peel and Goudkamp *Winfield and Jolowicz on tort* 689; Giliker *Tort* 605.

The influence of reasonableness on harm, loss or damage as demonstrated is explicit with respect to a claimant being entitled to damages and the assessment of the award of damages as mentioned throughout this section.

6. Conclusion

In general, English tort law explicitly refers to the influence of reasonableness throughout. In the tort of negligence and the torts of trespass to a person, the criterion of the reasonable person is specifically and explicitly referred to. Furthermore the concepts of reasonableness, fairness and justice are inextricably linked in determining whether there is a duty of care, whether there is causation in the tort of negligence and generally in determining damages. The English courts do not appear to be hesitant to refer to the concept of “reasonableness”. English tort law has influenced the South African law of delict to a very large extent and it is envisaged that it will continue to do so. The reasonableness of either the claimant’s or the defendant’s conduct is vital to determining whether a tort was committed in negligence or the intentional torts. There is a balancing and weighing of interests and even though specific reference is not made to rights or interests the way it is made in South African law, it is implied when reference is made to the reasonableness of conduct. Furthermore, although wrongfulness and fault are not differentiated as in South African law, both these elements are effectively dealt with under the criterion of the reasonable person whether judged objectively, subjectively, *ex ante* or *ex post facto*. Wrongfulness and fault are, in effect, generally combined when questioning the reasonableness of conduct. Where the courts are faced with difficult or novel cases or where it is not easy to determine an element of a tort, the concept of reasonableness, together with the concepts of fairness and justice are referred to in reaching a fair decision. Policy considerations are particularly referred to when the courts want to limit, exclude or extend liability. Policy considerations may not seem reasonable to a particular party and some policy considerations may indeed be said to work unreasonably towards certain parties in certain circumstances. However, in general, if all competing interests are weighed and such instances are evaluated holistically and not only from the angle of a particular party, policy does not seem to be capable of being entirely divorced from reasonableness. The influence of reasonableness also leads to an overlap and at times may lead to the conflation of elements, but it serves

a different purpose when determining each element and in determining liability in a tort as a whole. The influence of reasonableness is indeed predominantly explicit on the English torts discussed in this thesis. An important feature is that policy considerations are applied in not holding the state liable. The state, unlike in South Africa, enjoys preferential treatment and immunity from liability under certain circumstances. This was also the position in South Africa prior to the advent of the Constitution.¹²⁸⁸ However, the decisions of the English courts with respect to liability of the state especially with regard to omissions may still be influenced by the Human Rights Act or if a new Bill is implemented in future.

¹²⁸⁸ Constitution of the Republic of South Africa, 1996.

Chapter 5: Law of the United States of America

“[L]iability must be based upon conduct which is socially unreasonable. The common thread woven into all torts is the idea of unreasonable interference with the interests of others. In many cases, of course, what is socially unreasonable will depend upon what is unreasonable from the point of view of the individual. The tort-feasor usually is held liable for acting with an intention that the law treats as unjustified, or acting in a way that departs from the reasonable standard of care. The endeavour to find some standard of intentional interference that others may reasonably be required to endure, of unintentional interference that is reasonable under the circumstances, of the reasonable use of one’s land, of reasonable reliance upon representations made, of risks and inconveniences, associated with the use of land, which others may reasonably be required to endure at the hands of the defendant – in short, to strike some reasonable balance between the plaintiff’s claim to protection against damage and the defendant’s claim to freedom of action for the defendant’s own ends, and those of society, occupies a very large part of the tort opinions.

But socially unreasonable conduct is broader than this, and the law looks beyond the actor’s own state of mind and the appearances which the actor’s own conduct presented, or should have presented to the actor. Often it measures acts, and the harm an actor has done, by an objective, disinterested and social standard. ... Sometimes it must range rather far afield, and look primarily to the social consequences which will follow. ... [T]he law of torts is concerned not solely with individually questionable conduct but as well with acts which are unreasonable, or socially harmful, from the point of view of the community as a whole.”¹

1. Introduction

In this chapter the explicit and implicit influence of reasonableness on the elements of the tort of negligence and the torts of trespass to the person which includes battery, assault and false imprisonment in law of the United States of America will be discussed.² To begin with: the definition of tort law; the basic elements of tort liability; and the aims of tort law in the United States of America will be discussed. The role of the jury as representatives of the reasonable people will be referred to briefly; the concept of a *prima facie* case; different states, different laws and the *Restatement of Torts* in its various volumes will also be referred to briefly. A more detailed discussion on the explicit and implicit influence of reasonableness on the elements of the torts of trespass to a person and the tort of negligence will follow. Under the tort of negligence, the explicit and implicit influence of reasonableness on some of the expanded categories of duties of care relating to: omissions; medical practitioners and health care providers; wrongful conception, wrongful birth and wrongful life claims; emotional harm or distress; and pure economic loss will be discussed. The influence of reasonableness on the defences to the torts of trespass to the person and negligence

¹ Keeton *et al* *Prosser and Keeton on torts* 6-7.

² See chapter 1 para 4 as to reasons for choosing the tort of negligence and the torts of trespass to the person.

will be discussed after the discussions of the torts. Finally the influence of reasonableness on causation and harm will be discussed. As will become evident, there are fewer comparative remarks referring to South African law in this chapter than in the previous chapter where English law is discussed. The different approach followed in this chapter is because American tort law is based on English tort law.³ Therefore many of the comparative remarks made under the discussion of English law will apply to American law. The differences between English and American law will however be pointed out where possible.

American law is based on English common law. In the United States of America, a violation of the common law, legislation, state or federal constitutional provisions and in certain circumstances international law,⁴ may lead to liability in tort.⁵ American tort law like English tort law does not follow a general approach as in South Africa and France. There are a number of specific torts which may be varied and even new torts may develop.⁶

Dobbs, Hayden and Bublick,⁷ submit that a tort is “conduct that constitutes a legal wrong and causes harm for which courts will impose civil liability. The essence of tort is the defendant’s potential for civil liability to the plaintiff for harmful wrongdoing and the plaintiff’s corresponding potential for compensation or other relief”.⁸ Torts traditionally refer to “wrongdoing in some moral sense”.⁹ Quite often though, liability in tort law is determined by policy considerations.¹⁰ For example, for a long time, liability for emotional harm was denied for fear of the flood of litigation, a policy consideration which was not related to whether the defendant acted in a morally reprehensible

³ See Schwartz 1981 *Yale LJ* 1722-1727 with regard to the tort of negligence. Green and Cardin in Koziol (ed) *Basic questions of tort law* 431.

⁴ For example see Article 19 of the Warsaw Convention 1929 and Montreal conventions - treaties (which deal with international air carrier liability); Dobbs, Hayden and Bublick *Hornbook on torts* 3 fn 6.

⁵ See authority referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 3 fn 2-3, 5-6.

⁶ See *Rizzuto v Davidson Ladders Inc* 280 Conn 225, 905 A 2d 1165 (2006); Dobbs, Hayden and Bublick *Hornbook on torts* 4.

⁷ *Hornbook on torts* 3. See *Vigil v Franklin* 103 P 3d 322 (Colo 2004).

⁸ Keeton *et al Prosser and Keeton on torts* 1 submit that “a really satisfactory definition of tort is yet to be found”.

⁹ Dobbs, Hayden and Bublick *Hornbook on torts* 4.

¹⁰ Keeton *et al Prosser and Keeton on torts* 23.

manner.¹¹ Another consideration is the fairness of imposing liability on the defendant or the class of persons the defendant belongs to.¹²

It is submitted that even though there are various torts, certain elements of the tort must be present in order to ground liability and it is reasonable to find the defendant liable if all the elements are present. Even though it is not expressly stated, it will be demonstrated that generally the elements of conduct, wrongfulness (subsumed under fault), fault (except in instances of strict liability), causation and harm are required to ground liability. Cardi and Green¹³ point out that the element of “act” is based on the idea that the actor should make a choice to act voluntarily. The element of wrongfulness is subsumed under fault, particularly negligence, which is generally judged objectively.¹⁴ American law acknowledges fault or culpability which is also generally judged objectively.¹⁵ The element of fault, either in the form of intention or negligence, is important in American tort law as tort is essentially fault-based.¹⁶ However, strict liability, where fault is not required, is applicable for harm caused by animals,¹⁷ abnormally dangerous activity,¹⁸ and the manufacture and distributing of defective products.¹⁹ Vicarious liability, a form of strict liability,²⁰ is liability of a person for the tort of another and is also seen as an exception to the predominantly fault-based liability in American law.²¹ “Respondent superior” is a principle applied whereby the employer is held jointly and severally liable with the employee for the tort committed by the employee, while in the course and scope of employment. It is the most common type of vicarious liability.²²

The reasons supplied for the application of strict liability are: strict liability of certain businesses ventures where harm commonly or recurrently occurs is justified and is

¹¹ Keeton *et al* *Prosser and Keeton on torts* 24.

¹² Keeton *et al* *Prosser and Keeton on torts* 25.

¹³ In Koziol (ed) *Basic questions of tort law* 438, 483.

¹⁴ Green and Cardi in Koziol (ed) *Basic questions of tort law* 432 fn 4.

¹⁵ Green and Cardi in Koziol (ed) *Basic questions of tort law* 477.

¹⁶ Dobbs, Hayden and Bublick *Hornbook on torts* 753.

¹⁷ See in general Dobbs, Hayden and Bublick *Hornbook on torts* 778-784.

¹⁸ See in general Dobbs, Hayden and Bublick *Hornbook on torts* 784-791.

¹⁹ See in general Dobbs, Hayden and Bublick *Hornbook on torts* 797-848.

²⁰ Dobbs, Hayden and Bublick *Hornbook on torts* 754.

²¹ See in general Dobbs, Hayden and Bublick *Hornbook on torts* 753-775 with regard to vicarious liability.

²² Dobbs, Hayden and Bublick *Hornbook on torts* 753.

considered economically efficient; business entities can increase their price on commodities in order to cover the costs of insurance and are in a good position to take out insurance against such loss; it is fair or just to hold the person or entity strictly liable as such person or entity bears the burdens and benefits of its operation (the risk and profit theory);²³ and some activities carry more risk than others.²⁴ In respect of abnormally dangerous activity the reason for imposing strict liability are: the risk of harm is reduced and the defendant is encouraged to use safer methods or safer premises in conducting dangerous activities.²⁵ With regard to vicarious liability of employers for the torts committed by employees, the reasons referred to for imposing strict liability include: that either the plaintiff or the employer as the innocent person must bear the loss; the employer however has control over the employee and benefits from the activity of the employee, the employer should therefore bear the loss (the risk and profit theory); by imposing liability on the employer, the employer will exercise control over his employees deterring tortious conduct.²⁶

It is evident that the risk and profit theory are the main theories advanced for the imposition of strict liability. It is reasonable to impose strict liability in instances where there is increased, common or recurrent risk of harm. It is reasonable to hold the risk creator (for example, the manufacturer, business entity or the employer) strictly liable for harm as they create such risk or increase the risk of harm. They also obtain a profit or benefit and should therefore bear the burden of potential loss or harm. It is reasonable to impose strict liability on the risk creator because they are in a better position to take out insurance and in any event in taking out insurance, the loss is distributed amongst many and not on the individual risk creator. It is reasonable to impose strict liability on risk creators who engage in dangerous activities, such as rock blasting, as there are abnormal or unreasonable risks involved which they are aware of or should be aware of. Thus the influence of reasonableness on strict liability is implicit. Where there is normal, uncommon, non-recurring risk then it is reasonable that fault-based liability should be applied.

²³ Dobbs, Hayden and Bublick *Hornbook on torts* 801-802. See also chapter 3 para 1.

²⁴ Dobbs, Hayden and Bublick *Hornbook on torts* 755-756.

²⁵ Dobbs, Hayden and Bublick *Hornbook on torts* 790.

²⁶ Dobbs, Hayden and Bublick *Hornbook on torts* 755-756.

American tort law seems to refer to the term “wrong” and “tort” interchangeably. For example, an “intentional wrong” is synonymous with the term “intentional tort”.²⁷ In respect of intentional torts, intention on the part of the defendant is required where such defendant is usually conscious of his “wrongdoing” and if not at the very least he is aware of his “act”.²⁸ In respect of negligent wrongs, the defendant deviates from the standard of reasonableness whether he is consciously aware of it or not and may at times be aware of unreasonable risks that he takes.²⁹ Liability for negligence may be excluded if there was no harm or loss, or where the harm was remote or “fortuitous”.³⁰ Tort law is generally concerned with conduct and the consequences of such conduct.³¹ Tort law acknowledges the defendant’s accountability and personal responsibility for harm done to the plaintiff.³²

There are generally three broad categories of interests that are protected against wrongdoing: a person’s interest in security of property, physical security, physical liberty and autonomy; intangible interests such as an interest in one’s reputation etcetera; and economic interests.³³ Greater protection is afforded for physical harm and damage to property than to intangible harm such as emotional harm or pure economic loss.³⁴ The weighing of various interests in tort law is not easy and the courts’ decisions coincide with the community or public opinion. When the community is divided the courts’ decisions also reflect the division and uncertainty in the community.³⁵

The broader aims of tort law include morality or corrective justice³⁶ and “social utility” or “public policy” (based on what is good for society).³⁷ The aims of tort law have been debated, with some academic writers advocating the aims of corrective justice, others

²⁷ See Dobbs, Hayden and Bublick *Hornbook on torts* 4.

²⁸ Dobbs, Hayden and Bublick *Hornbook on torts* 4.

²⁹ Dobbs, Hayden and Bublick *Hornbook on torts* 4.

³⁰ Dobbs, Hayden and Bublick *Hornbook on torts* 5.

³¹ Dobbs, Hayden and Bublick *Hornbook on torts* 9.

³² Dobbs, Hayden and Bublick *Hornbook on torts* 12.

³³ Dobbs, Hayden and Bublick *Hornbook on torts* 5.

³⁴ Dobbs, Hayden and Bublick *Hornbook on torts* 5-6, 28-30.

³⁵ Keeton *et al Prosser and Keeton on torts* 17-18.

³⁶ Where it is “right” for the defendant to compensate the plaintiff for harm wrongfully caused.

³⁷ Dobbs, Hayden and Bublick *Hornbook on torts* 16. See chapter 2 paras 1, 2 and 3.2 with regard to “corrective justice”.

deterrence and yet others more mixed versions.³⁸ Much has been written about the theory of corrective justice.³⁹ The theory is however rarely referred to in practice or in decisions and if it is, it is associated with the principle of “fairness”⁴⁰ that is used to explain principles of justice as well as accountability for fault,⁴¹ in contrast to decisions that are reached based on policy and practicality.⁴² Corrective justice on the one hand entails that the defendant must pay compensation for his morally faulty conduct which caused harm or loss to the plaintiff. On the other hand, in terms of corrective justice, it would be wrong “to impose liability upon a defendant who is not at fault in causing the plaintiff’s harm”. Corrective justice focuses on fairness between the parties.⁴³ “Community standards” may be embodied in a custom or the views of the jury who provide a verdict reflecting the standards for fault as well as liability, which is also deemed a factor in considering corrective justice.⁴⁴ Thus corrective justice takes into account the interests of the plaintiff, the defendant, and the community. Dobbs, Hayden and Bublick⁴⁵ state that usually policy and justice reach the same result but not always, in which case either justice or policy prevails or both are “compromised”. The other two main subsidiary aims of the broader aims of tort law, compensation and deterrence of undesirable behaviour, are often subsumed under the broader aims.⁴⁶ With regard to deterrence, the idea is to deter all persons from tortious conduct in considering the potential for liability from tortious conduct.⁴⁷ The primary purpose of tort law is to “vindicate” the victim and his rights, to make him whole again and to shift the loss onto the person who was at fault for causing the harm.⁴⁸ The secondary purpose is to uphold standards of conduct and behaviour.⁴⁹

³⁸ See Green and Cardi in Koziol (ed) *Basic questions of tort law* 439. These aims are discussed further under the tort of negligence. See para 3.3 below.

³⁹ See in general Rabin 1996 *Yale LJ* 2261; Stapleton 2006 *Fordham L Rev* 1529; Walt 2006 *Virginia LR* 1311; Zipursky 2003 *Georgetown LJ*; Weinrib 1992 *Iowa L Rev* 403; Dobbs, Hayden and Bublick *Hornbook on torts* 17 fn 5, 18 fn 10.

⁴⁰ Fischer 1999 *Tenn L Rev* 1127 concludes that when adjudicators are forced to choose between fairness and efficiency, fairness prevails.

⁴¹ See *United States v Cannons Eng'g Corp* 899 F 2d 79, 87 (1st Cir 1990); Dobbs, Hayden and Bublick *Hornbook on torts* 17 fn 7.

⁴² Dobbs, Hayden and Bublick *Hornbook on torts* 17.

⁴³ Beever 2008 *OJLS* 491.

⁴⁴ See Wells 1990 *Mich L Rev* 2348; Dobbs, Hayden and Bublick *Hornbook on torts* 20.

⁴⁵ *Hornbook on torts* 16.

⁴⁶ Dobbs, Hayden and Bublick *Hornbook on torts* 15.

⁴⁷ See Hubbard 2006 *Hofstra L Rev* 445-452; Dobbs, Hayden and Bublick *Hornbook on torts* 23.

⁴⁸ See *Hanks v Powder Ridge Restaurant Corp* 276 Conn 314, 885 A 2d 734, 742 (2005); *Teschendorf v State Farms Ins Companies* 293 Wis 2d 123, 717 NW 2d 258, 273 (2006); Dobbs, Hayden and Bublick *Hornbook on torts* 6 fn 19.

⁴⁹ Dobbs, Hayden and Bublick *Hornbook on torts* 6.

As mentioned in chapter 2,⁵⁰ the concept of reasonableness developed from the concept of justice, which entails treating all parties equally and fairly. Liability will follow where there is an unreasonable interference of interests and unreasonable conduct which causes harm or loss. Whether the infringement of the interests is unreasonable or the conduct is unreasonable depends on the views of the community.⁵¹ Infringement of interests may be justified and reasonable depending on the circumstances. Where interests are infringed in an unreasonable manner, corrective justice requires the restoration of the balance, for the plaintiff to be compensated for the wrong done as a result of the morally faulty conduct of the defendant. By enforcing compensation for harm done, the aim of deterring undesirable behavior is indirectly achieved.⁵² In instances of strict liability where fault is irrelevant corrective justice still requires the plaintiff to be compensated for the harm sustained.⁵³ Thus it is evident that fairness, justice, equity, policy considerations, the community's views and reasonableness are all intertwined.

1.1 *The role of the jury*

The jury plays an essential and unique role in tort law in the United States of America. The right to a jury is enshrined in the Seventh Amendment to the Federal Constitution and there are similar provisions in all states, conferring such a right on all legal subjects.⁵⁴ The jury represents the community,⁵⁵ they represent the reasonable people.⁵⁶ As the representatives of the reasonable people, they provide input as to the norms of behaviour. The jury determines historical facts and makes value judgments.⁵⁷ The adjudicator decides on disputes of law and application of legal principles. As the

⁵⁰ Chapter 2 para 1.

⁵¹ Keeton *et al Prosser and Keeton on torts* 6-7.

⁵² See chapter 2 paras 1, 2 and 3.2 with regard to a number of authors' views on "corrective justice".

⁵³ See the rationales for imposing strict liability in chapter 3 para 1, chapter 5 para 1 and chapter 6 para 1.

⁵⁴ See Green and Cardi in Koziol (ed) *Basic questions of tort law* 432; Zweigert and Kötz *Comparative law* 274.

⁵⁵ Dobbs, Hayden and Bublick *Hornbook on torts* 189.

⁵⁶ Dobbs, Hayden and Bublick *Hornbook on torts* 204.

⁵⁷ See Gergen 1999 *Fordham L Rev* 407; Hubbard 2006 *Hofstra L Rev* 437, 454 fn 67; *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 8(b) (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 291 fn 3.

trained professional, the adjudicator must maintain certainty in the law. The jury, on the other hand as the “trier of facts”, establishes and evaluates facts.⁵⁸ Both parties, the plaintiff and the defendant must present their case, adduce evidence and either party may raise defences and cross-examine any witnesses.⁵⁹ The jury may draw inferences from the adduced evidence.⁶⁰ The plaintiff, defendant or witnesses may contradict themselves and there may be uncertainty with regard to the oral evidence. It is for the jury to evaluate the witnesses’ testimony and the adjudicator rarely asks witnesses any questions.⁶¹ The adjudicator may however regulate testimony by excluding testimony which he considers prejudicial or irrelevant.⁶²

An adjudicator determines whether a duty of reasonable care exists and if he does decide so then he also notifies the jury of the standard of care that must be applied.⁶³ If the adjudicator finds that there was no duty of care owed, he may grant a “motion to dismiss”,⁶⁴ “summary judgment”⁶⁵ or a “directed verdict”.⁶⁶ The jury decides on negligence, contributory negligence and the compensation of damages.⁶⁷ If the adjudicator finds that there is insufficient evidence or if the evidence is weak, that reasonable people would not consider sufficient to prove the case, then the adjudicator may direct a verdict for the defendant.⁶⁸ Thus in this instance, the adjudicator still regulates which claims may be heard by the jury.⁶⁹ If the adjudicator finds that reasonable people would not differ to find the defendant negligent, then he may direct a verdict for the defendant.⁷⁰ If, however, the adjudicator finds that reasonable people may differ then it is up to the jury to decide.⁷¹

⁵⁸ Dobbs, Hayden and Bublick *Hornbook on torts* 36.

⁵⁹ Dobbs, Hayden and Bublick *Hornbook on torts* 33-34.

⁶⁰ Dobbs, Hayden and Bublick *Hornbook on torts* 36.

⁶¹ Dobbs, Hayden and Bublick *Hornbook on torts* 36.

⁶² Dobbs, Hayden and Bublick *Hornbook on torts* 36.

⁶³ Dobbs, Hayden and Bublick *Hornbook on torts* 292.

⁶⁴ Where the case is dismissed.

⁶⁵ Where judgment is given in favour of a party and a trial is not necessary.

⁶⁶ A finding is given and there is no need for a jury to decide on the case. See Dobbs, Hayden and Bublick *Hornbook on torts* 292. Epstein *Torts* 166.

⁶⁷ Zweigert and Kötz *Comparative law* 274.

⁶⁸ Dobbs, Hayden and Bublick *Hornbook on torts* 292.

⁶⁹ See *Restatement Third of Torts (Liability for Physical and Emotional Harm)* §8(b) (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 36 fn 8.

⁷⁰ See *Peterson v Eichhorn* 344 Mont 540, 189 P 3d 615 (2008) where summary judgment was given; *Montas v JJC Constr Corp* 985 NE 2d 1225 (NY 2013); Dobbs, Hayden and Bublick *Hornbook on torts* 292 fn 6; Epstein *Torts* 166.

⁷¹ Dobbs, Hayden and Bublick *Hornbook on torts* 292; Epstein *Torts* 166.

The jury provides a verdict and does not give reasons why or justify its verdict.⁷² A jury verdict may be appealed.⁷³ If an adjudicator is of the opinion that there was some injustice done by the jury because certain evidence was not considered; or the damages awarded were too little or too much; or that the verdict was unjust, the adjudicator may grant a “new trial”.⁷⁴ Similarly if the adjudicator gives the jury an incorrect instruction which adversely affects a party or is prejudicial (constituting a “reversible error on appeal”) a new trial with the correct instructions may be ordered.⁷⁵ Generally a jury trial is available as a given right but the parties may decide not to have the jury decide on the facts thereby allowing the adjudicator to decide on the facts. This is referred to as a bench trial.⁷⁶ The use of juries has been declining and in cases where there is no jury, the adjudicator establishes and evaluates the facts.⁷⁷ Green⁷⁸ points out however that adjudicators and juries generally reach the same result.

As mentioned above, the jury decides whether the defendant’s or the plaintiff’s conduct strayed from the standard of the reasonable person under the circumstances based on the facts.⁷⁹ Dobbs, Hayden and Bublick⁸⁰ illustrate this aspect of the jury’s role by referring to an example where the “trier” establishes that the defendant drove his motor vehicle at sixty miles per hour. The adjudicator states that in terms of the law, the defendant is expected to “exercise reasonable care under the circumstances”. Thus the adjudicator must notify the jury about the applicable law when evaluating conduct. Driving at that speed may not be reasonable in an area where there are young children playing, while driving at that speed on the highway may be reasonable. Whether the defendant’s conduct was reasonable according to the facts of the case is decided by

⁷² Gilles 2001 *Vand L Rev* 814.

⁷³ Gilles 2001 *Vand L Rev* 814-815.

⁷⁴ See *Pocatello Auto Color Inc v Akzo Coatings Inc* 127 Idaho 41, 896 P 2d 949 (1995); *Botelho v Caster’s Inc* 970 A 2d 541 (RI 2009); Dobbs, Hayden and Bublick *Hornbook on torts* 292-293.

⁷⁵ Epstein *Torts* 166.

⁷⁶ Dobbs, Hayden and Bublick *Hornbook on torts* 35-36.

⁷⁷ See Hans and Albertson 2003 *Notre Dame L Rev* 1497.

⁷⁸ See Green *Judge and Jury* 404.

⁷⁹ See *Considine v City of Waterbury* 279 Conn 830, 905 A 2d 70 (2006); *Delmarva Power & Light v Stout* 380 A 2d 1365 (Del 1977); further cases cited by Dobbs, Hayden and Bublick *Hornbook on torts* 292.

⁸⁰ Dobbs, Hayden and Bublick *Hornbook on torts* 33-34.

the jury. The jury may decide that driving at that speed under the circumstances was “unreasonably risky” constituting negligence.⁸¹

There are a number of views on the positive role of the jury, that is, the jury: embodies democratic and community values because they are members of society randomly chosen; is a “meliorator of harshness or dispenser of equity” (they in a sense amend law which seems harsh or unfair);⁸² ensures the separation of powers within the judicial system; they contribute “to political stability through citizen-participation”; and they cannot be bribed or intimidated.⁸³ The negative view of the role of the jury is that they impose undue losses upon on unpopular defendants. Studies have however shown that juries actually reach the same outcome as the adjudicator and tend to be more sympathetic to the defendant.⁸⁴

It is submitted that the jury upholds community values similar to the manner the *boni mores* is relied on in South African law. They represent the reasonable people of the current time – reflecting changing *mores*, attitudes and give content to standards of reasonableness. They in fact influence standards of reasonableness implicitly. In South Africa though, community values are given content by legal professionals purportedly interpreting or “finding” the *boni mores*⁸⁵ whereas in the United States of America, lay members of the public must interpret community values in the given case.

1.2 The concept of a “*prima facie* case”

When the plaintiff alleges that a tort has been committed against him, all the elements of the tort must be present and proven. If not, the case will be dismissed by the adjudicator.⁸⁶ Once the elements have been established, then the plaintiff has made a “*prima facie* case” after which the case may proceed to trial with the jury. When a

⁸¹ See *Godfrey v Iverson* 559 F 3d 569 (DC Cir 2009); *Brooks v Lewin Realty III Inc* 378 Md 70, 835 A 2d 616 (2003); *Restatement Third of Torts (Liability for Physical and Emotional Harm)* §8(b) (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 36 fn 4.

⁸² Dobbs, Hayden and Bublick *Hornbook on torts* 37-38.

⁸³ See Dobbs, Hayden and Bublick *Hornbook on torts* 37; Epstein *Torts* 163-164.

⁸⁴ See *Clermont and Eisenberg* 1992 *Cornell L Rev* 1124; Saks 1998 *DePaul L Rev* 221; *Eisenberg et al* 2002 *Cornell L Rev* 743; Dobbs, Hayden and Bublick *Hornbook on torts* 37 fn 12, 15.

⁸⁵ See chapter 3 paras 3.1.4 and 3.1.6.

⁸⁶ Dobbs, Hayden and Bublick *Hornbook on torts* 37.

prima facie case has been established, defences have not been considered and the testimony on all the elements has not been evaluated. The jury has not yet considered whether the plaintiff's version in respect of each material fact is probable or more-likely-than not. Proving a *prima facie* case does not mean the plaintiff is automatically successful in his claim.⁸⁷ If for example, the jury does not believe the plaintiff's version on a particular element and does not find in favour of him, then the plaintiff has failed to fulfil his burden of proof.⁸⁸

In some instances, conduct causing harm, deserving compensation, cannot fit into neat pigeon-holes or specified torts (such as battery or negligence) and so it may be called a non-categorical tort, a *prima facie* tort. A *prima facie* tort applies as a safety net in not denying relief.⁸⁹ However, it may overlap with other areas of law and the courts may find a lack of guidance in dealing with the dispute and claim in tort law.⁹⁰

This concept or rule of evidence reasonably allows a plaintiff's case to be heard and not be denied relief even though he has not proven his case. It reasonably allows the possibility of relief even where the facts of the case may not fit into one of the categorised torts thus ensuring fairness. On the other hand it ensures that where there is an essential element missing the court's time is not wasted and a jury is not appointed unnecessarily. Thus money and time is not wasted. It is reasonable to dismiss a case and deny liability where an element of a tort is absent.

1.3 Different states, different laws and the Restatement of Torts

According to the U.S. Constitution, congress has legislative competence only in certain areas which include protection of copyright and trade, controlling commerce, citizenship and so on, which means that commercial and private law is completely regulated by the state laws of the various states.⁹¹ Federal courts interpret and enforce law stipulated in the federal constitution or federal statute.⁹² Patent and copyright

⁸⁷ Dobbs, Hayden and Bublick *Hornbook on torts* 37-38.

⁸⁸ Dobbs, Hayden and Bublick *Hornbook on torts* 41.

⁸⁹ *National Nutritional Foods Ass'n v Whelan* 492 F Supp 1253, 1255 (SDNY 1995). See Shapo *Tort* 89.

⁹⁰ *Cartelli v Lanier Worldwide Inc* 872 F Supp 1253, 1255 (SDNY 1995). See Shapo *Tort* 89.

⁹¹ Zweigert and Kötz *Comparative law* 250.

⁹² Dobbs, Hayden and Bublick *Hornbook on torts* 44.

claims are tried in federal courts and not state courts. In respect of other claims, they may be tried in either court.⁹³ Federal law is supreme and overrides state law. Generally tort law is not regulated by federal laws but is regulated by state laws.⁹⁴ However, the states cannot impose liability in tort which infringes the U.S. Constitution. Private law is regulated by the individual fifty states. Only the legislature of each state can pass statutes affecting tort law. Adjudicators in the individual states develop the law.⁹⁵ Nevertheless, American law may be seen as a unitary system due to the efforts of the American Law Institute and the publications of the *Restatements*.⁹⁶

The *Restatement of Torts* is referred to throughout this chapter and has particular importance in that it is an extensive, successive body of work⁹⁷ produced by the American Law Institute⁹⁸ that is aimed at gathering and combining black letter law applied throughout the different states. The volumes *inter alia* encapsulate case law, restate current existing common law, and also provide guidance on what the rule of law should be to the legal community. Where rules and case law are inconsistent in the different states the *Restatements* may reflect the most appropriate positive progressive rule even though it is the minority view among the states.⁹⁹ As will become evident, various volumes of the *Restatement of Torts* will be referred throughout this chapter. At times, the *First, Second or Third Restatement of Torts* may be referred to in order to show similarities or changes between the volumes which are often highlighted by American academic writers. Although the *Restatements* are not binding on the courts, they are regarded as authoritative and are often referred to in judgments.¹⁰⁰ In general, tort law solutions, general principles and methods are similar in all states.¹⁰¹

⁹³ Dobbs, Hayden and Bublick *Hornbook on torts* 46.

⁹⁴ Green and Cardi in Koziol (ed) *Basic questions of tort law* 435.

⁹⁵ Zweigert and Kötz *Comparative law* 250.

⁹⁶ Zweigert and Kötz *Comparative law* 250-251.

⁹⁷ The first volume of the *Restatement First of Torts* was published in 1934 and the current version is the *Restatement Third of Torts*.

⁹⁸ The American Law Institute is an organisation composed of legal practitioners, adjudicators and academics. It was founded by the American Bar Association in 1923. A leading scholar is appointed as a reporter for a particular topic. His task is to incorporate existing rules and case law in its current positive state. Other advisers, from the ranks of academics, legal practitioners and adjudicators, draft the text which must then be endorsed by a committee before official publication (Zweigert and Kötz *Comparative law* 251).

⁹⁹ Zweigert and Kötz *Comparative law* 252.

¹⁰⁰ See in general American Law Institute's website: <https://www.ali.org/about-ali/creation> (Date of use: 9 September 2017).

¹⁰¹ Zweigert and Kötz *Comparative law* 41.

Alternative or non-tort compensation systems not necessarily fault-based or relating to any wrongdoing, regulate *inter alia*: social security for medical treatment, benefits for persons with physical disabilities, workers' compensation benefits (for employees injured while at work); compensation for injuries resulting from motor vehicle accidents (no-fault based);¹⁰² compensation for persons injured as a result of dangerous products; and mass tort claims for asbestos-related injuries which are regulated by tort law principles but are dealt with differently within the law. These systems are aimed at public welfare and distributive justice or loss spreading.¹⁰³ Therefore there may be an overlap to some degree between these systems and tort law.¹⁰⁴ Dobbs Hayden and Bublick¹⁰⁵ submit that in United States of America:

“No one can understand tort law in the United States without recognizing that liability insurance fuels the system, limits its capacity for compensation and deterrence, shapes the litigation, and affects the cost and choices in the system as a whole”

Insurance liability influences tort law as also stated under the discussion of English law.¹⁰⁶ A full study of its influence falls beyond the scope of this study and will therefore only be referred to incidentally.

The explicit and implicit influence of reasonableness on the torts of trespass to the person will now be discussed.

2. Torts of trespass to the person

2.1 General requirements for the torts of trespass to a person

Generally, the torts of trespass to a person require some kind of physical act.¹⁰⁷ There must be intention on the part of the defendant to commit a particular act.¹⁰⁸ The torts of trespass to a person generally affect the plaintiff's interests in autonomy. The torts

¹⁰² Green and Cardi in Koziol (ed) *Basic questions of tort law* 440.

¹⁰³ Dobbs, Hayden and Bublick *Hornbook on torts* 11-12.

¹⁰⁴ See Green and Cardi in Koziol (ed) *Basic questions of tort law* 440; Dobbs, Hayden and Bublick *Hornbook on torts* 11-12.

¹⁰⁵ *Hornbook on torts* 47.

¹⁰⁶ See chapter 4 para 1.

¹⁰⁷ Dobbs, Hayden and Bublick *Hornbook on torts* 54.

¹⁰⁸ Dobbs, Hayden and Bublick *Hornbook on torts* 54.

are actionable *per se*, that is, proof of physical harm is not required (in contrast to the tort of negligence where proof of harm is required) and the plaintiff is in principle entitled to damages.¹⁰⁹ It is possible that a defendant may be held liable under a number of trespassory torts and a crime simultaneously, depending on the circumstances and facts of the case.¹¹⁰ The *Restatement Third of Torts*¹¹¹ provides for an umbrella rule of liability where a defendant “who intentionally causes physical harm is subject to liability for that harm”. Dobbs, Hayden and Bublick¹¹² state that this is regarded as a new tort of “purposeful infliction of bodily harm” where actual physical contact is not required. This tort is yet to be tested by the courts.

2.1.1 Intent

In the majority of the different states, infancy¹¹³ or mental incapacity¹¹⁴ does not negate intent. In respect of the element of intent, the defendant acts intentionally if he has a “purpose” to bring about a particular result, or alternatively does not have a purpose but acknowledges with “substantial certainty” that his conduct will bring about the result.¹¹⁵ The element of “intent” encompasses a state of mind about the consequences of conduct, having a will or desire to bring about consequences, but also believing or having knowledge of the consequences resulting from the conduct.¹¹⁶ In other words, the defendant “subjectively wants or subjectively foresees that harm to another will almost certainly result from his actions”.¹¹⁷ Dobbs, Hayden and Bublick¹¹⁸ explain the idea of “purpose” and “substantial certainty” as follows: if X attempts to hit the target and then fires his rifle, he satisfies the purpose test (in South African law or doctrine, X has direct intent);¹¹⁹ if X intends to put Y to sleep and in so

¹⁰⁹ Dobbs, Hayden and Bublick *Hornbook on torts* 54.

¹¹⁰ Dobbs, Hayden and Bublick *Hornbook on torts* 54.

¹¹¹ (*Liability for Physical Harm*) §5 (2005); Dobbs, Hayden and Bublick *Hornbook on torts* 54.

¹¹² *Hornbook on torts* 54-55.

¹¹³ *Farm Bureau Mut Ins Co of Ark v Henley* 275 Ark 122, 628 SW 2d 301 (1982); *Bailey v CS 12 SW 3d* 159 (Tex App 2000); Dobbs, Hayden and Bublick *Hornbook on torts* 58 fn 27.

¹¹⁴ *Polmatier v Russ* 206 Conn 229, 537 A 2d 468 (1988); *Williams v Kearbey* Kan App 2d 564, 775 P 2d 670 (1989); Dobbs, Hayden and Bublick *Hornbook on torts* 58 fn 28.

¹¹⁵ See *Restatement Third of Torts (Intentional Torts to Persons)* §102 cmt (a) (Tentative Draft No. 1 April 8 2015); Dobbs, Hayden and Bublick *Hornbook on torts* 56, 64.

¹¹⁶ See *Restatement Second of Torts* § 8A (1965); Keeton *et al Prosser and Keeton on torts* 34.

¹¹⁷ *Curtis v Porter* 784 A 2d 18, 23 (Me 2001); Dobbs, Hayden and Bublick *Hornbook on torts* 56 fn 13.

¹¹⁸ Dobbs, Hayden and Bublick *Hornbook on torts* 56.

¹¹⁹ See chapter 3 para 4.2.

doing puts sleeping pills in the food served at a cafeteria knowing that the food will be eaten by a number of students including Y, then according to the “substantial certainty” test he indeed intends to put others to sleep as well (in South African law or doctrine, X has indirect intent with regard to putting the other students to sleep and direct intent with regard to putting Y to sleep).¹²⁰ When establishing intent, the subjective state of mind of the defendant is in question but the subjective intent is determined from “external or objective evidence” by the trier of fact. If X locks Y in a room and disposes of the key, the trier of fact can infer that X intended to confine Y to the room.¹²¹ A bad motive is not indicative of intent but may be considered as an aggravating factor when determining liability under certain economic torts or when punitive damages are claimed.¹²² Motive like intent is concerned with the state of mind but deals with the reasons for bringing about consequences.¹²³ Similarly a mistake where the defendant believes that he is acting rightfully, joke¹²⁴ or good motive (such as giving a patient an injection in order to treat her despite her objection to such treatment)¹²⁵ on the part of the defendant will not negate intention. With trespassory torts, the defendant may be held liable for the intended and unintended consequences whether such consequence relates to the type of harm, or in instances where X intended to injure Y but instead injured Z.¹²⁶ The same applies if X intends to assault Y by pointing a gun at him but does not intend for the bullet to strike Y. If the bullet does strike Y, then X is liable for battery even though he did not intend it. This is referred to as transferred intent.¹²⁷ A

¹²⁰ See chapter 3 para 4.2.

¹²¹ Dobbs, Hayden and Bublick *Hornbook on torts* 57.

¹²² Dobbs, Hayden and Bublick *Hornbook on torts* 57.

¹²³ Keeton *et al Prosser and Keeton on torts* 35.

¹²⁴ See *Fuerschbach v Southwest Airlines Co* 439 F 3d 1197 (10th Cir 2006); Dobbs, Hayden and Bublick *Hornbook on torts* 58 fn 24.

¹²⁵ See *Shuler v Garrett* 743 F 3d 170 (6th Cir 2014). In South African law a *bona fide* mistake or joke depending on the circumstances may negate intention. See chapter 3 para 4.2.

¹²⁶ See *Baska v Scherzer* 283 Kan 750, 156 P 3d 617 (2007); *Davies v White* 18 BR 246 (Bkrtcy Va 1982); *Singer v Marx*, 144 Cal App 2d 637, 301 P 2d 440 (1956); Dobbs, Hayden and Bublick *Hornbook on torts* 79.

¹²⁷ See *Talmadge v Smith* 59 NW 656 (Mich 1894); *Hall v McBryde* 919 P 2d 910 (Colo Ct App 1996); *Manning v Grimsley* 643 F 2d 20 (1st Cir 1981); *Brown v Martinez* 68 NM 271, 361 P 2d 152 (1961) where shooting was not acceptable for the stealing of water melons on the defendant's property; *Restatement Second of Torts* § 16(2) and cmt b (1965); *Restatement Third of Torts (Intentional Torts to Persons)* §106 cmt b (Tentative Draft No. 1 April 8 2015); Dobbs, Hayden and Bublick *Hornbook on torts* 79-80; Keeton *et al Prosser and Keeton on torts* 37. In South African law, it may be said that some of the consequences were actually intended in the forms of for example, *dolus eventualis* or *dolus indeterminatus*. Thus even though the result may not have been desired or a different victim was targeted, the harm that resulted may still be regarded as intended because the defendant's will had been directed at the result, although perhaps not in the form of a desire as in *dolus directus*. For *dolus eventualis* to succeed, the defendant must actually, subjectively have foreseen the result which in American

plaintiff who succeeds in his claim of trespass to the person whether in the form of battery, assault or false imprisonment is entitled to claim damages,¹²⁸ including punitive damages depending on whether the defendant acted with malice, recklessness or oppression.¹²⁹

The influence of reasonableness on intent is implicit as it is reasonable to hold the defendant liable for the tort of trespass to the person if intention is present along with the other requirements for the tort. For intention to be present all that is required is the aim or acknowledgement with substantial certainty that one's conduct will bring about the consequence whether such consequence is achieved directly or indirectly. The relationship between reasonableness and blameworthiness in instances of intention is implicit insofar as it is reasonable, in principle, to hold someone liable if he has directed his will at attaining a particular harmful result. American law does not have a further requirement for intention like in South African law¹³⁰ where the defendant must be conscious of the wrongfulness or unreasonableness of his conduct. Thus infancy, mental incapacity, a mistake, joke or good motive does not negate intention. The *Restatement Third of Torts*¹³¹ refers to "single intent", that is, without "culpable intent to harm".¹³² This may be regarded as reasonable if one looks at it from the point of view of the innocent plaintiff who, for example, has suffered harm as a result of the intentional conduct of an infant or mentally impaired person. In respect of the intentional torts, it may be considered reasonable that the defendant is held liable for the direct or indirect consequences as long as the consequences are not too remote. This however relates more to the element of legal causation or rather "scope of liability" as it is called in American law, and whether it is reasonable to hold the defendant liable

law may be regarded as negligent conduct. If the defendant did not actually, subjectively foresee the result, but the reasonable person would have foreseen and prevented it, a finding of negligence will be appropriate in South African law. In American law, *dolus eventualis* will not assist the plaintiff in the instance of intentional torts. See chapter 3 paras 4.2-4.3 with regard to the different forms of intention as well as negligence in South African law.

¹²⁸ *Kennan v Checker Taxi Co Inc* 250 Ill App 3d 155, 897, 620 NE 2d 1208, 1214 (1993); *Rosenbloom v Flygare* 501 NW 2d 597 (Minn 1993); Dobbs, Hayden and Bublick *Hornbook on torts* 82.

¹²⁹ See Dobbs, Hayden and Bublick *Hornbook on torts* 82-84.

¹³⁰ See chapter 3 para 4.2.

¹³¹ (*Intentional Torts to Persons*) § 101-103 (Tentative Draft No. 1 April 8 2015).

¹³² See fn 141 below.

for the directly or indirectly factually caused consequences. The element of “scope of liability” will be discussed in more detail further on.¹³³

2.2 Battery

Battery “vindicates the plaintiff’s rights of autonomy and self-determination”.¹³⁴ According to the requirements, there must be a positive (affirmative) act,¹³⁵ and intention resulting in harm or offense to the plaintiff or another that is not privileged or consented to.¹³⁶ In terms of the act, such act must be voluntary.¹³⁷ Thus involuntary acts such as muscle spasms, fits and so forth do not qualify as an act.¹³⁸ However, an instinctive response to an emergency such as grabbing a person’s arm or striking a person out of “insane impulses”¹³⁹ constitutes an act.¹⁴⁰ The intention (which need not be “hostile”) to touch or come into physical bodily contact with the plaintiff¹⁴¹ or another must be in manner which is not wanted, not consented to¹⁴² and unjustified (a privilege or defence must not be applicable).¹⁴³ Even in instances where the defendant is justified and privileged to make a lawful arrest or touch the plaintiff, such conduct must

¹³³ See para 4 below.

¹³⁴ Dobbs, Hayden and Bublick *Hornbook on torts* 62. See *Schloendorff v Society of New York Hos* 105 NE 92, 93 (NY 1914) in respect of consent and the right to autonomy.

¹³⁵ See *Restatement Second of Torts* § 13 (1965); *Restatement Third of Torts (Intentional Torts to Persons)* § 101 cmt c (Tentative Draft No. 1 April 8 2015); Dobbs, Hayden and Bublick *Hornbook on torts* 68-69; Keeton *et al Prosser and Keeton on torts* 41.

¹³⁶ See *Restatement Second of Torts* § 13 (1965); Dobbs, Hayden and Bublick *Hornbook on torts* 62-64.

¹³⁷ See *Restatement Second of Torts* § 2 (1965).

¹³⁸ Keeton *et al Prosser and Keeton on torts* 34-35.

¹³⁹ *Poltmatier v Russ* 206 Conn 229, 537 A 2d 468 (1988); Dobbs, Hayden and Bublick *Hornbook on torts* 68.

¹⁴⁰ See *Restatement Second of Torts* § 2 cmt b (1965); Dobbs, Hayden and Bublick *Hornbook on torts* 68.

¹⁴¹ See *Restatement Third of Torts (Intentional Torts to Persons)* § 101-103 (Tentative Draft No. 1 April 8 2015) where “single intent” is required, that is, without “culpable intent to harm” (in South African legal doctrine this would refer to intent in the attenuated form without consciousness of wrongfulness). Cf *Restatement Second of Torts* § 19 (1965) which required the intent to cause “harmful or offensive contact”, dual intent, requiring culpable intent to harm. By using the single intent rule, it is likely that young children and mentally incapacitated persons may be held liable thus generally increasing the scope of liability. See discussion by Dobbs, Hayden and Bublick *Hornbook on torts* 65-67.

¹⁴² See *Dubbs v Head Start Inc* 336 F 3d 1194, 1219 (10th Cir 2003); *Cohen v Smith* 269 Ill App 3d 1087, 1090 648 NE 2d 329, 332 (1995); *Messina v Matarasso* 284 AD 2d 32, 35, 729 NYS 2d 4, 7 (2001).

¹⁴³ *Yoder v Cotton* 276 Neb 954, 758 NW 2d 630, 632 (2008); Dobbs, Hayden and Bublick *Hornbook on torts* 55.

not be “unnecessary”, “excessively forceful”,¹⁴⁴ or beyond the scope of the consent.¹⁴⁵ Contact or touch must be substantial or significant and it is interpreted widely. For example, contact is present where: a person drinks poison placed in a cup;¹⁴⁶ is exposed to dangerous fumes,¹⁴⁷ or radiation;¹⁴⁸ and smoke from tobacco provided there is a “purpose to harm or offend” on the part of the defendant.¹⁴⁹ Accidental touching which is not intentional is not battery but is construed as negligent conduct (there is no negligent battery).¹⁵⁰ It is sufficient if the intended bodily contact is “offensive”,¹⁵¹ unacceptable to the plaintiff, “violates ordinary social usages”,¹⁵² or is not permitted by law or a privilege.¹⁵³ An offensive touch infringes “a reasonable sense of personal dignity”.¹⁵⁴ Intention to cause physical harm satisfies the requirement of intent but it is not necessary.¹⁵⁵ Proof of physical harm, emotional harm,¹⁵⁶ bad motive, or violent conduct is also not necessary. Thus the tort is actionable *per se*,¹⁵⁷ the “tort itself is regarded as harmful and the plaintiff is always entitled to recover at least

¹⁴⁴ See *Jackson v District of Columbia* 412 A 2d 948, 955 (DC 1980); Dobbs, Hayden and Bublick *Hornbook on torts* 61.

¹⁴⁵ For example where a medical practitioner acts beyond the scope of the defence. See for example, *Mohr v Williams* 95 Minn 261, 104 NW 12 (1905) where battery was established because consent was given to operate on the right ear but an operation was conducted on the left ear. See cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 63 fn 72.

¹⁴⁶ *Snouffer v Snouffer* 621 NE 2d 879 (Ohio Ct App 1933). See Dobbs, Hayden and Bublick *Hornbook on torts* 67.

¹⁴⁷ *Swope v Columbian Chems Co* 281 F 3d 185 (5th Cir 2002). See Dobbs, Hayden and Bublick *Hornbook on torts* 67 fn 95.

¹⁴⁸ *Field v Philadelphia Elec Co* 388 Pa Super 400, 417, 565 A 2d 1170, 1178 (1989).

¹⁴⁹ See *Richardson v Henley* 209 Ga App 868, 434 SE 2d 772 (1993), reversed on other grounds – 264 Ga 355, 444 SE 2d 317 (1994); *Leichtman v WLW Jacor Commc'ns, Inc* 92 Ohio App 3d 232, 634 NE 2d 697 (1994); Dobbs, Hayden and Bublick *Hornbook on torts* 67.

¹⁵⁰ *Janelinsins v Button* 102 Md App 30, 648 A 2d 1039, 1045 (1994). See Dobbs, Hayden and Bublick *Hornbook on torts* 61.

¹⁵¹ See *Restatement Second of Torts* § 19 (1965); *Restatement Third of Torts (Intentional Torts to Persons)* § 101(Tentative Draft No. 1 April 8 2015); Dobbs, Hayden and Bublick *Hornbook on torts* 63.

¹⁵² See *Balas v Huntington Ingalls Industries Inc* 711 F 3d 401 (4th Cir 2013) where it was held that a hug by a supervisor was not offensive (objectively viewed); Dobbs, Hayden and Bublick *Hornbook on torts* 63-64. Cf *Keeton et al Prosser and Keeton on torts* 41 who refer to conduct which is contrary to good manners.

¹⁵³ Dobbs, Hayden and Bublick *Hornbook on torts* 61.

¹⁵⁴ *Restatement Second of Torts* § 19. See also *Restatement Third of Torts (Intentional Torts to Persons)* § 101, 103 (Tentative Draft No. 1 April 8 2015) which refers to contact which is “highly offensive to the other’s unusually sensitive sense of personal dignity”; Dobbs, Hayden and Bublick *Hornbook on torts* 62-63.

¹⁵⁵ *Frey v Kouf* 484 NW 2d 864 (SD 1992); Dobbs, Hayden and Bublick *Hornbook on torts* 61. See in general *Restatement Third of Torts (Liability for Physical Harm)* § 5 (2005).

¹⁵⁶ See *Harris v Forklift Systems Inc* 114 S Ct 367, 371 126 L Ed 2d 295, 510 US 17, 22 (1993); Dobbs, Hayden and Bublick *Hornbook on torts* 63.

¹⁵⁷ See Dobbs, Hayden and Bublick *Hornbook on torts* 61; *Keeton et al Prosser and Keeton on torts* 40.

“nominal damages”.¹⁵⁸ Consent is usually established by “custom, socially accepted practices, and other non-verbal behaviour”¹⁵⁹ which are “reasonably necessary” in common daily interaction. For example, a tap on the shoulder to gain a person’s attention would be regarded as common daily interaction.¹⁶⁰ Examples of battery include instances where the defendant: shoots or beats a spouse;¹⁶¹ spits on the plaintiff’s face,¹⁶² pushes the plaintiff aggressively even though the person is not physically harmed;¹⁶³ kisses the plaintiff without consent;¹⁶⁴ touches the plaintiff’s clothing,¹⁶⁵ body¹⁶⁶ or hair which is unwanted;¹⁶⁷ snatches an object from the plaintiff’s hand;¹⁶⁸ intentionally pulls the chair from underneath the plaintiff as she is about to sit resulting in her falling to the floor;¹⁶⁹ and where the defendant provides medical treatment which involves physical contact without consent, even if the treatment was intended to save the patient’s life.¹⁷⁰ The plaintiff need not be aware of the contact, contact could occur while the plaintiff is asleep or under anaesthetic.¹⁷¹ A claim for battery in principle will succeed if the harm was caused directly or indirectly. As soon

¹⁵⁸ Dobbs, Hayden and Bublick *Hornbook on torts* 851. From a South African viewpoint, some form of harm manifesting itself in the infringement of an interest of personality, will be required.

¹⁵⁹ Dobbs, Hayden and Bublick *Hornbook on torts* 66.

¹⁶⁰ See *Freeman v Wal-Mart Stores East LP*, 871 F Supp 2d 665 (ED Tenn 2011); Keeton *et al Prosser and Keeton on torts* 42.

¹⁶¹ *Noble v Noble* 761 P 2d 1369 (Utah 1988); *Cain v McKinnon* 552 So 2d 91 (Miss 1989); Dobbs, Hayden and Bublick *Hornbook on torts* 61.

¹⁶² See *Draper v Baker* 1884 61 Wis 450, 21 NW 527; Keeton *et al Prosser and Keeton on torts* 41.

¹⁶³ *Whitley v Anderson* 37 Colo App 486, 551 P 2d 1083 (1976), *aff'd*, 194 Colo 87, 570 P 2d 525 (1977); *Selmeczki v New Mexico Dep’t of Corrections* 139 NM 122, 129 P 3d 158 (Ct App 2006); Dobbs, Hayden and Bublick *Hornbook on torts* 61-62.

¹⁶⁴ *Johnson v Ramsey County*, 424 NW 2d 800 (Minn Ct App 1988); Dobbs, Hayden and Bublick *Hornbook on torts* 61 fn 54.

¹⁶⁵ *Piggly-Wiggly Alabama Co v Rickles* 1925 212 Ala 585, 103 So 860 where there was an attempted search of the plaintiff’s pockets. See Keeton *et al Prosser and Keeton on torts* 39.

¹⁶⁶ *Stockett v Tolin* 791 F Supp 1536 (SD Fla 1992) where the employer touched the employee’s breast and licked her; *White v University of Idaho* 797 P 2d 108, 109 (Idaho 1990) where the piano teacher touched the plaintiff’s back described as a pianist lifting fingers on and off the piano; Dobbs, Hayden and Bublick *Hornbook on torts* 62 fn 62.

¹⁶⁷ *Rogers v Loews L’Enfant Plaza Hotel* 526 F Supp 523 (DDC 1981); Dobbs, Hayden and Bublick *Hornbook on torts* 61 fn 54.

¹⁶⁸ See *Fisher v Carousel Motor Hotel Inc Tex* 1967 424 SW 2d 627, 629-630 where a plate was snatched from the plaintiff’s hand; Keeton *et al Prosser and Keeton on torts* 40.

¹⁶⁹ *Garratt v Dailey* 46 Wash 2d 197, 279 P 2d 1091 (1995); Dobbs, Hayden and Bublick *Hornbook on torts* 68.

¹⁷⁰ See *Taylor v Johnston* 985 P 2d 460 (Alaska 1999); *Mims v Boland* 110 Ga App 477, 138 SE 2d 902 (1964); Dobbs, Hayden and Bublick *Hornbook on torts* 61 fn 55.

¹⁷¹ See *Hivley v Higgs* 1927 120 Or 588, 253 P 363; Keeton *et al Prosser and Keeton on torts* 40.

as battery is established, the defendant may be held liable for intended and unintended harm.¹⁷² The consequences however must not be too remote.¹⁷³

The influence of reasonableness on battery is predominantly implicit. It is reasonable to hold the defendant liable if all the elements of battery are present and if one element is absent then it is unreasonable to hold the defendant liable. There must be positive conduct on the part of the defendant in the form of touching or contact with the plaintiff. Contact is interpreted widely to include for example, drinking poison from a cup or being exposed to toxic substances. Thus the intentional contact may occur directly or indirectly. The conduct must be voluntary, that is, the defendant must be able to mentally control his muscular movements when there is contact with the plaintiff. Thus if the conduct is involuntary then there is no act and it is unreasonable to hold the defendant liable. If the contact is accidental then intention is absent and it is unreasonable to hold the defendant liable for battery, the tort of negligence may however be applicable. There must be intentional physical infringement of the plaintiff's bodily integrity and his right to autonomy. The infringement must not be justified, it must be unreasonable. A defence such as consent or privilege for example, to make a lawful arrest must not be applicable. In determining intentional reasonable contact that the plaintiff must endure, contact which is socially accepted by the community which is similar to the *boni mores* yardstick used in South African law to determine wrongfulness¹⁷⁴ is considered. The harm must not be trivial and if it is trivial then naturally it is unreasonable to hold the defendant liable for battery. Furthermore it is reasonable that the defendant is held liable for the consequences resulting from the defendant's wrongful contact which may have occurred directly and indirectly, in principle, so long as they are not too remote. It seems that in Anglo-American law¹⁷⁵ with regard to the intentional torts, directly and indirectly caused consequences which are not too remote coupled with the requirement that the harm must not be trivial is considered reasonable to hold the defendant liable for "intended" and "unintended"

¹⁷² See *Ware v Garvey* DC Mass 1956 139 F Supp 71; *Bettel v Yim* 20 OR 2d 617, 88 DLR 3d 543 (Ont Co Ct 1978); *Restatement Second of Torts* §§ 15, 18, 20 (1965); *Restatement Third of Torts (Intentional Torts to Persons)* §101 (Tentative Draft No. 1 April 8 2015); Dobbs, Hayden and Bublick *Hornbook on torts* 61-62, 79; cases referred to by Keeton *et al Prosser and Keeton on torts* 40 fn 22.

¹⁷³ See *Vosburg v Putney* 50 NW 403 (Wis 1891); *Restatement Second of Torts* §16 illus 1 (1965) refers to an offensive touching intended to bother or annoy.

¹⁷⁴ See chapter 3 para 3.

¹⁷⁵ See chapter 4 para 2 and 4.

consequences. Here “intended” and “unintended” consequences are equated with “direct” and “indirect consequences”.

2.3 Assault

Assault usually occurs before battery and is “an act that is intended to and does place the plaintiff in apprehension of an immediate unconsented-to touching that would amount to a battery”.¹⁷⁶ There is a loss of mental tranquillity as a result of fear of a direct threat.¹⁷⁷ The *Restatement Second of Torts* refers to “apprehension”¹⁷⁸ while the *Restatement Third of Torts* refers to “anticipation”.¹⁷⁹ The courts sometimes refer to “fear”.¹⁸⁰ Subjective anticipation or apprehension of harm is required on the part of the plaintiff.¹⁸¹ A claim for assault (like in English law)¹⁸² is based on the lack of physical contact or harm. Thus if there is physical contact then it may be regarded as a battery.¹⁸³ The plaintiff must be aware of the impending harm.¹⁸⁴ Without such awareness there is no assault but if the plaintiff is subsequently harmed then there may be a battery.¹⁸⁵ It must be proven that the defendant had the will or purpose to put the plaintiff in apprehension or anticipation of unconsented-to harmful or offensive contact or was aware with substantial certainty that his conduct would result in such apprehension.¹⁸⁶

¹⁷⁶ Dobbs, Hayden and Bublick *Hornbook on torts* 69.

¹⁷⁷ Epstein *Torts* 14.

¹⁷⁸ § 21 and § 32 (1965).

¹⁷⁹ (*Intentional Torts to Persons*) §105 (Tentative Draft No. 1 April 8 2015); Dobbs, Hayden and Bublick *Hornbook on torts* 69.

¹⁸⁰ See *Lamb v State* 93 Md App 422, 438, 613 A 2d 402, 409 (1993); *Restatement Third of Torts (Intentional Torts to Persons)* §105 illus 1 (Tentative Draft No. 1 April 8 2015); *Restatement Second of Torts* § 24 cmt B and illus 1 and 2 (1965); Dobbs, Hayden and Bublick *Hornbook on torts* 70-71.

¹⁸¹ See *Chavez v Thomas & Betts Corp* 396 F 3d 1088, 1101 (10th Cir 2005) where comments of the plaintiff’s bra followed by a physical touching and reaching over to open her shirt, could easily be deemed as apprehension of imminent battery. See Dobbs, Hayden and Bublick *Hornbook on torts* 69; Shapo *Tort* 30 fn 7.

¹⁸² See chapter 4 para 2.2.

¹⁸³ See *Bowie v Murphy* 271 Va 127, 624 SE 2d 74 (2006); Dobbs, Hayden and Bublick *Hornbook on torts* 69-70.

¹⁸⁴ See *Restatement Second of Torts* § 22; Keeton *et al Prosser and Keeton on torts* 44.

¹⁸⁵ See *McCraney v Flanagan* 47 NC App 498, 267 SE 2d 404 (1980) where the plaintiff awoke and found that the defendant had had sexual intercourse with her. Due to the fact that she had been unaware of the imminent sexual assault, she was not assaulted.

¹⁸⁶ Shapo *Tort* 29.

An example of assault is where the defendant intends to scare the plaintiff by shooting at him but not intending for the bullet to strike him. In *Raess v Doescher*,¹⁸⁷ even though there was no attempt to strike the plaintiff, the plaintiff's belief of an imminent strike was reasonable considering that the defendant "aggressively and rapidly advanced on the plaintiff with clenched fists, piercing eyes, beet-red face, popping veins", screamed, swore at him, and backed him up against a wall.¹⁸⁸ If the plaintiff anticipates an imminent battery then there is an assault.¹⁸⁹ Other examples of assault include shaking a fist under the plaintiff's nose;¹⁹⁰ aiming a weapon at a person;¹⁹¹ and chasing a person with intent to harm.¹⁹² The courts have submitted that the "anticipation" or "apprehension" "must be reasonable or well-founded" and there must be an apparent ability to complete the battery on the part of the defendant.¹⁹³ It was previously thought that words without actual physical conduct does not constitute assault,¹⁹⁴ however, words are now considered in light of all circumstances and may, depending on the circumstances, constitute "assault".¹⁹⁵ For example, in *Cullison v Medley*,¹⁹⁶ the defendants entered the plaintiff's home one evening after he retired to bed. They accused and berated him while one of the defendant's repeatedly slapped at a gun which was in a holster on his thigh but did not draw it. The court found that in light of all the facts, there was an assault.¹⁹⁷ A conditional threat, where for example, a landowner threatens to forcefully remove a person from his property if he doesn't

¹⁸⁷ 883 NE 2d 790 (Ind 2008). See Dobbs, Hayden and Bublick *Hornbook on torts* 72.

¹⁸⁸ Dobbs, Hayden and Bublick *Hornbook on torts* 72.

¹⁸⁹ Dobbs, Hayden and Bublick *Hornbook on torts* 70.

¹⁹⁰ See *Stockwell v Gee* 1926 121 Okl 207, 249 P 389; Keeton *et al Prosser and Keeton on torts* 43.

¹⁹¹ See *Holdorf v Holdorf* 1918 185 Iowa 838, 169 NW 737 (threatening with a club); Keeton *et al Prosser and Keeton on torts* 43.

¹⁹² See *Townsdin v Nutt* 1877 19 Kan 282 where the defendant rode towards the plaintiff intending to run her down; Keeton *et al Prosser and Keeton on torts* 43.

¹⁹³ Dobbs, Hayden and Bublick *Hornbook on torts* 71 refer to *Allen v Walker* 569 So 2d 350, 351 (Ala 1990); *Espinoza v Thomas* 189 Mich App 110, 472 NW 2d 16 (1991); *Muslow v AG Edwards & Sons Inc* 509 So 2d 1012, 1021 (La Ct App 1987); *Hawkins v Hawkins* 101 NC App 529, 400 SE 2d 472 (1991) aff'd 331 NC 743, 417 SE 2d 447.

¹⁹⁴ *Webbier v Thoroughbred Racing Protective Bureau Inc* 105 RI 605, 614, 254 A 2d 285, 290 (1969).

¹⁹⁵ See *Muslow v AG Edwards & Sons Inc* 509 So 2d 1012, 1021 (La Ct App 1987); *Johnson v Bollinger* 86 NC App 1, 356 SE 2d 378 (1987); *Restatement Third of Torts (Intentional Torts to Persons)* §105 cmt g (Tentative Draft No. 1 April 8 2015); *Restatement Second of Torts* § 31 (1965); Dobbs, Hayden and Bublick *Hornbook on torts* 71.

¹⁹⁶ 570 NE 2d 27 (Ind 1991).

¹⁹⁷ See Dobbs, Hayden and Bublick *Hornbook on torts* 71 fn 131.

leave of his own accord, does not count as an assault.¹⁹⁸ However, if the defendant threatens the plaintiff that if things are not done his way, he will beat her, then such verbal threats may constitute assault.¹⁹⁹ The *Restatement Third of Torts*²⁰⁰ refers to a subjective approach in establishing whether the plaintiff anticipated imminent harm unless the claim for assault is based on words or anticipated contact that would not be regarded as offensive.²⁰¹ In respect of the requirement of “imminent” battery, there must be an immediate threat.²⁰² For example, threatening telephone calls would not qualify as imminent harm for the purpose of battery.²⁰³ Fleeing on the part of the plaintiff as a reasonable means of escape must not be an option and if there is no reason to anticipate imminent harm even though threats were made, then it would also not qualify as assault.²⁰⁴

Assault is more of a mental infringement of a person, as opposed to a physical infringement and damages are usually awarded for mental harm, fright and physical illness resulting from the mental harm.²⁰⁵

The influence of reasonableness on assault is partly implicit and partly explicit. It is reasonable to hold the defendant liable for assault if all the elements of assault are present. The harm suffered must not be trivial and the conduct must be in the form of an intentional, voluntary, positive act. The defendant through his actions or words must cause the plaintiff to subjectively fear, anticipate or apprehend an immediate, direct, unjustified battery. The plaintiff’s mental tranquillity must be infringed in an unjustified and unreasonable manner. Thus there must be no defence or privilege applicable whereby the plaintiff should be reasonably expected to endure the infringement of his

¹⁹⁸ *Restatement Third of Torts (Intentional Torts to Persons)* §105 cmt h (Tentative Draft No. 1 April 8 2015); *Restatement Second of Torts* § 30 illus 1(1965); Dobbs, Hayden and Bublick *Hornbook on torts* 72.

¹⁹⁹ *Gouin v Gouin* 249 F Supp 2d 62, 70 (D Mass 2003). See Dobbs, Hayden and Bublick *Hornbook on torts* 72 fn 137; Keeton *et al Prosser and Keeton on torts* 45.

²⁰⁰ *Intentional Torts to Persons* §105 cmt d (Tentative Draft No. 1 April 8 2015).

²⁰¹ See Dobbs, Hayden and Bublick *Hornbook on torts* 71.

²⁰² Keeton *et al Prosser and Keeton on torts* 44.

²⁰³ See *Johnson v Brooks* 567 So 2d 34, 35 (Fla Dist Ct App 1990); *Dickens v Puryear* 302 NC 437, 276 SE 2d 325 (1981); Dobbs, Hayden and Bublick *Hornbook on torts* 71.

²⁰⁴ See *Vietnamese Fishermen’s Ass’n v Knights of the Ku Klux Klan* 518 F Supp 993 (SD Tex 1981); *State Rubbish Collectors Ass’n v Siliznoff* 38 Cal 2d 330, 240 P 2D 282 (1952); Dobbs, Hayden and Bublick *Hornbook on torts* 71.

²⁰⁵ See *Brown v Crawford* 1944, 296 Ky 249, 177 SW 2d 1; *Ross v Michael* 1923 246 Mass 126, 140 NE 292; other cases referred to by Keeton *et al Prosser and Keeton on torts* 43 fn 4.

rights. Because the approach is subjective and affects the plaintiff's mind he must be aware of the impending harm, but if there is no reason to anticipate imminent harm or if the plaintiff was not aware of it, then it is unreasonable to hold the defendant liable for assault. Furthermore if the threat is conditional then it is reasonable to hold the defendant liable for assault. The influence of reasonableness is explicit on the requirement of reasonable fear or anticipation of harm.

2.4 False imprisonment

False imprisonment infringes the plaintiff's freedom of movement and such restriction of movement by the defendant may occur in a direct or indirect manner.²⁰⁶ The defendant must intend²⁰⁷ to confine (detain or restrain)²⁰⁸ or instigate the confinement of the plaintiff against his will.²⁰⁹ In terms of the *Restatement Second of Torts*,²¹⁰ the plaintiff must have been aware of his confinement. False arrest is similar to false imprisonment except that in false arrest, the arrest is executed by an officer or a person authorised to make an arrest.²¹¹ Confinement for even the shortest period of time is sufficient.²¹² Confinement of the plaintiff during the investigation of a crime may be considered reasonable.²¹³ Consent, immunity or a privilege may negate false imprisonment.²¹⁴ In terms of the requirement of confinement there must be no

²⁰⁶ Dobbs, Hayden and Bublick *Hornbook on torts* 77. Cf Keeton *et al Prosser and Keeton on torts* 47.

²⁰⁷ Accidental confinement by the defendant is not construed as intentional confinement. See *Adams v Wal-Mart Stores Inc* 324 F 3d 935, 941 (7th Cir 2003); Dobbs, Hayden and Bublick *Hornbook on torts* 73 fn 150.

²⁰⁸ See *Restatement Second of Torts* § 35 (1965) where all these terms may be used with regard to false imprisonment.

²⁰⁹ See Keeton *et al Prosser and Keeton on torts* 47, 52-53.

²¹⁰ § 35(1)(b) and § 42 (1934). See also *Douthit v Jones* 619 F 2d 527 (5th Cir 1980); *Parvi v City of Kingston* 41 NY 2d 553, 362 NE 2d 960, 394 NYS 2d 161 (1977); Dobbs, Hayden and Bublick *Hornbook on torts* 73; Keeton *et al Prosser and Keeton on torts* 48.

²¹¹ Dobbs, Hayden and Bublick *Hornbook on torts* 73.

²¹² See *Strain v Irwin* 1915 195 Ala 414, 70 So 734; *Fuerschbach v Southwest Airlines Co* 439 F 3d 1197, 1208 (10th Cir 2006); Dobbs, Hayden and Bublick *Hornbook on torts* 74; Keeton *et al Prosser and Keeton on torts* 48.

²¹³ See *Thornhill v Wilson* 504 So 2d 1205 (Miss 1987); Dobbs, Hayden and Bublick *Hornbook on torts* 74 fn 159.

²¹⁴ See *Morgan v Greenwaldt* 786 So 2d 1037, 1042-1043 (Miss 2001) where nurses as a result of the conduct of a psychiatric patient placed her in seclusion. The patient lashed out at the nurses shouting. She appeared out of control and a threat to her safety as well as others. The patient submitted that she was falsely imprisoned. Her claim was rejected and the court pointed out that she had voluntarily signed a consent form for treatment. Placing her in a secured environment is a common method of treatment in such institutions.

reasonable means of escape.²¹⁵ There must be complete confinement or restraint.²¹⁶ In order for the escape to be deemed reasonable, it must be “readily knowable” and “reasonably safe and appropriate”.²¹⁷ For example, escaping from a moving motor vehicle is not considered “reasonable”.²¹⁸ Even though a plaintiff may be confined against his will, the defendant may be privileged to confine the plaintiff. The confinement is usually in the form of a physical restraint²¹⁹ such as: locking the plaintiff in a room;²²⁰ detaining the plaintiff’s property whereby he has no choice but to be confined if he wants to guard it or regain possession of it;²²¹ blocking the plaintiff’s motor vehicle so that he cannot drive in any other direction;²²² or withholding the plaintiff’s motor vehicle car keys where there is no other means of escape but by using the motor vehicle.²²³ Intimidation²²⁴ or verbal threats of harm to the plaintiff, his property²²⁵ or to another person (such as an immediate family member)²²⁶ may be used to confine the plaintiff without physical contact. If there is no justification for the confinement then it qualifies as false imprisonment.²²⁷ Arrest, threats, duress or physical force may be used to confine a person.²²⁸ The plaintiff must show that he reasonably believed that the threat, whether express or implied,²²⁹ could have been carried out.²³⁰ If the plaintiff submits to confinement as a result of a police officer’s

²¹⁵ See *Restatement Second of Torts* § 36 cmt a (1965); *Krochalis v Insurance Co of N Am* 629 F Supp 1360 (ED Pa 1985); Dobbs, Hayden and Bublick *Hornbook on torts* 74.

²¹⁶ See *Restatement Second of Torts* §36(1) (1965); Keeton *et al Prosser and Keeton on torts* 47.

²¹⁷ Dobbs, Hayden and Bublick *Hornbook on torts* 74 fn 162. See *Furlong v German-American Press Association* Mo 1916, 189 SW 385, 389; other authority referred to by Keeton *et al Prosser and Keeton on torts* 47 fn 7.

²¹⁸ See *Noguchi v Nakamura* 2 Haw App 655, 638 P 2d 1383 (1982); *Sindle v New York City Transit Auth* 33 NYS 2d 183, 307 NE 2d 245 (1973).

²¹⁹ See Keeton *et al Prosser and Keeton on torts* 49.

²²⁰ *Geddes v Daughters of Charity of St Vincent de Paul Inc* 348 F 2d 144 (5th Cir 1965).

²²¹ See *Wallace v Stringer* 260 Ga App 850, 553 SE 2d 166 (2001); *Burrow v K-Mart Corp* 166 Ga App 284, 304 SE 2d 460 (1983); *Ashland Dry Goods Co v Wages* 302 Ky 577, 195 SW 2d 312 (1946); *Griffin v Clark* 42 P 2d 297, 299 (Idaho 1935); Dobbs, Hayden and Bublick *Hornbook on torts* 75.

²²² *Schanafelt v Seaboard Fin Co* 108 Cal App 2d 420, 239 P 2d 42 (1951); Dobbs, Hayden and Bublick *Hornbook on torts* 75.

²²³ *Verstraelen v Kellog* 60 Wash 2d 115, 372 P 2d 543 (1962); Dobbs, Hayden and Bublick *Hornbook on torts* 75.

²²⁴ See *Collins v Straight Inc* 748 F 2d 916 (4th Cir 1984).

²²⁵ See *Cassady v Tackett* 938 F 2d 693 (6th Cir 1991); Dobbs, Hayden and Bublick *Hornbook on torts* 75.

²²⁶ See *Restatement Second of Torts* § 40A (1965).

²²⁷ See Keeton *et al Prosser and Keeton on torts* 49-50.

²²⁸ See *Restatement Second of Torts* §§ 40 and 41 (1965).

²²⁹ See *DeAngelis v Jamesway Department Store* 205 NJ Super 519, 501 A 2d 561 (1985); *Dupler v Seubert* 69 Wis 2d 373, 230 NW 2d 626 (1975) where the plaintiff was outnumbered and isolated; Dobbs, Hayden and Bublick *Hornbook on torts* 76.

²³⁰ *Herbst v Wuennenberg* 83 Wis 2d 768, 266 NW 2d 391 (1978); Dobbs, Hayden and Bublick *Hornbook on torts* 75-76.

assertion of authority and it turns out that the police officer did not have immunity or a privilege to do so, then he may be liable for false arrest.²³¹

Examples of false imprisonment include: a patient being held against her will at an institute for substance abuse;²³² the driver of a motor vehicle not allowing a passenger to get off;²³³ and a police officer who detains the plaintiff without a warrant or “probable cause”. The plaintiff may in addition have a federal civil rights claim.²³⁴

There is a duty on a jailer to release a prisoner when he has fulfilled his sentence term.²³⁵ Failure to release such prisoner when his sentence has been completed may result in liability.²³⁶ The same principle applies when a patient who is supposed to be detained for only a certain period of time, is detained longer than necessary.²³⁷

A plaintiff may be entitled to *inter alia* nominal damages, punitive damages, compensation for loss of time, discomfort, harm to his reputation, as well as for physical and mental injury.²³⁸

The influence of reasonableness on the requirements of false imprisonment is partly implicit and partly explicit. In order for the plaintiff to be entitled to damages for false imprisonment, there must have been a complete unreasonable restriction of the plaintiff’s freedom of movement. The conduct is in the form of the voluntary, intentional, confinement of the plaintiff. The restriction of the plaintiff’s freedom of movement may be caused directly or indirectly. The plaintiff’s freedom of movement must be infringed

²³¹ See *Martin v Houck* 141 NC 317, 54 SE 291 (1906); Dobbs, Hayden and Bublick *Hornbook on torts* 75; Keeton *et al Prosser and Keeton on torts* 50.

²³² See *Collins v Straight Inc* 748 F 2d 916 (4th Cir 1984); *Geddes v Daughters of Charity of St Vincent de Paul Inc* 348 F 2d 144 (5th Cir 1965); authority cited by Dobbs, Hayden and Bublick *Hornbook on torts* 74 fn 164.

²³³ See *Noguchi v Nakamura* 2 Haw App 655, 638 P 2d 1383 (1982); *Sindle v New York City Transit Auth* 33 NYS 2d 183, 307 NE 2d 245 (1973); Dobbs, Hayden and Bublick *Hornbook on torts* 74.

²³⁴ See *Clark v Cohen* 794 F 2d 79, 86-87 (3rd Cir 1986); *Gordon v Villagas* 1994 WL 86373 (Conn Super Ct 1994) (unpublished); Dobbs, Hayden and Bublick *Hornbook on torts* 74, 78.

²³⁵ See *Douthit v Jones* 619 F 2d 527 (5th Cir 1980); *Bennett v Ohio Department of Rehab & Correction* 60 Ohio St 3d 107, 573 NE 2d 633 (1991); Dobbs, Hayden and Bublick *Hornbook on torts* 77.

²³⁶ See *Birdsall v Lewis* 1936 246 App Div 132 285 NYS 146 aff'd 271 NY 592, 3 NE 2d 200; Keeton *et al Prosser and Keeton on torts* 51.

²³⁷ See *Kowalski v St Francis Hospital & Health Ctrs* 1 NY 3d 480 (2013); Dobbs, Hayden and Bublick *Hornbook on torts* 77; Keeton *et al Prosser and Keeton on torts* 51 fn 52.

²³⁸ See authority cited by Keeton *et al Prosser and Keeton on torts* 48-49 fn 16-27.

in an unreasonable manner. That is, there should not have been a privilege or ground of justification applicable that would make the restriction of movement reasonable under the circumstances. For example, confining a person for the purpose of investigating a crime may be considered reasonable as it may be necessary and in the interests of justice. Or confining a patient to his room may be considered necessary for his own safety and well-being under the circumstances. Thus the restriction on the freedom of movement may be justified and reasonable. The confinement must be complete in the sense that there must be no reasonable means of escaping the confinement. However, in order for the escape to be deemed reasonable, the plaintiff must be aware of the manner of escape and it must be safe and appropriate to escape under the circumstances. If a person is confined unnecessarily longer than he should have been then such confinement for that period of time till his release may be unreasonable.

2.5 Defences applicable to the intentional torts of trespass to the person

In American tort law, a defence to tortious conduct such as self-defence (where all the elements of the tort have been established *prima facie*) is referred to as a “privilege” and known as an affirmative defence.²³⁹ If an element such as fault is absent, then the plaintiff has failed to satisfy the burden of proof and it is not referred to as an affirmative defence or justifications.²⁴⁰ Privileges are referred to with regard to the intentional torts.²⁴¹ There is no *numerus clausus* with regard to privileges and new privileges may be recognised.²⁴² By using a privilege, the defendant in essence “injects issues of reasonableness into the case”, that is, in respect of a reasonable belief, reasonable expectations or reasonable conduct on his part.²⁴³ Justifications relate to the objective standards of reasonableness while excuses relate to excusing the actor’s conduct due to his “subjective mental or psychological characteristics”. Fletcher²⁴⁴ refers to a

²³⁹ Keeton *et al* *Prosser and Keeton on torts* 108. See *Boyer v Waples* 206 Cal App 2d 725, 24 Cal Rptr 192 (1962); *Winn v Inman* 119 Ill App 3d 836, 457 NE 2d 141 (1983) with regard to self-defence. The person relying on such defence generally has the burden of proof. See also Dobbs, Hayden and Bublick *Hornbook on torts* 132.

²⁴⁰ Dobbs, Hayden and Bublick *Hornbook on torts* 42-43.

²⁴¹ Keeton *et al* *Prosser and Keeton on torts* 109.

²⁴² See *Peterson v Sorlien* 299 NW 2d 123 (1980); Dobbs, Hayden and Bublick *Hornbook on torts* 41.

²⁴³ Dobbs, Hayden and Bublick *Hornbook on torts* 42.

²⁴⁴ 1985 *Harv L Rev* 954-955, 958.

“justification” as self-defence, consent and so forth and a “justification negates an assertion of wrongful conduct”. He refers to excuses such as “insanity, involuntary intoxication, duress or mistake of the law” which “negates a charge that a particular defendant is personally to blame for the wrongful conduct”. From a South African perspective, an excuse may negate blameworthiness of conduct.²⁴⁵ This would include if the party committing the tort was a minor or mentally incapacitated person and made an error.²⁴⁶ Fletcher²⁴⁷ submits that the “analysis of justification must precede the analysis of excuse”, thus from a South African perspective, the enquiry of wrongfulness precedes the enquiry of fault. Generally privileges and justifications may in principle exclude liability with regard to the intentional torts but not “excuses”. In certain instances the defendant may be lacking intent because he: is very young; made an honest mistake which would be considered reasonable under the circumstances justifying his conduct;²⁴⁸ or his mental condition is such that it cannot be said that he had intent to commit battery (the element of intent is lacking in the plaintiff’s *prima facie* case).²⁴⁹ Liability may also be excluded due to prescription of a claim in terms of the “statutes of limitation” (dealing with prescription of claim)²⁵⁰ or “immunity” of certain government entities.²⁵¹

2.5.1 Self-defence

With regard to self-defence a “person is privileged to use reasonable force to defend himself against unprivileged acts that he reasonably believes will cause him bodily harm, offensive bodily contact, or confinement”.²⁵² Thus if a defendant commits

²⁴⁵ Fletcher 1985 *Harv L Rev* 961 with reference to common law and German law refers to the finding of wrongfulness before blameworthiness as a matter of logic and “retributive thinking” – first whether there is a wrong, if so how grievous and then whether (in mitigation) the defendant should be excused or punished for the full extent of the harm or loss.

²⁴⁶ Dobbs, Hayden and Bublick *Hornbook on torts* 41.

²⁴⁷ 1985 *Harv L Rev* 958.

²⁴⁸ Keeton *et al Prosser and Keeton on torts* 110. See *Adams v National Bank of Detroit* 444 Mich 329, 508 NW 2d 464 (1993); Dobbs, Hayden and Bublick *Hornbook on torts* 42.

²⁴⁹ *White v Muniz* 999 P 2d 814 (Colo 2000); Dobbs, Hayden and Bublick *Hornbook on torts* 42 fn 34.

²⁵⁰ See in general Dobbs, Hayden and Bublick *Hornbook on torts* 427-443. The provisions and rules pertaining to prescription fall outside the scope of this study and will not be discussed further.

²⁵¹ Dobbs, Hayden and Bublick *Hornbook on torts* 42.

²⁵² Dobbs, Hayden and Bublick *Hornbook on torts* 131.

assault, battery or false imprisonment, his conduct may, depending on the circumstances, be privileged.²⁵³

There are certain requirements that must be met for the attack or impending attack. The attack or impending attack must be imminent, requiring immediate, necessary action to avoid harm or further harm.²⁵⁴ If the danger seems to be reasonably imminent to the defendant, then the defendant need not wait for the attacker to strike first. He may act first in self-defence.²⁵⁵ The use of force by the defendant must be reasonable according to the circumstances the defendant finds himself in, that is, he must subjectively believe that self-defence was necessary due to an imminent attack.²⁵⁶ Subjective factors relating to the defendant's state of mind may be considered by the jury in reaching a decision as to whether the conduct was reasonable.²⁵⁷ Thus even if the defendant believed there was an imminent attack but in actual fact it transpired that the plaintiff never intended to attack the defendant, the defendant may still rely on self-defence.²⁵⁸ The belief however must be one that a reasonable person would have also had under similar circumstances.²⁵⁹ If the defendant knew of the attacker's tendency for violent behaviour or if the attacker was hostile to the defendant on a prior occasion and the defendant acts in self-defence reasonably believing an attack is imminent, his conduct is privileged even though bystanders may not acknowledge the need for the defendant's conduct. The bystanders naturally do not have the knowledge

²⁵³ Dobbs, Hayden and Bublick *Hornbook on torts* 132.

²⁵⁴ There must be impending or imminent harm expected. See for example, *Martin v Estrella* 107 RI 247, 266 A 2d 41 (1970); Dobbs, Hayden and Bublick *Hornbook on torts* 132; Keeton *et al Prosser and Keeton on torts* 124.

²⁵⁵ See *Boston v Muncy* 233 P 2d 300 (Okla 1951); *Chapleyn of Greye's Inn* 1400 YB 2 Hen IV 8 pl 40; Keeton *et al Prosser and Keeton on torts* 125 fn 7; Dobbs, Hayden and Bublick *Hornbook on torts* 132; Epstein *Torts* 54.

²⁵⁶ See *re Paul F* 543 A 2d 255, 257 (RI 1988); *Beck v Minneapolis Union Railway Co* 1905, 95 Minn 73, 103 NW 746; *McCoy v Taylor Tire Co* 254 SW 2d 923, 924 (Ky 1953); *Tatman v Cordingly* 672 P 2d 1286 (Wyo 1983); *Restatement Second of Torts* § 70 (1965); Dobbs, Hayden and Bublick *Hornbook on torts* 132,135; cases referred to by Keeton *et al Prosser and Keeton on torts* 125 fn 14.

²⁵⁷ *Simms v D'Avillier* La App 1965, 179 So 2d 707; *Zell v Dunaway* 1911, 115 Md 1, 80 A 215; Keeton *et al Prosser and Keeton on torts* 125.

²⁵⁸ See *Pearson v Taylor* La App 1959, 116 So 2d 833 as well as other cases referred to by Keeton *et al Prosser and Keeton on torts* 125 fn 5-6; Dobbs, Hayden and Bublick *Hornbook on torts* 136.

²⁵⁹ See *Patterson v Standley* 1900 91 Ill App 671; *Daggs v St Louis-San Francisco Railway Co* 1930, 326 Mo 555, 31 SW 2d 769; other cases referred to by Keeton *et al Prosser and Keeton on torts* 125 fn 10.

the defendant has.²⁶⁰ Even though the foundation for successful reliance on self-defence is based on the defendant's knowledge, it is still judged objectively in that if the defendant believed that there was an imminent attack due to his "idiosyncratic fears or biases" but there is no evidence to support it, or a reasonable person would not have the same belief then the defendant cannot rely on the privilege.²⁶¹ The courts acknowledge that even a reasonable person under the circumstances cannot make a perfect judgment with respect to the use of force when faced with such a situation like a robbery.²⁶²

Deadly force or force which causes serious bodily injury would generally not be deemed reasonable unless the defendant reasonably believed he was about to be killed or sustain serious bodily injury. In such a case the defendant may retaliate with deadly force if it is "the only safe alternative" (reasonable alternative).²⁶³ Whether the extent of the force is reasonable or not depends largely on the harm that was threatening and to some degree on the circumstances of the case, also taking into consideration whether there were alternative measures the defendant could have taken. If the defendant uses excessive force which is deemed unreasonable then he himself will be liable for the harm caused by "the excess" unnecessary force and not the "privileged force".²⁶⁴ If the defendant however causes harm which is indivisible and it is not practically possible to separate the "excess force" from the "privileged force", then the defendant will be liable for the full extent of the harm.²⁶⁵ If violence is used after the assailant is disarmed or if there is no longer any impending harm, then the

²⁶⁰ See *Martin v Estrella* 107 RI 247, 266 A 2d 41 (1970) where the court allowed evidence of the plaintiff's reputation of being violent; *Bradley v Hunter* 413 So 2d 674 (LA App 1982) where a woman shot a man in the head in self-defence. The woman had prior trouble with the man who subsequently approached her threatening her and cursing her; Dobbs, Hayden and Bublick *Hornbook on torts* 135.

²⁶¹ See *Restatement Second of Torts* § 70 cmt b (1965); Epstein *Torts* 53.

²⁶² For example, see *Bennett v Dunn* 507 So 2d 451 (Ala 1987); Dobbs, Hayden and Bublick *Hornbook on torts* 136.

²⁶³ See *Martin v Yeoham* 419 SW 2d 937, 950 (Mo App 1967); *Restatement Second of Torts* § 65 (1965); Dobbs, Hayden and Bublick *Hornbook on torts* 131-133; cases referred to by Keeton *et al Prosser and Keeton on torts* 127 fn 27.

²⁶⁴ See *Beavers v Bowen* 1906 26 Ky L Rep 291, 80 SW 1165; *Jahner v Jacob* 233 NW 2d 791 (ND 1975); *Schumann v McGinn* 307 Minn 446, 240 NW 2d 525 (1976); Dobbs, Hayden and Bublick *Hornbook on torts* 133; Keeton *et al Prosser and Keeton on torts* 126.

²⁶⁵ See *Restatement Second of Torts* § 7 cmt b (1965); Dobbs, Hayden and Bublick *Hornbook on torts* 133; Keeton *et al Prosser and Keeton on torts* 126.

privilege may no longer be used as the conduct will be regarded as unreasonable.²⁶⁶ The courts are lenient and only expect the defendant to act reasonably and not to make a “microscopic analysis” of the circumstances he finds himself in.²⁶⁷ If it is possible and safe for the defendant to flee or retreat under the circumstances instead of using deadly or excessive force, then it is expected of him to use such reasonable alternative conduct under the circumstances.²⁶⁸ However, the defendant is not expected to flee from his own dwelling.²⁶⁹ Verbal provocation is not a defence to the infliction of physical harm on another although it may have a bearing on mitigating damages²⁷⁰ and or avoiding an award of punitive damages.²⁷¹

The influence of reasonableness on self-defence is explicit. In conclusion with regard to the attack, the defendant must reasonably believe that an assault, battery or confinement is imminent which requires necessary action in order to avoid harm. The reasonable belief is tested against the standard of the reasonable person, that is, for example, whether a reasonable person would believe that an attack is imminent and it is necessary to act. Thus if for example, the defendant is always paranoid and thinks impending harm was imminent when a reasonable person would not believe so, then the belief of impending harm would not be reasonable. However, if the defendant is aware of the alleged attacker’s violent behaviour and acts in self–defence, his actions may be considered reasonable. There must be a reasonable response to the impending harm which is judged objectively but based on the facts known to the defendant at the time. Deadly force used would be considered reasonable if the defendant reasonably believed that his life was in danger or would sustain serious bodily injuries, and further if there was no other alternative but to use such deadly

²⁶⁶ See *Drabeck v Sabley* 1966, 31 Wis 2d 184, 142 NW 2d 798; *McCombs v Hegarty* 1954, 205 Misc 937, 130 NYS 2d 547; other cases referred to by Keeton *et al Prosser and Keeton on torts* 126 fn 19.

²⁶⁷ Dobbs, Hayden and Bublick *Hornbook on torts* 132.

²⁶⁸ See *Restatement Second of Torts* § 65 (1965); Epstein *Torts* 53.

²⁶⁹ See *Hanauer v Coscia* 157 Conn 49, 54, 244 A 2d 611, 614 (1968); *State v Johnson* 261 NC 727, 136 SE 2d 84 (1964); *contra People v McGrandy* 1967 9 Mich App 187, 156 NW 2d 48. See also *Restatement Second of Torts* § 65 (1965); Dobbs, Hayden and Bublick *Hornbook on torts* 134; Keeton *et al Prosser and Keeton on torts* 127.

²⁷⁰ It is apparent that in Anglo-American law provocation is not a complete defence. See chapter 7 para 2.5.

²⁷¹ See *Patterson v Henry* 1953 72 Ohio L Abs 403, 136 NE 2d 764; *Manning v Michael* 188 Conn 607, 616, 452 A 2d 1157, 1162 (1982); Keeton *et al Prosser and Keeton on torts* 126.

force. If excessive, unnecessary, force is used or force used where there is no longer a threat of harm, then the act will be deemed unreasonable and not privileged.

It is apparent that the reasonable person standard is used here in an objective manner to determine a reasonable belief. There must be a reasonable response to the attack or imminent attack from an objective viewpoint, but the facts known to the defendant at the time and his subjective belief are considered. The influence of reasonableness is apparent from an objective and subjective viewpoint. Analysed from a South African perspective, self-defence in American law straddles both the elements of wrongfulness and fault. When judging the reasonable reaction from the belief in terms of putative defence from an objective point of view, in this manner, it may be argued that the reasonable person is regarded as the embodiment of the *boni mores* from a South African perspective.²⁷² The reasonable belief is judged *ex ante* as well as objectively. Thus whether the belief was reasonable as well as whether the reaction stemming from the belief was reasonable, *ex post facto*, *ex ante*, objective and subjective approaches are applied combining the tests for wrongfulness and fault in one enquiry. There is however no reason in Anglo-American law to distinguish between putative and actual defence.

2.5.1.1 Defending another person

A defendant may rely on self-defence when subjected to any physical threat, in the form of assault, battery or false imprisonment.²⁷³ A person may defend another from an imminent attack as well as himself.²⁷⁴ The same principles that apply to self-defence will apply in defending another. The influence of reasonableness is also explicit. Thus the state of necessity must be immediate and threats or attacks in the past or future will not justify infliction of harm in self-defence.²⁷⁵ The intervention on the part of the defendant in defending another must appear to be “reasonably

²⁷² See Neethling and Potgieter *Delict* 120-121 fn 633; chapter 3 para 3.4.2-3.4.4 and 3.4.7 with regard to South African law.

²⁷³ See *Restatement Second of Torts* §§ 63(1), 68 (1965).

²⁷⁴ *Restatement Second of Torts* § 76 (1965).

²⁷⁵ See *Webb v Snow* 1942 102 Utah 435, 132 P 2d 114; Keeton *et al Prosser and Keeton on torts* 130.

necessary”.²⁷⁶ The defendant must believe that the victim would be entitled to the “privilege” of self-defence and “reasonable appearances” must justify such belief. Reasonable force must be used.²⁷⁷ Any unnecessary force used may result in liability.²⁷⁸ It would therefore be reasonable for a person to defend another only if such person believed it was reasonably necessary and the defensive force used was reasonably necessary.

2.5.1.2 Defence of property

The possessor of land or property may use reasonable force where necessary in order to defend possession and enjoyment of his land or property against intrusion or harm.²⁷⁹ If the plaintiff technically trespasses without the threat of harm, a verbal request for the plaintiff to leave may be sufficient. If however, the plaintiff refuses, then the defendant may rely on a privilege if it would normally amount to assault or battery, but without inflicting serious bodily harm upon the plaintiff.²⁸⁰ For example, a disruptive customer may be forcibly removed if he does not leave voluntarily (even though it would normally amount to battery)²⁸¹ or shooting at a dog that has been killing the defendant's chickens may be privileged.²⁸² In the former example, the defendant would not be held liable for battery and in the latter the defendant would not be held liable for damage due to the death of the dog. In determining reasonable force in defending possession of land, “it must appear that any force used to defend possession is needed, adapted, and proportioned to the protection of the possessor’s interest in preventing the intrusion or ousting the intruder”.²⁸³ Thus there is a correlation between the extent of force used and the interest protected (possession of property). The force used must not be excessive when compared to the interest protected in the

²⁷⁶ See *Beavers v Calloway* 1946, 270 App Div 873, 61 NYS 2d 804; *Restatement Second of Torts* § 76 (1965); other cases referred to by Keeton *et al Prosser and Keeton on torts* 126 fn 6.

²⁷⁷ Dobbs, Hayden and Bublick *Hornbook on torts* 137.

²⁷⁸ *Lopez v Surchia* 1952 112 Cal App 2d 314, 246 P 2d 111. See Keeton *et al Prosser and Keeton on torts* 130.

²⁷⁹ Keeton *et al Prosser and Keeton on torts* 131.

²⁸⁰ Epstein *Torts* 55.

²⁸¹ See *Griego v Wilson* 91 NM 74, 570 P 2d 612 (Ct App 1977); Dobbs, Hayden and Bublick *Hornbook on torts* 139.

²⁸² See *Grabenstein v Sunsted* 237 Mont 254, 772 P 2d 865 (1989); Dobbs, Hayden and Bublick *Hornbook on torts* 139 fn 68. Cf Keeton *et al Prosser and Keeton on torts* 137.

²⁸³ *Person v Children’s Hosp National Medical Center* 562 A 2d 648 (DC 1989).

circumstances in order for such force to be deemed reasonable.²⁸⁴ Whether excessive force was used is determined by the jury and depends on the circumstances of the case.²⁸⁵ The defendant's use of excessive force may result in battery or assault. For example, firing a rifle some distance away from the plaintiff but at a spot which was ten feet away from where the plaintiff was standing was considered excessive in order to remove a peaceful trespasser.²⁸⁶ The use of force will be considered unjustified and unreasonable where it is apparent that there is no immediate interference with the property or if a verbal warning would suffice.²⁸⁷ Threatening to shoot a person may also under the circumstances be deemed unnecessary, amounting to excessive use of force and therefore unreasonable.²⁸⁸ Most criminal statutes allow the use of deadly force which causes serious injury when defending possession of one's home²⁸⁹ or protecting property such as one's car particularly in car hijacking cases.²⁹⁰ Thus use of deadly force in such circumstances is generally considered reasonable, at least in terms of criminal law and may be used as a guideline in tort law.²⁹¹ Generally in determining reasonable force, the least force must be used in the circumstances. For example, if the intruder is peaceful, then an oral request and chance for him to leave may be sufficient²⁹² unless it appears that such a request is not possible or dangerous under the circumstances.²⁹³ If it reasonably appears to the defendant that the plaintiff is breaking into his house but in actual fact it turns out to be a delivery boy delivering

²⁸⁴ See for example *Brown v Martinez* 361 P 2d 152 (NM 1961) where shooting was not justified in order to stop thieves stealing watermelons on the defendant's property; Posner 1971 *JL & Econ* 201.

²⁸⁵ See *Vancherie v Siperly* 243 Md 366, 221 A 2d 356 (1966); *Fields v State* 21 So 2d 412 (Miss 1945); Dobbs, Hayden and Bublick *Hornbook on torts* 140; Keeton *et al Prosser and Keeton on torts* 131.

²⁸⁶ See *Scheufele v Newman* 187 Or 263, 210 P 2d 573 (1949); *Restatement Second of Torts* § 79 (1965) - force likely to cause serious bodily injury may not be used against a peaceful intruder; Dobbs, Hayden and Bublick *Hornbook on torts* 140 fn 75.

²⁸⁷ See *Hamilton v Howard* 1930 234 Ky 321, 28 SW 2d 7; *Miller v McGuire* 1918 202 Ala 351, 80 So 433; Keeton *et al Prosser and Keeton on torts* 132.

²⁸⁸ See *Applegreen v Walsh* 136 Ill App 3d 700, 483 NE 2d 686 (1985); Dobbs, Hayden and Bublick *Hornbook on torts* 140 fn 75.

²⁸⁹ For example against burglary or arson, see Fla Stat Ann §782.02; Cal Penal Code §198.5; *Restatement Second of Torts* § 65 cmt g (1965) Dobbs, Hayden and Bublick *Hornbook on torts* 140 fn 77; Keeton *et al Prosser and Keeton on torts* 134.

²⁹⁰ See La Rev Stat Ann § 14:20 (4); Tex Penal Code § 9.42; Dobbs, Hayden and Bublick *Hornbook on torts* 141 fn 78.

²⁹¹ See Dobbs, Hayden and Bublick *Hornbook on torts* 141. Cf Keeton *et al Prosser and Keeton on torts* 134.

²⁹² See *MacDonald Hees* 46 DLR 3d 720 (NS 1974); *Restatement Second of Torts* § 77(c) & cmt j (1965); Dobbs, Hayden and Bublick *Hornbook on torts* 141.

²⁹³ *State v Cessna* 1915 170 Iowa 726, 153 NW 194; Keeton *et al Prosser and Keeton on torts* 132.

the paper, the defendant may be justified in using force.²⁹⁴ However, if the plaintiff has a “superior privilege”, for example if the plaintiff (a police officer) is authorised to search the property, then the defendant cannot rely on a privilege to use force in defending his property.²⁹⁵ However, if, for example, the police officer cuts off the power to the defendant’s house, appears in plain clothes wearing a ski mask, and the defendant is misled and mistaken into believing that the police officer is a violent attacker, then the defendant’s use of force may be justified as the police officer misled the defendant nullifying the “superior privilege”.²⁹⁶ Only necessary force and no more is considered reasonable.²⁹⁷ In instances where tenants or squatters are unlawfully occupying a property, the owner of such property must make use of the procedures set out by the relevant statutes. The policy behind enacting such legislation is to: reduce the risk of violent force used by the owner in evicting the tenant or squatter; to not leave such tenant or squatter homeless;²⁹⁸ and to give the tenant or squatter the right to be heard as part of a “fair judicial process” especially since the tenant or squatter is in a weaker position when compared to the landlord (there is a difference in the bargaining power).²⁹⁹ However, at the same time the law provides for a more speedy streamlined judicial process to put the owner back in possession of his property.³⁰⁰ This confirms the higher value placed on human life and limb over an interest in property. If for example, the landlord locks out the tenant from the premises because he did not pay the rent, the landlord may be held liable if there is the alternative of a speedy remedy through the courts.³⁰¹ Thus even reasonable force is not permitted to remove a tenant or squatter.³⁰²

²⁹⁴ See *Smith v Delery* 238 La 180, 114 So 2d 857 (1959); Dobbs, Hayden and Bublick *Hornbook on torts* 141.

²⁹⁵ *Restatement Second of Torts* § 77(a) & cmt d; Dobbs, Hayden and Bublick *Hornbook on torts* 141

²⁹⁶ See *State v White* 642 So 2d 842 (Fla App 1994); Dobbs, Hayden and Bublick *Hornbook on torts* 141-142.

²⁹⁷ See *Schwinn v Perkins* 79 NJL 515, 78 A 19 (1910); Dobbs, Hayden and Bublick *Hornbook on torts* 147.

²⁹⁸ See Gerchick 1994 *UCLA L Rev* 759; Dobbs, Hayden and Bublick *Hornbook on torts* 149.

²⁹⁹ This policy is a good example of a reasonable policy.

³⁰⁰ Dobbs, Hayden and Bublick *Hornbook on torts* 149-150.

³⁰¹ See *Berg v Wiley* 264 NW 2d 145 (Minn 1978); Dobbs, Hayden and Bublick *Hornbook on torts* 148.

³⁰² See *Daluiso v Boone* 71 Cal 2d 484, 455 P2d 811, 78 Cal Rptr 707 (1969); Dobbs, Hayden and Bublick *Hornbook on torts* 149.

Under certain circumstances the use of mechanical traps (spring guns or rigged wire traps which fire weapons) may be reasonable if used in self-defence, to protect one's home.³⁰³ According to the *Restatement Second of Torts*³⁰⁴ such mechanical traps are allowed if according to the facts of the case, the defendant would have used the same force in person. This has been criticised as being "infeasible" or "logically impossible" as in reality the defendant would usually give a warning to the intruder, which is not possible with the mechanical trap.³⁰⁵ The defendant however who uses a mechanical trap must be liable for the consequences when such device injures or kills a wandering child³⁰⁶ or a trespasser who commits a minor crime. For example in *Katko v Briney*,³⁰⁷ the defendants had experienced a number of break-ins on their property over ten years. They boarded the windows and put up signs stating that no trespassing would be tolerated. They then set up a spring gun but did not put up signs warning intruders of the device. The plaintiff who intruded on their property looking for jars and bottles suffered severe injury to his leg when the spring gun was triggered upon opening the bedroom door. The plaintiff was fined and sentenced to sixty days in jail but entitled to recover damages. The court,³⁰⁸ relying on the *Restatement Second of Torts*,³⁰⁹ held that life and limb is more valuable than an interest in property and in the circumstances the defence of using the spring gun to defend the property was rejected.³¹⁰ In *McKinsey v Wade*,³¹¹ a young man who broke into a vending machine was killed when a booby-trapped dynamite charge went off. The estate of the young man was entitled to damages.³¹² It seems that in order for it to be reasonable to use a mechanical device or "engine of destruction", warning signs must be provided.³¹³ Property may now be covered at a minimal cost by insurance and using devices may be deemed

³⁰³ See *Katko v Briney* 183 NW 2d 657 (Iowa 1971); Dobbs, Hayden and Bublick *Hornbook on torts* 143.

³⁰⁴ § 85 (1965). See also *Allison v Fiscus* 156 Ohio St 120, 100 NE 2d 237, 44 ALR 2d 369 (1951); Dobbs, Hayden and Bublick *Hornbook on torts* 142; Epstein *Torts* 57.

³⁰⁵ See Dobbs, Hayden and Bublick *Hornbook on torts* 142.

³⁰⁶ See *Allison v Fiscus* 156 Ohio St 120, 100 NE 2d 237, 44 ALR 2d 369 (1951); *Restatement Second of Torts* § 85 cmt d (1965); Dobbs, Hayden and Bublick *Hornbook on torts* 143.

³⁰⁷ 183 NW 2d 657 (Iowa 1971).

³⁰⁸ *Katko v Briney* 183 NW 2d 657, 660 (Iowa 1971).

³⁰⁹ *Restatement Second of Torts* § 85 cmt a (1934). See also *Restatement Second of Torts* § 85 cmt A (1965).

³¹⁰ See also Keeton *et al Prosser and Keeton on torts* 135.

³¹¹ 220 SE 2d 30, 33 (Ga App 1975).

³¹² See Dobbs, Hayden and Bublick *Hornbook on torts* 144.

³¹³ See discussion by Dobbs, Hayden and Bublick *Hornbook on torts* 145-146.

unreasonable.³¹⁴ Shapo³¹⁵ summaries a set of rules that may be used in determining the reasonableness of conduct. He suggests using an objective reasonableness standard. Deadly force may be used where serious property crimes are committed, by giving clear notice. However, this may not be relevant to those who are illiterate or do not understand the language and if there is no reasonable alternative to protecting the property. Reasonable force may be used where the owner has a *bona fide* belief that he is acting reasonably.

The influence of reasonableness in defence of property is explicit. It is apparent that in defending one's property and considering whether reasonable force was used, the plaintiff's property interests are weighed against the value of life and limb. Reasonable force used must be: necessary; based on a reasonable belief that one's property interests will be infringed, not excessive; not disproportionate when compared to the property interests protected in the circumstances; and there must be no other alternatives such as verbal warnings that could have been used in the circumstances. As Shapo explains above, deadly force may be used depending on the circumstances, where serious property crimes are committed and where clear notice is given.

2.5.2 The merchant's privilege to detain or arrest another

Over time, shoplifting became more common resulting in large losses for merchants. The courts³¹⁶ then developed the traditional common law privilege of detaining a person for investigation purposes, which was traditionally only applied by public entities that were authorised to do so. Currently a merchant who reasonably believes that a person has committed a theft or attempted theft is permitted to detain such person for a certain period of time for the purposes of investigating whether he did indeed commit theft or attempted theft.³¹⁷ The interests in protection of property are weighed against a dignitary interest (freedom from restraint).³¹⁸ The detention must

³¹⁴ Keeton *et al* *Prosser and Keeton on torts* 135.

³¹⁵ *Tort* 97-98.

³¹⁶ See *Collyer v SH Kress Co* 5 Cal 2d 175, 54 P 2d 20 (1936); *Jacques v Childs Dining Hall Co* 244 Mass 438 NE 843, 26 ALR 1329 (1923).

³¹⁷ See *Restatement Second of Torts* § 120A (1965); Dobbs, Hayden and Bublick *Hornbook on torts* 153.

³¹⁸ Shapo *Tort* 99.

take place for a reasonable period of time³¹⁹ and in a reasonable manner. If the suspected shoplifter is detained for an unreasonable period of time or in an unreasonable manner, then the merchant cannot rely on such privilege.³²⁰ For example, handcuffing the suspected shoplifter and making a spectacle of her in front of other shoppers is considered unreasonable conduct and exceeds the privilege.³²¹

There are a number of statutory privileges for merchants, which are beyond the scope of this study, but it suffices to state that the influence of reasonableness is explicit, requiring a reasonable belief of suspecting a person as well as reasonable conduct in detaining the person (that is, for a reasonable period of time as well as in a reasonable manner) to prevent theft, or recover property, or turn the suspect over to the police.³²²

2.5.3 Privileged arrest (lawful arrest)

Under certain circumstances private individuals may make a lawful arrest for criminal offenses also known as a “citizen’s arrest” as long as they are made “without unreasonable and excessive force”.³²³ Whether reasonable force was used in the circumstances is determined from the facts of the case.³²⁴ The use of deadly force would not be justified for a misdemeanour but may be justified to prevent a dangerous criminal from escaping and causing harm or further harm to others.³²⁵ The purpose of the arrest is to bring the suspect before a court of law.³²⁶ There must at least be a reasonable belief that a person committed a felony or “a breach of the peace in the presence of the defendant”.³²⁷ A police officer may also make an arrest and may rely

³¹⁹ In *Collyer v SH Kress Co* 5 Cal 2d 175, 54 P 2d 20 (1936) twenty minutes was considered a reasonable period of time.

³²⁰ *Jacques v Childs Dining Hall Co* 244 Mass 438 NE 843, 26 ALR 1329 (1923).

³²¹ See *Dillard Department Stores Inc v Silva* 148 SW 3d 370 (Tex 2004); Dobbs, Hayden and Bublick *Hornbook on torts* 154.

³²² See for example Iowa Code Ann §808.12 and Fla Stat Ann § 812.015. See also discussion by Dobbs, Hayden and Bublick *Hornbook on torts* 154-155; Shapo *Tort* 100-101.

³²³ Dobbs, Hayden and Bublick *Hornbook on torts* 156. See *Whitten v Cox* 799 So 2d 1 (Miss 2000); *Restatement Second of Torts* § 131 (1965).

³²⁴ See *Coles v McNamara* 1924 131 Wash 377, 230 P 430; Keeton *et al Prosser and Keeton on torts* 155.

³²⁵ See authority cited by Keeton *et al Prosser and Keeton on torts* 156.

³²⁶ See *Restatement Second of Torts* § 127 (1965); Dobbs, Hayden and Bublick *Hornbook on torts* 156.

³²⁷ See *State v Hughlett* 1923 124 Wash 366, 214 P 841; *Byrd v Commonwealth* 1932 158 Va 897, 164 SE 400; *People v Martin* 1955 45 Cal App 2d 755, 290 P 2d 855; Keeton *et al Prosser and Keeton on torts* 153; Dobbs, Hayden and Bublick *Hornbook on torts* 156.

on the privilege if he reasonably suspects (judged objectively) that a person committed a felony even though it may transpire that no felony was committed.³²⁸ A private person may arrest a person where a felony has been committed and he has reasonable grounds to believe that the person he is arresting is the one who committed such felony.³²⁹ If a private person makes a reasonable mistake as to the individual he may escape liability but not if he makes a mistake as to the felony.³³⁰ A police officer will not be held liable for an arrest if he relies on a warrant of arrest which appears valid (when in actual fact it is invalid),³³¹ but will be held liable if the warrant of arrest is *prima facie* invalid.³³² If a police officer affects an arrest with a valid warrant but uses excessive force; affects an arrest in an unreasonable manner; seizes property when authorized to do so but fails to protect such property while under his custody;³³³ or acts beyond the scope of his authority, then such officer may be held liable in tort.³³⁴ It is submitted that his conduct is unreasonable in such instances and unnecessary or excessive.

The influence of reasonableness on privileged arrest is explicit. It is explicit with the requirements of: a reasonable belief that a person committed an offence; reasonable force used in a manner that must not be excessive and unnecessary; that the detention must be for a reasonable period of time, the detention must last no longer than is necessary; and that deadly force may be used depending on the gravity of the crime committed and the potential harm the suspected criminal may cause.

³²⁸ See *State v Smith* 1960 56 Wn 2d 368, 353 P 2d 155; *Stephens v United States* 1959 106 US App DC 249, 271 F 2d 832; *Restatement Second of Torts* § 121 (1965); Dobbs, Hayden and Bublick *Hornbook on torts* 156.

³²⁹ See *American Railway Express Co v Summers* 1922 208 Ala 531, 94 So 737; Keeton *et al Prosser and Keeton on torts* 154.

³³⁰ See *Walters v Smith & Sons* 1914 1 KB 595; Keeton *et al Prosser and Keeton on torts* 154.

³³¹ See *McIntosh v Bullard, Earnheart & Magness* 1910 95 Ark 227, 129 SW 85; Keeton *et al Prosser and Keeton on torts* 111.

³³² *Allison v Cnty of Ventura* 68 Cal App 3d 689, 137 Cal Rptr 542 (1977); Dobbs, Hayden and Bublick *Hornbook on torts* 156-157.

³³³ See for example *Yeager v Hurt* 433 So 2d 1176, 1180 (Ala 1983). See also Dobbs, Hayden and Bublick *Hornbook on torts* 156.

³³⁴ See *Restatement Second of Torts* § 131 (1965); Dobbs, Hayden and Bublick *Hornbook on torts* 156.

2.5.4 Discipline

Parents in some states may not be held liable in tort for disciplining their children; they may rely on “immunity” from liability.³³⁵ In states where the immunity from liability has been limited or abolished, parents are still entitled to discipline their minor children by using force and confining them in what they reasonably believe is necessary for teaching and regulating their behaviour.³³⁶ Dobbs, Hayden and Bublick³³⁷ point out that due to varying social and cultural differences³³⁸ any punishment administered to a child must be reasonable. The following factors are considered when determining whether the discipline is reasonable: “age and condition of child, the nature of the child’s offense, the possibility of an example to other children in the family, whether the punishment inflicted is ‘necessary and appropriate’ to compel obedience and whether it is disproportionate, unnecessarily degrading or likely to cause serious or permanent harm”.³³⁹ The same privilege applies to persons in *loco parentis*,³⁴⁰ however a parent may specifically prohibit such person supervising their child from physically hitting their child.³⁴¹ In some instances the extent of force used to discipline a child may be considered reasonable when administered by a parent but not reasonable when administered by the person in *loco parentis*.³⁴² Teachers in general are entitled to discipline children as long as such punishment is within reasonable limits.³⁴³ “Excessive force, wrongful purpose, or a disproportionate response to the problem” by the teacher are indicative of unreasonable conduct and the teacher may not rely on the privilege to discipline.³⁴⁴ The influence of reasonableness on discipline is explicit in respect of the requirement of a reasonable belief that it is necessary to

³³⁵ Dobbs, Hayden and Bublick *Hornbook on torts* 138.

³³⁶ *Restatement Second of Torts* § 147 (1965); Dobbs, Hayden and Bublick *Hornbook on torts* 138.

³³⁷ *Hornbook on torts* 138.

³³⁸ See *Holodook v Spencer* 36 NY 2d 35, 324 NE 2d 338, 364 NYS 2d 859 (1974) where it was acknowledged that there are varying economic, religious, cultural, educational and ethnic attitudes when it comes to bringing up children; Dobbs, Hayden and Bublick *Hornbook on torts* 138 fn 56.

³³⁹ Dobbs, Hayden and Bublick *Hornbook on torts* 138. See *Restatement Second of Torts* § 150 (1965); Keeton *et al Prosser and Keeton on torts* 158.

³⁴⁰ *Restatement Second of Torts* § 147(2) (1965).

³⁴¹ *Restatement Second of Torts* § 153 (1965). See Dobbs, Hayden and Bublick *Hornbook on torts* 139.

³⁴² *Restatement Second of Torts* § 150(a) (1965). See Dobbs, Hayden and Bublick *Hornbook on torts* 139.

³⁴³ See *Rinehart v Western Local School Dist Bd of Education* 87 Ohio App 3d 214, 621 NE 2d 1365 (1993); Dobbs, Hayden and Bublick *Hornbook on torts* 139.

³⁴⁴ Dobbs, Hayden and Bublick *Hornbook on torts* 139. See for example, *Thomas v Bedford* 389 So 2d 405 (La App 1980).

teach and regulate the child's behaviour. The method used to discipline the child must also be reasonable, that is, it must be within reasonable limits.

2.5.5 Necessity

2.5.5.1 Private necessity

Dobbs, Hayden and Bublick³⁴⁵ explain that the privilege of necessity can only be invoked "when the defendant is threatened, or reasonably appears to be threatened, with serious harm and the response is reasonable in light of the threat."³⁴⁶ There must be an imminent threat and some kind of legally recognisable harm.³⁴⁷ In respect of necessity, the emergency to which the defendant reacts must be significant to save himself or another.³⁴⁸ With respect to the response, such response must be reasonable, that is the harm or loss sustained by the plaintiff must not be disproportionate to the harm or loss prevented.³⁴⁹ Usually with necessity, the defendant causes harm to the plaintiff as a result of a natural event or an act of a third party.³⁵⁰ For example, protestors cannot rely on the privilege if they trespass on a clinic where legal abortions are carried out claiming that they are acting out of necessity in preventing abortions.³⁵¹

³⁴⁵ *Hornbook on torts* 157.

³⁴⁶ See *Lange v Fisher Real Estate Dev Corp* 358 Ill App 3d 962, 832 NE 2d 274 (2005); *Restatement Second of Torts* § 197 (1965) which states that the defendant must act reasonably (see cmt a, c and f) and § 263 (according to the defendant's reasonable belief). *The Restatement Second of Torts* § 263 (1965) refers to the English decision known as "*Mouse's case*" (1609) 12 Co Rep 83, 77 ER 1341 where passengers on a barge were not found liable in trespass when they out of necessity cast cargo overboard during a storm in order to save their own lives. A casket as part of the cargo owned by Mouse (a passenger on the barge) was cast out containing £113, considered in those days a considerable amount of money. Mouse sued the passengers who were found not liable but the carrier was ordered to compensate Mouse partially for his loss. See also Tamblyn 2012 *Global Journal of Comparative Law* 1 47, 63.

³⁴⁷ Dobbs, Hayden and Bublick *Hornbook on torts* 157.

³⁴⁸ Mere inconveniences will not suffice, there must be a real emergency, see *Gulf Production Co v Gibson* Tex Civ App 1921, 234 SW 906; *Currie v Silvernale* 1919 142 Minn 254, 171 NW 782; *Keeton et al Prosser and Keeton on torts* 147; *Epstein Torts* 61.

³⁴⁹ See *Restatement Second of Torts* §§ 197 cmt c and § 263 cmt d (1965); *Latta v New Orleans Rly Co* 131 La 272 (1912) (Sup Ct Louisiana) where in respect of property it was held that when considering proportionality, that is, the reasonableness of the response, the market value of the property protected and lost should not solely be considered but the comparative ability of the plaintiff and the defendant to bear the loss. See also Tamblyn 2012 *Global Journal of Comparative Law* 1 46.

³⁵⁰ *Epstein Torts* 59.

³⁵¹ *Cyr v State* 887 SW 2d 203 (Tex App 1994). See Dobbs, Hayden and Bublick *Hornbook on torts* 157.

The decision in American law which led to the recognition of private necessity, albeit not as a complete defence, is *Vincent v Lake Erie Transportation Co.*³⁵² In this case, a steamship was tied to the dock owned by the plaintiff in order to offload cargo. A strong storm emerged while the cargo was being offloaded. The master of the steamship decided that it was not practical or safe to continue on the journey. He called for a tug boat to tow the steamship away from the dock due to the developing storm, but a tug boat was not available at the time. The master kept on replacing cables in order to ensure that the steamship remained tied to the dock, if not it would have drifted off. Due to the storm and waves, the steam ship repeatedly struck the plaintiff's dock damaging it. The court held that the defendant acted prudently in protecting his own more valuable property (the value of the damage to the ship was more considerable than the damage to the dock) but had to out of fairness pay compensation for the damage caused to the plaintiff's dock.³⁵³ The court held that the master exercised "good judgment and prudent seamanship".³⁵⁴ The court faced with deliberate conduct which was not unreasonable or unjustified³⁵⁵ in effect established private necessity but as an incomplete privilege³⁵⁶ as liability was not excluded.³⁵⁷ This decision has been criticized.³⁵⁸ Tamblyn³⁵⁹ points out that a claim in trespass would likely have been rejected as the court approved of *Ploof v Putnam*³⁶⁰ where it was held that there was no trespass in an instance where a ship moors at a dock due to bad

³⁵² 124 NW 221 Minn 1910.

³⁵³ *Vincent v Lake Erie Transportation Co* 124 NW 221 Minn 1910 222. *The Restatement Second of Torts* § 263 cmt e (1965) also refers to a duty to compensate for harm.

³⁵⁴ *Vincent v Lake Erie Transportation Co* 124 NW 221 Minn 1910 221.

³⁵⁵ *Vincent v Lake Erie Transportation Co* 124 NW 221 Minn 1910 222. See Fletcher 1972 *Harv L Rev* 546.

³⁵⁶ Bohlen 1926 *Harv LR* 307 made reference to the privilege as an incomplete privilege which was adopted by the Restatement Second of Torts § 197(1965).

³⁵⁷ See Shapo *Tort* 308; Epstein *Torts* 64-65.

³⁵⁸ See Keeton 1959 *Harv L Rev* 410-418; Christie 1999 *Duke LJ* 1002-1003; Weinrib 1987 *Chi-Kent L Rev* 421-422; Tamblyn 2012 *Global Journal of Comparative Law* 1 57-58 states that it is a new tort which may be referred to as "the rule in *Vincent v Lake Erie*" (57). The outcome of the decision has been described as an instance of strict liability – See Shulman *et al Torts* 49; Johnson and Gunn *American Tort* 168.

³⁵⁹ 2012 *Global Journal of Comparative Law* 1 57.

³⁶⁰ 71 Atl 188 (1908) (Sup Ct Vermont). Tamblyn 2012 *Global Journal of Comparative Law* 1 59 refers to *Depue v Flateau* 111 NW 1 (1907) (Sup Ct Minnesota) where it was held that an owner of a house could not eject a guest invited for supper who subsequently became too ill to leave, and *Bradshaw v Frazier* 85 NW 752 (1901) (Sup Ct Iowa) where the defendant was held liable for ejecting his granddaughter who had measles and subsequently died from exposure. The defendant was at the time of the ejection in possession of a writ.

weather conditions without the owner's permission. Furthermore the *Restatement Second of Torts*³⁶¹ confirms that the defendant is not a trespasser.

Coleman,³⁶² with reference to his idea of "wrong" which makes the wrongdoer responsible for wrongfulness sustained by the victim, refers to *Vincent v Lake Erie Transportation Co*³⁶³ and explains that the defendant by keeping the ship moored to the plaintiff's dock infringed the plaintiff's right in contract³⁶⁴ and the defendant was therefore wrong. The court noted that it was wrong for the plaintiff to exercise that right and if the dock owner would have allowed the ship to meet its fate at sea with bad weather conditions then the plaintiff may be held liable for the damage to the ship.³⁶⁵ However, this does not extinguish "the right or the claims to which the right gives right". Thus because it was wrong, in terms of corrective justice, the defendant has a responsibility to compensate the plaintiff for the wrongful loss.³⁶⁶ Fletcher,³⁶⁷ with reference to Coleman's³⁶⁸ explanation, states that it was considered a wrong because the defendant did not obtain permission to moor his ship to the dock. Fletcher³⁶⁹ correctly states that the defendant's conduct was justified and does not require consent, there was a state of emergency and the plaintiff's interests were infringed justifiably for the interests of the defendant.

The influence of reasonableness is explicit on the defence of private necessity. A state of emergency must exist for the defendant to act in infringing an innocent person's interests. Thus without such state of emergency it would be unjustified and unreasonable to cause harm to an innocent person. First of all there must be a reasonable appearance of a threat of serious harm and secondly the response to the threat must be reasonable, in that, the loss sustained by the plaintiff must be not disproportionate to the harm or loss prevented. In *Vincent v Lake Erie Transportation Co*,³⁷⁰ it is clear that the ship-owner's conduct was reasonable and justified.

³⁶¹ See § 263 cmt b and § 197 cmt k; Tamblyn 2012 *Global Journal of Comparative Law* 1 57.

³⁶² *Risks and wrongs* 371-372. See Fletcher 1993 *Harv L Rev* 1670.

³⁶³ 124 NW 221 (Minn 1910).

³⁶⁴ As a result of the ship being moored on his dock beyond the time specified in the contract.

³⁶⁵ *Vincent v Lake Erie Transportation Co* 124 NW 221, 222 (Minn 1910).

³⁶⁶ Coleman *Risks and wrongs* 372.

³⁶⁷ Fletcher 1993 *Harv L Rev* 1670.

³⁶⁸ Coleman *Risks and wrongs* 302.

³⁶⁹ Fletcher 1993 *Harv L Rev* 1670-1671.

³⁷⁰ 124 NW 221 Minn 1910.

Furthermore, the infringement of the dock owner's interests was not unreasonable. It is submitted that the court however applied strict liability and in essence found it fair and reasonable that the dock owner should be compensated for his loss as the innocent party.

2.5.5.2 Public necessity

A defendant who causes harm in the reasonable belief that he is able to avoid imminent harm or minimise serious imminent harm to the public³⁷¹ may rely on public necessity as a complete defence.³⁷² In respect of public necessity, the interests of the public are considered. The defendant who is usually a public official must have a reasonable belief that it was necessary to act and that such act was reasonably necessary. The emergency must be significant and the defendant must have acted reasonably under the circumstances.³⁷³ For example, a defendant may escape liability if he causes damage to the plaintiff's house in order to stop a fire spreading, causing further and more serious damage,³⁷⁴ or causes damage to property, such as a herd of Elk infected with tuberculosis,³⁷⁵ in order to prevent the spread of disease.³⁷⁶ It would not be fair and just for an individual to be held liable for loss "reasonably incurred for the benefit of the entire public". One could add that it is not reasonable for an individual to be held liable for the loss. However, if less drastic means may be used, for example in apprehending felons without having to burn the plaintiff's property, then the privilege may not apply.³⁷⁷ The plaintiff is not compensated when the loss resulted in protecting private individual's interests for two possible reasons: firstly because his property was in any event going to be destroyed and secondly the defendant would be justified in damaging property when the property threatens damage to other property. When

³⁷¹ See *Brewer v State* 341 P 3d 1107 (Alaska 2014); Dobbs, Hayden and Bublick *Hornbook on torts* 158.

³⁷² See *United States v Caltex Inc* 344 US 149 (1952); *Restatement Second of Torts* §§ 197 and 263 (1965).

³⁷³ See *Allen v Camp* 1915 14 Ala App 341, 70 So 290; Keeton *et al Prosser and Keeton on torts* 146.

³⁷⁴ See *Surocco v Geary* 3 Cal 69 (1853); *American Print Works v Lawrence* 23 NJL 9 (1850), *aff'd* 23 NJL 590 (1851); Dobbs, Hayden and Bublick *Hornbook on torts* 159.

³⁷⁵ *South Dakota Department of Health v Heim* 357 NW 2d 522 (SD 1984).

³⁷⁶ See also *Farmers Insurance Exchange v State* 221 Cal Rptr 225 (Cal App 1985) in order to eradicate medfly; Dobbs, Hayden and Bublick *Hornbook on torts* 159; Epstein *Torts* 65.

³⁷⁷ See *Wegner v Milwaukee Mutual Insurance Co* 479 NW 2d 38 (Minn 1991); Epstein *Torts* 66.

dealing with public liability, public entities are obliged in terms of constitutional provisions to pay owners for any property they damage or seize.³⁷⁸

The influence of reasonableness on public necessity is also explicit. There must be a reasonable belief of imminent serious harm to the public; it must be necessary and reasonable to act out of necessity under the circumstances; the act must be reasonable; and the least drastic measures in order to prevent harm to the public must be taken. Thus if there was an alternative safer means of acting out of necessity in the public's interests and such alternative was not taken; then the conduct may be found unreasonable. In respect of public necessity, the defence is a complete defence in that the defendant is not held strictly liable and does not need to compensate the innocent person to whom he caused harm. The interests of the public are held in higher regard when compared to the interests of the individual thereby making the infringement of the individual's interests justifiable and reasonable in avoiding greater harm.

2.5.6 Consent

If the plaintiff consents, then in principle, the defendant cannot be held liable in tort. Thus there is no wrong done to one who consents.³⁷⁹ Dobbs, Hayden and Bublick submit that generally at a fundamental level, consent negates intent with regard to the intentional torts of trespass, thus the plaintiff does not have a *prima facie* case.³⁸⁰ Consent applies to a claim for all torts of trespass to the person (battery,³⁸¹ assault, and false imprisonment)³⁸² and trespass to property. Consent may be viewed as an affirmative defence or as an element lacking to ground liability in a tort. Keeton *et al* submit that consent with regard to intentional infringement of the plaintiff's legally protected interests negates the "wrongfulness" of the defendant's conduct.³⁸³ It seems that here the authors are not referring to wrongfulness in the sense that it is used in South African law as there is no explicit element of wrongfulness in American law.

³⁷⁸ Dobbs, Hayden and Bublick *Hornbook on torts* 160-161.

³⁷⁹ See *Smith v Calvary Christian Church* 462 Mich 679, 614 NW 2d 590 (2000) Dobbs, Hayden and Bublick *Hornbook on torts* 163.

³⁸⁰ *Hornbook on torts* 164.

³⁸¹ See *Houston v Kinder-Care Learning Centers Inc* 208 Ga App 235, 430 SE 2d 24 (1993); Dobbs, Hayden and Bublick *Hornbook on torts* 164.

³⁸² See *Lolley v Charter Woods Hosp Inc* 572 So 2d 1223 (Ala 1990); Dobbs, Hayden and Bublick *Hornbook on torts* 164.

³⁸³ *Prosser and Keeton on torts* 113.

However, it is apparent that if one were to look at the interests in autonomy which is intentionally infringed with consent, the infringement may not be unreasonable and there is no intentional wrong. If consent cannot be obtained, for example, in instances where emergency medical treatment is required to save the patient's life, the patient is unconscious, and the patient's relatives cannot be found; then the health care provider may provide emergency care where time is of the essence. It must reasonably appear that a delay in treatment will result in serious risk of injury to the patient and it is probable that the patient would consent (substituted consent) or that a reasonable person would consent.³⁸⁴ The conduct of the health care provider is no doubt necessary, reasonable and justified.³⁸⁵ Some states require convincing evidence before terminating life support treatment.³⁸⁶ Some states will allow termination of life support if it is shown that it would have been the patient's choice.³⁸⁷

Consent may be in the form of "actual" or "apparent" consent.³⁸⁸ "Actual consent" is where the plaintiff willingly and subjectively consents to the occurrence of the act. With "apparent consent", the plaintiff's conduct or words are reasonably understood by the defendant as reflecting consent.³⁸⁹ Thus consent may be given expressly or implied. In *O'Brien v Cunard S.S Co*³⁹⁰ the plaintiff was on board a ship intending to enter the country. She stood in line with other immigrants awaiting a vaccination required to enter the country. She held up her arm as the other immigrants had done and received the vaccination. She subsequently suffered harm from the vaccination and brought an action against the defendant. The court held that even though she did not subjectively

³⁸⁴ See *McGuire v Rix* 225 NW 120 (Neb 1929); *Miller v Rhode Island Hospital* 625 A 2d 778 (RI 1993); *Canterbury v Spence* 464 F 2d 772 (DC Cir 1972); *Restatement Second of Torts* §§ 62 and illus 3, 892D (1) (1979); Dobbs, Hayden and Bublick *Hornbook on torts* 182; Keeton *et al Prosser and Keeton on torts* 117; Epstein *Torts* 47-48.

³⁸⁵ See *Miller v HCA Inc* 118 SW 3d 758, 767-769 (Tex 2003) where the medical practitioner was not held liable for battery as he was acting in an emergency situation in saving a child without obtaining the parents' consent. The father refused to sign a consent form entitling them to resuscitate the child after birth.

³⁸⁶ See *Westchester County Medical Center v Hall* 531 NE 2d 607 (NY1988); Epstein *Torts* 48.

³⁸⁷ *Brophy v New England Sinai Hospital Inc* 497 NE 2d 626 (Mass 1986); Epstein *Torts* 48.

³⁸⁸ See Bell 2010 *W LR* 1 who refers to different types of consent such as "hypothetical consent", and non-consent besides express and implied consent.

³⁸⁹ Dobbs, Hayden and Bublick *Hornbook on torts* 165. See *Restatement Second of Torts* § 892 (1979); Keeton *et al Prosser and Keeton on torts* 113.

³⁹⁰ 154 Mass 272, 28 NE 266 (1891).

intend to consent, her conduct “gave the appearance of consent” which the defendant reasonably believed reflected consent.³⁹¹

Consent is determined objectively. Consent on the one hand may be assumed from actions or words leading the defendant “reasonably to believe” that the plaintiff consented even though the plaintiff did not intend to consent (apparent consent).³⁹² On the other hand, the plaintiff may actually subjectively consent without outwardly showing or expressing.³⁹³ Determining consent objectively encourages freedom of conduct and autonomy. The defendant may rely on what a reasonable person would understand from the plaintiff’s conduct.³⁹⁴ However, appearances can be deceiving or misinterpreted.³⁹⁵

Conduct will be deemed tortious when it goes beyond the parameters of consent given or where the consent has been revoked.³⁹⁶ For example, if a plaintiff gives consent for a particular medical procedure and the medical practitioner performs another or different treatment which the plaintiff did not consent to; then the medical practitioner’s conduct is beyond the scope of consent given and he may be held liable.³⁹⁷ Consent may be revoked orally³⁹⁸ or by conduct reflecting revocation, for example, leaving the hospital before an operation.³⁹⁹ If a patient revokes consent just before a procedure and the medical practitioner performs the procedure which is successful, he will still

³⁹¹ See *Restatement Second of Torts* § 50, illus 1 (1965); Dobbs, Hayden and Bublick *Hornbook on torts* 166; Epstein *Torts* 41.

³⁹² See Keeton *et al Prosser and Keeton on torts* 113; Dobbs, Hayden and Bublick *Hornbook on torts* 164.

³⁹³ See *Restatement Second of Torts* § 49 cmt a, illus 2 (1965); Dobbs, Hayden and Bublick *Hornbook on torts* 164.

³⁹⁴ Keeton *et al Prosser and Keeton on torts* 113.

³⁹⁵ Dobbs, Hayden and Bublick *Hornbook on torts* 168.

³⁹⁶ See Dobbs, Hayden and Bublick *Hornbook on torts* 164; Keeton *et al Prosser and Keeton on torts* 118.

³⁹⁷ For example, if a patient consents to the removal of excess skin and a breast augmentation is also performed, then the medical practitioner has gone beyond the scope of consent (see *Perry v Shaw* 88 Cal App 4th 658, 106 Cal Rptr 2d 70 (2001)). The same applies if the plaintiff consents to an operation on a particular body part (see *Moos v United States* (8th Cir 1995) 255 F 2d 705 where the wrong leg was operated on); See also *Conte v Girard Orthopaedic Surgeons Medical Group Inc* 107 Cal App 4th 1260, 132 Cal Rptr 2d 855 (2003); Dobbs, Hayden and Bublick *Hornbook on torts* 169.

³⁹⁸ *Restatement Second of Torts* § 892A (5) & cmt i (1979); Dobbs, Hayden and Bublick *Hornbook on torts* 170.

³⁹⁹ See Dobbs, Hayden and Bublick *Hornbook on torts* 170.

be held liable as his conduct is beyond the scope of consent.⁴⁰⁰ The defendant must however be given a reasonable opportunity to discontinue the conduct for which the consent has been revoked. In the instance where consent is revoked for a medical procedure, the medical practitioner must be given the opportunity to terminate the treatment in a medically safe manner.⁴⁰¹ A person may refuse medical treatment and nutrition.⁴⁰² A person may not consent to euthanasia.⁴⁰³

Generally consent must be given by a person with capacity,⁴⁰⁴ but if a person lacks capacity due to for example minority or mental impairment, then another may have the authority to consent on his behalf. For example, a parent may give consent on behalf of a minor for serious medical treatment,⁴⁰⁵ to discipline the minor,⁴⁰⁶ or confine the minor.⁴⁰⁷ If a parent unreasonably refuses treatment for a child then the court may appoint a custodian for the child who will consent on the child's behalf where necessary.⁴⁰⁸ If the defendant is aware of the incapacity, for example, if he is aware that he is dealing with a child he must be aware of the incapacity and may be held liable for torts to the child, even if the child gave consent.⁴⁰⁹ The courts do however accept that a child consents to minor physical contact, such as contact during sporting activities,⁴¹⁰ or mature minors to some medical procedures.⁴¹¹ A minor is deemed to have capacity when he has the ability of that compared with the average person able

⁴⁰⁰ *Pugsley v Privette* 220 Va 892, 263 SE 2d 69 (1980); Dobbs, Hayden and Bublick *Hornbook on torts* 170.

⁴⁰¹ *Mims v Boland* 110 Ga App 477, 138 SE 2d 902 (1964); Dobbs, Hayden and Bublick *Hornbook on torts* 171.

⁴⁰² See *Brophy v New England Sinai Hospital Inc* 497 NE 2d 115 (Mass 1986); Epstein *Torts* 46.

⁴⁰³ See *People v Kerkovian* 517 NW 2d 293 (Mich 1993) dealing with physician assisted suicide; Epstein *Torts* 46-47.

⁴⁰⁴ Keeton *et al Prosser and Keeton on torts* 114.

⁴⁰⁵ See for example, *Roger v Sells* 1936 178 Okl, 103, 61 P 2d 1018; *Doerr v Movius* 154 Mont 346, 463 P 2d 477 (1970); Keeton *et al Prosser and Keeton on torts* 115.

⁴⁰⁶ See *Houston v Kinder-Care Learning Centers Inc* 208 Ga App 235, 239, 430 SE 2d 24, 27 (1993).

⁴⁰⁷ See *RJD v Vaughan Clinic PC* 572 So 2d 1225 (Ala 1990); Dobbs, Hayden and Bublick *Hornbook on torts* 164-165.

⁴⁰⁸ See *Brooklyn Hospital v Tores* 1965 45 Misc 2d 914, 258 NYS 2d 621; Keeton *et al Prosser and Keeton on torts* 115.

⁴⁰⁹ See *Reavis v Slominski* 250 Neb 711, 551 NW 2d 528 (1996); Dobbs, Hayden and Bublick *Hornbook on torts* 171.

⁴¹⁰ See *Hellriegel v Tholl* 69 Wash 2d 97, 417 P 2d 362 (1966) – where it was held that a teenager gave consent to “rough house play”; Dobbs, Hayden and Bublick *Hornbook on torts* 172.

⁴¹¹ See *re EG* 133 II 2d 98, 549 NE 2d 322 (1989) where a minor was found competent to refuse life-saving treatment; *Ohio v Akron Centre for Reproductive Health* 497 US 502, 110 S Ct 2972 111 LE 2d 405 (1990) where it was held that a female teenager can give consent to an abortion (a constitutional right); Dobbs, Hayden and Bublick *Hornbook on torts* 172.

to weigh the risks and benefits.⁴¹² Court approval may be required for serious procedures or treatments such as in instances of organ donation, withdrawing of life support, or compelling one to undergo life-saving treatment.⁴¹³ In respect of incapacitated adults, guardians may give consent on their behalf if the treatment is generally beneficial for the incapacitated person. The guardian may refuse life-saving treatment as long as the guardian follows the “best interest” standard.⁴¹⁴ If the treatment or procedure is not in the best interests of the minor or the adult, then the treatment or procedure is not sanctioned.⁴¹⁵ Whether an adult has capacity is often determined by considering: whether a person is a threat to himself or others; is able to manage his day to day affairs; or is able to understand his rights and consequences of his conduct.⁴¹⁶ If the incapacity was not known to the defendant, for example, where the plaintiff gives the appearance that he has capacity, then the defendant will not be held liable.

There is no valid consent in instances where the plaintiff is coerced to consent⁴¹⁷ as a result of the defendant’s misrepresentation,⁴¹⁸ fraud,⁴¹⁹ or material mistake which the

⁴¹² See *Gulf & Ship Island Railroad v Sullivan* 1928, 155 Miss 1, 119 So 501, 62 ALR 191; Keeton *et al Prosser and Keeton on torts* 115.

⁴¹³ Even if the proposed life-saving treatment is against the parents’ wishes. See *Miller v HCA Inc* 118 SW 3d 758 (Tex 2003); Dobbs, Hayden and Bublick *Hornbook on torts* 174.

⁴¹⁴ See *Matter of Gordy* 658 A 2d 613 (Del Ch 1994); *DeGrella v Elston* 858 SW 2d 698 (Ky 1993); Dobbs, Hayden and Bublick *Hornbook on torts* 174.

⁴¹⁵ See for example *Curran v Bosze* 141 Ill 2d 473, 566 NE 2d 1319, 4 ALR 5th 1163 (1990) where it was held that taking bone marrow from a four year child is not in the child’s best interests even if it is to save a sibling’s life. See Dobbs, Hayden and Bublick *Hornbook on torts* 174 fn 86.

⁴¹⁶ See *Ayuluk v Red Oaks Assisted Living Inc* 201 P 3d 1183, 1196 (Alaska 2009); *Landmark Medical Center v Gauthier* 635 A 2d 1145 (RI 1994); *re Guardianship of Jackson* 61 Mass App Ct 768, 814 NE 2d 393 (2004); *McCarthy v Volkswagen of America Inc* 55 NY 2d 543, 435 NE 2d 1072, 450 NYS 2d 457 (1982); Dobbs, Hayden and Bublick *Hornbook on torts* 171-172.

⁴¹⁷ Keeton *et al Prosser and Keeton on torts* 114.

⁴¹⁸ See for example, *Duncan v Scottsdale Med Imaging Ltd* 205 Ariz 306, 70 P 3d 435 (2003) where it was held that a healthcare provider who obtained consent for medication as a result of a misrepresentation would be held liable for battery; *Kathleen K v Roni L* 164 Cal Rptr 273, 276, 277 (Ct App 1984) where the court upheld the plaintiff’s claim holding that the defendant misrepresented that he was free from disease; *Restatement Second of Torts* § 892B (1979); *Wall v Brim* 5th Cir 1943, 138 F 2d 478; Dobbs, Hayden and Bublick *Hornbook on torts* 175 fn 92; Keeton *et al Prosser and Keeton on torts* 120.

⁴¹⁹ See for example, *Maharam v Maharam* 510 NYS 2d 104 (1986) where incurable genital Herpes was not disclosed; *Janelins v Button* 102 Md App 30 648 A 2d 1039 (1994); *Micari v Mann* 126 Misc 2d 422, 481 NYS 2d 1984 where an acting teacher persuaded students to engage in sexual acts which were purportedly required as part of their drama training; *Taylor v Johnston* 985 P 2d 460 (Alaska 1999) where it was held that a physician purporting to act with the required licence when in fact he did not have the licence, may be held liable for battery when performing a medical procedure; Dobbs, Hayden and Bublick *Hornbook on torts* 175 fn 95.

defendant knew or should have known of.⁴²⁰ There is no valid consent where the defendant abuses his power or authority,⁴²¹ or obtains consent under duress.⁴²²

The influence of reasonableness on the requirements of consent is partially explicit and partially implicit. It is explicit where the consent is determined objectively, particularly in establishing apparent consent (not actual subjective consent) where the criterion of the reasonable person is used in determining the defendant's reasonable belief and act of infringement of the person's bodily integrity (reasonable reaction). It is submitted that the reasonable person used in this sense from a South African perspective produces similar results as applying the *boni mores* criterion in determining wrongfulness in South African law. Presuming the consent is valid, the plaintiff's interests must have been reasonably infringed and the defendant must act reasonably in exercising his own rights, within the limits of the consent given. The infringement of the plaintiff's right is unreasonable in instances where the defendant goes beyond the scope of defence. Consent may not be given for murder or euthanasia as it is not permitted by law and therefore unreasonable. Where the consent is revoked, the defendant must be given a reasonable opportunity to discontinue infringing the plaintiff's rights in a safe manner. A medical practitioner's conduct is justified and reasonable in providing treatment in cases of emergency when consent cannot be obtained. Thus it must reasonably appear that a delay in treatment would result in serious harm and the standard of the reasonable person is applied in determining whether consent would have been given under the circumstances. It is reasonable for a court or another to provide consent for a person who lacks capacity as such person lacks the capacity to give the required consent.

⁴²⁰ For example, where the plaintiff consents to manipulation of her body believing that it is a therapeutic treatment when in fact it is for the sexual satisfaction of the defendant. The plaintiff is mistaken about the nature of the treatment, consent is lacking – see *Bartell v State* 106 Wis 342, 82 NW 142 (1900); the *Second Restatement of Torts* § 55 (1965); Dobbs, Hayden and Bublick *Hornbook on torts* 176; Keeton *et al Prosser and Keeton on torts* 119.

⁴²¹ Often found in employer-employee, teacher-student, jailer-prisoner, doctor-patient, professional-client relationships. See discussion by Dobbs, Hayden and Bublick *Hornbook on torts* 178-180 as well as the cases referred to.

⁴²² Usually by threats of physical harm or by use of force which interfere with the plaintiff's free will or choice. See *Restatement Second of Torts* § 58 (1965); Dobbs, Hayden and Bublick *Hornbook on torts* 177-178; Keeton *et al Prosser and Keeton on torts* 119-121.

3. The tort of negligence

Negligence claims represent the majority of claims brought in tort before the courts in the United States of America.⁴²³

Green and Cardiac⁴²⁴ point out that wrongdoing and fault in the form of negligence are combined under the tort of negligence which is determined objectively.

The requirements of the tort of negligence are: duty, breach of a duty, causation and harm.⁴²⁵ The *Restatement Third of Torts*⁴²⁶ states that the tort of negligence requires the element of fault in the form of negligence which is a “failure to use reasonable care under the circumstances”. The *Restatement Second of Torts*⁴²⁷ states that negligence is conduct which falls below the standard “established by law for the protection of others against unreasonable risk of harm”.

A person is negligent if his conduct is perceived as “unreasonably risky” by a reasonable person. With regard to negligence the focus is on the conduct not the person’s state of mind as with intent.⁴²⁸ If the defendant acknowledges and deliberately decides to take a chance anyway without having a “purpose” or acknowledges with “substantial or virtual certainty” that his conduct will bring about the result, then he does not have tortious intent but negligence. For example, if a defendant does not know that he has HIV and infects his wife, he acts negligently and not intentionally; therefore he is liable in negligence and not battery.⁴²⁹ Traditionally negligence and intention were considered as separate concepts and mutually exclusive.⁴³⁰ The courts do recognise another category of fault distinct from intent and negligence, referred to as “reckless” or “willful or wanton misconduct” resembling both traits of negligence and intention thus blurring the distinction between the two. Two

⁴²³ Dobbs, Hayden and Bublick *Hornbook on torts* 187.

⁴²⁴ Green and Cardiac in Koziol (ed) *Basic questions of tort law* 432.

⁴²⁵ Goldberg and Zipursky 2001 *Vand L Rev* 658; Coleman 2012 *Yale LJ* 548.

⁴²⁶ (*Liability for Physical and Emotional Harm*) § 3 (2010). See Dobbs, Hayden and Bublick *Hornbook on torts* 263.

⁴²⁷ §282 (1965).

⁴²⁸ Coleman 2012 *Yale LJ* 548.

⁴²⁹ See *Endres v Endres* 968 A 2d 336, 338 (Vt 2008); Dobbs, Hayden and Bublick *Hornbook on torts* 58 fn 30.

⁴³⁰ See *District of Columbia v Chinn* 839 A 2d 701 (DDC 2003); Dobbs, Hayden and Bublick *Hornbook on torts* 58.

elements are usually present. Firstly, besides the conduct creating unreasonable risk of harm to others, the conduct must create a high or very serious risk of harm, alternatively if there is a “lesser risk or less probable risk, than one that is easily avoided”.⁴³¹ Secondly, the defendant must be aware (conscious) of the risk of harm to others but nevertheless proceed with the conduct (this would be referred to as intent in the form of *dolus eventualis* in South African law).⁴³² Thus knowledge and appreciation of risk without substantial certainty falls short of intent.⁴³³ Classic examples demonstrating this third category of fault include drag racing on a highway⁴³⁴ or driving while intoxicated (where the alcohol was consumed voluntarily prior to the driving) which constitutes “wanton misconduct”.⁴³⁵ If the risk of harm is obvious, the trier of facts may infer consciousness of the risk of harm.⁴³⁶ In addition, if there is “serious risk of substantial harm” then the trier of facts may find: “recklessness”; “willful or wanton misconduct”, or “deliberate indifference” usually synonymous with “recklessness”, but used more in cases dealing with civil rights.⁴³⁷ Dobbs, Hayden and Bublick⁴³⁸ explain that in respect of recklessness, the form of fault is not intention but when the risk of harm is high, reaching “virtual certainty” it becomes a form of intent. “Consciousness of risk” or “deliberate indifference” refers to an intention to take a risk but falls short of pure intent and does not form the basis of an intentional tort.⁴³⁹ Gross negligence generally refers to a higher degree of negligence when compared with ordinary negligence, usually where the conduct creates a very high degree of risk or where there is a bad state of mind coupled with a high degree of negligence.⁴⁴⁰ Often with regard to injuries sustained during sporting activities, liability in tort with reckless or wanton conduct can be shown.⁴⁴¹ Certain statutes, for example, the so-called Good

⁴³¹ Dobbs, Hayden and Bublick *Hornbook on torts* 59. See *Restatement Third of Torts (Liability for Physical Harm)* § 2 cmt e (2005).

⁴³² See chapter 3 para 4.2.

⁴³³ See *Cook v Kinzua Pine Mills Co* 1956 207 Or 34, 293 P 2d 717; *Restatement Second of Torts* § 13 cmt d (1965); Keeton *et al Prosser and Keeton on torts* 36.

⁴³⁴ See *Lewis v Miller* 374 Pa Super 515, 521 543 A 2d 590, 592 (1998); Dobbs, Hayden and Bublick *Hornbook on torts* 59.

⁴³⁵ *Booker Inc v Morrill* 639 NE 2d 358, 361 (Ind Ct App 1994).

⁴³⁶ See *Farmer v Brennan* 511 US 825, 114 S Ct 1970, 128 L Ed 2d 811 (1994); Dobbs, Hayden and Bublick *Hornbook on torts* 60.

⁴³⁷ Dobbs, Hayden and Bublick *Hornbook on torts* 60.

⁴³⁸ *Hornbook on torts* 60.

⁴³⁹ Dobbs, Hayden and Bublick *Hornbook on torts* 60.

⁴⁴⁰ See *Franklin Corp v Tedford* 18 So 3d 215, 240 (Miss 2009); *U-Haul Int'l Inc v Waldrip* 380 SW 3d 118 (Tex 2012); *Cowan v Hospice Support Care Inc* 268 Va 482, 603 SE 2d 916 (2004); Dobbs, Hayden and Bublick *Hornbook on torts* 240 fn 291.

⁴⁴¹ See *Feld v Borkowski* 790 NW 2d 72 (Iowa 2010); *Angland v Mountain Creek Resort Inc* 213 NJ 573, 66 A 3d 1252 (2013); Dobbs, Hayden and Bublick *Hornbook on torts* 240 fn 294, 623.

Samaritan statutes,⁴⁴² do not impose liability on health care professionals in instances of medical emergencies unless there was gross negligence, “reckless or wanton misconduct”.⁴⁴³ The same applies to drivers of emergency rescue vehicles, such as fire engines.⁴⁴⁴ With regard to willful, reckless or wanton conduct, the risk must be high and the cost of avoiding harm low, a so-called risk-utility or risk-benefit analysis is undertaken. In order for the defendant to be found negligent, he must have “conscious indifference” for the safety of others.⁴⁴⁵ The *Restatement Third of Torts*⁴⁴⁶ states that recklessness may be present where the actor has reason to know the risk and his failure to take precautionary measures shows the indifference to the risk.

The defendant’s state of mind reflecting, for example bad motive, subjective beliefs or subjective knowledge, may be relevant in determining reasonableness of conduct but is not necessary to ground liability in the tort of negligence.⁴⁴⁷ Dobbs, Hayden and Bublick⁴⁴⁸ point out that with the intentional torts, for example battery, the defendant must have a “purpose to invade the plaintiff’s legally protected interest or a certainty that such an invasion will occur”. This is not to be equated with intentionally taking a risk of contact which is considered under the tort of negligence. Such intentional risk taking will have to be evaluated in order to determine whether it is indeed negligent by considering the seriousness of the risk of harm as well as the reasons for taking such risk. The authors refer to the example of a batter who is aware that when he hits a ball, it may lead to the breaking of a window outside the park, across the street, but the chances of that happening are slight. The batter intentionally takes a risk which falls short of the requirement of “substantial certainty”. Even though he intentionally takes the risk he is not intentionally causing the ball to land on another’s property. The batter

⁴⁴² The reasons for these statutes is to encourage health care providers’ to assist in emergency situations and so the standard of reasonable care is lowered from the reasonable profession to the reasonable person (see in general Dobbs, Hayden and Bublick *Hornbook on torts* 523-524). The term “Good Samaritan” is self-explanatory where it is understood in normal usage referring to people who assist voluntarily out of good morals.

⁴⁴³ Dobbs, Hayden and Bublick *Hornbook on torts* 241.

⁴⁴⁴ See *Saarin v Kerr* 84 NY 2d 494, 644 NE 2d 988, 620 NYS 2d 297 (1994); *Estate of Graves v City of Circleville* 922 NE 2d 201 (Ohio 2010); Dobbs, Hayden and Bublick *Hornbook on torts* 240 fn 298.

⁴⁴⁵ See *Estate of Rae v Murphy* 956 A 2d 1266 (Del 2008); *Morris v Leaf* 534 NW 2d 388 (Iowa 1995); *Campbell v City of Elmira* 84 NY 2d 505, 644 NE 2d 993, 620 NYS 2d 302 (1994); Dobbs, Hayden and Bublick *Hornbook on torts* 241 fn 303.

⁴⁴⁶ (*Liability for Physical and Emotional Harm*) § 2 cmt a (2010). See Dobbs, Hayden and Bublick *Hornbook on torts* 241-242.

⁴⁴⁷ Dobbs, Hayden and Bublick *Hornbook on torts* 200.

⁴⁴⁸ *Hornbook on torts* 200-201.

is not liable for an intentional tort and whether he is liable in negligence depends on whether the risk is deemed an unreasonable risk. If the house is very close to the park, he may be negligent, but if it is some distance away then the risk is slight and the batter may not be negligent.

In South African legal doctrine, recklessness would like “gross negligence” generally refer to a serious form of negligence but consciousness of the risk of harm to others while simultaneously proceeding with the conduct where the actor reconciles himself with the consequences of proceeding with the conduct is a form of intent known as *dolus eventualis*.⁴⁴⁹ However, in South African law, the distinction between a delict committed intentionally or negligently plays a much diminished role. As long as fault is present in either form it may, with the other established elements, constitute a delict, especially in instances where patrimonial loss has been caused.⁴⁵⁰ It is trite that the form of fault has a greater impact in criminal law where it may result in the difference between two crimes such as murder and culpable homicide. In American law “recklessness” is relevant where punitive damages are claimed.⁴⁵¹

As with negligence claims in English law, initially in American law, some kind of relationship, whether a special or contractual relationship, between the parties was required. With the intentional torts of trespass to the person (stemming from its historical development) a special or contractual relationship between the parties was not required.⁴⁵² In the nineteenth century, claims for negligence were found even where no special or contractual relationship was present between the parties.⁴⁵³ This was the catalyst for the development of the tort of negligence to all kinds of circumstances.⁴⁵⁴ Currently the following elements which make up the *prima facie* case for negligence must be present in principle for a successful claim in the tort of negligence: the defendant must owe the plaintiff a duty of “reasonable care under the

⁴⁴⁹ See chapter 3 para 4.2.

⁴⁵⁰ However, intention plays an important part where the *actio iniuriarum* is instituted for most forms of personality infringement (see Neethling and Potgieter *Delict* 14). In exceptional instances involving patrimonial loss, for example, with regard to interference with contractual relations, intention may also be the requisite form of fault (see Neethling and Potgieter 323).

⁴⁵¹ Dobbs, Hayden and Bublick *Hornbook on torts* 60, 62.

⁴⁵² Dobbs, Hayden and Bublick *Hornbook on torts* 191.

⁴⁵³ See *Livingston v Adams* 8 Cow 175 (NY 1828); *Brown v Kendall* 60 Mass 292 1850; Dobbs, Hayden and Bublick *Hornbook on torts* 193-194.

⁴⁵⁴ See Dobbs, Hayden and Bublick *Hornbook on torts* 194.

circumstances”⁴⁵⁵ (also often referred to as “due care” or “ordinary care”); the defendant must breach such duty “by his unreasonably risky conduct” which deviates from the standard of the reasonable person;⁴⁵⁶ the defendant’s conduct must “in fact” cause the plaintiff’s harm (factual causation), must also be the “proximate cause” of such harm; and there must be some form of legally recognised harm.⁴⁵⁷ Even though there may be a *prima facie* case in that all the elements present for the tort of negligence, in principle is present, a defence, for example, where an element relating to liability is absent (such as no duty is owed to the plaintiff), an affirmative defence (such as contributory fault on the part of the plaintiff, assumption of risk, or the applicability of the “statute of limitations”) or immunity from liability may exclude or limit liability.⁴⁵⁸

The influence of reasonableness on the elements of the tort of negligence will now be considered in more detail.

3.1 *The existence of a duty of reasonable care*

The duty of care element demarcates the types of harms or risks a defendant may be responsible for.⁴⁵⁹ The *Restatement Second of Torts*⁴⁶⁰ provides that such duty should be “applicable to a general class of cases” including “categories of actors or patterns of conduct”.⁴⁶¹ The duty of care owed by the defendant was a standard historically set by the community, in other words, “accepted community practices and expectations”.⁴⁶² It depends on what the community considers as proper, a judgment on the risks encountered and the precautions to be taken – what the community considers as reasonable conduct.⁴⁶³ A practice or custom must be based on the custom or practice in the area and it must be so well known that the defendant is aware

⁴⁵⁵ See *United States v Stevens* 994 So 2d 1062 (Fla 2008); *Werne v Exec Women’s Golf Ass’n* 158 NH 373, 969 A 2d 346 (2009); Dobbs, Hayden and Bublick *Hornbook on torts* 205.

⁴⁵⁶ See Keeton *et al Prosser and Keeton on torts* 169-170.

⁴⁵⁷ See Keeton *et al Prosser and Keeton on torts* 164-165.

⁴⁵⁸ Dobbs, Hayden and Bublick *Hornbook on torts* 198.

⁴⁵⁹ Geistfeld 2011 *Yale LJ* 149.

⁴⁶⁰ §289 cmt b (1965).

⁴⁶¹ Geistfeld 2011 *Yale LJ* 147.

⁴⁶² Dobbs, Hayden and Bublick *Hornbook on torts* 191. See also *Coburn v Lenox Homes Inc* 1982 186 Conn 370, 441 A 2d 620; Keeton *et al Prosser and Keeton on torts* 193.

⁴⁶³ Keeton *et al Prosser and Keeton on torts* 193-194.

of it or should be aware of it.⁴⁶⁴ Epstein⁴⁶⁵ submits that when a customary practice is widely accepted:

“they enable people to coordinate their activities with greater ease Custom organizes human experience into standardized modules that can be reshuffled and recombined, almost at will ... [and] are invoked to set the standard of reasonable care in ordinary negligence actions”.⁴⁶⁶

If a person’s conduct is in accordance with a custom, then it is usually evidence of reasonable conduct.⁴⁶⁷ Conduct that strays from custom is an indication of negligence but is not conclusive of negligence. Similarly conduct that conforms to custom is not conclusive of a lack of negligence.⁴⁶⁸ Thus from early on, the standard set for professionals such as doctors was the “care of doctors”.⁴⁶⁹ In *Brown v Kendall*⁴⁷⁰ the standard of negligence was set to the use of “ordinary care”⁴⁷¹ which would vary according to the circumstances of the case.⁴⁷² In this case, the adjudicator left the decision with the jury with the following instructions.

“If the defendant ... was doing a necessary act, or one which it was his duty under the circumstances of the case to do, and was doing it in a proper way; then he was not responsible in this action, provided he was using ordinary care at the time If it was not a necessary act; if he was not in duty bound to [act] ... but might with propriety interfere or not as he chose; the defendant was responsible for the consequences of the [act], unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable, using the word inevitable not in a strict but a popular sense.

If, however, the plaintiff, when he met with the injury, was not in the exercise of ordinary care, he cannot recover ...”.⁴⁷³

⁴⁶⁴ See *Rhine v Duluth, Missabe & Iron Range Railway Co* 1941 210 Minn 281, 297 NW 852; *Munn v Hotchkiss School* 24 F Supp 3d 155, 173 (D Conn 2014); *Restatement Second of Torts* § 290 (1965); Keeton *et al Prosser and Keeton on torts* 195.

⁴⁶⁵ *Torts* 135-136.

⁴⁶⁶ See *Restatement Second of Torts* § 295A (1965).

⁴⁶⁷ Terry 1915 *Harv L Rev* 49.

⁴⁶⁸ See *Restatement Third of Torts (Liability for Physical and Emotional Harm)* 11(1) and (2) (2010); Epstein *Torts* 136.

⁴⁶⁹ Dobbs, Hayden and Bublick *Hornbook on torts* 191.

⁴⁷⁰ 60 Mass 292 1850.

⁴⁷¹ See Zipursky 2015 *U Pa L Rev* 2131ff who supports the use of the term ordinary care.

⁴⁷² See Dobbs, Hayden and Bublick *Hornbook on torts* 194; Keeton *et al Prosser and Keeton on torts* 163.

⁴⁷³ *Brown v Kendall* 60 Mass 292 1850 293-294.

The plaintiff must prove that he is owed a duty of care by the defendant⁴⁷⁴ and whether he does indeed owe such duty of care is determined by the adjudicator, not the jury.⁴⁷⁵ Keeton *et al*⁴⁷⁶ explain that the concept of a wrong is still applicable in criminal law and intentional torts with regard to transferred intent but when negligence became recognised as a separate tort, the idea of “duty” was born and a relationship between the plaintiff and the defendant was necessary before liability could ensue. This concept of duty is not an essential requirement in continental law and produces confusion in American law.

“Its artificial character is readily apparent; in the ordinary case, if the court should desire to find liability, it would be quite as easy to find the necessary ‘relation’ in the position of the parties toward one another, and hence to extend the defendant’s duty to the plaintiff. The statement that there is or is not a duty begs the essential question – whether the plaintiff’s interests are entitled to legal protection against the defendant’s conduct.”

Keeton *et al*⁴⁷⁷ state that the concept of duty as a result of the influence of English law is firmly embedded in American law, it cannot be discarded and a suitable substitute for it limiting the defendant’s liability in the manner it is applied has yet to be devised. However, duty is “only an expression of the sum total of those considerations of policy which lead the way to say that the plaintiff is entitled to protection”. Keeton *et al*⁴⁷⁸ with regard to Lord Atkin’s neighbour principle, submit that – it is vague and has no value as a guide to decisions. The courts in any event generally find a duty where “reasonable persons would recognize it and agree that it exists.”

A duty may stem from the common law, legislation, a contract, or where the relationship of the parties is of such a nature that the law imposes a duty on the defendant to act reasonably in protecting the plaintiff.⁴⁷⁹ There is no *numerus clausus* of duties and new duties may be created by the courts based on principles or policy

⁴⁷⁴ *Romain v Frankenmuth Mut Ins Co* 483 Mich 18, 762 NW 2d 911 (2009); *Lahm v Farrington* 90 A 3d 620 (NH 2014); *MacGregor v Walker* 322 P 3d 706 (Utah 2014); *Giggers v Memphis Hous Auth* 277 SW 3d 359 (Tenn 2008); Dobbs, Hayden and Bublick *Hornbook on torts* 203-204 fn 1.

⁴⁷⁵ See *Beacon Residential Cmty Ass’n v Skidmore, Owings & Merrill LLP* 59 Cal 4th 568, 327 P 3d 850, 173 Cal Rptr 3d 752 (2014); *Commerce Ins Co v Ultimate Livery Serv Inc* 452 Mass 639, 897 NE 2d 50 (2008); Dobbs, Hayden and Bublick *Hornbook on torts* 204.

⁴⁷⁶ *Prosser and Keeton on torts* 356. See also Dobbs, Hayden and Bublick *Hornbook on torts* 203-204.

⁴⁷⁷ *Prosser and Keeton on torts* 358. See also Dobbs, Hayden and Bublick *Hornbook on torts* 204.

⁴⁷⁸ *Prosser and Keeton on torts* 359.

⁴⁷⁹ *Lucero v Holbrook* 288 P 3d 1228, 1232 (Wyo 2012) (referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 204).

considerations.⁴⁸⁰ In general, if the defendant “creates, maintains or continues” a risk of harm, he owes a duty of care.⁴⁸¹ The standard of care usually applied by the courts is reasonable care under the circumstances⁴⁸² but academic writers and courts sometimes use the term in different ways, with a different meaning⁴⁸³ referring to it as a conclusion as to whether conduct should be actionable, instead of referring to it as a general standard. For example, it is considered in a narrow sense as a specific duty to look before proceeding to the intersection. This relates to the breach of duty. Whether such conduct was negligent according to the standard of the reasonable person is for the jury and not the adjudicator to decide.⁴⁸⁴

When courts determine the existence of a duty of care a number of factors have been considered, which include *inter alia*: policy considerations,⁴⁸⁵ a question of fairness – whether reasonable people would agree that a duty of care exists,⁴⁸⁶ the relationship between the plaintiff and defendant,⁴⁸⁷ and reasonable foreseeability of harm. These factors have been criticised for being vague and reflecting opinions of adjudicators in particular or value judgments.⁴⁸⁸ Reasonable foreseeability of harm as a factor for determining a duty of care has been severely criticised on the following grounds: it is fact-specific and fact-related, it does not coincide with the broad policy assessments required for determining categories of duties; it shifts the focus away from policy considerations necessary in determining the duty of care; it unnecessarily duplicates the foreseeability of harm enquiry at the duty stage when it is already considered in

⁴⁸⁰ See *Restatement Third of Torts (Liability for Physical Harm)* § 7(b) and § 37 cmt g (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 205.

⁴⁸¹ Exceptions apply where a positive duty to act is expected from, for example, health care providers. See Dobbs, Hayden and Bublick *Hornbook on torts* 204.

⁴⁸² See list of cases cited by Dobbs, Hayden and Bublick *Hornbook on torts* 205 fn 10-11, academic writers who agree and is approved of in the *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 7 (2010).

⁴⁸³ See *Marshall v Burger King Corp* 222 Ill 2d 422, 305 Ill Dec 897 (2006) where this was pointed out; Dobbs, Hayden and Bublick *Hornbook on torts* 205.

⁴⁸⁴ See authority cited by Dobbs, Hayden and Bublick *Hornbook on torts* 206-208 fn 18-33.

⁴⁸⁵ See Keeton *et al Prosser and Keeton on torts* 358; cases cited by Dobbs, Hayden and Bublick *Hornbook on torts* 208-209 fn 39.

⁴⁸⁶ *Casebolt v Cowan* 829 P 2d 352, 356 (Co 1992) referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 208).

⁴⁸⁷ See *Marshall v Burger King Corp* 222 Ill 2d 422, 305 Ill Dec 897 (2006); Goldberg and Zipursky 1998 *U Pa LR* 1733; cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 209 fn 40.

⁴⁸⁸ See *Cohen v Cabrini Med Ctr* 94 NY 2d 639, 730 NE 2d 949, 709 NYS 2d 151 (2000); *Stephenson v Universal Metrics Inc* 251 Wis 2d 171, 642 NW 2d 158 (2002); Cardi 2009 *Wake Forest L Rev* 877, 886; Dobbs, Hayden and Bublick *Hornbook on torts* 209 fn 44-46.

determining negligence and the scope of liability (legal causation);⁴⁸⁹ if an adjudicator decides that a duty of care does not exist when considering foreseeability of harm as a factor, he takes over the role assigned to the jury; if the adjudicator states that the foreseeability of harm determined by the court is different from the manner in which it is determined by the jury, he inevitably brings about obscurity and confusion; and if the adjudicator uses foreseeability to deny a duty of care he uses it as an excuse to justify his prejudice or decision.⁴⁹⁰ Dobbs, Hayden and Bublick⁴⁹¹ explain that The *Restatement Third of Torts* suggests that to overcome the use of vague factors three principles may be applied. Firstly, all persons owe a duty of care to not “create unreasonable risks to others”.⁴⁹² Secondly, foreseeability of harm must be considered as it was traditionally considered under the breach of a duty and not in determining whether a duty of care exists.⁴⁹³ Thirdly, courts may consider specific policy factors in determining whether *to impose a duty of reasonable care* in exceptional cases.⁴⁹⁴ That is: if a duty of care would be in conflict with social norms;⁴⁹⁵ if a duty of care would be in conflict with other areas of the application of law;⁴⁹⁶ if a duty of care would be in conflict with the relationship between the parties or with the assertion of the defendant’s other legally recognised interests;⁴⁹⁷ where the determination of a duty of care would extend beyond the parameters of the court’s function;⁴⁹⁸ if a duty of care “would fail to defer to another branch of government”.⁴⁹⁹ The third principle

⁴⁸⁹ Cardi 2005 *Vand L Rev* 739 submits that foreseeability should be left to the breach of duty and proximate cause stage. Determining foreseeability at those stages should be left with the jury which require “common sense, common experience, and application of the standards and behavioural norms of the community” (799-800). Bahadur 2011 *No Ky L Rev* 61ff submits that the foreseeability of harm should only be used to determine negligence at the breach of duty stage.

⁴⁹⁰ See Cardi 2005 *Vand L Rev* 790-794. Dobbs, Hayden and Bublick *Hornbook on torts* 212-213.
⁴⁹¹ *Hornbook on torts* 210-211.

⁴⁹² Except for extraordinary cases of physical harm. See *Restatement Third of Torts (Liability for Physical Harm)* § 7(a) (2010). See Zipursky 2015 *U Pa LR* 2163 who states that the duty is universal “regardless of status or prior relationship”.

⁴⁹³ *Restatement Third of Torts (Liability for Physical Harm)* § 7 cmt j (2010).

⁴⁹⁴ *Restatement Third of Torts (Liability for Physical Harm)* § 7 cmt a (2010). See Geistfeld 2011 *Yale LJ* 154.

⁴⁹⁵ For example, imposing liability on hosts for providing alcohol to drunken guests who then drive in such drunken state. See *Restatement Third of Torts (Liability for Physical Harm)* § 7 cmt c (2010).

⁴⁹⁶ For example, where liability for economic loss should be dealt with in the law of contracts instead of tort law. See *Restatement Third of Torts (Liability for Physical Harm)* § 7 cmt d (2010).

⁴⁹⁷ *Restatement Third of Torts (Liability for Physical Harm)* § 7 cmt e (2010).

⁴⁹⁸ For example, where the plaintiff alleges that it is negligent to manufacture motor vehicles. See *Restatement Third of Torts (Liability for Physical Harm)* § 7 cmt f (2010).

⁴⁹⁹ *Restatement Third of Torts (Liability for Physical Harm)* § 7 cmt g (2010). Dobbs, Hayden and Bublick *Hornbook on torts* 211.

recommended by the *Restatement Third of Torts*⁵⁰⁰ no doubt follows the third element of the three-fold test in the English tort of negligence in determining a duty which has also been adopted in South African law in determining wrongfulness.⁵⁰¹

Courts have over time formulated a no-duty rule under instances that commonly occur in practice. For example, providers of alcohol do not owe a duty of reasonable care towards consumers or third parties where the consumer subsequently causes harm to such third party.⁵⁰² Thus the alcohol provider will not be held liable. On the other hand there are recognised categories of duties for omissions, pure economic loss and so on.⁵⁰³ Hospitals and prison authorities do have a duty of reasonable care to prevent suicide of patients or prisoners.⁵⁰⁴

The influence of reasonableness on the element of a duty of reasonable care under the circumstances is explicit. In summary, reasonable care means ordinary care and does depend on under what circumstances the community expects the defendant to take reasonable care of the plaintiff's interests and whether the plaintiff's interests are entitled to protection by the law. Unlike English law, emphasis is not placed on a special relationship as a duty of care may be owed to anyone, it depends on whether reasonable people would agree and recognise that a duty of care exists. A duty may stem from the common law, contract, legislation or a relationship between the parties. Factors such as fairness, policy considerations and reasonable foreseeability of harm have been used to determine the existence of a duty. The development of American law with the *Restatement Third of Torts* clearly states that a duty may be owed to all persons not to create unreasonable risks and policy considerations may be considered under certain circumstances in determining whether it is reasonable to impose a duty of care on a person. It is apparent that the development of American law seems to diverge from English law in the sense that a special relationship is not necessarily

⁵⁰⁰ See *Gipson v Kasey* 214 Ariz 141, 150 P 3d 228 (2007); Green 2008 *South Cal L Rev* 671, 678; Twerski 2008 *Hastings LJ* 1, 22-23 referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 211.

⁵⁰¹ See chapter 3 para 3.2; chapter 4 para 3.2.2.1.

⁵⁰² See *Rodriguez v Primadonna Co LLC* 216 P 3d 793 (Nev 2009); Dobbs, Hayden and Bublick *Hornbook on torts* 371.

⁵⁰³ See para 3.4 below.

⁵⁰⁴ See *Joseph v State* 26 P 3d 459 (Alaska 2001); *Hickey v Zezulka* 439 Mich 408, 487 NW 2d 106 1992; *Cowan v Doering* 111 NJ 451, 545 A 2d 159 (1988); *Parvi v City of Kingston* 41 NY 2d 553, 560, 362 NE 2d 960, 965, 394 NYS 2d 161, 166 (1977); *Bexiga v Havir Manufacturing Corp* 60 NJ 402, 290 A 2d 281 (1972); Dobbs, Hayden and Bublick *Hornbook on torts* 372, 375.

required between the parties, reasonable foreseeability of harm is not required in determining the existence of a duty of reasonable care, and policy considerations in determining the existence of a duty of care are applied under certain circumstances. There is a clear trend to be more progressive in recognising a duty of care depending on the infringement of the interests of the plaintiff deemed worthy of protection by the law and a concerted effort to bring clarity and certainty in the law.

3.2 *The standard of reasonable care and capacity*

Once it is established that a duty of reasonable care is owed, the conduct of the parties is tested against the standard of a reasonable person under the circumstances.⁵⁰⁵ Sometimes the standard must be adjusted to that of the reasonable professional, that is, the reasonable medical practitioner, etcetera and the adjudicator determines the standard that should be applied in the particular circumstances of the case.⁵⁰⁶ The jury must then be instructed of the applicable standard.⁵⁰⁷ The standard is determined with regard to risky behaviour and the defendant is generally liable for the unreasonable risks he created in relation to his conduct.⁵⁰⁸ It depends on whether the defendant's conduct conformed to the "standard of reasonable conduct in the light of the apparent risk".⁵⁰⁹ The circumstances of the case encompass factors such as whether the danger encountered was slight or significant.⁵¹⁰ Thus in general, the defendant or the plaintiff in cases of contributory fault must use ordinary, reasonable care commensurate with the reasonably foreseeable risk of harm under the circumstances.⁵¹¹

⁵⁰⁵ See *Lugtu v Cal Highway Patrol* 26 Cal 4th 703, 110 Cal Rptr 2d 528, 28 P 3d 249 (2011); *Gossett v Jackson* 249 Va 549, 457 SE 2d 97 (1995); *Restatement Second of Torts* § 282-283 (1965); *Restatement Third of Torts (Liability for Physical and emotional Harm)* §§ 7, 16(2) (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 214.

⁵⁰⁶ *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 10(1) (2010).

⁵⁰⁷ See *Frazier ex rel Frasier v Norton* 334 NW 2d 865 (SD 1983); *Robinson v Lindsay* 92 Wash 2d 410, 598 P 2d 392 (1979); Dobbs, Hayden and Bublick *Hornbook on torts* 233.

⁵⁰⁸ *Roberts v Ring* 173 NW 437, 438 (Minn 1919); *Restatement Third of Torts (Liability for Physical Harm)* § 9 cmt c (2005); Epstein *Torts* 119.

⁵⁰⁹ See Dobbs, Hayden and Bublick *Hornbook on torts* 215-216; Keeton *et al Prosser and Keeton on torts* 169; Epstein *Torts* 129.

⁵¹⁰ Keeton *et al Prosser and Keeton on torts* 356.

⁵¹¹ Dobbs, Hayden and Bublick *Hornbook on torts* 216.

⁵¹¹ See *Doe v Andujar* 297 Ga App 696,678 SE 2d 163 (2009); *Anderson v Nashua Corp* 246 Neb 420, 519 NW 2d 275 (1994); *Stewart v Motts* 539 Pa 596, 654 A 2d 535 (1995); Dobbs, Hayden and Bublick *Hornbook on torts* 217.

A “special danger” is one factor considered when determining reasonableness of risks.⁵¹² If a defendant is faced with a sudden unforeseeable emergency which he did not create himself, the jury may consider such factor when determining the reasonableness of conduct.⁵¹³ However, as of late some states⁵¹⁴ disapprove of such instruction to the jury finding it unnecessary as the standard of the reasonable person applied to the circumstances of the cases is sufficient. The *Restatement Third of Torts*⁵¹⁵ refers to an emergency situation as an event preventing reasonable persons from exercising the good judgment that will ordinarily be exercised. Although reference is often made to the doctrine of sudden emergency, it is strictly speaking not a doctrine but an application of the reasonable person test under the circumstances, that is, the reasonable person faced with an emergency.⁵¹⁶ It is not a defence or an excuse and does not shift the burden of proof.⁵¹⁷ Sudden unforeseen emergencies can arise in just about any context and is commonly referred to in motor vehicle accidents. Some emergencies must be anticipated, such as traffic or animals or obstacles suddenly appearing during travel on the road or highway.⁵¹⁸ For example, a driver is faced with a sudden threat where a motor vehicle veers into his lane of travel and in order to avoid colliding with the motor vehicle, he swerves to the left or right striking the plaintiff’s vehicle or perhaps the plaintiff himself. Thus the defendant has a limited amount of time to decide how to react.⁵¹⁹ It is common knowledge for example that if bees are disturbed they may sting⁵²⁰ or horses which are left on a road without supervision may become frightened and run causing harm.⁵²¹ If the defendant

⁵¹² Dobbs, Hayden and Bublick *Hornbook on torts* 218.

⁵¹³ See *Willis v Westerfield* 839, NE 2d 1179 (Ind 2006); *Regenstrief v Phelps* 142 SW 3d 1 (Ky 2004); *Kreidt v Burlington* NRR 615 NW 2d 153 (ND 2000); Dobbs, Hayden and Bublick *Hornbook on torts* 218.

⁵¹⁴ Keeton *et al Prosser and Keeton on torts* 197 point out that Illinois, Florida, Missouri and Kansas do not refer the jury to the doctrine while Mississippi has abolished the doctrine. See *Knapp v Stanford*, 329 So2d 196 (Miss 1980); *Lyons v Midnight Sun Transp Servs Inc* 928 P.2d 1202 (Alaska 1996); *Wiles v Webb* 329 Ark 108, 946 SW 2d 685 (1997); as well as other cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 221 fn 129.

⁵¹⁵ (*Liability for Physical and Emotional Harm*) § 9 cmt b (2010).

⁵¹⁶ See *Oberempt v Egri* 1979, 176 Conn 652, 410 A 2d 482; Dobbs, Hayden and Bublick *Hornbook on torts* 218-219; Keeton *et al Prosser and Keeton on torts* 197.

⁵¹⁷ *Vahdat v Holland* 274 Va 417, 424, 649 SE 2d 691, 695 (2007).

⁵¹⁸ Keeton *et al Prosser and Keeton on torts* 197.

⁵¹⁹ See *Petefish ex rel Clancy v Dawe* 137 Ariz 570, 672 P 2d 914 (1983); *Restatement Third of Torts (Liability for Physical and emotional Harm)* § 9 (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 220.

⁵²⁰ See *Pehowic v Erie Lackawanna Railroad Co* 3rd Cir 1970 430 F 2d 697; Keeton *et al Prosser and Keeton on torts* 198.

⁵²¹ See *Griggs v Fleckenstein* 1869 14 Minn 81, 14 Gil 62; Keeton *et al Prosser and Keeton on torts* 198.

negligently creates the situation whether wholly or in part, wherefrom the emergency arises, he will not escape liability as he behaved unreasonably.⁵²²

Certain statutes may in a sense lower the standard of reasonable care. For example motor vehicles responding to an emergency such as police motor vehicles, fire engines and ambulances etcetera may, according to certain legislation, disobey usual traffic rules but must still either drive with reasonable care⁵²³ or not recklessly in the circumstances.⁵²⁴

The standard of the reasonable person is predominantly objective in that it applies generally to cases testing the parties' conduct against the hypothetical model reasonable person. It is an external standard based on "what society demands generally of its members rather than upon the actor's personal morality or individual sense of right and wrong".⁵²⁵ The reasonable person has reasonable prudence;⁵²⁶ is cautious;⁵²⁷ has common knowledge (compared with common knowledge in the community at the time of the tort); normal perception and memory.⁵²⁸ The subjective part of the reasonable person standard relates to "additional intelligence, skill, or

⁵²² See *Howen v Cahoon* 236 Va 3, 372 SE 2d 363 (1988); *Brown v Spokane Cty Fire Prot Dist No 1* 100 Wash 2d 188, 668 P 2d 571 (1983); *Restatement Second of Torts* § 296(2) (1965); *Restatement Third of Torts (Liability for Physical and emotional Harm)* § 9 cmt d (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 220 fn 122-123.

⁵²³ See *Torres v City of Los Angeles* 58 Cal 2d 35, 372 P 2d 906, 22 Cal Rptr 866 (1962); *Frazier v Common Wealth* 845 A 2d 253, 260 (Pa Commw Ct 2004); Dobbs, Hayden and Bublick *Hornbook on torts* 221 fn 134.

⁵²⁴ See *Robins v City of Wichita* 285 Kan 455, 172 P 3d 1187 (2007); *Lenard v Dilley* 805 So 2d 175 (La 2002); Dobbs, Hayden and Bublick *Hornbook on torts* 221 fn 135.

⁵²⁵ Keeton *et al Prosser and Keeton on torts* 169. See *McNeely v M & M Supermarkets Inc* 1980 154 Ga App 675, 269 SE 2d 483; *Stewart v Jefferson Plywood Co* 1970 255 Or 603, 469 P 2d 783.

⁵²⁶ See *Trentacoast v Brussel* 1980, 82 NJ 214, 412 A 2d 436; *Swenson Trucking & Excavating Inc v Truckweld Equipment Co* Alaska 1980, 604 P 2d 1113; Keeton *et al Prosser and Keeton on torts* 174 (referring to the reasonable prudent person).

⁵²⁷ See *Massey v Scriptor* 1977 401 Mich 385, 258 NW 2d 44; *St Mary's Hosp Inc v Bynum*, Ark 1978, 573 SW 2d 914; Keeton *et al Prosser and Keeton on torts* 174 (referring to the reasonably careful person).

⁵²⁸ Dobbs, Hayden and Bublick *Hornbook on torts* 222, 229. See *Restatement Second of Torts* §§ 289-290 (1965) which states that an ordinary person has knowledge that matches will burn, alcohol induces intoxication, gravity makes weight fall from a high place, a person can get electrocuted when coming into contact with a power line. *Restatement Third of Torts (Liability for Physical and emotional Harm)* § 12 (2010). For example, a reasonable person is not expected to know that fumes from gasoline are heavier than air (see *Blakes v Blakes* 517 So 2d 444 (La Ct App 1987)). See also discussion by Keeton *et al Prosser and Keeton on torts* 182-185 with regard to the difficulty with the question of how much knowledge the defendant is required to know; Epstein *Torts* 113- 114.

knowledge actually possessed by the individual”⁵²⁹ coupled with his “physical attributes” although they are still tested objectively.⁵³⁰ The *Restatement Third of Torts*⁵³¹ refers to superior skills or knowledge as circumstances to be taken into account in determining whether the actor acted reasonably. For example, a race car driver who has superior driving abilities would be more skilled at avoiding an accident in an emergency situation than an ordinary driver. The race car driver may be held negligent for failing to use his superior skill in avoiding an accident.⁵³² A person with a disability is judged according to the standard of the reasonable person with such disability.⁵³³ The *Restatement Third of Torts*⁵³⁴ with reference to conduct of persons with physical disability states that the standard of negligence is that of a “reasonably careful person with the same disability”. This standard is usually applied to persons who are blind, deaf and where there is a loss of a motor function.⁵³⁵ If a person is below average in “judgment knowledge, or skills” such as a learner driver, he is still judged according to the reasonable person standard.⁵³⁶ Professionals are expected to exercise reasonable care and to possess a minimum standard of knowledge and ability. If the professional professes further specialised knowledge or skills, the standard is adjusted to the specialised skill and knowledge held to the accepted practice, customary and usual standard of the relevant professional (doctor, dentist, accountant etcetera).⁵³⁷ A person who is “reasonably unaware” of his own disability or physical limitation, for example, where a person suffers a heart attack and was not aware of his condition; even though there is conduct, he may not be held liable because the heart attack was unforeseeable and he was therefore not negligent.⁵³⁸

⁵²⁹ See *Restatement Second of Torts* §§ 289, 290 cmt f, 299 cmt f (1965).

⁵³⁰ Dobbs, Hayden and Bublick *Hornbook on torts* 222.

⁵³¹ (*Liability for Physical and Emotional Harm*) § 12 (2010). See *Sinai v Polinger Co* 498 A 2d 520 (DC 1985); Dobbs, Hayden and Bublick *Hornbook on torts* 230-231.

⁵³² See *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 12 (2010); Green and Cardi in Koziol (ed) *Basic questions of tort law* 484.

⁵³³ See *Fink v City of New York* 206 Misc 79, 132 NYS 2d 172 (Sup Ct 1954); *Restatement Second of Torts* § 283C (1965); Dobbs, Hayden and Bublick *Hornbook on torts* 223; cases referred to Keeton *et al Prosser and Keeton on torts* 176 fn 23 in respect of people with disabilities, who are blind and deaf.

⁵³⁴ (*Liability for Physical Harm and Emotional Harm*) § 11(a) (2010).

⁵³⁵ Epstein *Torts* 121.

⁵³⁶ *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 10 cmt b (2010); Epstein *Torts* 114.

⁵³⁷ See discussion by Keeton *et al Prosser and Keeton on torts* 185-193 as well as the authority referred to. See para 3.4.2 below.

⁵³⁸ See *Baker v Joyal* 4 AD 3d 596, 771 NYS 2d 269 (2004); *Hancock-Underwood v Knight* 670 SE 2d 720 (Va 2009); *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 11(b) (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 224.

The same applies where a person sustains a stroke, epileptic fit or faints.⁵³⁹ A person who is aware of his condition, disability or physical impairment, or can reasonably foresee that he is prone to such impairment, for example, a person prone to seizures may be held negligent for not controlling the seizures.⁵⁴⁰ The portion of the test referring to the *circumstances* of the case “brings flexibility and common sense to the standard”.⁵⁴¹

Generally children under the age of five are deemed incapable of being negligent.⁵⁴² In a few states, children under seven years of age may not be held liable in tort and children from seven to fourteen years of age are presumed incapable of negligence which may be rebutted.⁵⁴³ The conduct of a minor is not judged according to the standard of the reasonable person or the reasonable child of the same age but with the care of a reasonable person “of his own age, intelligence, and experience in similar circumstances” (a more subjective standard).⁵⁴⁴ Thus liability in tort will depend on whether in view of the child’s own age, experience and intelligence he acted reasonably.⁵⁴⁵ The age of the child, maturity, knowledge, prior experience, whether he can understand the consequences of his actions (accountability), as well as other

⁵³⁹ See *Moore v Preenell* 1977 38 Md App 243, 379 A 2d 1246 and *Frechette v Welch* (1st Cir 1980), 621 F 2d 11 (with regard to an unforeseeable blackout); Keeton *et al Prosser and Keeton on torts* 162.

⁵⁴⁰ See *Goodrich v Blair* 132 Ariz 459, 646 P 2d 890 (1982) where a driver was prone to heart attacks; *Lutzkovitz v Murray* 339 A 2d 64, 93 ALR 3d 321 (Del 1975) in respect of the risk of having blackouts; *Howle v PYA/Monarch Inc* 288 SC 586, 344 SE 2d 157 (1986) in respect of fatigue and drowsiness due to insulin resistance. Thus where the defendant is aware of his condition and continues to drive or operate machinery thereafter causing an accident or harm, then such person’s conduct is considered unreasonable. See Dobbs, Hayden and Bublick *Hornbook on torts* 225 fn157-159.

⁵⁴¹ See *Johnson v Clay* 1978 38 NC App 542, 248 SE 2d 382; *Restatement Second of Torts* § 283 (1965); Dobbs, Hayden and Bublick *Hornbook on torts* 223; Keeton *et al Prosser and Keeton on torts* 175.

⁵⁴² See *Mastland Inc v Evans Furniture Inc* 498 NW 2d 682 (Iowa 1993); *Price v Kitsap Transit* 125 Wash 2d 456, 886 P.2d 556 (1994); *Restatement Third of Torts (Liability for Physical Harm)* § 10(b) (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 233; Epstein *Torts* 117.

⁵⁴³ Georgia has by a statute exempted children under 13 years of age from liability in tort. See *Horton v Hinley* 261 Ga 863, 413 SE 2d 199 (1992); *Savage Indus v Duke* 598 So 2d 856 (Ala 1992); *Queen Ins v Hammond* 374 Mich 655, 132 NW 2d 792 (1965); *Steele v Holiday Inns Inc* 626 So 2d 593 (Miss 1993); Dobbs, Hayden and Bublick *Hornbook on torts* 233; authority referred to by Keeton *et al Prosser and Keeton on torts* 179 fn 58; Epstein *Torts* 117.

⁵⁴⁴ See *First Nat’l Bank of Ariz v Dupree* 136 Ariz 296, 665 P 2d 1018 (Ct App 1983); *Lehmuth v Long Beach Unified Sch Dist* 53 Cal 2d 544, 348 P 2d 887, 2 Cal Rptr 279 (1960); *Restatement Second of Torts* § 283A (1965); *Restatement Third of Torts (Liability for Physical and Emotional Harm)* §§ 8 (2), 10 (a) (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 233 fn 224; cases referred to by Keeton *et al Prosser and Keeton on torts* 179 fn 47.

⁵⁴⁵ See cases cited by Dobbs, Hayden and Bublick *Hornbook on torts* 233 fn 227-280.

surrounding circumstances are taken into consideration.⁵⁴⁶ A child with a mental impairment or incapacity is not expected to act with the care of a child without such impairment or incapacity.⁵⁴⁷ Similarly, a child with the experience and intelligence equivalent to that of an adult will be expected to act like the reasonable person.⁵⁴⁸ A child's conduct may be judged according to the standard of the reasonable person when a child undertakes a dangerous activity usually undertaken by adults.⁵⁴⁹ For example, the courts have applied the reasonable person test to children operating a motorised vehicle,⁵⁵⁰ tractor,⁵⁵¹ boat,⁵⁵² and a snowmobile.⁵⁵³ The reasonable person standard however does not apply to minors who were involved in hunting accidents where guns were involved,⁵⁵⁴ or where minors ride bicycles.⁵⁵⁵

With regard to the elderly, if an elderly driver is not able to respond to accidents as a result of a decline in his mental or physical abilities then he should not be driving as he poses a risk to others.⁵⁵⁶

A mental impairment, incapacity or disability will generally not lead to the exclusion of liability in the tort of negligence or the intentional torts.⁵⁵⁷ Keeton *et al*⁵⁵⁸ point out that

⁵⁴⁶ See *Hudson v Old Guard Ins* 3 A 3d 246 (Del 2010); Dobbs, Hayden and Bublick *Hornbook on torts* 233 fn 236.

⁵⁴⁷ See *Lafayette Par Sch Bd v Cormier ex rel Cormier* 901 So 2d 1197 (La Ct App 2005); Dobbs, Hayden and Bublick *Hornbook on torts* 234.

⁵⁴⁸ *Dorais v Paquin* 113 NH 187, 304 A 2d 369 (1973); Dobbs, Hayden and Bublick *Hornbook on torts* 234.

⁵⁴⁹ See *Restatement Second of Torts* § 283(A) (1965); *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 10(c) (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 236; Epstein *Torts* 118.

⁵⁵⁰ See *Adams v Lopez* 407 P 2d 50 (NM 1965) in respect of a motorized scooter; *Pritchard v Veterans Cab Co* 63 Cal 2d 727, 408 P 2d 360, 47 Cal Rptr 904 (1965); other cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 236 fn 251; Keeton *et al Prosser and Keeton on torts* 179.

⁵⁵¹ See *Jackson v McCuiston* 448 SW 2d 33 (Ark 1969); *Goodfellow v Cogburn* 98 Idaho 202, 203-204, 560 P 2d 873 (1977).

⁵⁵² *Dellwo v Pearson* 259 Minn 452, 107 NW 2d 859, 97 ALR 2d 866 (1961).

⁵⁵³ See *Robinson v Lindsay* 92 Wash 2d 410, 598 P 2d 392 (1979); Dobbs, Hayden and Bublick *Hornbook on torts* 236; Keeton *et al Prosser and Keeton on torts* 179.

⁵⁵⁴ See *Purtle v Shelton* 474 SW 2d 123 (Ark 1971) where the reasonable person standard was not applied, the minors age (a seventeen-year-old child) was considered.

⁵⁵⁵ *Restatement Third of Torts (Liability for Physical Harm)* § 8 cmt f (2005); Epstein *Torts* 119.

⁵⁵⁶ *Roberts v Ring* 173 NW 437, 438 (Minn 1919); *Restatement Third of Torts (Liability for Physical Harm)* § 9 cmt c (2005); Epstein *Torts* 119.

⁵⁵⁷ See *McGuire v Almy* 8 NE 2d 760 (Mass 1936); *Polmatier v Russ* 537 A 2d 468 (Conn 1988); *Williams v Kearby* 775 P 2d 670 (Kan App 1989); *Restatement Second of Torts* § 895J (1979); *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 11(c) (2010); Epstein *Torts* 50.

⁵⁵⁸ *Prosser and Keeton on torts* 177.

this was the way the law developed and the person with a mental impairment or insane person is still judged according to the standard of the reasonable person.⁵⁵⁹ Holding insane persons to such a standard that they cannot meet has been criticised.⁵⁶⁰ The reasons for holding them to the reasonable person standard include that it is difficult to differentiate between one's bad judgment and mental incapacity; that it is fair to the plaintiff to receive compensation for harm done to him; that it will encourage those who are charged with the care of the mentally incapacitated to take care of them and control them with more care;⁵⁶¹ and that it is costly to determine the capabilities of a person with a mental impairment.⁵⁶² Dobbs, Hayden and Bublick⁵⁶³ refer to two cases that have applied as exceptions to the general rule. In one of them a court in Wisconsin⁵⁶⁴ held that a person cannot be held liable for conduct as a result of a sudden unforeseeable insanity and in the other a court in New York⁵⁶⁵ found a defendant who became insane "as a result of extraordinary efforts to protect the plaintiff" not liable. The standard of care applied to a mentally incapacitated person, whether he is suffering a mental impairment⁵⁶⁶ or insanity⁵⁶⁷ etcetera, remains the standard of the reasonable person, not the standard of the reasonable person affected by a mental deficiency or insanity etcetera. Where comparative or contributory fault is involved, the courts may lower the standard and the plaintiff's incapacity due to the mental condition is considered as a subjective factor in the circumstances in judging his behaviour.⁵⁶⁸

It is possible that a patient, who for example, suffers from Alzheimer's disease, may not be held liable in negligence for harm sustained by his caregiver as the caregiver

⁵⁵⁹ See for example, *Kuhn v Zabostsky* 1967, 9 Ohio St 2d 129, 224 NE 2d 137; *Jolley v Powell* Fla App 1974 299 So 2d 647; *Restatement Second of Torts* § 283B cmt b (1965); cases cited by Keeton *et al Prosser and Keeton on torts* 177 fn 32; Epstein *Torts* 120.

⁵⁶⁰ See Ague 1956 *Dick L Rev* 211; Curan 1960 *Ohio St LJ* 52; Alexander & Szasz 1967 *Notre Dame L Rev* 24; Seidelson 1981 *Geo Wash L Rev* 17; Ellis 1981 *Am Bar Found Res J* 1079; Note 1972 39 *Tenn L Rev* 705; Keeton *et al Prosser and Keeton on torts* 177 fn 33.

⁵⁶¹ Keeton *et al Prosser and Keeton on torts* 177.

⁵⁶² Green and Cardi in Koziol (ed) *Basic questions of tort law* 483.

⁵⁶³ *Hornbook on torts* 225-226. See also Keeton *et al Prosser and Keeton on torts* 178.

⁵⁶⁴ *Breunig v American Family Ins* 45 Wis 2d 536, 173 NW 2d 619, 49 ALR 3d 179 (1970).

⁵⁶⁵ *Williams v Hays* 157 NY 541, 52 NE 589 (1899).

⁵⁶⁶ *Vaughan v Menlove* 3 Bing NC 468, 132 Eng Rep 490 (CP 1837); *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 12 cmt b (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 226 fn 168.

⁵⁶⁷ See *Creasy v Rusk* 730 NE 2d 659 (Ind 2000); *Restatement Second of Torts* §§ 283B cmt b, 895J (1979); Dobbs, Hayden and Bublick *Hornbook on torts* 226 fn 169.

⁵⁶⁸ See for example, *Emory University v Lee* 1958, 97 Ga App 680 104 SE 2d 234; *Restatement Second of Torts* § 464 cmt g; other cases referred to by Keeton *et al Prosser and Keeton on torts* 178 fn 39.

owes a duty of reasonable care to the patient.⁵⁶⁹ A person who voluntarily consumes alcohol⁵⁷⁰ is still judged according to the standard of the sober reasonable person.⁵⁷¹ The reason for this is that it would be a common excuse for a defendant to raise intoxication. Drunkenness is not encouraged in society and a person who consumes alcohol should be held accountable for the consequences of consuming alcohol and causing harm.⁵⁷²

The influence of reasonableness on the standard of the reasonable person whether it is lowered or raised, is explicit. It is reasonable to lower the standard when dealing with: younger children; persons with physical disabilities; persons who are unaware of their own disability or physical limitation (as the condition was reasonably unforeseeable); and persons attending to emergency situations. The reasonable person standard refers to care usually expected, common, normal, standard, or ordinary. Irrespective of whether the standard is lowered or raised, reasonable care must still be applied, even for drivers of emergency vehicles who must drive reasonably and not recklessly. Where the standard is raised due to the person's professional skill, knowledge or experience, it is reasonable to judge a person according to such raised standard. The standard is objective in that it applies uniformly to conduct but is also subjective where a person's age, knowledge, intelligence, experience, skill, physical attributes, and mental capacity is considered in determining the standard to be applied and whether the actor acted reasonably according to the standard. The anomaly applies to persons with mental illness or mental impairment where such subjective illness or impairment is not considered in adjusting the standard or nullifying the requirement of conduct. Such persons are in a sense held strictly liable and even though many reasons have been provided and holding such person to the reasonable person standard has been criticised; the most plausible reason is that it is fair and reasonable to compensate the innocent plaintiff.

⁵⁶⁹ See *Gregory v Cott* 59 Cal 4th 996, 1000, 331 P 3d 179, (2014); *Berberian v Lynn* 179 NJ 290, 845 A 2d 122 (2004); Dobbs, Hayden and Bublick *Hornbook on torts* 226 fn 172.

⁵⁷⁰ A person who is involuntarily intoxicated is not judged according to the reasonable person standard. See *Davies v Butler* 95 Nev 763, 602 P 2d 605 (1979); *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 12 cmt c (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 231 fn 209.

⁵⁷¹ See for example, *Hamilton v Kinsey* Ala 1976 337 So 2d 344; *Haber v County of Nassau* 2nd Cir 1977, 577 F 2d 322 in respect of drugs; *Restatement Second of Torts* § 283C cmt d (1965); Keeton *et al Prosser and Keeton on torts* 178; Dobbs, Hayden and Bublick *Hornbook on torts* 232; Epstein *Torts* 122.

⁵⁷² See Keeton *et al Prosser and Keeton on torts* 178.

3.3 Breach of a duty of reasonable care

Dobbs, Hayden and Bublick⁵⁷³ submit that a violation of a statute⁵⁷⁴ is deemed *negligence per se* if the violation caused “the type of harm the statute was intended to avoid, to a person within the class of persons the statute was intended to protect”.⁵⁷⁵ Generally where there is no excuse, the violation of the statute establishes negligence.⁵⁷⁶ An inference of negligence can be rebutted by providing evidence that the defendant’s conduct was reasonable under the circumstances.⁵⁷⁷ The legislature supersedes the common law as long as it meets constitutional standards.⁵⁷⁸ Violations of the various statutes fall beyond the scope of this study and will not be discussed further.

The second element of the tort of negligence, breach of a duty of reasonable care, relates to determining fault in the form of negligence.⁵⁷⁹ Negligence is established if the defendant fails to exercise reasonable care and protect the plaintiff from risk of harm under the circumstances.⁵⁸⁰ In terms of contributory negligence where the plaintiff’s negligence is considered, the standard of reasonable care also applies and will be referred to where appropriate. Dobbs, Hayden and Bublick,⁵⁸¹ explain that the tests used to determine negligence in the United States of America are multifaceted

⁵⁷³ *Hornbook on torts* 243.

⁵⁷⁴ See Nelson 1999 *Buff L Rev* 215 who submits that violation of a regulation or ordinance in the state of New York was not considered negligence *per se* but established evidence of negligence.

⁵⁷⁵ See *Martin v Herzog* NE 814 (NY 1920) where the rule was laid out and then followed in many cases. See for example, *Michalek v United States Gypsum Co* 16 F Supp 708, 709 (WDNY 1936); *Coe v City of New York* 265 NYS 10, 12 (App Div 1935); *Wager v State* 10 NYS 2d 814 (App Div 1923); further cases cited by Nelson 1999 *Buff L Rev* 153 fn 166 with respect to New York cases.

⁵⁷⁶ See *Martin v Herzog* 126 NE 814 (NY 1920); *Rong Yao Zhou v Jennifer Mall Restaurant Inc* 534 A 2d 1268 (DC 1987); *Duphily v Delaware Elec Co-op Inc* 662 A.2d 821 (Del 1995); *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 14 (2010); Wells 1990 *Mich L Rev* 2356-2357; Dobbs, Hayden and Bublick *Hornbook on torts* 243-261; Epstein *Torts* 147. For example, the state of Washington follows the negligence *per se* rule where there is a violation of a statute (Wash Rev Code 5.40.050).

⁵⁷⁷ See *Kalatta v Anheuser-Busch Co Inc* 581 NE 2d 656 (Ill 1991); *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 14 cmt c (2010); Epstein *Torts* 147.

⁵⁷⁸ Thayer, Ezra, Ripley 1914 *Harv L Rev* 317. See Epstein *Torts* 147.

⁵⁷⁹ See Simons 2008 *Loy LA L Rev* 1181.

⁵⁸⁰ *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 3 (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 263.

⁵⁸¹ *Hornbook on torts* 263.

and include: “an unstructured weighing of risks and utilities”;⁵⁸² the so-called Hand formula which follows a “more structured weighing of risks and utilities”; violation of a statute, for example, violation of a speed limit may serve as an indication of negligence;⁵⁸³ and customs or practices followed in the community.⁵⁸⁴ Specific negligent conduct must be proven or a reasonable inference of negligent conduct from the facts must be drawn.⁵⁸⁵ For example, if the plaintiff was involved in a rear end accident and suffered a neck injury where there was no pre-existing neck injury, the jury may reasonably infer that the neck injury was caused due to the accident.⁵⁸⁶ Compliance with a statute does not automatically mean that there is no negligence and the trier of the facts may find that even though there was statutory compliance, the defendant should have done more in order to exercise reasonable care under the circumstances.⁵⁸⁷ For example, although the statute states a speed limit of sixty miles per hour, driving at such a speed where small children are present or during bad weather will not automatically result in a conclusion of lack of negligence due to driving within the speed limit.⁵⁸⁸

Foreseeability of harm is necessary in establishing negligence but is not sufficient as a stand-alone factor. The defendant must actually foresee the risk of harm or a reasonable person in a similar position as the defendant would have foreseen the risk of harm.⁵⁸⁹ The defendant’s conduct will be deemed unreasonable and negligent when he “knew of the risk of foreseeable harm or should have known” (constructive

⁵⁸² Epstein *Torts* 129 submits that there is a tendency of the appellate courts to resort to the Hand Formula but some legal writers point out that many courts do not – see Allen and Rosenberg 2002 *Chi-Kent L Rev* 700-719; Wright 2003 *TIL* 151-152; Kelley and Wendt 2002 *Chi-Kent L Rev* 618-622 who point out that in many courts in the United States of America, the juries are not instructed to determine negligence according to the Hand Formula but rather that negligence should be determined by the standard of exercising ordinary care according to the conduct of the reasonable person. See Porat 2011 *Yale LJ* 84 fn 1; Geistfeld 2011 *Yale LJ* 151. See Zipursky 2015 *U Pa L Rev* 2164.

⁵⁸³ Dobbs, Hayden and Bublick *Hornbook on torts* 263.

⁵⁸⁴ See *McQuaig v Tarrant* 269 Ga App 236, 603 SE 2d 751 (2004); Dobbs, Hayden and Bublick *Hornbook on torts* 264.

⁵⁸⁵ See *Foddrill v Crane* 894 NE 2d 1070 (Ind Ct App 2008); Dobbs, Hayden and Bublick *Hornbook on torts* 326.

⁵⁸⁶ See *Restatement Second of Torts* § 288C (1965); *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 16 (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 289.

⁵⁸⁷ Dobbs, Hayden and Bublick *Hornbook on torts* 289.

⁵⁸⁸ See *Emanuel v Great Falls Sch Dist* 351 Mont 56, 209 P 3d 244 (2009); *Miller v David Grace Inc* 212 P 3d 1223 (Okla 2009); *Behrendt v Gulf Underwriters Ins Co* 318 Wis 2d 622, 768 NW 2d 568 (2009); Dobbs, Hayden and Bublick *Hornbook on torts* 265.

negligence).⁵⁹⁰ Reasonable foreseeable harm is harm that is probable or most likely to occur, which may justify the need to take precautionary measures to prevent the harm occurring.⁵⁹¹ At the breach of a duty stage, reasonable foreseeability of harm to a person is generally foreseeable while at the proximate cause stage, the question of reasonable foreseeability is phrased narrowly – was the type of harm that ensued foreseeable.⁵⁹²

Holmes⁵⁹³ emphasised that the standard of determining whether conduct is unreasonable or not is objective and that the risk of harm must be reasonably foreseeable by the defendant.⁵⁹⁴ Terry⁵⁹⁵ proposed the idea of balancing risks of conduct against its utility, thus it depended not only on unreasonable conduct but on unreasonable *risky* conduct. He submits that the “essence of negligence is unreasonableness; due care is simply reasonable conduct”.⁵⁹⁶ Terry refers to five factors upon which the reasonableness of a given risk may depend upon: the magnitude of the risk, the value of the object placed at risk, the value of the collateral object for which the risk is undertaken, the benefit of the risk, and the probability that the collateral object would not be achieved if the risk was not taken. In order to illustrate these factors he refers to *Eckert v Long Island R R Co*⁵⁹⁷ where the deceased saw a child on a railroad track in danger of being run over by an approaching train. The deceased saved the child but was killed by the train. The jury found that the deceased was not contributorily negligent. Terry⁵⁹⁸ submits that the question was whether the deceased had exposed himself to the unreasonable risk of death and in determining this answer, the following is considered:

⁵⁹⁰ Dobbs, Hayden and Bublick *Hornbook on torts* 265. See *Wal-Mart Stores Inc v Spates* 186 SW 3d 566 (Tex 2006).

⁵⁹¹ See *Edwards v Honeywell Inc* 50 F 3d 484, 491 (7th Cir 1995); *Ethyl Corp v Johnson* 345 Ark 476, 49 SW 3d 644 (2001); *Jutzi-Johnson v United States* 263 F 3d 753, 756 (7th Cir 2001); Dobbs, Hayden and Bublick *Hornbook on torts* 265.

⁵⁹² See *CH v Los Lunas Schools Bd of Educ* 852 F Supp 2d 1344 (DNM 2012); *BR & CR v West* 275 P 3d 228 (Utah 2012); Dobbs, Hayden and Bublick *Hornbook on torts* 267.

⁵⁹³ *Common law* 94, 108; Dobbs, Hayden and Bublick *Hornbook on torts* 195.

⁵⁹⁴ See *The Nitro-Glycerine Case* 82 US 15 Wall 524, 536-537 (1872); *Dunnaway v Duquesne Light Co* 423 F 2d 66, 71 (3rd Cir 1970) where defendants were not held liable for unforeseen risks. See discussion of these cases by Shapo *Tort* 121.

⁵⁹⁵ 1915 *Harv L Rev* 40 ff. See Zipursky 2015 *U Pa L Rev* 2151; Dobbs, Hayden and Bublick *Hornbook on torts* 196.

⁵⁹⁶ Terry 1915 *Harv L Rev* 42.

⁵⁹⁷ 43 NY 502 (1871).

⁵⁹⁸ 1915 *Harv L Rev* 43-44.

- “(1) The magnitude of the risk was the probability that he would be killed or hurt. That was very great.
- (2) The principal object was his own life, which was very valuable.
- (3) The collateral object was the child’s life, which was also very valuable.
- (4) The utility of the risk was the probability that he could save the child. That must have been fairly great, since he in fact succeeded. Had there been no fair chance of saving the child, the conduct would have been unreasonable and negligent.
- (5) The necessity of the risk was the probability that the child would not have saved himself by getting off the track in time.

Here, although the magnitude of the risk was very great and the principal object very valuable, yet the value of the collateral object and the great utility and necessity of the risk counterbalanced those considerations, and made the risk reasonable. The same risk would have been unreasonable, had the creature on the track been a kitten, because the value of the collateral object would have been small.”

Terry⁵⁹⁹ still generally refers to the standard of the reasonable person and states that the test of reasonableness is what the standard man would do in the circumstances or the judgment call he would make in a similar position. Thus whatever a standard man would do is reasonable and “all the law requires of a man is reasonable conduct”. Fletcher⁶⁰⁰ submits that the reasonableness of a risk determines whether the plaintiff is entitled to compensation and whether the defendant should be held liable. Reasonableness is determined by weighing costs and benefits which reflects fairness. He⁶⁰¹ submits that reasonableness involves: “defining the risk, assessing its consequences, balancing costs and benefits”. Zipursky⁶⁰² points out that Terry’s analysis focuses on “what is being risked and its value” as well as “at what costs and with what prospects”. Gilles⁶⁰³ submits that Terry’s ideas focus on social community values and value judgments where conflicting interests are weighed. Terry’s ideas were adopted in the First,⁶⁰⁴ Second⁶⁰⁵ and Third *Restatements*.⁶⁰⁶ The *Restatements* accept an unstructured risk-utility approach in determining negligence as part of the reasonable person test.⁶⁰⁷ The utility of conduct is weighed against the risk of harm.⁶⁰⁸ Thus the reasonable person balances risks and benefits in his decision making and

599 1915 *Harv L Rev* 47-48.

600 1972 *Harv L Rev* 542, 550.

601 Fletcher 1972 *Harv L Rev* 573.

602 2015 *U Pa L Rev* 2152.

603 2001 *Vand L Rev* 828.

604 See *Restatement First of Torts* §§ 291-293 (1934) where it is stated that in determining negligence there must a balance between the extent of the risk and the utility of the conduct creating it. See Schwartz 1997 *Tex LR* 1819 fn 135.

605 See *Restatement Second of Torts* §§ 283, 291 (1965).

606 Zipursky 2015 *U Pa L Rev* 2151.

607 Gilles 2001 *Vand L Rev* 815.

608 See *Barker v Lull Eng’g Co* 573 P 2d 443, 456 (Cal 1978); Shapo *Tort* 125.

whether his conduct is unreasonably risky or not.⁶⁰⁹ Practical reasoning is undertaken in avoiding accidents.⁶¹⁰ The *Restatement Second of Torts*⁶¹¹ states that a risk is unreasonable and an act negligent “if the risk is of such magnitude” that it outweighs “what the law regards as the utility of the act or of the particular manner in which it is done”. The risk-utility analysis suggested in the *Restatement Second of Torts* depends on the “social value which the law attaches to the interest advanced or protected by the conduct”, the chances of those interests being advanced or protected and whether there was a less risky alternative course of conduct available.⁶¹² The *Restatement Third of Torts*⁶¹³ submits that a person acts negligently if he does not exercise reasonable care under the circumstances. The *Restatement Third of Torts*⁶¹⁴ further elaborates on the balancing approach, in that the following factors are at least informally considered when evaluating whether the conduct is negligent: the foreseeable likelihood of the harm as well as the foreseeable extent of the harm – the magnitude of the risk (disadvantages) is weighed against the burden (utility or benefit of the defendant’s conduct) of reducing or avoiding the risk of harm (advantages). Thus conduct is negligent if the disadvantages outweigh the advantages.⁶¹⁵ An omission in the form of failure to warn of harm may be deemed negligent as giving a warning costs little.⁶¹⁶ The Hand Formula and the *Restatements’* are more concerned with the burden of reducing or eliminating the risk.⁶¹⁷

The more structured way of evaluating whether conduct is negligent from an economic point of view is to weigh the plaintiff’s costs of harm or loss sustained, against the defendant’s cost in avoiding or reducing the harm. The more structured approach was formulated by Judge Hand in *United States v Carroll Towing Co*⁶¹⁸ and is widely

⁶⁰⁹ Gilles 2001 *Vand L Rev* 824.

⁶¹⁰ Gilles 2001 *Vand L Rev* 825.

⁶¹¹ §291 (1965).

⁶¹² *Restatement Second of Torts* §292 cmt b, cmt d (1965).

⁶¹³ (*Liability for Physical and Emotional Harm*) §3 (2010). See Green and Cardi in Koziol (ed) *Basic questions of tort law* 480.

⁶¹⁴ (*Liability for Physical and Emotional Harm*) § 3 (2010). See *Doe Parent’s No 1 v State Dept of Educ* 100 Haw 34, 58 P 3d 545 (2002); *Dauzat v Curnest Guillot Logging Inc* 995 So 2d 1184, 1186-1187 (La 2008); *Gilhooley v Star Mkt Co Inc* 400 Mass 205, 508 NE 2d 609 (1987); *Gaudreau v Clinton Irrigation Dist* 30 P3 d 1070, 1074 (Mont 2001); Dobbs, Hayden and Bublick *Hornbook on torts* 268 fn 30.

⁶¹⁵ Green and Cardi in Koziol (ed) *Basic questions of tort law* 480.

⁶¹⁶ See *Happel v Wal-Mart Stores Inc* 199 Ill 2d 179, 766 NE 2d 1118, 262 Ill Dec 815 (2002); Dobbs, Hayden and Bublick *Hornbook on torts* 268 fn 33.

⁶¹⁷ Zipursky 2015 *U Pa L Rev* 2152.

⁶¹⁸ 159 F 2d 169 (2nd Cir 1947).

referred to as the “Hand formula”.⁶¹⁹ In this case, a barge carrying flour owned by the United States of America broke loose from a pier. It lost its cargo and sank. At the time, no one was on board the barge and the towing company alleged that if there had been a care taker (bargee) on board the barge, at all times, the loss or damage could have been prevented. Judge Hand stated:⁶²⁰

“the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that [the barge] will break away; (2) the gravity of the resulting injury, if [the barge] does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i. e., whether $B < PL$ ”.

Therefore if the burden is less than the probability multiplied by the injury, there may be negligence. But if the burden is greater than or equal to the probability multiplied by the injury, then there may not be negligence. It was held that in such circumstances “it was a fair requirement” that a caretaker should have been aboard the barge during day time working hours. The barge broke loose during working day time hours and there was no valid excuse for the caretaker’s absence.⁶²¹ Negligence was present – only harm that is reasonably foreseeable, reasonably preventable with reasonable care, and within the scope of the duty of care is considered.⁶²² The risk of harm may be interpreted as including harm to the defendant as well as others.⁶²³

Much has been written on the positive economic theory⁶²⁴ of tort law in general⁶²⁵ and the Hand Formula for determining negligence, with academic writers either embracing

⁶¹⁹ Green submits that the *First Restatement of Torts* may have influenced Judge Hand in formulating the algebraic Hand Formula (referred to by Gilles 2001 *Vand L Rev* 815).

⁶²⁰ *United States v Carroll Towing Co* 159 F 2d 169, 173 (2nd Cir 1947).

⁶²¹ *United States v Carroll Towing Co* 159 F 2d 169, 174 (2nd Cir 1947).

⁶²² Dobbs, Hayden and Bublick *Hornbook on torts* 271-272.

⁶²³ See *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 3 cmt b (2010); Cooter and Porat 2000 *J Leg Stud* 19; Dobbs, Hayden and Bublick *Hornbook on torts* 272.

⁶²⁴ In general Wells 1990 *Mich L Rev* 2361 explains that a positive legal theory establishes the standard used to resolve legal problems while a normative legal theory evaluates whether the standard is in accordance with standards that should be employed in view of the “larger normative metatheory”.

⁶²⁵ See for example, Cooter and Ulen *Law and economics*; Landes and Posner *The economic structure of tort law*; Posner *Economic analysis of law*; Shavell *The economic analysis of accident law*; Kaplow and Shavell 2001 *Harv LJ* 961; Coase 1960 *J Law & Econ* 1; Pigou *The economics of welfare*; Polinsky *An introduction to law and economics*.

it fully,⁶²⁶ disagreeing with it⁶²⁷ or at the very least acknowledging its value.⁶²⁸ Schwartz⁶²⁹ refers to two broad groups of tort academics, those who favour the aim of deterrence⁶³⁰ commonly expounded in the economic efficiency approach⁶³¹ and those who support the aim of corrective justice,⁶³² which encompasses deontological

⁶²⁶ See in general Calabresi *The costs of accidents* 144-160; Posner 1972 *J Leg Stud* 29ff; Porat 2011 *Yale LJ* 82ff; Levmore 1990 *J Leg Stud* 691; Tullock 1981 *Int'l Rev L & Econ* 51.

⁶²⁷ See for example, Wright 1987 *Chi-Kent L Rev* 578 who submits that tort law is about rights and responsibilities not about efficiency; Calnan *Justice and tort law* 5 refers to the economic approach as a craze which has faded; Epstein 1974 *J Leg Stud* 169; 1987 *Ohio St L J* 469; Fletcher 1972 *Harv L Rev* 537-539; Kelley 1990 *Clev St L Rev* 315; Coleman 2012 *Yale L J* 541ff. Coleman *Yale LJ* 548-549 submits that “[i]n spite of what economists of law would have us believe, tort law speaks infrequently, if at all, of costs. Instead it invokes the concepts of wrong and of harm. ... Harms and wrongs have a normative valence that costs do not. The concept of cost may be all that the accountant or the economist needs, but it is not the concept the law of torts relies on as a basis of repair or recourse”. See also Schwartz 1997 *Tex L Rev* 1806-1807.

⁶²⁸ See Green and Gilead 2012 *Wake Forest Univ Legal Studies Paper No.2014874* 2 fn 7; Green 2008 *Cal L Rev* 671, 708; Schwartz 1997 *Tex L Rev* 1801; Gilles 2001 *Vand L Rev* 813; Geistfeld 2011 *Yale LJ* 152 submits that the algebraic Hand Formula is but one of the tests embodied in the standard of reasonable care. When determining whether the actors conduct is reasonable, “[t]he jury has a great deal of normative discretion” (Gergen 1999 *Fordham L Rev* 434); Simons 2008 *Loy LA L Rev* 1182-1183 states that the Hand Formula “is both morally attractive and a credible interpretation of tort practice”; Owen 1992 *GA L Rev* 722; Rabin 1996 *Yale LJ* 2275.

⁶²⁹ 1997 *Tex L Rev* 1801. See also Geistfeld 2011 *Yale LJ* 146.

⁶³⁰ Schwartz 1994 *UCLA L Rev* 381 analyses the deterrent aim of tort law whereby tortious conduct can be deterred by the threat of imposing liability for such conduct. After reviewing *inter alia* motor vehicle liability, product liability, medical practitioner’s liability, and liability of public entities he submits that generally in these areas, the possibility of liability does moderately reduce negligence and safer practices are undertaken. However, the threat of liability does not *always* lead to avoiding negligence as claimed by the economists (422-423). Schwartz 1994 *UCLA L Rev* 381-382 refers to the following academic writers who have disagreed with the claims made by economics (such as Shavell 1982 *Bell J Econ* 120 and Landes and Posner *The economic structure of tort law* 10) regarding the aim of deterrence in tort law; Abel 1990 *UCLA L Rev* 785; Cane *Atiyah’s accidents, compensation and the law* 361-374; Englard *The philosophy of tort law* 31-44; Fleming 1984 *LA L Rev* 1193, 1198, 1203; Franklin 1967 *VA L Rev* 774; O’Connell *The lawsuit lottery* 23-27; Pierce 1980 *Vand L Rev* 1288-1307; Rodgers 1980 *South Cal L Rev* 16-23; Sugarman 1985 *Cal L Rev* 555; White *Tort law in America* 279.

⁶³¹ See for example, Kaplow and Shavell 2001 *Harv L Rev* 961; Posner 1972 *J Leg Stud* 29ff; Landes and Posner *The economic structure of tort law* embraced the Hand Formula further developing it and explaining the structure of tort law as being economic in nature. See Nelson 1999 *Buff L Rev* 120-121.

⁶³² See for example, Perry 1992 *Iowa L Rev* 503-512; Fletcher 1972 *Harv L Rev* 541-548 whose idea of “fairness” is mainly based on reciprocity – where a non-reciprocal risk is imposed on the victim, such victim must be compensated. Coleman’s (*Risks and wrongs* 329, 361) idea of corrective justice is based on a responsibility to compensate for wrongful losses. Epstein (1974 *J Leg Stud* 165; 1973 *J Leg Stud* 152) submits that a person must be liable for any harm caused (corrective justice focusing on causation). Weinrib 1994 *Duke LJ* 277 is of the view that corrective justice is the foundation of tort law. See Nelson 1999 *Buff L Rev* 119-120.

values.⁶³³ There is yet another group of academic writers, to which Schwartz⁶³⁴ belongs, where principles of fairness in the corrective justice approach and efficiency in the economic approach both play a part in tort law.⁶³⁵

Academic writers who agree with the economic approach have further analysed and elaborated on the approach using more complex mathematical calculations than that employed in the Hand Formula.⁶³⁶ Zipursky⁶³⁷ submits that the Hand Formula built on Terry's idea (that negligence involves unreasonably risky behaviour) but made it algebraic and utilitarian. Posner⁶³⁸ then turned the "soft utilitarian conception in Hand's Formula into one that appeared rigorous and openly wealth-based rather than welfare-based". Zipursky⁶³⁹ submits that Terry's idea of unreasonable risk shifted the negligence question from determining whether the defendant's conduct strayed from the reasonable person.

According to the economic approach of imposing liability for "economically inefficient risk taking", incentives for taking appropriate safety measures are promoted and relate to the idea of "efficient deterrence".⁶⁴⁰ The reasonable person is regarded as good based on efficiency, that is, the reasonable person is the hypothetical efficient person.⁶⁴¹ Risks worth taking produce more benefits than losses and benefits maximize the wealth of society.⁶⁴² The so-called Coase theorem also follows an economic analysis of the law.⁶⁴³ According to Coase's theory there are no "transaction costs" between the parties who are bound in a relationship which leads to injury or

⁶³³ See Zipursky 2003 *Geo LJ* 699. He states (754) that he joins the corrective justice group and that he applies a pragmatic conceptualist approach in analysing wrongs in tort law (748). He promotes the idea of "rights, wrongs and recourse" in tort law with a focus on the plaintiff's right of action and the relationship between the plaintiff and the defendant. He emphasizes (699-700) that wronged plaintiffs' have a right to civil recourse for tortious conduct.

⁶³⁴ Schwartz 1997 *Tex L Rev* explains that liability in tort law can be seen as a means of deterring tortfeasors "from violating moral rights of potential victims" but its main objective is to achieve justice or prevent injustice.

⁶³⁵ See for example, Nelson 1999 *Buff L Rev* 121 ff; Claybrook *Product liability* 26-27 who does not agree with an economic approach but accepts deterrence as aim of tort law; Abel 1990 *UCLA L Rev* 785 also criticises the economic analysis of tort law but accepts deterrence as aim of tort law. See Schwartz 1997 *Tex L Rev* 1829-1831.

⁶³⁶ For purposes of this study these more complex approaches will not be discussed.

⁶³⁷ 2015 *U Pa L Rev* 2151.

⁶³⁸ See Posner 1972 *J Leg Stud* 29.

⁶³⁹ 2015 *U Pa L Rev* 2152.

⁶⁴⁰ See Gilead and Green 2012 *Wake Forest Univ Legal Studies Paper No.2014874* 3.

⁶⁴¹ See Shapo *Tort* 123; Posner *Economic analysis of law* 209; Coleman 2012 *Yale LJ* 558.

⁶⁴² See Posner 1972 *J Leg Stud* 29 ff; Dobbs, Hayden and Bublick *Hornbook on torts* 275.

⁶⁴³ See in general Coase 1960 *J Law & Econ* 1. See also Pigou *The economics of welfare*.

loss. The parties will then bargain till they reach the same efficient result irrespective of which party the law imposes the costs on. Shapo⁶⁴⁴ comments on Coase's theory with reference to an example that Coase used to illustrate his theory. A rancher's cattle stray onto a farmer's land. If the law lets the farmer sustain the loss, "the farmer would bargain with the rancher to limit his herd to the same number of cattle that the rancher would keep if the law held the rancher liable". A practical consequence of this theory is that the costs will fall upon the "least cost avoider".⁶⁴⁵ This theory focuses on economic efficiency and not on fairness or morality.⁶⁴⁶ Justice and fairness are not economic terms.⁶⁴⁷ Shapo⁶⁴⁸ submits that economic approaches to determining negligence are used as a convenient way of "expressing the qualitative as well as the quantitative balancing that is a central part of judicial application of the standard of care in negligence. They are part of a more broad-gauged effort to determine the justice of individual cases".

Posner,⁶⁴⁹ who is a supporter of the Hand Formula,⁶⁵⁰ points out that even though the Hand Formula was formulated relatively recently, the underlying method has been used to determine negligence "ever since negligence was first used as a standard of liability in accident cases". According to Posner⁶⁵¹ reasonableness in the tort of negligence is "economic rationality".⁶⁵² Posner refers to the English decision of *Blyth v Birmingham Water Works*⁶⁵³ where the court was requested to determine whether a water company was negligent in failing to bury its pipes deeper underground in order to prevent them from bursting due to frost and causing damage to the plaintiff's house. In finding that the water company was not negligent, it reasoned that the probability of damage to the plaintiff's property was low and the frost was unusually severe, it was abnormal and unforeseeable. The damage was not so severe as to require a great expense just to bury the pipes deeper.⁶⁵⁴ Posner⁶⁵⁵ submits that a problem with the

⁶⁴⁴ Tort 126.

⁶⁴⁵ This was expounded by Calabresi *The costs of accidents* 135-173.

⁶⁴⁶ See Kraus 2007 *Va L Rev* 357; Geistfeld 2011 *Yale LJ* 147 fn 8.

⁶⁴⁷ See Posner *Economic analysis of law* 32-34.

⁶⁴⁸ Tort 127.

⁶⁴⁹ *Economic analysis of law* 195; Posner 1972 *J Leg Stud* 29.

⁶⁵⁰ See Zipursky 2015 *U Pa L Rev* 2151 ff who rejects the Hand Formula.

⁶⁵¹ 1972 *J Leg Stud* 29.

⁶⁵² As stated by Zipursky 2004 *Fordham L Rev* 1928-1929.

⁶⁵³ 11 Exch 781, 156 Eng Rep 1047 (1856).

⁶⁵⁴ Posner *Economic analysis of law* 194.

⁶⁵⁵ Posner *Economic analysis of law* 194.

Hand formula is that the probability of the harmful event occurring (unless precautions were taken) cannot be estimated. The probability was low (P), the loss (L) moderate and the burden of taking precautionary steps (B) in preventing harm was high (P times L was less than B = no negligence). If the cost of preventing the harm materialising is low compared to the risk of harm it is likely that there is negligence.⁶⁵⁶

*Rhode Island Hospital Trust National Bank v Zapata Corp*⁶⁵⁷ is an example of a case where the Hand Formula was applied. An employee of Zapata Corporation, the defendant, forged several cheques. The plaintiff, the bank, paid out on receipt of the forged cheques. The defendant did not examine the statements sent by the bank where the payments were reflected nor did it find out about the forged cheques for some time. When the defendant eventually found out about the forged cheques it notified the bank, which thereupon stopped processing the forged cheques. By that time an amount of fewer than one hundred and ten thousand dollars had been paid out by the bank. The bank sued the defendant, submitting that it was entitled to reimbursement for the funds it had paid out in respect of the forged cheques, even though the bank was negligent in failing to discover and report the forged cheques. The bank was legally obligated by legislation to reimburse the defendant for all cheques it cleared for two weeks after the defendant had received the first statement showing the forgeries. The question was whether after the two week period the bank was still obliged to reimburse the defendant, even though the defendant did not exercise reasonable care by promptly examining its statements and detecting the forgeries. The bank had provided evidence that it had a practice of checking cheques randomly for forgery between \$100 and \$1000 only upon reasonable suspicion and that its practice was consistent with customary practice in the industry. By employing this practice, one percent of cheques within the \$100-\$1000 bracket were checked. Their practice was cost effective and there was no significant increase in forgeries. Their practice was found to be reasonable. Zipursky⁶⁵⁸ explains how Breyer J affirmed the district court's judgment in finding the bank not negligent by using the Hand

⁶⁵⁶ See *Hendricks v Peabody Coal Co* 253 NE 2d 56 (Ill App 1969) where it was held that the cost of fencing off a body of water was slight (\$1200 to \$1400) compared to the risk of harm to children being seriously injured while swimming in the body of water which was dangerous due to a concealed ledge below the surface of the water. In this case a sixteen-year-old boy dived in and sustained injuries (see discussion of this case by Posner *Economic analysis of law* 195).

⁶⁵⁷ 848 F 2d 291 (1988).

⁶⁵⁸ 2007 *Wm & Mary L Rev* 2025-2026.

Formula. Thus the aggregate burden of checking every cheque outweighed the aggregate benefit of reducing the risk of forgeries. Zipursky⁶⁵⁹ points out that the method employed by the bank was appropriate as the bank's customers, who included the plaintiff, would have had to bear the increased costs for the detection of forgery. Zipursky⁶⁶⁰ states that in this case, the Hand Formula was appropriate to apply as there was "little tension between the interests" of the parties. The bank followed a practice which was reasonable and according to practices in the industry.

Keating,⁶⁶¹ who does not support Posner's⁶⁶² view or the Hand Formula, refers to competing ideals of the social contract and utilitarian traditions. According to the social contract tradition "reasonable risk imposition should be terms of equal freedom and mutual benefit", while the utilitarian tradition is of the view that risk imposition "should be terms which maximize overall well-being". Keating⁶⁶³ submits that reasonableness is the central concept of the so-called due care doctrine. He opines that economists conceptualise "due care as a matter of rationality" while according to the social contract theory, due care is a question of reasonableness which he prefers, drawing from Rawls's idea of reasonableness.⁶⁶⁴

It has been argued that the Hand formula may be suitable at protecting one's interests and setting limits for those interests. It is considered a useful guide to legal practitioners in that they have an idea of the type of evidence to produce. Estimates based on similar practical everyday life occurrences are used as opposed to precise mathematical calculations.⁶⁶⁵ It forces adjudicators to explain their reasons for finding negligence or not.⁶⁶⁶ It may however be argued that adjudicators must give reasons for finding negligence whether the Hand Formula is applied or not.

⁶⁵⁹ 2007 *Wm & Mary L Rev* 2025-2026.

⁶⁶⁰ 2007 *Wm & Mary L Rev* 2026.

⁶⁶¹ 1996 *Stan L R* 314 in reference to Fletcher 1972 *Harv L Rev* 541-551.

⁶⁶² Posner 1972 *J Leg Stud* 29.

⁶⁶³ 1996 *Stan L Rev* 318.

⁶⁶⁴ Keating 1996 *Stan L Rev* 325. See also Zipursky 2004 *Fordham L Rev* 1929. See chapter 2 paras 1, 3.2 and 4 with regard to Rawl's views.

⁶⁶⁵ See *Levi v Southwest La Elec Membership Coop* 542 So 2d 1081 (La 1989); Owen 1996 *U III L Rev* 743; Dobbs, Hayden and Bublick *Hornbook on torts* 276 fn 64.

⁶⁶⁶ See Dobbs, Hayden and Bublick *Hornbook on torts* 275-276.

Zipursky⁶⁶⁷ states that the Hand Formula defines reasonable care as the taking of precautions if the “cost of the precaution is justified by the magnitude of risk it diminishes”. Zipursky, like several other academic writers, is cautious of the economic approach to determining negligence.⁶⁶⁸ Some of the main criticisms of the Hand formula⁶⁶⁹ include: it emphasises on what is deemed good for society as a whole too much in comparison to what is deemed good for the individual⁶⁷⁰ or what negligence law demands;⁶⁷¹ the danger of referring to benefits, costs and risks in a monetary value is that disproportionate risks or interests⁶⁷² may be treated equally; related to this the question presents itself of how one values loss of life in monetary terms;⁶⁷³ a mathematical formula requires precise relationships between costs of safety, probability and extent of harm;⁶⁷⁴ it cannot be applied in all instances, for example, with regard to product liability where the manufacturer may not know the extent of the risk of harm;⁶⁷⁵ in order to make a decision on negligence the damages must be assessed fully, whereas the merits and quantum of the case are often separated and the courts have to provide judgment on negligence first;⁶⁷⁶ tort law does not really provide incentives for taking appropriate safety measures;⁶⁷⁷ the Hand Formula is a cost-cost test instead of a test weighing risks or costs against benefits or utilities;⁶⁷⁸ the “connection between the reasonable person” and a duty of care (an actual duty to be reasonably careful whereby members of the community feel morally bound) “is lost in the Hand Formula conception”,⁶⁷⁹ and it focuses on risks which ought to be taken or not instead of a value judgment anchored in a sense by social *mores* about ordinary care owed to others,⁶⁸⁰ and the Hand formula should be modified.⁶⁸¹

⁶⁶⁷ 2015 *U Pa L Rev* 2151.

⁶⁶⁸ See Zipursky 2000 *Legal Theory* 457; Zipursky 2004 *Fordham L Rev* 1933.

⁶⁶⁹ See Zipursky 2003 *Wm & M L Rev* 1999 ff.

⁶⁷⁰ See Keating 1996 *Stan L Rev* 328 ff; Fletcher 1972 *Harv L Rev* 537; Dobbs, Hayden and Bublick *Hornbook on torts* 277.

⁶⁷¹ Zipursky 2015 *U Pa L Rev* 2165.

⁶⁷² See Geistfeld 2011 *Yale LJ* 150-151.

⁶⁷³ See Keating 1996 *Stan L Rev* 337-342; Dobbs, Hayden and Bublick *Hornbook on torts* 273, 277.

⁶⁷⁴ Dobbs, Hayden and Bublick *Hornbook on torts* 275.

⁶⁷⁵ See Dobbs, Hayden and Bublick *Hornbook on torts* 278 fn 71. Cf Posner *Economic analysis of law* 210-212.

⁶⁷⁶ Shapo *Tort* 124.

⁶⁷⁷ See Shuman 1993 *Kan L Rev* 115; Dobbs, Hayden and Bublick *Hornbook on torts* 276.

⁶⁷⁸ Shapo *Tort* 126.

⁶⁷⁹ Zipursky 2015 *U Pa L Rev* 2163, 2166.

⁶⁸⁰ Zipursky 2015 *U Pa L Rev* 2168-2169.

⁶⁸¹ See Gilles 1994 *Va L Rev* 1032-1035 who proposes that the jury should be instructed to consider whether the defendant should have used the amount of care that an average person would have used if the risks created were borne by such average person. Zipursky 2015 *U Pa*

A well-known case in which the risk-benefit or risk-utility approach was rejected by the public illustrating its weakness is *Grimshaw v Ford Motor Co*⁶⁸² (hereinafter referred to as “*Grimshaw*”). In this case, Ford in 1967 planned the design of a hatch-back motor vehicle called the “Pinto”. A design decision was made regarding the placement of the fuel tank behind the rear axle to provide more boot space. This design made the tank susceptible to rupturing and this made the vehicle prone to catching fire in the instance of a rear-end motor vehicle accident. Gray, the driver, and her passenger Grimshaw, a thirteen year old boy, were travelling on the freeway in a Pinto when the motor vehicle stalled in the middle lane as a result of a carburetor problem. Another motor vehicle struck the Pinto from behind. The Pinto caught fire. Gray died and Grimshaw was seriously injured. Gray’s family sued Ford for wrongful death and was awarded \$560 000, while Grimshaw was awarded \$2.5 million in compensatory damages and a further \$125 million in punitive damages. The trial court subsequently reduced the punitive award damages to \$3.5 million, which was confirmed by the appeal court. This case spawned debate on a number of issues,⁶⁸³ but of importance for the current purpose, the economic risk-benefit analysis was called into question where a manufacturing design defect led to death and serious injury.⁶⁸⁴ Schwartz⁶⁸⁵ explains that there was a lot of publicity around this case, dealing with legal and ethical issues. Six months after the verdict was delivered in *Grimshaw*, another Pinto was involved in a motor vehicle accident where the fuel system of the Pinto contributed to the death of three women. The State of Indiana⁶⁸⁶ charged Ford with reckless homicide in terms of a criminal law but Ford was later found not guilty. The jury was indecisive but because Ford had begun a recall program of the affected Pinto’s, their conduct was found not reckless.⁶⁸⁷ During discovery of documents in *Grimshaw*, the plaintiffs produced a report from Ford which Schwartz⁶⁸⁸ explains:

L Rev 2131 ff submits that negligence is about ordinary moderate care and mutuality with regards to others needs; Green 1997 *Tex L Rev* 1640 fn 167; Grady 1983 *Yale LJ* 799; Dobbs, Hayden and Bublick *Hornbook on torts* 276

⁶⁸² 1 19 Cal App 3d 757, 174 Cal Rptr 348 (1981).

⁶⁸³ See Schwartz 1991 *Rutgers L Rev* 1036 fn 94 who cites a number of contributions written by academic writers relating to aspects of business, sociology, law, religion, and criminology. See also Green 1997 *Tex L Rev* 1640 fn 167 who refers to the views of other academic writers.

⁶⁸⁴ See Schwartz 1991 *Rutgers L Rev* 1013ff.

⁶⁸⁵ 1991 *Rutgers L Rev* 1013ff.

⁶⁸⁶ *State v Ford Motor Co Cause No 11-431* (1980).

⁶⁸⁷ See Schwartz 1991 *Rutgers L Rev* 1017-1019.

⁶⁸⁸ 1991 *Rutgers L Rev* 1020.

“compared the ‘costs and benefits’ of reducing the chances of certain fuel-tank fires. The safety device considered by the document would have cost \$11 per vehicle; multiplied by 12.5 million vehicles, the total cost would thus have been \$137 million. According to the document, the added safety provided by the device would have resulted in the avoidance of 180 deaths and another 180 serious burn injuries. Setting \$200,000 as the value of life and \$67,000 as the value of injury avoidance, the document calculated the total safety benefit at \$49.5 million, much less than its \$137 million cost”.

This document was subsequently not admissible at trial, but the public was appalled at the value of life being traded off in the interests of Ford saving costs and producing a lower cost motor vehicle.⁶⁸⁹ Schwartz explains in great detail how the document was somewhat misunderstood as laying all the blame on Ford, but the fact remains that for under \$12 per vehicle, design changes could have been made to make the Pinto appreciably safer. Ford chose not to make these alternative changes and was aware that their decision would increase the chances of loss of life.⁶⁹⁰ The Hand Formula and risk-benefit approach to determining negligence generally excuses the defendant if the cost exceeds the benefit. *Grimshaw* thus illustrates how the public rejected the Hand Formula, particularly where human lives are being weighed against profit. The jury as the reflection of the reasonable people were made aware of the safer alternative design which was not that costly per motor vehicle. The jury found Ford liable for the death of Gray and serious injury of Grimshaw. It should be an exercise of judgment and not an algebraic calculation. Simons points out that the lesson to be learned from this case is that the act of “engaging in cost-benefit analysis displays morally reprehensible callousness”.⁶⁹¹ The Hand Formula is not an appropriate test to be applied in every case where answers to normative questions or the making of intuitive judgments are called for. Wells⁶⁹² points out with the well-known English decision of *Butterfield v Forrester*⁶⁹³ how the jury is expected to answer normative questions and make intuitive judgments. In this case, Forrester had created an obstruction on the road while conducting repairs to his house. Butterfield was riding his horse and collided with the obstruction. A witness stated that had Butterfield been riding slower, he could have avoided the accident. The adjudicator instructed the jury to use the standard of “ordinary care”. The jury then had to conclude, from the facts: who was responsible:

⁶⁸⁹ See Green 1997 *Tex L Rev* 1641; Schwartz 1991 *Rugters L Rev* 1035.

⁶⁹⁰ Schwartz 1991 *Rugters L Rev* 1035.

⁶⁹¹ 2008 *Loy LA Law Rev* 1180.

⁶⁹² Wells 1990 *Mich L Rev* 2385.

⁶⁹³ 103 Eng Rep 926 (1809).

at what speed was Butterfield riding?; taking surrounding circumstances into account, was the speed reasonable?; and in respect of Forester placing the obstruction on the road, should there have been warning signs or should the obstruction have been removed? Thus the jury had no option but to “to apply its own sense of responsibility to a situation whose elements are so common as to be within the ready imagination of each juror”. The jury must make a decision on the complex set of facts and answer normative questions. The legal rules must eventually be decided with intuitive judgments.⁶⁹⁴

Nevertheless, in spite of the criticism of the application of the Hand formula in determining negligence, it is often applied informally.⁶⁹⁵ Jury instructions rarely refer to the Hand Formula,⁶⁹⁶ and the Hand Formula is only occasionally referred to by adjudicators in appellate decisions.⁶⁹⁷ Most jurisdictions instruct juries to apply the standard of reasonable care under the circumstances.⁶⁹⁸ There is a moral element considered where the reasonable person is required to make decisions about the risks and benefits.⁶⁹⁹ Even though the Hand Formula may not be an appropriate method for determining negligence in all cases, it is still useful in determining whether conduct is reasonable.⁷⁰⁰ The element of breach is usually a question for the jury to decide. The jury may decide that the conduct of the defendant is not risky enough to attract negligence as the defendant could reasonably expect others to contribute to safety, for example, where a driver can reasonably expect other drivers to also keep a proper look-out.⁷⁰¹ Small risks may be considered unreasonable if they could be avoided with little effort (such as a warning) while significant risks (such as the risk of death during an operation to remove a tumour) may be justified if there is a possibility of a greater advantage (saving a person’s life by removing the tumour).⁷⁰²

The risk-benefit assessment is not the only or most appropriate test for determining negligence. For example, in cases of professional negligence claims or negligently

⁶⁹⁴ Wells 1990 *Mich L Rev* 2389.

⁶⁹⁵ Dobbs, Hayden and Bublick *Hornbook on torts* 278.

⁶⁹⁶ Except with cases involving product liability (Simons 2008 *Loy LA L Rev* 1183).

⁶⁹⁷ Gilles 2001 *Vand L Rev* 843.

⁶⁹⁸ Simons 2008 *Loy L A L Rev* 1183.

⁶⁹⁹ See Gilles 2001 *Vand L Rev* 832; Dobbs, Hayden and Bublick *Hornbook on torts* 278-279.

⁷⁰⁰ See Dobbs, Hayden and Bublick *Hornbook on torts* 278-279 as well as the authority cited.

⁷⁰¹ See Dobbs, Hayden and Bublick *Hornbook on torts* 279-280.

⁷⁰² See Dobbs, Hayden and Bublick *Hornbook on torts* 280-281.

inflicted sports injuries, the risk-benefit assessment is not the most suitable test and the test for determining negligence falls on customary conduct.⁷⁰³ Customary conduct is not usually regarded as negligent conduct;⁷⁰⁴ it may also reflect the balance between risks and utilities.⁷⁰⁵ Thus procedures with a high risk of harm may be customarily performed by medical practitioners.⁷⁰⁶ Evidence showing alignment with customary conduct or not may assist in establishing whether there is a breach of a duty of reasonable care or not. A plaintiff may provide proof of customary conduct, for example, customary precautionary practices usually undertaken to prove that the defendant's conduct fell short of the reasonable person standard under the circumstances.⁷⁰⁷ Similarly, the defendant may rely on customary conduct to prove that he acted like a reasonable person under the circumstances. Evidence of custom need not be well-known, widely used, or uniform.⁷⁰⁸ At times, the defendant's own custom and practices (for example, if in the form of a written manual) may be used to establish that the defendant had a duty to use reasonable care. For example, where a landlord provided a security guard in the past and then subsequently stopped providing security, the practice impliedly set the duty to exercise reasonable care with regard to the tenant's safety. The removal of the security guard may be considered a breach of the duty of reasonable care.⁷⁰⁹

The application of what is known as the "firefighter's rule" or "professional rescuer's doctrine" must be noted.⁷¹⁰ Certain professionals such as police officers⁷¹¹ and

⁷⁰³ Dobbs, Hayden and Bublick *Hornbook on torts* 2821-282.

⁷⁰⁴ See *Texas & Pac Ry v Behymer* 189 US 468, 23 S Ct 622 (1903); Dobbs, Hayden and Bublick *Hornbook on torts* 282.

⁷⁰⁵ Dobbs, Hayden and Bublick *Hornbook on torts* 282.

⁷⁰⁶ See Dobbs, Hayden and Bublick *Hornbook on torts* 275.

⁷⁰⁷ For example, in *McComish v DeSoi* 42 NJ 274, 200 A 2d 116 (1964) where testimony of safety standards showed conduct that should be followed; *Besette v Enderlin Sch Dist* No 22, 310 NW 2d 759 (ND 1981) where a child was injured from falling from a slide, evidence showing safer playground surfaces in other schools was allowed; *Kaiser v Cook* 67 Wis 2D 460, 227 NW 2d 50 (1975) where a spectator was injured, evidence that on other race tracks spectators are prohibited from being present around dangerous bends was sufficient for the court to appoint a jury (referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 283 fn 104).

⁷⁰⁸ See *Bowan ex rel Bowan v Express Med Transporters Inc* 135 SW 3d 452 (Mo Ct App 2004); Dobbs, Hayden and Bublick *Hornbook on torts* 286.

⁷⁰⁹ See *Kline v 1500 Massachusetts Ave Apt Corp* 439 F 2d 477, 43 ALR 3d 311 (DC Cir 1970); Dobbs, Hayden and Bublick *Hornbook on torts* 287.

⁷¹⁰ See *Fordham v Oldroyd* 171 P 3d 411 (Utah 2007); Dobbs, Hayden and Bublick *Hornbook on torts* 605.

⁷¹¹ See *Moody v Delta Western Inc* 38 P 3d 1139 (Alaska 2002); *White v State* 419 Md 265, 19 A 3d 369 (2011); cases cited by Dobbs, Hayden and Bublick *Hornbook on torts* 605 fn 27.

firefighters⁷¹² who are injured after being exposed to harm that has been negligently created by the defendant generally do not have a claim against the defendant. According to this rule, no duty of reasonable care is owed to the professional rescuer where it is part of his job to render assistance and confront risk of harm.⁷¹³ It has been argued that the reason for this rule is based on public policy,⁷¹⁴ in that the firefighters or professional rescuers are paid to face such risks, it is inherent in their job and that they are entitled to benefits from workers compensation schemes or similar benefits.⁷¹⁵ Thus they would be overcompensated if the defendant were also required to compensate them,⁷¹⁶ which may depending on the circumstances be considered fair and reasonable. Some states such as Oregon and New York⁷¹⁷ have abolished this rule, some did not accept it to begin with, such as South Carolina,⁷¹⁸ while others limit the rule, or apply it with caution.⁷¹⁹ Courts limit the application of the rule by holding that the professional risk taker is barred from recovery when the injuries result from “the negligently created risk that was the very reason for his presence on the scene”.⁷²⁰ For example, in *Wiley v Redd*,⁷²¹ a firefighter could not recover compensation for injuries resulting from a fire but could recover damages as a result of being attacked by dogs. This is not always followed as there are instances where the courts did not entitle a professional rescuer to claim compensation for a risk that did not necessitate his presence. For example, in *White v State*,⁷²² police officer was barred from recovery

⁷¹² See *Krauth v Geller* 31 NJ 270, 157 A 2d 129 (1960).

⁷¹³ See *Carson v Headrick* 900 SW 2d 685, 690 (Tenn 1995); Dobbs, Hayden and Bublick *Hornbook on torts* 605-606.

⁷¹⁴ See *Flowers v Rock Creek Terrace Ltd P'ship* 308 Md 432, 520 A 2d 361 (1987); *Kreski v Modern Wholesale Elec Supply Co* 429 Mich 347, 415 NW 2d 178 (1987); Dobbs, Hayden and Bublick *Hornbook on torts* 607.

⁷¹⁵ See *Babes Showclub Jaba Inc v Liar* 918 NE 2d 308 (Ind 2009); *Krauth v Geller* 31 NJ 270, 274, 157 A2d 129, 131 (1960); Dobbs, Hayden and Bublick *Hornbook on torts* 6037.

⁷¹⁶ See *Farmer v B & G Food Enters Inc* 181 So 2d 1154 (Miss 2002); Dobbs, Hayden and Bublick *Hornbook on torts* 607.

⁷¹⁷ See *Christensen v Murphy* 296 Or 610, 620, 678 P 2d 1210, 1217 (1984). Wisconsin has refused to apply the rule to police officers (see *Cole v Hubanks* 681 NW 2d 147 (Wisc 2004)); New York has abolished the rule allowing police officers and firefighters to recover for injuries culpably caused by anyone or any entity except by the plaintiff's employee or co-employee (Dobbs, Hayden and Bublick *Hornbook on torts* 608).

⁷¹⁸ See *Minnich v Med-Waste Inc* 349 SC 567, 575, 564 SE 2d 98, 102 (2002); *Mull v Kerstetter* 373 Pa Super 228, 540 A 2d 951 (1988); Dobbs, Hayden and Bublick *Hornbook on torts* 608 fn 49.

⁷¹⁹ See *Sallee v GTE South Inc* 839 SW 2d 277, 278 (Ky1992); Dobbs, Hayden and Bublick *Hornbook on torts* 608.

⁷²⁰ 419 Md 265, 19 A 3d 369 (2011) referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 609. See other cases cited by Dobbs, Hayden and Bublick *Hornbook on torts* 609 fn 56.

⁷²¹ 110 Nev 1310, 885 P 2d 592 (1994). See Dobbs, Hayden and Bublick *Hornbook on torts* 609.

⁷²² 419 Md 265, 19 A 3d 369 (2011).

when he slipped and fell on a floor soiled with oil while he was searching the premises for a suspected burglary.⁷²³ In *Flowers v Rock Creek Terrace Ltd P'ship*,⁷²⁴ a firefighter who was injured when he fell in an unguarded elevator shaft was also not entitled to claim compensation. The reason for the bar to recovery was because the risks were associated with the specific operation.⁷²⁵

The influence of reasonableness on the breach of a duty of reasonable care or fault in the form of negligence is predominantly explicit. The influence of reasonableness is implicit in the application of the Hand Formula. In summary, negligence is present when the conduct is considered unreasonable when tested against the particular standard of reasonable care to be applied in the case. Unreasonable conduct may be in the form of: taking unreasonable risks, whether a structured or unstructured balancing of risks and utilities is applied; a violation of a statute without justification; and where conduct is *contra* to customs or practices followed in the community. A weighing of risks and utilities really comes down to a weighing of the plaintiff's and defendant's interests (protected and advanced) and whether harm to the plaintiff could have been prevented by less risky alternative measures that could have been taken under the circumstances.⁷²⁶ Whether the unstructured approach or the Hand Formula is followed, the reasonable foreseeable likelihood of the harm materialising as well as the extent of the harm is weighed against the burden of reducing or avoiding the harm. If the cost of preventing the harm materialising is low compared to the likelihood of the harm materialising as well as the extent of the harm, then there is negligence.⁷²⁷ The Hand Formula which is based on the idea that negligence is not present when the costs exceed the benefits was appropriate to apply in a case such as *Rhode Island Hospital Trust National Bank v Zapata Corp.*⁷²⁸ Zipursky⁷²⁹ explains that there was "little tension between the interests" of the parties and the bank's practice was considered reasonable under the circumstances. In *Grimshaw*, the Hand Formula would not have been appropriate to apply as it may be considered unreasonable to

⁷²³ See also *Lee v Luigi Inc* 696 A 2d 1371 (DC 1997); Dobbs, Hayden and Bublick *Hornbook on torts* 609.

⁷²⁴ 308 Md 432, 520 A 2d 361 (1987).

⁷²⁵ Dobbs, Hayden and Bublick *Hornbook on torts* 609.

⁷²⁶ See *Restatement Second of Torts* §292 cmt b, cmt d (1965).

⁷²⁷ See *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 3 (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 268 fn 30.

⁷²⁸ 848 F 2d 291 (1988).

⁷²⁹ 2007 *Wm & Mary L Rev* 2026.

weigh human lives against profit and where the preventive costs to avoiding harm are low or could have been easily shifted onto the consumers. Thus in the end it should come down to an exercise of judgment and not be based on mathematical calculations. The element of breach is usually a question for the jury to decide as the representatives of the reasonable people in the community. American law does not make a conceptual difference between wrongfulness and fault but in determining unreasonableness of conduct and breach of a duty of reasonable care, the interests of the parties are weighed, community values are considered, and the conduct is generally tested against standards of reasonableness.

3.4. *Specific categories of duties of care*

3.4.1 Omissions

There is generally no duty to act in cases of pure omission (nonfeasance) even if harm is foreseeable.⁷³⁰ In terms of negligence, the question is whether the reasonable person would have acted under the circumstances.⁷³¹ Thus if the defendant observes a blind person about to cross the road while there is a motor vehicle approaching, he will not be held liable for failing to act even though he could easily warn the blind person of danger, verbally or by touching, without any inconvenience or putting himself in harm's way.⁷³² The courts have for example found that there was no duty to save a neighbour from drowning;⁷³³ to warn against dangerous approaching traffic;⁷³⁴ to take a gun away from a person with suicidal tendencies;⁷³⁵ or to render emergency assistance to a person who has been injured.⁷³⁶

⁷³⁰ See for example, *Williams v Southern Calif Gas Co* 176 Cal App 4th 591, 98 Cal Rptr 3d 258 (2009); Dobbs, Hayden and Bublick *Hornbook on torts* 615.

⁷³¹ Dobbs, Hayden and Bublick *Hornbook on torts* 618.

⁷³² See *Restatement Second of Torts* § 314 Illus 1 (1965); *Restatement Third of Torts (Liability for Physical and Emotional Harm)* §§ 37-38 (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 615.

⁷³³ See *Yania v Bigan* 307 Pa 316, 155 A 2d 343 (1959); Dobbs, Hayden and Bublick *Hornbook on torts* 615 fn 4.

⁷³⁴ *Long v Patterson* 198 Miss 554, 22 So 2d 490 (1945); Dobbs, Hayden and Bublick *Hornbook on torts* 615 fn 4.

⁷³⁵ *Krieg v Massey* 239 Mont 469, 781 P 2d 277 (1989); Dobbs, Hayden and Bublick *Hornbook on torts* 615 fn 4.

⁷³⁶ See *Cilley v Lane* 985 A 2d 418 (Me 2009); Dobbs, Hayden and Bublick *Hornbook on torts* 615 fn 4.

There are exceptions to the general rule whereby a duty “of reasonable assistance to a plaintiff” is required.⁷³⁷ These exceptions include: where the defendant causes harm or creates a risk of harm for the plaintiff (prior conduct); there is a special relationship between the plaintiff and the defendant whereby a duty to act positively is created; the defendant by his promise or conduct assumes a duty to act positively; and the defendant commences offering assistance.⁷³⁸ The duty to act positively has however in recent times grown due to public sentiment and social policy.⁷³⁹ The plaintiff is typically vulnerable and dependant on the defendant who has power over the plaintiff’s welfare.⁷⁴⁰ With liability for nonfeasance there must be a relationship between the plaintiff and defendant of such a nature that “social policy justifies the imposition of a duty to act”.⁷⁴¹

Where there is a special relationship between the parties, there may be a duty on the defendant to use reasonable care even if he didn’t cause the initial risk of harm or independently undertook to protect the plaintiff from harm, or rescue the plaintiff.⁷⁴² The *Restatement Third of Torts*⁷⁴³ provides that the first person in all the following relationships owes a duty of reasonable care: carrier to a passenger, to protect the passenger from harm;⁷⁴⁴ innkeeper to his guest;⁷⁴⁵ staff on a ship, to assist a person who has fallen overboard;⁷⁴⁶ inviter to the person invited, the invitee;⁷⁴⁷ a shopkeeper to his customer;⁷⁴⁸ “possessor of land which is open to the public to a lawful entrant” (for example, to protect visitors from foreseeable negligent acts or criminal acts of

⁷³⁷ Dobbs, Hayden and Bublick *Hornbook on torts* 616.

⁷³⁸ Dobbs, Hayden and Bublick *Hornbook on torts* 616. Cf Terry 1915 *Harv L Rev* 52-54.

⁷³⁹ Keeton *et al Prosser and Keeton on torts* 374.

⁷⁴⁰ Keeton *et al Prosser and Keeton on torts* 374.

⁷⁴¹ Keeton *et al Prosser and Keeton on torts* 374.

⁷⁴² See *Delgado v Trax Bar & Grill* 36 Cal 4th 224, 113 P 3d 1159, 30 Cal Rptr 3d 145 (2005); Dobbs, Hayden and Bublick *Hornbook on torts* 620.

⁷⁴³ (*Liability for Physical and Emotional Harm*) §§ 19, 24, 40. See *Restatement Second of Torts* §§314A & 314B (1965). See Dobbs, Hayden and Bublick *Hornbook on torts* 620.

⁷⁴⁴ See for example, *Todd v Mass Transit Admin* 373 Md 149, 816 A 2d 930 (2003); Dobbs, Hayden and Bublick *Hornbook on torts* 638 fn 41; cases referred to by Keeton *et al Prosser and Keeton on torts* 376 fn 32.

⁷⁴⁵ See for example, *Dove v Lowden* WD Mo 1942, 47 F Supp 546; Keeton *et al Prosser and Keeton on torts* 376.

⁷⁴⁶ See for example, *Abbott v United States Lines Inc* (4th Cir 1975) 512 F 2d 118; cases referred to by Keeton *et al Prosser and Keeton on torts* 376 fn 34.

⁷⁴⁷ See *Olivo v Owens-Illinois Inc* 186 NJ 394, 895 A 2d 1143 (2006) with regard to asbestos exposure on the land; cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 650 fn 162-166, 653; Keeton *et al Prosser and Keeton on torts* 376.

⁷⁴⁸ See for example, *Harold’s Club v Sanchez* 1954, 70 Nev 518, 275 P2d 384; other cases referred to by Keeton *et al Prosser and Keeton on torts* 376 fn 36.

others);⁷⁴⁹ employer to his employee;⁷⁵⁰ institute to a student;⁷⁵¹ landlord to a tenant, to maintain the premises so that it is in a safe condition minimising the risk of harm;⁷⁵² and a custodian to protect the person in his custody from foreseeable harm.⁷⁵³ A custodian may be a: jailer who owes a prisoner a duty of reasonable care to ensure that he is protected from harm, such as an attack from another inmate⁷⁵⁴ or from committing suicide;⁷⁵⁵ a hospital who owes a patient a duty of reasonable care to protect the patient from harm;⁷⁵⁶ a parent who owes their child a duty of reasonable care to protect them from harm, which even applies to an emancipated minor still in their custody;⁷⁵⁷ and a school who owes a duty of reasonable care in respect of supervision and protection of a student.⁷⁵⁸ There is no *numerus clausus* with regard to the list of relationships and a duty of care may be applicable in instances where the defendant creates an unreasonable risk or assumes a duty of care.⁷⁵⁹ Keeton *et al*⁷⁶⁰ point out that extending liability for omissions has been slow but may continue till a general duty is applicable where a defendant may prevent harm to another with little inconvenience.

Where a duty to come to another's aid is required, the defendant must act with reasonable care under the circumstances.⁷⁶¹ For example, he is seldom required to

⁷⁴⁹ See *Marshall v Burger King Corp* 222 Ill 2d 422, 856 NE 2d 1048, 305 Ill Dec 897 (2006); *Nallan v Helmsley-Spear Inc* 50 NY 2d 507, 429 NYS 2d 606, 407 NE 2d 451 (1980); Dobbs, Hayden and Bublick *Hornbook on torts* 638-639 and the cases referred to in fn 51-55 in respect of rape, robberies, shootings, beatings and killings.

⁷⁵⁰ See *Didier v Ash Grove Cement Co* 272 Neb 28, 718 NW 2d 484 (2006); Dobbs, Hayden and Bublick *Hornbook on torts* 650; cases referred to by Keeton *et al Prosser and Keeton on torts* 376 fn 35.

⁷⁵¹ See *Stanton v University of Maine System* 773 A 2d 1045 (Me 2001); Dobbs, Hayden and Bublick *Hornbook on torts* 638 fn 43.

⁷⁵² The landlord's duty may arise from his undertakings, foreseeability of harm and powers in terms of the lease agreement. See Dobbs, Hayden and Bublick *Hornbook on torts* 643-645.

⁷⁵³ See *Restatement Second of Torts* §314A (4 (1965)); Dobbs, Hayden and Bublick *Hornbook on torts* 645.

⁷⁵⁴ See *Giraldo v California Dep't of Corrections and Rehabilitation* 168 Cal App 4th 231, 85 Cal Rptr 3d 371 (2008) where a number of cases from other jurisdictions were cited.

⁷⁵⁵ *Joseph v State* 26 P 3d 459 (Alaska 2001); Dobbs, Hayden and Bublick *Hornbook on torts* 645. See cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 646 fn 110-112.

⁷⁵⁶ See *Hite v Brown* 100 Ohio App 3d 606, 654 NE 2d 452 (1995); Dobbs, Hayden and Bublick *Hornbook on torts* 646.

⁷⁵⁷ See *Eric M Cajon Valley Union School Dist* 174 Cal App 4th 285, 95 Cal Rptr 3d 428 (2009); *Jenkins v Anderson* 191 NJ 285, 922 A 2d 1279 (2007); cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 646 fn 119-137.

⁷⁵⁸ Dobbs, Hayden and Bublick *Hornbook on torts* 621.

⁷⁵⁹ *Prosser and Keeton on torts* 377.

⁷⁶⁰ Keeton *et al Prosser and Keeton on torts* 377.

do more than provide first aid if possible, call for assistance, or to leave such person in the care of another.⁷⁶²

It is not always easy to distinguish between active and passive conduct. For example, a failure to repair a gas pipe is regarded as negligent distribution of the gas.⁷⁶³ Sometimes the defendant, such as a medical practitioner begins treating the plaintiff and then neglects him. *Keeton et al*⁷⁶⁴ submit that the question seems to be whether the defendant's conduct has gone so far that there is a relationship between him and the plaintiff and his conduct has begun affecting the plaintiff's interests in an adverse manner.

A duty may arise from negligent entrustment of property, such as entrusting a dangerous weapon to a person who the defendant knows or should have known that it will be used in a dangerous manner.⁷⁶⁵ For example, in *Kitchen v K-Mart Corporation*,⁷⁶⁶ a firearm was sold to an intoxicated man who subsequently used it to shoot his girlfriend. The court confirmed that an action for negligent entrustment was in line with Florida's public policy in protecting its citizens from harm with regard to negligent entrustment of a dangerous weapon. Thus selling a dangerous weapon to an intoxicated person satisfied the requirement and was sufficient enough to bring the cause of action before a jury.⁷⁶⁷

The list of factors whereby a duty of care may be present in cases of omissions is not exhaustive and the courts may find a duty to act positively especially where little effort was required on the part of the defendant and the failure to act was deadly.⁷⁶⁸ For example, in *Soldano v O'Daniels*⁷⁶⁹ the court held that there was a duty owed to the deceased by a bartender to call the police for help or allow a patron from a saloon across the street to call the police for help when requested to do so. The court found

⁷⁶² See *Owl Drug Co v Crandall* 1938 52 Ariz 322, 80 P 2d 952; *Keeton et al Prosser and Keeton on torts* 377.

⁷⁶³ See *Consolidated Gas Co v Connor* 1911 114 Md 140, 78 A 725; *Keeton et al Prosser and Keeton on torts* 374.

⁷⁶⁴ *Prosser and Keeton on torts* 375.

⁷⁶⁵ See Dobbs, Hayden and Bublick *Hornbook on torts* 653.

⁷⁶⁶ 697 So 2d 1200 (Fla 1997).

⁷⁶⁷ Cf Dobbs, Hayden and Bublick *Hornbook on torts* 653-656.

⁷⁶⁸ Dobbs, Hayden and Bublick *Hornbook on torts* 616.

⁷⁶⁹ 141 Cal App 3d 443, 190 Cal Rptr 310, 37 ALR 4th 1183 (1983).

such omission morally wrong and under the circumstances there was a duty on the bartender to allow the patron to use the phone. There was a close connection between the omission and the resulting death.⁷⁷⁰ In *Podias v Marais*⁷⁷¹ an eighteen year old boy who had been drinking, lost control of the motor vehicle he was driving and struck a motorcyclist. The young boy and his two friends, who were passengers in the motor vehicle and who had also been drinking, made a number of calls but failed to contact the police for assistance. They left the motorcyclist injured on the road. Another driver subsequently ran over the motorcyclist and the motorcyclist died. The motorcyclist's widow sued *inter alia* the three young boys. The driver of the motor vehicle settled before the trial and the trial court found that no duty of care was owed by the passengers. However on appeal,⁷⁷² the court found that the two friends and the driver acted together in creating the risk of harm to the motorcyclist. They could have prevented the reasonably foreseeable risk of serious injury to the motorcyclist and in the circumstances imposing a duty to act positively "does not offend notions of fairness and common decency".⁷⁷³ In *Tarasoff v Regents of the University of California*,⁷⁷⁴ a patient confided in a psychologist and informed him of his intention to murder his former girlfriend, Tarasoff. The psychologist notified the campus police who briefly detained the patient but then released him. The patient subsequently killed Tarasoff and her parents sued the police and the psychologist employed by the University of California, for the wrongful death of their daughter. The parents alleged that the defendants failed to detain the patient and failed to warn either Tarasoff or her parents. The court held that a mental health professional owes a duty of reasonable care to those specifically being threatened by the patient. The court held that in terms of public policy the protection afforded to confidentiality between patient and therapist must be yielded "to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins".⁷⁷⁵ A number of states have since adopted the mental health professional's duty of reasonable care.⁷⁷⁶

⁷⁷⁰ 451-452.

⁷⁷¹ 394 NJ Super 338, 926 A 2d 859 (App Div 2007).

⁷⁷² *Podias v Mairs* 394 NJ Super 338, A 2d 859 (App Div 2007); Dobbs, Hayden and Bublick *Hornbook on torts* 617.

⁷⁷³ *Podias v Mairs* 394 NJ Super 338, 351-352 A 2d 859, 866-867 (App Div 2007).

⁷⁷⁴ 17 Cal 3d 425, 131 Cal Rptr 14, 551 P 2d 334 (1976).

⁷⁷⁵ 442.

⁷⁷⁶ See *Eisel v Board of Educ of Montgomery County* 324 Md 376, 597 A 2d 447 (1991); authority referred to Dobbs, Hayden and Bublick *Hornbook on torts* 658-659

A few states have statutes whereby a failure to assist or rescue a person in peril may lead to a criminal sanction. Rhode Island,⁷⁷⁷ Vermont⁷⁷⁸ and Minnesota⁷⁷⁹ require “reasonable assistance”, generally when the defendant is in a position to assist without danger to himself or others and when he knows that another has been exposed to grave harm or risk of harm.⁷⁸⁰ “Reasonable assistance” takes into account the rescuer’s efforts to render aid.⁷⁸¹

Where a defendant acting innocently knows or should know that he has caused harm to the plaintiff, he owes the plaintiff a duty of reasonable care to prevent further harm by taking reasonable steps.⁷⁸² He may be held liable for the further harm caused or for the full extent of the harm if he was negligent to begin with.⁷⁸³ For example, in *Maldonado v Southern Pacific Transport Company*⁷⁸⁴ the appellant tried to board a freight train but the train jerked, causing the appellant to fall while he was trying to board it. The appellant fell under the wheels of the train, his arm was severed, and he sustained severe bodily injury. The employees of the freight train refused to assist the appellant. The court held that the railroad company had a duty to render reasonable aid and assistance. The railroad company breached such duty and was held liable. In *Pacht v Morris*,⁷⁸⁵ Pacht’s motor vehicle struck and killed a horse. He continued driving, leaving the horse on the road. Another motorist subsequently drove into the horse. The court found Pacht liable for the failure to take positive action by either warning motorists or removing the horse. He failed to exercise reasonable care. Thus the defendant may be held liable if he knows or should have known that he created a risk of harm and he had an opportunity to minimise the risk of harm under the circumstances.⁷⁸⁶

⁷⁷⁷ RI Gen Laws §11-56-1.

⁷⁷⁸ Vt Stat Ann tit 12 §519(a).

⁷⁷⁹ Minn Stat § 604A.01.

⁷⁸⁰ Dobbs, Hayden and Bublick *Hornbook on torts* 618.

⁷⁸¹ See *Hardingham v United Counseling Service of Bennington* 164 Vt 158, 667 A 2d 289 (1995); Dobbs, Hayden and Bublick *Hornbook on torts* 616 fn 20.

⁷⁸² See *Restatement Second of Torts* § 322 (1965); Dobbs, Hayden and Bublick *Hornbook on torts* 619.

⁷⁸³ See *South National Railroad Passenger Corp* 290 NW 2d (ND 1980) where railroad employees were held liable for failing to assist a victim of rail road crossing accident.

⁷⁸⁴ 129 Ariz 165, 629 P 2d 1001 (Ct App 1981).

⁷⁸⁵ 107 Ariz 392, 489 P 2d 29 (1971).

⁷⁸⁶ Dobbs, Hayden and Bublick *Hornbook on torts* 620.

The *Restatement Third of Torts*⁷⁸⁷ provides that where assistance or rescue efforts have already commenced, the rescuer must act with reasonable care and should aid or assistance be discontinued, then the plaintiff must not be left in a worse off state than had the rescue effort not begun. The “rescuer must not unreasonably discontinue aid” and when aid is discontinued, reasonable care must be applied.⁷⁸⁸ When the plaintiff is no longer in danger, the rescuer cannot return the plaintiff to danger even if the danger would not be greater than he would have been in had rescue efforts not begun.⁷⁸⁹ If the rescue attempt results in prevention or interference of rescue by other means, then the rescuer may be held liable. Dobbs, Hayden and Bublick⁷⁹⁰ refer to the following examples from case law. In *Zelenko v Gimbel Bros*,⁷⁹¹ a customer fell ill in a department store. The employees left her in the infirmary for six hours without providing further medical assistance. The court held that a good-hearted person would not have left her and would have called for an ambulance. The plaintiff was thus denied further medical attention and once the defendant began to assist, a duty arose to use reasonable care. In *United States v De Vane*,⁷⁹² a coast guard misread a message and wrongly informed others that a distressed ship had reached safety when it had not. The court was of the opinion that had the coast guard not been negligent, the search for the ship would have continued and the ship would have been found.

Where a person voluntarily undertakes a duty whether express or implied, then the duty must be performed with reasonable care as the line has been crossed from nonfeasance to misfeasance.⁷⁹³ For example, in *Lokey v Breuner*⁷⁹⁴ a truck driver signalled an approaching motorist from the opposite direction by gesturing his hand that it was safe for the motorist to turn left, but the lane was not clear and the motorist collided with a cyclist. The court held that the truck driver had assumed a duty and should have acted with reasonable care in ensuring that the lane was clear.⁷⁹⁵ Where a person undertakes conduct that would enhance the plaintiff’s safety, such person

⁷⁸⁷ (*Liability for Physical and Emotional Harm*) § 44 (b) (2010). See Dobbs, Hayden and Bublick *Hornbook on torts* 622.

⁷⁸⁸ Dobbs, Hayden and Bublick *Hornbook on torts* 622.

⁷⁸⁹ *Third Restatement (Liability for Physical and Emotional Harm)* § 44 cmt h (2010).

⁷⁹⁰ *Hornbook on torts* 622-623

⁷⁹¹ 158 Misc 904, 287 NYS 134 (1935).

⁷⁹² 306 F 2d 182 (5th Cir 1962).

⁷⁹³ See Dobbs, Hayden and Bublick *Hornbook on torts* 624; Keeton *et al Prosser and Keeton on torts* 378.

⁷⁹⁴ 2010 MT 216, 358 Mont 8, 243 P 3d 384 (2010).

⁷⁹⁵ See Dobbs, Hayden and Bublick *Hornbook on torts* 624 fn 77.

has a duty to use reasonable care only if the plaintiff relied on such undertaking and if the defendant's failure to exercise reasonable care increased the risk of harm to the plaintiff. This limits liability to harm that occurs from the risk that "the undertaking was intended or reasonably expected to protect against".⁷⁹⁶

A defendant who undertakes to do something for X may be under a duty of reasonable care towards X as well as other third parties. This in principle applies if the defendant knows or should have known that his failure to act according to the undertaking would increase the risk of physical harm to others and where the defendant's breach of the duty puts the plaintiff in a worse off condition than when he did not undertake to do something for the plaintiff. The plaintiff or other individuals thus rely on the promise or undertaking and the defendant's undertaking replaces a duty owed by another.⁷⁹⁷ For example, where the defendant is contracted by the landowner to clear ice and snow on the walkway, he assumes the duty of the landowner. If the plaintiff slips on the pavement because the ice and snow was not cleared, then the defendant may be held liable in negligence.⁷⁹⁸ The premises must be in a condition deemed "reasonably safe for purposes for which it was accustomed to be used" but not for every "unexpected or unheard of event, or ... every possible accident which might occur".⁷⁹⁹ Whether a duty of care, based on such undertaking is owed, is predominantly based on justice and policy considerations.⁸⁰⁰ Dobbs, Hayden and Bublick⁸⁰¹ refer to *Anderson v Fox Hill Village Homeowners Corp*⁸⁰² as an example where a tenant promised the landlord to clear the ice and snow on the property. The plaintiff was employed on the property, but not by the tenant and slipped on the ice sustaining injury. As there was no common law duty upon the tenant to clear the snow and ice, the plaintiff referred to the tenant's promise to the landlord. The court accepted that the undertaking by the tenant was to the landlord and not for the benefit of others. The court did not consider the tenant's promise as creating a duty of care to others. In Massachusetts, duties of clearing snow

⁷⁹⁶ Dobbs, Hayden and Bublick *Hornbook on torts* 625.

⁷⁹⁷ See *Restatement Second of Torts* § 324(A) (1965); *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 43 (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 628.

⁷⁹⁸ See *Gazo v City of Stamford* 255 Conn 245, 765 A 2d 505 (2001); Dobbs, Hayden and Bublick *Hornbook on torts* 630 fn 121.

⁷⁹⁹ *Ploemankos v Cohn* 256 NYS 5 (App Div 1932) referred to by Nelson 1999 *Buff L Rev* 162 in respect of a landowner's duty of reasonable care owed to an invitee. See references to slip-and-fall cases in the state of New York by Nelson 1999 *Buff L Rev* 163 fn 211.

⁸⁰⁰ Dobbs, Hayden and Bublick *Hornbook on torts* 630.

⁸⁰¹ *Hornbook on torts* 630.

⁸⁰² 424 Mass 365, 676 NE 2d 821 (1997).

are as a matter of policy, not easily imposed. There are a growing number of decisions where a voluntary promise to do something such as: calling for help;⁸⁰³ passing on a message (for example, that one's wife has gone into labour);⁸⁰⁴ or confining a cat⁸⁰⁵ has resulted in harm and the recognition of a duty to act with reasonable care.⁸⁰⁶

There is a general no-duty rule in respect of control over other persons but exceptions apply in the following instances: where a statute specifically imposes a duty of care, for example, to investigate reports of child abuse;⁸⁰⁷ where there is a special relationship between the parties that requires the defendant to use reasonable care in protecting the plaintiff from harm; where there is a special relationship between the parties and the defendant has control over a person who is dangerous or at the very last has the means to minimise risk of harm to a plaintiff in some manner; and where the defendant's conduct actively creates an unreasonable risk of harm to third parties – for example, signalling a motorist that it is safe to overtake or turn when in actual fact there is traffic which leads to harm to the motorist as well as others.

In 1947, the Federal Tort Claims Act (hereinafter referred to as the "FTCA") became applicable and in effect generally abolished government immunity from tort liability. Thus the government may be held liable under the relevant state law in instances where a private person would also have been liable under similar circumstances.⁸⁰⁸

The general rule is that public entities will not be held liable for failure to provide fire or police protection services even if their failure is negligent, unless there is a special relationship between the person and the entity whereby the entity undertook to protect the person and then negligently failed to do so.⁸⁰⁹ For example, if the police respond

⁸⁰³ See *DeLong v County of Erie* 1982 89 AD 2d 376, 455 NYS 2d 887 where an emergency call was made to the police and the police sent aid to the wrong address.

⁸⁰⁴ *Mixon v Dobbs Houses Inc* 1979 149 Ga App 481, 254 SE 2d 864.

⁸⁰⁵ *Marsalis v La Salle La App* 1957 94 So 2d 120.

⁸⁰⁶ See Keeton *et al Prosser and Keeton on torts* 380.

⁸⁰⁷ See *District of Columbia v Harris* 770 A 2d 82 (DC 2001); *Rees v State Dep't Health & Welfare* 143 Idaho 10, 137 P 3d 397 (2006); *Jensen v Anderson County Dep't of Social Services* 304 SC 195, 403 SE 2d 615 (1991); Dobbs, Hayden and Bublick *Hornbook on torts* 634 fn 9.

⁸⁰⁸ 28 US CA §2674. See in general Dobbs, Hayden and Bublick *Hornbook on torts* 549-589; Keeton *et al Prosser and Keeton on torts* 1032-1056 with regard to the limitations applicable to government immunity. For purposes of this study the United States of America government immunity will not be discussed further.

⁸⁰⁹ Dobbs, Hayden and Bublick *Hornbook on torts* 574.

to a 911 emergency call but the police vehicle goes to the wrong address, the police may be held liable as a duty of reasonable care was undertaken. Thus reasonable rescue measures should have been undertaken.⁸¹⁰ A fire department may be held liable for failing to use adequate methods of putting out fires or for using dangerous methods when they respond to a call for assistance.⁸¹¹ However, if the police fail to make a phone call that could have saved a victim's life after finding out that she had been kidnapped,⁸¹² or fail to arrest a dangerous person once a warrant has been issued; then the police will not be held liable as the special relationship is absent.⁸¹³ Similarly, a fire department that fails to respond to an emergency call or fails to follow safety regulations may not be held liable.⁸¹⁴ There are cases where the public entity was held liable for negligently allowing a prisoner to escape⁸¹⁵ or where a dangerous person was negligently released.⁸¹⁶ Courts are also reluctant to hold a public entity liable for the negligent release of a dangerous person, such as, a patient in a mental institution or a prisoner who subsequently harms another. The courts either apply discretionary immunity or the so-called public duty rule, which entails that a duty to all is a duty to no one.⁸¹⁷ The *Restatement Second of Torts*⁸¹⁸ acknowledges a duty to control dangerous persons under the defendant's care or where the defendant has the authority to control such dangerous person.⁸¹⁹ A prison has a duty of reasonable care

⁸¹⁰ See *De Long v County of Erie* 60 NY 2d 296, 496 NYS 2d 611, 457 NE 2d 717 (1983); Dobbs, Hayden and Bublick *Hornbook on torts* 574.

⁸¹¹ See *Harry Stoller and Co v City of Lowell* 412 Mass 139, 587 NE 2d 780 (1992); *Invest Cast Inc v City of Blaine* 471 NW 2d 368 (Minn 1991); Dobbs, Hayden and Bublick *Hornbook on torts* 574 fn 235.

⁸¹² See *Kircher v City of Jamestown* 74 NY 2d 251, 544 NYS 2d 995, 543 NE 2d 443 (1989); Dobbs, Hayden and Bublick *Hornbook on torts* 574.

⁸¹³ See *Dore v City of Fairbanks* 31 P 3d 788 (Alaska 2001); Dobbs, Hayden and Bublick *Hornbook on torts* 574.

⁸¹⁴ See *Frye v Clark County* 97 Nev 632, 637 P 2d 1215 (1981); *Motyka v City of Amsterdam* 15 NY 2d 134, 204 NE 2d 635, 256 NYS 2d 595 (1965); Dobbs, Hayden and Bublick *Hornbook on torts* 574.

⁸¹⁵ See for example, *Natroma County v Blake* 81 P 3d 948 (Wyo 2003); Dobbs, Hayden and Bublick *Hornbook on torts* 576.

⁸¹⁶ See for example, *Grimm v Arizona Board of Pardons & Paroles* 115 Ariz 260, 564 P 2d 1227 (1977); Dobbs, Hayden and Bublick *Hornbook on torts* 576.

⁸¹⁷ See for example, *State Dep't of Corrections v Cowles* 151 P 3d 353 (Alaska 2006); *Parkulo v West Virginia Board of Probation and Parole* 199 W Va 161, 483 SE 2d 507 (1996); *Leonard v State* 491 NW 2d 508 (Iowa 1992). There are statutes that provide that such entity is immune from liability, see for example NJ Stats Ann §59:5-2; 51 Okla St Ann §15-78-60; Dobbs, Hayden and Bublick *Hornbook on torts* 570, 575-576.

⁸¹⁸ § 318 (1965). See also *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 41 (2010).

⁸¹⁹ See *Osborn v Mason County* 157 Wash 2d 18, 134 P 3d 197 (2006); Dobbs, Hayden and Bublick *Hornbook on torts* 652.

to ensure that its prisoners do not escape and cause harm to others.⁸²⁰ Custodians of dangerous persons have been held liable for the reasonable foreseeable death and harm caused by the dangerous person.⁸²¹

Off-duty police officers who rescue others from peril have been regarded as private persons where the firefighters rule does not apply.⁸²² But some courts have held that police officers in particular even if they are off-duty are in a sense always on duty and may be barred from claiming.⁸²³ The firefighter's rule has in certain cases been applied to paramedics and in some cases not.⁸²⁴

The influence of reasonableness on omissions is partially implicit and partially explicit. It is implicit in deciding whether there is a duty to act in a given case insofar as it often depends on factors including whether a positive intervention has begun or not, whether the right kind of relationship exists, or whether there was prior conduct etcetera. The influence of reasonableness is explicit in determining the content of the duty insofar as determining whether a duty to take *reasonable* steps or to act with *reasonable* care was required under the circumstances. The defendant may be held liable for omitting to provide reasonable assistance or reasonable care owed to a plaintiff under the circumstances. The duty to prevent harm and act positively in providing reasonable assistance or reasonable care has grown as a result of public policy.⁸²⁵ A duty to provide reasonable assistance or reasonable care may be recognised where the relationship between the plaintiff and defendant is of such a nature that public policy "justifies the imposition of a duty to act"⁸²⁶ or where it "does not offend notions of fairness and common decency".⁸²⁷ This echoes from English law in respect of determining a duty of care and has recently been applied in South African law in order

⁸²⁰ See *Raas v State* 729 NW 2d 444 (Iowa); *Marceaux v Gibbs* 699 So 2d 1065 (La 1997); Dobbs, Hayden and Bublick *Hornbook on torts* 656.

⁸²¹ See for example *DeJesus v US Dep't of Veterans Affairs* 384 F Supp 2d 780 (ED Pa 2005); Dobbs, Hayden and Bublick *Hornbook on torts* 656.

⁸²² See *Espinoza v Schulenburg* 212 Ariz 215, 129 P 3d 937 (2006); *Alessio v Fire & Ice Inc* 197 NJ Super 22, 484 A 2d 24 (1984); *Wadler v City of New York* 14 NY 3d 192, 899 NYS 2d 73, 925 NE 2d 875 (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 611.

⁸²³ See *Hodges v Yarian* 53 Cal App 4th 973, 62 Cal Rptr 2d 130 (1997); *Levine v Chemical Bank* 221 AD 2d 175, 633 NYS 2d 296 (1995); *Trammel v Bradberry* 256 Ga App 412, 568 SE 2d 715 (2002); Dobbs, Hayden and Bublick *Hornbook on torts* 611.

⁸²⁴ See *Conder* 1992 89 ALR 4th 1072; Dobbs, Hayden and Bublick *Hornbook on torts* 612 fn 84.

⁸²⁵ Keeton *et al Prosser and Keeton on torts* 374.

⁸²⁶ Keeton *et al Prosser and Keeton on torts* 374.

⁸²⁷ *Podias v Marais* 394 NJ Super 338, 926 A 2d 859, 866-867 (App Div 2007).

to determine wrongfulness. The main factors which are considered in determining whether positive conduct in the form of reasonable care or reasonable assistance is required are: prior conduct; a special relationship between the parties; a promise or undertaking to act positively;⁸²⁸ entrustment or control over a dangerous object⁸²⁹ or person;⁸³⁰ and where a person voluntarily undertakes a duty whether express or implied.⁸³¹ These factors are similar to the factors indicating a duty to act positively in preventing harm in English and South African law.⁸³² It is submitted that although these factors may be indicative in cases of omissions of a duty to provide reasonable assistance or reasonable care in preventing harm, what needs to be determined in order to ground liability is whether the defendant's failure to act in the circumstances was unreasonable. The courts may find a duty to act positively especially where little effort is required on the part of the defendant to prevent reasonable foreseeable harm.⁸³³ Thus a failure to provide assistance where little effort or inconvenience is required may be considered unreasonable. American law has developed in a different direction from that of English law⁸³⁴ in so far as the state may be held liable for omissions. For example, in the case where the police respond to a 911 emergency call but the police response vehicle then goes to the incorrect address, the police may be held liable as a duty of reasonable care was undertaken and reasonable rescue measures should have been undertaken.⁸³⁵ In *United States v De Vane*,⁸³⁶ where coast guard made an error and rescue efforts to find a lost ship were terminated, the coast guard was found negligent. The FTCA has also abolished the rule of state immunity from liability.

⁸²⁸ See Dobbs, Hayden and Bublick *Hornbook on torts* 616. Cf Terry 1915 *Harv L Rev* 52-54.

⁸²⁹ See Dobbs, Hayden and Bublick *Hornbook on torts* 653.

⁸³⁰ See for example *DeJesus v US Dep't of Veterans Affairs* 384 F Supp 2d 780 (ED Pa 2005); Dobbs, Hayden and Bublick *Hornbook on torts* 656.

⁸³¹ See Dobbs, Hayden and Bublick *Hornbook on torts* 624; Keeton *et al Prosser and Keeton on torts* 378.

⁸³² See chapter 3 paras 3.1.10-3.1.11.

⁸³³ Dobbs, Hayden and Bublick *Hornbook on torts* 616.

⁸³⁴ See chapter 4 para 3.3.1.

⁸³⁵ See *De Long v County of Erie* 60 NY 2d 296, 496 NYS 2d 611, 457 NE 2d 717 (1983); Dobbs, Hayden and Bublick *Hornbook on torts* 574.

⁸³⁶ 306 F 2d 182 (5th Cir 1962).

3.4.2 A duty of reasonable care owed by medical practitioners and health care providers

Medical malpractice claims straddle both the tort of battery where there is a lack of consent and the tort of negligence.⁸³⁷ The reasonable level of conduct required by medical practitioners is controversial and the incidence of medical malpractice claims in the United States of America has been high.⁸³⁸

The standard of care of medical practitioners is applied to *inter alia*: the requirement of continuing education of medical practitioners in order to keep abreast of new developments; the practitioner's diagnosis and choice of treatment; the practitioner's duty to inform the patient of the material risks and benefits of treatment including alternative treatment; the practitioner's conduct in performing procedures or operations; referral to other specialists where required as well as after-care and follow-ups on patients.⁸³⁹

In respect of medical malpractice claims, the usual elements required for the tort of negligence are applicable except that the standard of care is tested differently. The standard of care is determined by either customs or practices of the medical community⁸⁴⁰ in a similar locality, state or nation⁸⁴¹ and by relevant expert testimony.⁸⁴² For example, in *Robinson v Okla Nephrology Associates Inc*,⁸⁴³ the expert testimony that a medical practitioner's conduct strayed from the standard, was that he violated the acceptable standard by not immediately hospitalising the patient

⁸³⁷ See Dobbs, Hayden and Bublick *Hornbook on torts* 514-516.

⁸³⁸ Shapo *Tort* 167.

⁸³⁹ See Shapo *Tort* 168.

⁸⁴⁰ See *David MacLeod Regional Med Ctr* 367 SC 242, 247-248, 626 SE 2d 1, 4 (2006).

⁸⁴¹ In a country like the United States of America with 50 states applying their own rules relating to negligence including state courts and federal courts, the question has been asked whether the reasonable standard of care should be a local or national one. A national standard has more support. Courts do however acknowledge that certain areas may not have the same resources available as others and this is considered under the circumstances of the case. See *Hall v Hilbun* 466 So 2d 856, 872-875 (Miss 1985); *Purtill v Hess* 111 Ill 2d 229, 489 NE 2d 867, 95 Ill Dec 305 (1986); *Keebler v Winfield Carraway Hosp* 531 So 2d 841 (Ala 1988); cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 509 fn 133-135.

⁸⁴² Expert testimony is not required where: it is obvious that negligence is present; cases of non-medical negligence where the ordinary standard of reasonable care is applied; and cases where there is informed consent. See Dobbs, Hayden and Bublick *Hornbook on torts* 494, 503 fn 84.

⁸⁴³ 154 P 3d 1250 (2007). See Dobbs, Hayden and Bublick *Hornbook on torts* 504 fn 93.

upon learning that her sodium levels were dangerously low. In *Bitar v Rahman*,⁸⁴⁴ the expert opinion of one medical practitioner that was accepted and considered, was that Dr Bitar prior to an abdominoplasty marked and pre-determined the amount of tissue to be removed, thereby deviating from the standard of care. Instead he should have removed the tissue as he deemed fit during the operation. Such breach was considered the proximate cause of the plaintiff's injuries. The medical standard requires the medical practitioner to exercise professional care in *inter alia* providing advice, diagnosis, treatment, when referring a patient to an appropriate specialist, and keeping medical records.⁸⁴⁵ The jury is instructed to consider whether the medical practitioner exercised the care, skill and knowledge normally exercised by other members of a school of practice within the relevant medical community.⁸⁴⁶ For example, a chiropractor will be held to a similar standard of other chiropractors in the chiropractic community.⁸⁴⁷

To begin with, in medical malpractice claims, there should be a doctor-patient relationship whereby the medical practitioner undertakes to treat the plaintiff for his benefit and with the required consent.⁸⁴⁸ In an instance where a patient's medical practitioner consults another medical practitioner merely for advice without employing him, there is no doctor-patient relationship between the patient and the advising medical practitioner.⁸⁴⁹ However, modern methods of providing advice and treatment are changing and in instances where a medical practitioner provides advice over the telephone⁸⁵⁰ or where a team of medical practitioners provide advice or treatment to a patient without necessarily physically seeing the patient, a doctor-patient relationship may be recognised.⁸⁵¹ The medical practitioner's duty is limited to the scope of his

⁸⁴⁴ 272 Va 130, 630 SE 2d 319. See Dobbs, Hayden and Bublick *Hornbook on torts* 504 fn 93.

⁸⁴⁵ Dobbs, Hayden and Bublick *Hornbook on torts* 505.

⁸⁴⁶ See *Keebler v Winfield Carraway Hosp* 531 So 2d 841 (Ala 1988); *Purtill v Hess* 111 Ill 2d 229, 489 NE 2d 867, 95 Ill Dec 305 (1986); Dobbs, Hayden and Bublick *Hornbook on torts* 504.

⁸⁴⁷ See *Felton v Lovett* 388 SW 3d 656 (Tex 2012); Kinney 2001 *J L Med & Ethics* 323 in respect of the medical standards of care; Dobbs, Hayden and Bublick *Hornbook on torts* 494 fn 4.

⁸⁴⁸ See for example *Kelley v Middle Tennessee Emergency Physicians PC* 133 SW 3d 587, 593 (Tenn 2004); *Didato v Strehler* 262 Va 617, 554 SE 2d 42 (2001); cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 497 fn 34-35.

⁸⁴⁹ See for example *Jennings v Budget* 230 P 3d 861 (Okla 2010); Dobbs, Hayden and Bublick *Hornbook on torts* 497-498.

⁸⁵⁰ See for example, *Adams v Via Christi Regional Medical Center* 270 Kan 824, 19 P 3d 132 (2001); cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 498 fn 42.

⁸⁵¹ See for example, *Mead v Legacy Health System* 352 Or 267, 283 P 3d 904 (2012); Dobbs, Hayden and Bublick *Hornbook on torts* 498 fn 41.

undertaking.⁸⁵² A medical practitioner may still be under a duty of reasonable care to non-patients when he is not acting in a professional capacity where the ordinary standard of care is applied;⁸⁵³ he creates unreasonable risks by his negligent conduct.⁸⁵⁴ For example, where the medical practitioner fails to warn a patient with epilepsy against driving and thus risking harm to others⁸⁵⁵ or when he verbally or tacitly undertakes to provide advice or treatment to a person that was not previously treated by him.⁸⁵⁶

The medical standard deviates from the ordinary standard of reasonable care. It has even been criticised for giving too much reverence for the profession and for the fact that there is often no “standard” practice.⁸⁵⁷ Some courts⁸⁵⁸ have dismissed the medical standard and applied the ordinary standard of reasonable care under the circumstances. When the ordinary standard is applied, there is not so much emphasis on expert testimony in establishing the customs and practices, which paves the way for any other relevant evidence to be provided in order to determine whether the medical practitioner’s conduct was appropriate and reasonable.⁸⁵⁹ In respect of the medical standard, expert testimony must be specific in order to establish if the standard of the medical community was met or not.⁸⁶⁰ Where there are two different accepted schools of thought in respect of the treatment and procedure that should have been followed, the defendant may not be held liable provided that his conduct

⁸⁵² See *Garcia v Lifemark Hospitals of Fla* 754 So 2d 48 (Fla Dist Ct App 1999) where it was held that an emergency room’s medical practitioner’s duties was to treat emergency conditions, not whether the plaintiff had a mental condition that may lead to suicide; Dobbs, Hayden and Bublick *Hornbook on torts* 497 fn 36.

⁸⁵³ See *MCG Health Inc v Cassey* 269 Ga App 125, 603 SE 2d 438 (2004); Dobbs, Hayden and Bublick *Hornbook on torts* 498.

⁸⁵⁴ See *Healthone v Rodriguez* 50 P 3d 879 (Colo 2002); Dobbs, Hayden and Bublick *Hornbook on torts* 498.

⁸⁵⁵ See *Duvall v Goldin* 139 Mich App 342, 362 NW 2d 275 (1984); Dobbs, Hayden and Bublick *Hornbook on torts* 500-503.

⁸⁵⁶ *Nold ex rel Nold v Binyon* 272 Kan 87, 31 P 3d 274 (2001); Dobbs, Hayden and Bublick *Hornbook on torts* 498.

⁸⁵⁷ See Peters 2000 *Wash & Lee L Rev* 163; *Cramm, Hartz and Green* 2002 *Wake Forest L Rev* 699; Dobbs, Hayden and Bublick *Hornbook on torts* 507.

⁸⁵⁸ See *Helling v Carey* 83 Wash 2d 514, 519 P 2d 981 (1974); *Harris v Groth* 99 Wash 2d 438, 663 P 2d 113 (1983); *Advincula v United Blood Services* 176 Ill 2d 1, 678 NE 2d 1009, 223 Ill Dec 1 (1996); cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 507 fn 123 as well as some statutes following the ordinary standard fn 124.

⁸⁵⁹ See Dobbs, Hayden and Bublick *Hornbook on torts* 507.

⁸⁶⁰ See *Murray v UNMC Physicians* 282 Neb 260, 806 NW 2d 118 (2011); Dobbs, Hayden and Bublick *Hornbook on torts* 509.

falls within one of the schools of thought.⁸⁶¹ The plaintiff must prove by expert testimony that there was a breach of the standard of care and at least factual causation.⁸⁶²

In terms of a patient's autonomy he has the right to be informed about the risks of treatment or procedures, whether there are other alternative procedures and the necessity of the procedure.⁸⁶³ Just over half the states in the United States of America require a "medical standard of disclosure" – information disclosed according to medical custom, in other words, what the reasonable medical practitioner would have disclosed under similar circumstances.⁸⁶⁴ The rest of the states require the material risks to be disclosed.⁸⁶⁵ According to the "medical standard of disclosure" expert evidence is required to show the standard⁸⁶⁶ while the "materiality standard of disclosure" does not require expert evidence relating to the medical custom but depends on what information a reasonable patient would want to know in order to make a decision as to whether to continue with the treatment or not.⁸⁶⁷ Generally, the medical practitioner should inform the patient of the diagnosis, general nature of the proposed procedure, the material risks involved in the procedure, the probability of success, the prognosis should the procedure not be performed, and any alternative treatment.⁸⁶⁸ A medical practitioner is generally required to inform the patient of expected or material risks and not all risks, this requirement applies as a limitation. For Example, in *Harrison v United States*⁸⁶⁹ the plaintiff's child was injured during birth and the plaintiff alleged that the obstetrician was negligent in delivering a baby normally (vaginally) without informing her of the option of a caesarean section as well as the risks involved. The court held

⁸⁶¹ See *Hood v Phillips* 554 SW 2d 160 (Tex 1977); Dobbs, Hayden and Bublick *Hornbook on torts* 494; Epstein *Torts* 142.

⁸⁶² See *Milliun v New Mildford Hospital* 310 Conn 711, 80 A 3d 887 (2013); *Beckles v Madden* 160 NH 118, 993 A 2d 209, 214 (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 512.

⁸⁶³ See *Fox v Smith* 594 So 2d 596, 604 (Miss 1992); Dobbs, Hayden and Bublick *Hornbook on torts* 513; Keeton *et al Prosser and Keeton on torts* 190.

⁸⁶⁴ See *Aiken v Clary* 396 SW 2d 668, 675 (Mo 1965); *Bronneke v Rutherford* 89 P 3d 40, 45-46 (Nev 2004) in respect of the standard of a reasonable chiropractor.

⁸⁶⁵ See authority cited by Dobbs, Hayden and Bublick *Hornbook on torts* 516 fn 203.

⁸⁶⁶ See *Woolley v Henderson* 418 A 2d 1123 (Me 1980); *Tashman v Gibbs* 263 Va 65, 556 SE 2d 772 (2002); Dobbs, Hayden and Bublick *Hornbook on torts* 516.

⁸⁶⁷ See *Logan v Greenwich Hosp Ass'n* 465 A 2d 294, 299-300 (Cal 1980); *Acuna v Turkish* 192 NJ 399, 930 A2d 416 (2007); *Moure v Raeuchle* 529 Pa 394, 405, 604 A 2d 1003, 1008 (1992); Dobbs, Hayden and Bublick *Hornbook on torts* 517-518; Epstein *Torts*.

⁸⁶⁸ See *Vasa v Compass Medical PC* 456 Mass 175, 921 NE 2d 963 (2010); *Felton v Lovett* 388 SW 3d 656 (Tex 2012); cases cited by Dobbs, Hayden and Bublick *Hornbook on torts* 519 fn 229.

⁸⁶⁹ 284 F 3d 293, 301 (1st Cir 2002).

that if the risks to either the mother or child were material to the reasonable patient in the mother's position, then the defendant had a duty to inform her.⁸⁷⁰

The requirement of disclosing material risks may be dispensed with where there is an emergency; the patient is incapacitated; the patient waives his right to be informed; if informing the patient would be harmful to him, the doctor may withhold the information as a "therapeutic privilege"; where the risks are commonly known; or if the patient is already aware of the risks.⁸⁷¹ A "material risk" is a risk which may be severe and likely to occur,⁸⁷² or relevant medical information.⁸⁷³ Most courts hold that in instances where the plaintiff was not informed of the risks, his claim lies in negligence and not in battery.⁸⁷⁴ The negligence does not lie in performing the operation which may have been performed without negligence, but lies in failing to inform the patient of any risks, alternative treatment and other required relevant information (this relates to negligent non-disclosure).⁸⁷⁵ Traditionally the scope of the duty to inform was based on whether the reasonable medical practitioner would inform the patient under the circumstances⁸⁷⁶ but Keeton *et al*⁸⁷⁷ point out that this left the right of choice to the medical community "in derogation of the patient's right of self-determination". There has thus been a shift and it now depends on whether "the reasonable person in the plaintiff's position would attach significance to the information".⁸⁷⁸ The wrong done, lies in contravening the plaintiff's right of autonomy.⁸⁷⁹ The plaintiff must prove that there was non-disclosure of the required information; harm which resulted from the risks the plaintiff was not informed of; factual causation – the plaintiff would have not

⁸⁷⁰ 301-302.

⁸⁷¹ See Meisel 1979 *Wis L Rev* 413; authority referred to by Keeton *et al Prosser and Keeton on torts* 192 fn 75-81.

⁸⁷² See *Feeley v Baer* 424 Mass 875, 876, 679 NE 2d 180, 181 (1997); Dobbs, Hayden and Bublick *Hornbook on torts* 519.

⁸⁷³ See *Acuna v Turkish* 192 NJ 399, 930 A 2d 416 (2007); Dobbs, Hayden and Bublick *Hornbook on torts* 520.

⁸⁷⁴ See *Cobbs v Grant* 8 Cal 3d 229, 502 P 2d 1, 104 Cal Rptr 505 (1972); *Kennis v Mercy Hosp Medical Center* 491 NW 2d 161 (Iowa 1992); *Howard v Univ of Med & Dentistry of New Jersey* 172 NJ 537, 800 A2d 73 (2002); cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 515 fn 194.

⁸⁷⁵ See *Hayes v Camel* 283 Conn 475, 927 A 2d 880 (2007); *Spencer v Goodill* 17 A 3d 552 (Del 2011); Dobbs, Hayden and Bublick *Hornbook on torts* 515.

⁸⁷⁶ See *Canterbury v Spence* 464 F 2d 772 (DC Cir 1972); Epstein *Torts* 144.

⁸⁷⁷ Keeton *et al Prosser and Keeton on torts* 191.

⁸⁷⁸ See *Cobbs v Grant* 1972 8 Cal 3d 229, 104 Cal Rptr 505, 502 P 2d 1, 10; *Sard v Hardy* 1977 281 Md 432, 379 A 2d 1014, 1022-1024; Keeton *et al Prosser and Keeton on torts* 191.

⁸⁷⁹ Dobbs, Hayden and Bublick *Hornbook on torts* 515.

continued with the procedure or treatment if he was aware of the risks;⁸⁸⁰ and that “reasonable persons, if properly informed, would have rejected the proposed treatment”.⁸⁸¹ Here the requirement relating to reasonable persons follows an objective approach. Keeton *et al*⁸⁸² recommend a fairer objective-subjective test whereby the ordinary patient is substituted for the “reasonable patient” and the plaintiff’s subjective fears and beliefs may be considered.⁸⁸³ However, a claim in battery is still possible in instances where the patient did not consent or where the treatment the plaintiff consented to was different from the treatment he received.⁸⁸⁴ Where a patient fails to comply with the health care provider’s instructions,⁸⁸⁵ for example to return for follow-up care or to report symptoms or medical history accurately; the medical practitioner may not be negligent or the plaintiff’s claim may be reduced as a result of his contributory fault.⁸⁸⁶

Keeton *et al*⁸⁸⁷ explain that during the 1960s and 1970s, the United States of America experienced a medical malpractice crisis as a result of an increase in medical malpractice claims. Most states thereafter passed legislation in an effort to control the crisis and litigation. Reform took place: in the statute of limitations; limitations or caps were applied to damages claimed, the “collateral source rule” was modified; emphasis was placed on pre-litigation efforts such as screening and arbitration, regulation or abolition of contingency fee agreements; adaptations to the so-called Good Samaritan statutes; changes in the law relating to the standard of reasonable care in terms of the doctrine of informed consent; and the rules relating to civil procedure and evidence.⁸⁸⁸ All states have “Good Samaritan Statutes”, which initially began in California, where the duty or care is lowered to take into account the fact that a health care provider

⁸⁸⁰ See *Tashman v Gibbs* 263 Va 65, 556 SE 2d 772 (2202); Dobbs, Hayden and Bublick *Hornbook on torts* 515.

⁸⁸¹ Dobbs, Hayden and Bublick *Hornbook on torts* 515. See *Aronson v Harriman* 321 Ark 359, 901 SW 2d 832 (1995); *Ashe v Radiation Oncology Assocs* 9 SW 3d 119 (1999); Keeton *et al Prosser and Keeton on torts* 191.

⁸⁸² Keeton *et al Prosser and Keeton on torts* 192.

⁸⁸³ See *Kinikin v Heupel Minn* 1981, 305 NW 2d 589, 595 referred to by Keeton *et al Prosser and Keeton on torts* 192.

⁸⁸⁴ See *Shuler v Garret* 743 F 3d 170 (6th Cir 2014) (Tenn Law) as well as other cases cited by Dobbs, Hayden and Bublick *Hornbook on torts* 515 fn 196.

⁸⁸⁵ See *Harlow v Chin* 405 Mass 697, 545 NE 2d 602 (1989).

⁸⁸⁶ See *Hall v Carter* 825 A 2d 954 (DC 2003); authority cited by Dobbs, Hayden and Bublick *Hornbook on torts* 528 fn 306-308.

⁸⁸⁷ *Prosser and Keeton on torts* 192-193.

⁸⁸⁸ See Probert 1975 *Fla L Rev* 56; Keeton *et al Prosser and Keeton on torts* 193.

renders assistance in emergency situations which occur beyond his regular professional practice.⁸⁸⁹ It encourages health care providers to render assistance where applicable and the health care provider may depending on the circumstances, not be held liable in negligence.⁸⁹⁰

There is a duty on health care institutions, such as hospitals owed towards its patients to act with reasonable care.⁸⁹¹ Traditionally health care institutions enjoyed immunity from liability; however, over time stemming from *Darling v Charleston Community Memorial Hospital*,⁸⁹² the courts have held health care institutions liable.⁸⁹³ In *Darling*, a doctor's treatment of a patient's broken leg in hospital subsequently resulted in gangrene. The leg had to be amputated. The patient sued the hospital for failing to provide trained nurses who could have recognised the early onset of gangrene and for failing to oversee or supervise the doctor's treatment. The court found the hospital liable. Health care institutions may be held liable for failing to: provide adequate facilities, staff or equipment;⁸⁹⁴ looking after patients;⁸⁹⁵ or supervising or reviewing medical practitioners who use the hospitals resources.⁸⁹⁶

As can be gleaned from the above discussion with regard to medical malpractice claims, all the elements of the tort of negligence must be present. The influence of reasonableness on medical malpractice is predominantly explicit. The influence of reasonableness may be considered implicit when the duty of care is established from the doctor-patient relationship. It is explicit in respect of whether a duty of reasonable care is owed by the medical practitioner, the ordinary standard of care owed as well as the breach of the reasonable duty of care. The duty of reasonable care owed stems from the doctor-patient relationship. There are reciprocal duties in that a medical practitioner undertakes to treat the patient to the best of his abilities while the patient

⁸⁸⁹ See Dobbs, Hayden and Bublick *Hornbook on torts* 523.

⁸⁹⁰ See discussion by Dobbs, Hayden and Bublick *Hornbook on torts* 523-524.

⁸⁹¹ See *Duling v Bluefield Sanitarium Inc* 149 W Va 567, 142 SE 2d 754 (1965); *Johnson v Hilcrest Health Ctr Inc* 70 P 3d 811 (Okla 2003); cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 529 fn 316.

⁸⁹² 33 Ill 2d 326, 211 NE 253 (1965).

⁸⁹³ See in general Dobbs, Hayden and Bublick *Hornbook on torts* 529-531.

⁸⁹⁴ See *Douglas v Freeman* 117 Wash 2d 242, 814 P2d 1160 (1991); cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 531 fn 341.

⁸⁹⁵ See *Johnson v Hilcrest Health Ctr Inc* 70 P 3d 811 (Okla 2003); Dobbs, Hayden and Bublick *Hornbook on torts* 531.

⁸⁹⁶ See *Darling v Charleston Community Memorial Hospital* 33 Ill 2d 326, 211 NE 253 (1965).

consents to such treatment⁸⁹⁷ and must follow the advice of the medical practitioner with regard to treatment. There must be a breach of a duty of reasonable care owed to the patient and the harm must result from the negligent conduct, for a successful claim in negligence. In respect of the required duty of care placed on the medical practitioner, professional reasonable conduct is expected from the medical practitioner in all aspects of treatment: whether it deals with providing information to the patient; treatment; conduct during operations; follow-up treatment; and so forth. In order to establish whether a medical practitioner or health care provider's conduct was reasonable and appropriate, either expert testimony of acceptable customs or practices of the medical community is considered, where it will depend on whether the medical practitioner applied the care and skill normally exercised by other medical practitioners in similar circumstances,⁸⁹⁸ or any other relevant evidence may be considered.⁸⁹⁹ With regard to disclosing information, a medical practitioner's conduct may be found unreasonable when tested either against the medical standard of disclosure, that is, tested against what information a reasonable medical practitioner would have disclosed under similar circumstances where expert evidence relating to medical custom and practice must be provided;⁹⁰⁰ or the material risks that a reasonable patient would want to know in order to make an informed decision as to whether to continue with the treatment or not.⁹⁰¹ The focus has shifted from the medical practitioner to the patient and his right of autonomy.⁹⁰² It is submitted that in the end it still comes down to whether the medical practitioner acted reasonably or not in providing the patient with the required information. It is reasonable that not all risks need to be explained, but rather only the material risks.⁹⁰³ The test is still objective, in that in order for the plaintiff to succeed in proving negligence, the plaintiff must prove that if a reasonable patient under similar circumstances would have been informed of the risks he would have refused the treatment.⁹⁰⁴ It is reasonable that the requirement of disclosing material risks may be dispensed with: in cases of emergency; where the

⁸⁹⁷ See cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 497 fn 34-35.

⁸⁹⁸ Dobbs, Hayden and Bublick *Hornbook on torts* 504.

⁸⁹⁹ Dobbs, Hayden and Bublick *Hornbook on torts* 507.

⁹⁰⁰ See *Aiken v Clary* 396 SW 2d 668, 675 (Mo1965).

⁹⁰¹ See Dobbs, Hayden and Bublick *Hornbook on torts* 517-518.

⁹⁰² See Dobbs, Hayden and Bublick *Hornbook on torts* 515; Keeton *et al Prosser and Keeton on torts* 191.

⁹⁰³ See authority cited by Dobbs, Hayden and Bublick *Hornbook on torts* 516 fn 203.

⁹⁰⁴ See Dobbs, Hayden and Bublick *Hornbook on torts* 515; Keeton *et al Prosser and Keeton on torts* 191.

patient is incapacitated; if depending on the circumstances informing the patient would be harmful to him; where the patient has waived his rights to be informed; where the risks are commonly known; or if the patient is aware of the risks.⁹⁰⁵ It is reasonable that in instances where the patient acts unreasonably and fails to heed the advice of the medical practitioner or follow his instructions with regard to treatment and so on,⁹⁰⁶ then depending on the circumstances, the medical practitioner may not be held liable or the plaintiff's claim may be reduced as a result of his contributory fault.⁹⁰⁷ It is reasonable that the standard of care is lowered for persons who provide emergency medical treatment in terms of the Good Samaritan Statutes. These statutes encourage health care providers to freely render assistance where possible in such an emergency situation without having to face a claim in negligence.⁹⁰⁸ The United States of America legislature had to control the crisis through legislation as a result of the high medical malpractice claims.⁹⁰⁹ It is common knowledge that South Africa is experiencing a similar crisis and the legislature must inevitably intervene to control the crisis.

3.4.3 Wrongful conception, wrongful birth and wrongful life claims

In wrongful conception, wrongful birth and wrongful life claims, an action is usually brought against the medical practitioner.⁹¹⁰ The plaintiff must prove that the medical practitioner was negligent in breaching either a medical standard or a statute.⁹¹¹ In a wrongful life claim, the child sues the medical practitioner for harm suffered as a result of a birth defect or disability. The allegation is usually that the medical practitioner negligently allowed the child to be born with such birth defect or disability and the child claims for the suffering he must endure.⁹¹² Most courts do not allow such a claim due to a number of policy factors such as the view that "life itself cannot be considered as harm, or that compensation cannot be determined "for the harm of living as compared

⁹⁰⁵ See authority referred to by Keeton *et al Prosser and Keeton on torts* 192 fn 75-81.

⁹⁰⁶ See *Harlow v Chin* 405 Mass 697, 545 NE 2d 602 (1989).

⁹⁰⁷ See authority cited by Dobbs, Hayden and Bublick *Hornbook on torts* 528 fn 306-308.

⁹⁰⁸ See discussion by Dobbs, Hayden and Bublick *Hornbook on torts* 523-524.

⁹⁰⁹ See Keeton *et al Prosser and Keeton on torts* 192-193.

⁹¹⁰ Dobbs, Hayden and Bublick *Hornbook on torts* 677.

⁹¹¹ Dobbs, Hayden and Bublick *Hornbook on torts* 677.

⁹¹² See Rogers 1982 *S C L Rev* 713; Trotzig 1980 *Fam L Q* 15; comprehensive authority cited by Keeton *et al Prosser and Keeton on torts* 370 fn 33.

to never having lived at all”.⁹¹³ In *Gleitman v Cosgrove*,⁹¹⁴ a child sustained birth defects as a result of a mother contracting German measles during pregnancy. The medical practitioner was sued for negligently assuring the mother that the child would not be affected. The mother alleged that had she been aware of the risks she would have terminated the pregnancy. The court presented with a number of factors to consider which included: calculating damages for harm; the view that the child should not have been born; the benefit of parenthood rule; and the effect of sanctioning abortion denied a wrongful life and wrongful birth claim. Following this decision most courts deny wrongful life claims.⁹¹⁵ If claims are allowed, general damages are not usually awarded but claims for special damages relating to medical and similar related expenses have been allowed.⁹¹⁶

Wrongful birth claims are usually instituted by the mother based on the negligence of the medical practitioner in failing to pick up genetic defects which, had the mother known of, would have terminated the pregnancy.⁹¹⁷ The wrongful birth claim is “viewed as a species of an informed consent claim” in that it protects the right to autonomy, the choice to terminate the pregnancy.⁹¹⁸ Some states⁹¹⁹ have denied wrongful life claims⁹²⁰ or have anti-abortion legislation in place.⁹²¹ Some states allow recovery for

⁹¹³ Dobbs, Hayden and Bublick *Hornbook on torts* 677 fn 61-62. See *Willis v Wu* 362 SC 146, 607 SE 2d 63 (2004); *Walker v Mart* 164 Ariz 37, 790 P 2d 735 (1990); *Kassama v Magat* 368 Md 113, 792 A 2d 1102 (2002); *Cowe v Forum Group Inc* 575 NE 2d 630 (Ind 1991); *BDH ex rel SKL v Mickelson* 792 NW 2d 169 (ND 2010) – statute denied a wrongful life claim.

⁹¹⁴ 1967 49 NJ 22, 227 A 2d 689.

⁹¹⁵ See *Berman v Allan* 404 A 2d 8 (New Jersey 1979); Green and Cardi in Koziol (ed) *Basic questions of tort law* 463.

⁹¹⁶ See *Turpin v Sortini* 31 Cal 3d 220, 182 Cal Rptr 337, 643 P 2d 954 (1982); *Harbeson v Parke-Davis Inc* 1983 98 Wn 2d 460, 656 P 2d 483; *Johnson v Superior Court* 101 Cal App 4th 869, 124 Cal Rptr 2d 650 (2002); cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 677 fn 63; cases referred to by Keeton *et al Prosser and Keeton on torts* 371 fn 45.

⁹¹⁷ See *Galvez v Frields* 88 Cal App 4th 1410, 107 Cal Rptr 2d 50 (2001); *Arche v United States* 247 Kan 276, 798 P 2d 477 (1990); *Ditato v Strehler* 554 SE 2d 42 (Va 2001); Dobbs, Hayden and Bublick *Hornbook on torts* 678.

⁹¹⁸ Dobbs, Hayden and Bublick *Hornbook on torts* 679.

⁹¹⁹ Such as Georgia holding that the legislature must recognise such claims. See *Etkind v Suarez* 271 Ga 352, 519 SE 2d 210 (1999); Dobbs, Hayden and Bublick *Hornbook on torts* 679 fn 76-77.

⁹²⁰ See *Szekeres v Robinson* 715 P 2d 1076 954 (California 1982); Green and Cardi in Koziol (ed) *Basic questions of tort law* 463.

⁹²¹ See for example, Idaho Code § 145.424; Minn Stat Ann §5-334; cf authority cited by Dobbs, Hayden and Bublick *Hornbook on torts* 679 fn 79-81; Keeton *et al Prosser and Keeton on torts* 371.

wrongful birth claims by applying the “benefit rule”, whereby the costs of raising a child are offset by the benefit of the joy and companionship of the child to the parents.⁹²²

Wrongful conception claims assert that the medical practitioner was negligent in providing advice or failing to prevent conception, resulting in the mother giving birth to a healthy child but being burdened with the expenses of raising the child.⁹²³ In instances of failed sterilisation, most courts do not allow compensation related to the cost of raising a healthy child.⁹²⁴ Some courts have allowed juries to award child-raising costs where the parents wanted to avoid having children for financial or economic reasons.⁹²⁵ However, courts have allowed damages relating to *inter alia*: medical costs incurred during pregnancy and delivery of the child;⁹²⁶ lost wages from taking time off from work due to the pregnancy and delivery of the baby;⁹²⁷ and emotional distress from having an unplanned child.⁹²⁸ The limitations on the damages recovered are based on the idea that the economic or emotional harm suffered by the parents as a result of an unwanted or unplanned child are offset by the benefit of having the child.⁹²⁹ Damages are generally not allowed for child-raising costs where the child is born normal,⁹³⁰ but some courts do award such damages. When the courts allow recovery for child raising costs, the award may be reduced by taking into account the benefit of parenthood rule.⁹³¹

⁹²² See *Johnson v University Hospital of Cleveland* 540 NE 2d 1370, 1378 (Ohio 1989); *Jones v Malinowski* 473 A 2d 429 Maryland 1984; Green and Cardi in Koziol (ed) *Basic questions of tort law* 463.

⁹²³ See *Etkind v Suarez* 271 Ga 352, 519 SE 2d 210 (1999); *Jackson v Bumgardner* 318 NC 172, 347 SE 2d 743 (1986); Dobbs, Hayden and Bublick *Hornbook on torts* 680.

⁹²⁴ See *Chaffee v Seslar* 786 NE 2d 705 (Ind 2003); *Schork v Huber* 648 SW 2d 861 (Ky 1983); authority cited by Dobbs, Hayden and Bublick *Hornbook on torts* 681 fn 100.

⁹²⁵ See *University of Ariz Health Scis Ctr v Superior Court* 136 Ariz 579, 667 P 2d 1294 (1983); *Burke v Rivo* 406 Mass 764, 551 NE 2d 1 (1990); authority cited by Dobbs, Hayden and Bublick *Hornbook on torts* 682 fn 103.

⁹²⁶ See *Pitre v Opelousas Gen Hosp* 530 So 2d 1151 (La 1988); Dobbs, Hayden and Bublick *Hornbook on torts* 682.

⁹²⁷ See *Smith v Gore* 728 SW 2d 738, 751 (Tenn 1987); Dobbs, Hayden and Bublick *Hornbook on torts* 682.

⁹²⁸ See *Pitre v Opelousas Gen Hosp* 530 So 2d 1151 (La 1988); cases referred to by Keeton *et al Prosser and Keeton on torts* 372 fn 57; Dobbs, Hayden and Bublick *Hornbook on torts* 682.

⁹²⁹ Dobbs, Hayden and Bublick *Hornbook on torts* 682.

⁹³⁰ See *Ramey v Fassoulas* Fla App 1982 414 So 2d 198 where special damages were allowed for raising a child with significant impairment. See Keeton *et al Prosser and Keeton on torts* 372.

⁹³¹ See *Ochs v Borrelli* 1982 187 Conn 253, 445 A2d 883; *Phillips v United States DSC* 1981 508 F Supp 544; *Sherlock v Stillwater Clinic Minn* 1977 260 NW 2d 169; *Hartke v McKelway* DC Cir 1983, 707 F 2d 1544; Keeton *et al Prosser and Keeton on torts* 372.

The influence of reasonableness on wrongful conception, wrongful birth and wrongful life claims is partly implicit and partly explicit. The duty of care stems from the doctor-patient relationship. With wrongful conception and wrongful birth claims, the parents' interests in autonomy are infringed in an unreasonable manner. In terms of negligence it must be proven that the provision of the statute was infringed unreasonably and unjustifiably or that the medical practitioner breached the medical standard and his conduct was unreasonable. Thus it would be reasonable to hold the medical practitioner liable for the damages sustained where the medical standard or statute is breached. The birth of a healthy child results in costs of upbringing of the child; or the birth of a child born with disabilities results in costs of raising the child and medical expenses which may not have occurred had the medical practitioner acted reasonably.

3.4.4 Emotional harm or distress

Recovering damages for emotional harm is not problematic when it is claimed with other damages under a tort such as assault, battery, physical injury from negligent conduct and so on. So-called parasitic damages are awarded in these instances.⁹³² Stand-alone claims for emotional distress (pure emotional harm) as a separate tort itself (whether the emotional harm was caused negligently or intentionally), is however subject to specific limitations.⁹³³ The policy concerns for being cautious in awarding damages for stand-alone emotional harm⁹³⁴ include: the anticipated flood of litigation;⁹³⁵ the difficulty of proving and quantifying damages for such harm, which impacts negatively on consistency in awards and the dispensing of justice;⁹³⁶ the subjectivity of how much emotional harm a person sustains;⁹³⁷ and an award for emotional harm may not result in a person no longer suffering such harm.⁹³⁸ It is

⁹³² See Keeton *et al Prosser and Keeton on torts* 363.

⁹³³ See Keeton *et al Prosser and Keeton on torts* 55 fn 1 who refer to a number of articles explaining the development of claims for emotional harm and how the limits are still to be determined; Dobbs, Hayden and Bublick *Hornbook on torts* 700.

⁹³⁴ See *Restatement Third of Torts (Liability for Physical Harm and Emotional Harm)* ch 8 scope note 2 (Tentative Draft No. 5 2007); Geistfeld 2011 *Yale L J* 155.

⁹³⁵ See Keeton *et al Prosser and Keeton on torts* 56.

⁹³⁶ See Bohlen 1902 *Am L Reg NS* 141, 143; Keeton *et al Prosser and Keeton on torts* 55.

⁹³⁷ See Keeton *et al Prosser and Keeton on torts* 55.

⁹³⁸ See *Thing v La Chusa* 771 P 2d 814, 828-829 (Cal 1989); Dobbs, Hayden and Bublick *Hornbook on torts* 700-703 and in particular the authority cited in fn 7-10.

possible, however, to claim emotional harm under one tort such as battery as well as a stand-alone emotional distress claim where the facts may give rise to both claims.⁹³⁹

The *Restatement Third of Torts*⁹⁴⁰ recognises liability for severe emotional harm caused intentionally⁹⁴¹ or recklessly.⁹⁴² With regard to intentionally inflicted harm, there must be proof of severe emotional harm suffered (not trivial harm);⁹⁴³ “extreme” or “outrageous” conduct on the part of the defendant which has passed the limit of reasonable bounds of decency and is “intolerable” in a civilised community;⁹⁴⁴ intention to cause such harm, where proof that the harm is certain to occur is sufficient,⁹⁴⁵ or “recklessness”, or a “willful attitude”.⁹⁴⁶ Courts in reference to extreme or outrageous conduct articulate conduct which is clearly beyond human decency and social norms.⁹⁴⁷ The notion of “outrageousness” requires the adjudicator to evaluate the complaints, evidence, conduct, and estimate whether the community would consider such conduct as outrageous.⁹⁴⁸ For example, conduct which results in the defendant abusing his position or power;⁹⁴⁹ taking advantage of or emotionally harming the

⁹³⁹ See for example, *KM v Ala Dep’t of Youth Servs* 360 F Supp 2d 1253 (MD Ala 2005); Dobbs, Hayden and Bublick *Hornbook on torts* 705.

⁹⁴⁰ (*Liability for Physical and Emotional Harm*) § 46 (2012). See also *Restatement Second of Torts* § 46 (1965).

⁹⁴¹ See Prosser 1939 *Mich L Rev* 874; Givelber 1982 *Colum L Rev* 42, 46-49.

⁹⁴² See *Russell v Salve Regina College* 649 F Supp 391, 401 (DR 1 1986); Shapo *Tort* 68.

⁹⁴³ In *Braski v Ah-Ne-Pee Dimensional Hardwood Inc* 630 F Supp 862, 866 (WD Wis 1986) the court denied recovery for emotional distress to a plaintiff who had not visited a medical practitioner after the incident stemming from the termination of her employment and had only seen a psychiatrist before the trial. The psychiatrist noted temporary and limited distress for seven months. The court held that the employers conduct was not outrageous and that her claim was frivolous. See also *Eckenrode v Life of America Insurance Co* (7th Cir 1972) 470 F 2d 1; *Fletcher v Western National Insurance Co* 1970 10 Cal App 3d 376, 89 Cal Rptr 78; Magruder 1936 *Harv L Rev* 1033, 1035; Keeton *et al Prosser and Keeton on torts* 59, 60 fn 54; Shapo *Tort* 70-71.

⁹⁴⁴ See for example, *Boswell v Barnum & Bailey* 1916 135 Tenn 35, 185 SW 692 where the insult and abuse of circus seats was considered outrageous; *Interstate Amusement Co v Martin* 1913 8 Ala App 481, 62 So 404 where the plaintiff was called on stage and humiliated; *Restatement Second of Torts* § 46 comment d (1965); Keeton *et al Prosser and Keeton on torts* 59.

⁹⁴⁵ See *Chamberlain v Chandler* CC Mass 1823 3 Mason 242, 5 Fed Cas No.2, 575; Prosser 1939 *Mich L Rev* 874; Vold 1939 *Neb L B* 222; Borda 1939 *Geo L J* 55; Seitz 1940 *Ky L J* 411; Smith 1957 *Drake L Rev* 53; Keeton *et al Prosser and Keeton on torts* 57.

⁹⁴⁶ See *Blakely v Shortfal’s Estate* 1945 236 Iowa 787, 20 NW 2d 28; *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 46 cmt h; Dobbs, Hayden and Bublick *Hornbook on torts* 707.

⁹⁴⁷ See *Mahnke v Moore* 1951, 197 Md 61, 77 A 2d 923; *McCulloh v Drake* 24 P 3d 1162, 1169-1170 (Wyo 2001); *White v Brommer* 747 F Supp 2d 447 (ED Pa 2010); *Valadez v Emmis Commc’ns* 229 P 3d 389 (Kan 2010); Rabin 2009 *Wake Forest L Rev* 1197; Dobbs, Hayden and Bublick *Hornbook on torts* 707.

⁹⁴⁸ See Shapo *Tort* 78.

⁹⁴⁹ See for example, *District of Columbia v Tulin* 994 A 2d 788 (DC 2010) where a police officer was a cause of an accident but instead allowed another motorist to be falsely arrested for

plaintiff who is vulnerable;⁹⁵⁰ continuing or repeating unacceptable conduct;⁹⁵¹ threats or acts of violence to the plaintiff, person or his property⁹⁵² where the plaintiff has a special relationship with the person or special interest in the property;⁹⁵³ and sexual harassment in the place of employment;⁹⁵⁴ may be deemed as outrageous conduct.⁹⁵⁵ The emotional distress endured by the plaintiff must be severe in that either a reasonable person should not be expected to tolerate it (an objective test)⁹⁵⁶ or the plaintiff may show that he endured severe emotional distress.⁹⁵⁷ Hurt feelings,⁹⁵⁸ mere profanity or abuse, obscenity, threats and so on that are considered as annoyances will not lead to recovery of compensation for mental harm.⁹⁵⁹ Fright, shock, rage, anxiety, grief and so on are considered as “physical” injuries.⁹⁶⁰ Therefore the brain and nervous system is considered just as much as part of the body as for example an arm or a leg.⁹⁶¹ In general, if a reasonable person would not suffer serious emotional harm, then the plaintiff may not be entitled to compensation.⁹⁶² However, if a plaintiff

reckless driving; *Brandon v Cnty of Richardson* 261 Neb 636, 624 NW 2d 604 (2001) where a sheriff interrogated a transsexual victim of rape in a cruel manner soon after the rape occurred; *Grager v Schudar* 770 NW 2d 692 (ND 2009) where a jailer had intercourse with a prisoner; Dobbs, Hayden and Bublick *Hornbook on torts* 708 fn 54.

⁹⁵⁰ See for example *Doe v Corporation of President of Church of Jesus Christ of Latter-Day Saints* 141 Wash App 407, 167 P 3d 1193 (2007) where a bishop told a teenager who was sexually abused that if she reported the abuse, she would be blamed for the break-up of her family (Dobbs, Hayden and Bublick *Hornbook on torts* 708 fn 55).

⁹⁵¹ See for example *Gleason v Smolinski* 88 A 3d 589 (Conn 2014) where the defendants continued hanging posters close to the plaintiff's house purely to intimidate her; *Contreras v Crown Zellerbach Corp* 88 Was 2d 735, 565 P 2d 1173 (1977) (harassment at place of employment); other cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 708 fn 56.

⁹⁵² See *Plotnik v Meihaus* 208 Cal App 4th 1590, 146 Cal Rptr 3d 585 (2012) where threats were made to harm the homeowners dog and wife; Dobbs, Hayden and Bublick *Hornbook on torts* 709.

⁹⁵³ See for example, *Nims v Harrison* 768 So 2d 1198 (Fla Dist Ct App 2000) where the plaintiff was threatened with harm to her children; cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 709 fn 59-61.

⁹⁵⁴ See *Shaffer v National Can Corp* 565 F Supp 909, 915 (ED Pa 1983).

⁹⁵⁵ Dobbs, Hayden and Bublick *Hornbook on torts* 708-709.

⁹⁵⁶ See *McQuay v Guntharp* 331 Ark 466, 963 SW 2d 583 (1998); Dobbs, Hayden and Bublick *Hornbook on torts* 710.

⁹⁵⁷ See *State Farm Mut Auto Ins Co v Campbell* 538 US 408, 123 S Ct 1513, 155 L Ed 2d 585 (2003); Dobbs, Hayden and Bublick *Hornbook on torts* 710-711.

⁹⁵⁸ See *Wallace v Shoreham Hotel Corp* App DC 1946 49 A 2d 81; Keeton *et al Prosser and Keeton on torts* 60.

⁹⁵⁹ See for example, *Taft v Taft* 1867 40 Vt 229; *Johnson v General Motors Acceptance Corp* 5th Cir 1955, 228 F 2d 104; *Slocum v Food Fair Stores of Florida Inc* Fla 1958 100 So 2d 396; other cases cited by Keeton *et al Prosser and Keeton on torts* 59 fn 42-44.

⁹⁶⁰ See Goodrich 1922 *Mich L Rev* 497; Tibbets 1904 *Cent LJ* 83; as well as other authority cited by Keeton *et al Prosser and Keeton on torts* 56 fn 9

⁹⁶¹ See chapter 3 para 8.

⁹⁶² See for example *Williamson v Bennett* 251 NC 498, 112 SE 2d 48 (1960) where the plaintiff went into such an emotional state imagining that she had struck down a child – she was not entitled to compensation for emotional harm as the reasonable person would not have suffered

has an inherent infirmity or pre-existing condition which results in the plaintiff sustaining more harm than a normal person without a pre-existing condition, then the thin-skull rule applies whereby the plaintiff is in principle entitled to full compensation for the emotional harm suffered.⁹⁶³

Secondary victims of intentionally inflicted emotional distress may be entitled to claim. However, the *Restatement Third of Torts*⁹⁶⁴ limits recovery for emotional harm to close family members⁹⁶⁵ and where the defendant acts with a purpose, or substantial certainty, or is reckless in harming the secondary victim. For example, where a child witnesses the battery of the mother, the mother (as the primary victim) and the child (secondary victim) may claim for emotional distress.⁹⁶⁶ Compensation for emotional harm to a large group of persons such as secondary victims who witness a disturbing event will generally not be entitled to claim as liability may be unlimited.⁹⁶⁷ Claims by secondary victims have been limited by requiring that the mental harm must have been reasonably foreseen or anticipated.⁹⁶⁸

In terms of negligently inflicted harm, claims for emotional harm have succeeded in instances of, for example: negligently informing a person that someone has died when in fact they had not and where it is likely to result in serious mental harm;⁹⁶⁹ or negligent mishandling of corpses resulting in mental harm.⁹⁷⁰

such emotional harm; cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 732 fn 257.

⁹⁶³ See for example, *Brackett v Peters* 11 F 3d 78 (7th Cir 1993); *Steinhauser v Hertz Corp* 421 F 2d 1169 (2nd Cir 1970); cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 732 fn 256.

⁹⁶⁴ (*Liability for Physical and Emotional Harm*) § 46 cmt m (2012). See also *Restatement Second of Torts* § 46(2) (1965).

⁹⁶⁵ See however, *Hill v Kimball* 1890 76 Tex 210, 13 SW 59; *Rogers v Williard* 1920 144 Ark 587, 223 SW 15 where the family members were not immediate family members.

⁹⁶⁶ See *Courtney v Courtney* 413 SE 2d 418, 424 (W Va 1991); *Bevan v Fix* 42 P 3d 1013, 1022-1024 (Wyo 2002); Dobbs, Hayden and Bublick *Hornbook on torts* 712.

⁹⁶⁷ *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 46 cmt i (2012). See Dobbs, Hayden and Bublick *Hornbook on torts* 712.

⁹⁶⁸ See for example, *Goddard v Watters* 1914 14 Ga App 722, 82 SE 304; as well as other cases referred to by Keeton *et al Prosser and Keeton on torts* 65 fn 4-6.

⁹⁶⁹ See *Russ v Western Union Telegraph Co* 1943 222 NC 504, 23 SE 2d 681 where the company negligently transmitted a message that a person had died; *Johnston v State of New York* 1975 37 NY 2d 378, 372 NYS 2d 638, 334 NE 2d 590 where a hospital negligently misinformed the plaintiff that her mother had died; *Prosser and Keeton on torts* 362.

⁹⁷⁰ See *Chisum v Behrens* SD 1979 283 NW 2d 235; *Chelini v Nieri* 1948 32 Cal 2d 480, 196 P 2d 915 (negligent embalming); *Torres v State* 1962 34 Misc 2d 488, 288 NYS 2d 1005 dealing with unauthorised burial and autopsy; other cases referred to by *Prosser and Keeton on torts* 362.

Physical contact or injury⁹⁷¹ in a claim for emotional shock is no longer a requirement.⁹⁷² Evidence of any medically recognisable harm, which need not be severe,⁹⁷³ manifesting the emotional shock or fright sustained from a sudden event or threat of harm, is generally required. The emotional harm must result in an illness or injury to the mind, injury to personality, or the nervous system.⁹⁷⁴ However, the *Restatement Third of Torts*⁹⁷⁵ and some states allow a plaintiff to recover compensation for negligently inflicted emotional harm if on a preponderance of evidence it is shown that the plaintiff suffered serious emotional harm, without proving physical contact or physical manifestations of the emotional harm.⁹⁷⁶ In Tennessee, the special requirements for emotional harm have been abolished and reliance is placed on a foreseeability of emotional harm test requiring medical or scientific proof.⁹⁷⁷

Emotional harm may result from: sudden shock or fright;⁹⁷⁸ physical harm or the threat thereof;⁹⁷⁹ fear of future harm from toxic exposure; receiving incorrect information, for

⁹⁷¹ In *Mitchell v Rochester Railway Co* 45 NE 354 (NY 1896) the plaintiff had sustained a miscarriage and suffered shock when the defendant's horses came close to contact with her. There was no physical contact and the court denied compensation for shock alone. In *Battalla v State* 176 NE 2d 729 (NY 1961) the requirement of physical contact was abandoned. See *Restatement Second of Torts* § § 436, 436A; other cases referred to by *Prosser and Keeton on torts* 364 fn 55.

⁹⁷² Dobbs, Hayden and Bublick *Hornbook on torts* 715.

⁹⁷³ See *Armstrong v Paoli Mem'l Hosp* 430 Pa Super 36, 633 A 2d 605 (1993) where the plaintiff lost control of his bowel and bladder after sustaining shock. This evidence was considered sufficient. See Dobbs, Hayden and Bublick *Hornbook on torts* 722.

⁹⁷⁴ See for example *Paz v Brush Engineered Materials Inc* 949 So 2d 1 (Miss 2007); cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 722 fn 191.

⁹⁷⁵ (*Liability for Physical and Emotional Harm*) § 47 cmt j and § 48 cmt i (2012). All that is required is "serious emotional disturbance". See Dobbs, Hayden and Bublick *Hornbook on torts* 723.

⁹⁷⁶ See *Camper v Minor* 915 SW 2d 437 (Tenn 1996); *Hagel v McMahon* 136 Wash 2d 122, 134, 960 P 2d 424, 431 (1998); *Bowen v Lumbermens Mut Cas Co* 183 Wis 2d 627, 517 NW 2d 432 (1994); *Gates v Richardson* 719 P 2d 193 (Wyo 1986); *Johnson v State* 37 NY 2d 378, 334 NE 2d 590, 372 NYS 2d 638 (1975); further cases cited by Dobbs, Hayden and Bublick *Hornbook on torts* 723 fn 196.

⁹⁷⁷ See *Camper v Minor* 915 SW 2d 437 (Tenn 1996); *Ramsey v Beavers* 931 SW 2d 527 (Tenn 1996); *Flax v DaimlerChrysler Corp* 272 SW 3d 521 (Tenn 2008); Dobbs, Hayden and Bublick *Hornbook on torts* 724.

⁹⁷⁸ See *Sundquist v Madison Ry* 221 NW 2d 63 (Wisc 1960).

⁹⁷⁹ See *Orlo v Connecticut Co* 21 A 2d 402 (Conn 1941).

example, that a person has a condition;⁹⁸⁰ or that a person died but is in fact alive;⁹⁸¹ and where the “defendant is under a duty of care for the plaintiff’s well-being”.⁹⁸² In instances where a plaintiff is exposed to something harmful such as asbestos or excessive x-rays and then develops emotional harm from fear of future harm such as cancer, the plaintiff may be entitled to compensation for the emotional harm sustained.⁹⁸³ The emotional harm usually forms part of other damages claimed stemming from the injury, referred to as “parasitic damages”, but the courts have awarded compensation for stand-alone emotional harm where there is fear of future harm. An example of a stand-alone claim for emotional harm is where a medical practitioner negligently fails to detect a condition due to a negligent reading of test results, but later finds out that the plaintiff requires treatment. The delay results in the likelihood of future cancer and the plaintiff subsequently suffers emotional harm.⁹⁸⁴ There must however be a reasonable fear of future harm in that an ordinary person in society would have a similar fear. The plaintiff may prove the reasonable fear by providing evidence, for example, that he was exposed to a virus (such as AIDS) or injected with a possible contaminated needle.⁹⁸⁵

Negligently inflicted emotional harm may occur directly to the plaintiff (from here referred to as the “primary victim”) or to a third person (from here referred to as the “secondary victim”).⁹⁸⁶ Limitations do however apply to claims for primary and

⁹⁸⁰ See *Moolien v Kaiser Foundation Hospitals* 616 P 3d 813, 816-817 (Cal 1980) where a woman was told she had syphilis which was infectious and that she should inform her husband. This caused distrust between the couple leading to the breakdown of the marriage. The court allowed the husband’s claim for emotional distress stating that it was reasonably foreseeable and predictable that a wrong diagnosis would result in marital discord and emotional distress (820).

⁹⁸¹ See for example, *Russ v W Union Tel Co* 222 NC 504, 23 SE 2d 681 (1943); Dobbs, Hayden and Bublick *Hornbook on torts* 726.

⁹⁸² For example, where a medical practitioner’s negligent conduct results in the loss of a foetus. The mother may claim for emotional harm sustained as there is a doctor-patient relationship, see *Broadnax v Gonzalez* 2 NY 3d 148, 809 NE 2d 645, 777 NYS 2d 416 (2004); *Toney v Chester Cnty Hosp* 36 A 3d 83 (Pa 2011). See also Dobbs, Hayden and Bublick *Hornbook on torts* 728-731; Dobbs 2008 *Ariz L Rev* 49; *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 47(b) (2012).

⁹⁸³ See for example, *Ferrara v Galluchio* 5 NY 2d 16, 152 NE 2d 249, 176 NYS 2d 996 (1958); *CSX Transp Inc v Hensley* 556 US 838, 129 S Ct 2139, 173 L Ed 2d 1184 (2009); *Norfolk & Western Railway Co v Ayers*, 538 US 135, 123 S Ct 1210, 155 L Ed 2d 261 (2003); cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 725 fn 208-211.

⁹⁸⁴ See for example *Gilliam v Roche Biomedical Labs Inc* 989 F 2d 278 (8th Cir 1993).

⁹⁸⁵ See *Faya v Almaraz* 329 Md 435, 620 A 2d 327 (1993); *Madrid v Lincoln Cnty Med Ctr* 923 P 2d 1134 (NM 1996). Cf cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 723 fn 214-220.

⁹⁸⁶ See *Restatement Third of Torts (Liability for Physical and Emotional Harm)* §§ 47-48 (2012).

secondary emotional harm sustained. In the case of primary victims, they must have been in a position of “immediate danger of bodily harm”,⁹⁸⁷ or the harm must occur “within the confines of particular undertakings or special relationships”.⁹⁸⁸ The plaintiff must have suffered severe emotional stress which may be proven by providing medical evidence or evidence relating to the physical manifestation of the emotional stress.⁹⁸⁹ Generally only serious emotional harm that a normal person would sustain or that a reasonable person would foresee is compensable.⁹⁹⁰ Where the defendant negligently causes emotional harm which was foreseeable, the defendant will be held liable.⁹⁹¹ Dobbs, Hayden and Bublick⁹⁹² however state that it is “fair to say that these rules are not about foreseeability but about pragmatic limits on liability, which are endemic to this area”.

In respect of secondary victims, only close family members are entitled to claim where they also “contemporaneously perceived the harm-causing event”.⁹⁹³ Where emotional harm results from negligent harm or threat to property including one’s pet, the courts will not award compensation.⁹⁹⁴ Claims for negligently inflicted secondary emotional harm are more likely to succeed where the victim: was a bystander who witnesses injury or threat of harm to a close relative;⁹⁹⁵ was in the zone of danger where the victim fears for his own safety;⁹⁹⁶ or where the emotional harm was

⁹⁸⁷ *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 47 cmt a (2012).

⁹⁸⁸ Dobbs, Hayden and Bublick *Hornbook on torts* 714. See *Hedgepeth v Whitman Walker Clinic* 22 A 3d 789 (DC 2011); *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 47 (2012).

⁹⁸⁹ See *Feller v First Interstate Bancsystem Inc* 299 P 3d 338 (Mont 2013); *Camper v Minor* 915 SW 2d 437 (Tenn 1996); other cases referred to Dobbs, Hayden and Bublick *Hornbook on torts* 714 fn 112.

⁹⁹⁰ See *Perodeau v City of Hartford* 259 Conn 729, 754, 792 A 2d 752, 767 (2002); Dobbs, Hayden and Bublick *Hornbook on torts* 714.

⁹⁹¹ *Restatement Third of Torts (Liability for Physical and Emotional Harm)* §§ 47-48 (2012); Dobbs, Hayden and Bublick *Hornbook on torts* 713 fn 101. Most states award compensation for stand-alone emotional harm sustained but a small number of states do not. See *Dowty v Riggs* 385 SW 3d 117 (Ark 2010).

⁹⁹² *Hornbook on torts* 714.

⁹⁹³ Dobbs, Hayden and Bublick *Hornbook on torts* 714. See *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 48 (2012).

⁹⁹⁴ See *McDougall v Lamm* 211 NJ 203, 48 A 3d 312 (2012); Dobbs, Hayden and Bublick *Hornbook on torts* 714.

⁹⁹⁵ See *Consolidated Rail Corp v Gottshall* 512 US 532, 546-47, 114 S Ct 2396, 129 L Ed 2d 427 (1994); *Thing v La Chusa* 48 Cal 3d 644, 257 Cal Rptr 865, 771 P 2d 814 (1989); cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 718 fn 151-153.

⁹⁹⁶ See *Stadler v Cross Minn* 1980 295 NW 2d 552; *Corso v Merrill* 119 NH 647, 650, 406 A 2d 300 (1979); *Jelley v Laflame*, 108 NH 471, 238 A 2d 728 (1968); *Cote v Litawa*, 96 NH 174, 71 A 2d 792 (1950); *Keck v Jackson* 122 Ariz 114, 593 P 2d 668 (1979); *Bovsun v Sanperi* 61 NY 2d 219, 461 NE 2d 843, 473 NYS 2d 357 (1984); *Restatement Second of Torts* § 313(2) (1965);

foreseeable.⁹⁹⁷ Emotional harm will generally be deemed foreseeable if the victim: was closely related to the primary victim;⁹⁹⁸ was close to the scene where the primary victim was injured; or was aware of the injury or threat of harm to the primary victim. In respect of foreseeability of harm, the secondary victim need not witness the initial injury of the primary victim but should see the primary victim soon after the incident, before his condition changes significantly.⁹⁹⁹ A close relationship between the primary and secondary victim is required and it may be interpreted by courts restrictively to exclude non-family members such as a fiancé,¹⁰⁰⁰ or family members not deemed close enough (such as a son-in-law¹⁰⁰¹ or aunt who raised a child).¹⁰⁰² On the other hand a close enough relationship may be interpreted widely not limiting the relationship to blood or marriage, to include a partner,¹⁰⁰³ fiancé¹⁰⁰⁴ and even distant relatives depending on how close the relationship is.¹⁰⁰⁵ In determining whether there is a close relationship between the primary and secondary victim, the following factors may be considered:

“(1) the duration of the relationship; (2) the degree of mutual dependence; (3) the extent of common contributions to a life together; (4) the extent and quality of shared experience; (5)

Dobbs, Hayden and Bublick *Hornbook on torts* 715; Keeton *et al Prosser and Keeton on torts* 365.

⁹⁹⁷ This test was enunciated in *Dillon v Legg* 68 Cal 2d 728, 69 Cal Rptr 72, 441 P2d 912 (1968) where a mother witnessed her child run over and killed even though she was safe from harm. See also *Catron v Lewis* 271 Neb 416, 712 NW 2d 245 (2006); *Restatement Third of Torts (Liability for Physical and Emotional Harm)* §§ 47-48 (2012); cases cited by Dobbs, Hayden and Bublick *Hornbook on torts* 715 fn 125; Keeton *et al Prosser and Keeton on torts* 366.

⁹⁹⁸ Parents and siblings are most likely to be successful in their claims. See for example, *Carter v Williams* 792 A2d 1093, 1099 (Me 2002) where a five-year-old child witnessed her sister being fatally injured. Courts are reluctant to award compensation for emotional harm sustained by fiancés, see for example, *Smith v Toney* 862 NE 2d 656 (Ind 2007). However, a step-grandmother (as a secondary victim) was entitled to compensation, see *Leong v Takasaki* 520 P 2d 758, 766 (Haw 1974).

⁹⁹⁹ See for example *Gabaldon v Jay-Bi Property Mgmt Inc* 925 P 2d 510 (NM 1996); other cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 716 fn 130-131. In *Cohen v McDonnell Douglas Corp* 450 NE 2D 581, 589 (Mass 1983) the mother in Massachusetts heard about the death of her son seven hours after he died in a plane crash in Chicago. The mother upon hearing the news suffered angina attacks and died of a heart attack two days later. The court denied recovery.

¹⁰⁰⁰ See for example, *Zimmerman v Dane Cnty* 329 Wis 2d 270, 789 NW 2d 754 (Ct App 2010); Dobbs, Hayden and Bublick *Hornbook on torts* 717.

¹⁰⁰¹ See *Moon v Guardian Postacute Servs Inc* 95 Cal App 4th 1005, 116 Cal Rptr 2d 218, 98 ALR 5th 767 (2002); Dobbs, Hayden and Bublick *Hornbook on torts* 717.

¹⁰⁰² *Trombetta v Conkling* 82 NY 2d 549, 626 NE 2d 653, 605 NE 2d 653, 605 NYS 2d 678 (1993); Dobbs, Hayden and Bublick *Hornbook on torts* 717.

¹⁰⁰³ See Cal Civ Code § 1714.01; Dobbs, Hayden and Bublick *Hornbook on torts* 717.

¹⁰⁰⁴ See for example, *Graves v Estabrook*, 818 A 2d 1255 (NH 2003); cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 717 fn 144.

¹⁰⁰⁵ See *Eskin v Bartee* 262 SW 3d 727 (Tenn 2008); Dobbs, Hayden and Bublick *Hornbook on torts* 717.

whether the plaintiff and the injured person were members of the same household; (6) their emotional reliance upon each other; (7) the particulars of their day-to-day relationship; and (8) the manner in which they related to each other in attending to life's mundane requirements, the nature, duration, and quality of experiences shared in the relationship are considered".¹⁰⁰⁶

The influence of reasonableness on claims for emotional harm or distress is predominantly explicit. Emotional harm or distress may be caused negligently or intentionally. With both intentionally and negligently inflicted emotional harm, there must be proof of severe emotional harm suffered¹⁰⁰⁷ as it would be unreasonable to hold the defendant liable for trivial harm suffered such as threats and so on deemed mere annoyances. In gauging whether the emotional harm or distress endured by the plaintiff is severe, the standard of the reasonable person is applied in that a reasonable person should not be expected to tolerate such emotional harm or stress,¹⁰⁰⁸ or alternatively proof of severe emotional harm or distress endured the plaintiff may be provided.¹⁰⁰⁹ The defendant's conduct must be "extreme" or "outrageous" in respect of intentionally inflicted emotional harm and here the community's views are important in gauging whether the defendant's conduct is reasonable. Conduct is unreasonable if it is beyond human decency and not acceptable by the community.¹⁰¹⁰ In respect of primary victims the harm must be foreseeable in that the plaintiff must have been in a position of immediate danger of harm,¹⁰¹¹ or within the scope of an undertaking or special relationship.¹⁰¹² Claims for secondary emotional harm or distress are also limited to what is reasonably foreseeable. The harm will be considered foreseeable if the secondary victim was a bystander witnessing the injury or threat of harm to a close relative,¹⁰¹³ or within the zone of danger fearing for his own safety,¹⁰¹⁴ or where the harm is anticipated.¹⁰¹⁵ Where a person fears future harm and sustained emotional harm or distress as a result of such fear, there must be a reasonable fear of future harm. The reasonable person must have a similar fear under similar

¹⁰⁰⁶ See *St Onge v MacDonald* 154 NH 768, 917 A 2d 233, 236 (2007) referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 717.

¹⁰⁰⁷ See Keeton *et al Prosser and Keeton on torts* 59-60; Shapo *Tort* 70-71.

¹⁰⁰⁸ See Dobbs, Hayden and Bublick *Hornbook on torts* 710.

¹⁰⁰⁹ See Dobbs, Hayden and Bublick *Hornbook on torts* 710-711.

¹⁰¹⁰ See Dobbs, Hayden and Bublick *Hornbook on torts* 707; Keeton *et al Prosser and Keeton on torts* 59.

¹⁰¹¹ See *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 47 cmt a (2012).

¹⁰¹² See *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 47 (2012); Dobbs, Hayden and Bublick *Hornbook on torts* 714.

¹⁰¹³ See cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 718 fn 151-153.

¹⁰¹⁴ See Dobbs, Hayden and Bublick *Hornbook on torts* 715; Keeton *et al Prosser and Keeton on torts* 365.

¹⁰¹⁵ See Keeton *et al Prosser and Keeton on torts* 65.

circumstances.¹⁰¹⁶ In terms of closeness with regard to the relationship between the primary and secondary victim, the courts are at liberty to decide and make use of a number of factors.¹⁰¹⁷ It is apparent that the standard of the reasonable person is applied in determining both intentional and negligent inflicted emotional harm. Reasonable foreseeability of harm is used to limit claims and liability.

3.4.5 Pure economic loss

Pure economic loss is loss which does not stem from physical harm to the plaintiff's property or person.¹⁰¹⁸ The general rule is that a person owes no duty of reasonable care to prevent "unintentional infliction of economic loss to another".¹⁰¹⁹ The courts are reluctant to award compensation for pure economic loss whether caused negligently, with malice or with intention and this is often referred to as the economic loss rule.¹⁰²⁰ The *Restatement Third of Torts*¹⁰²¹ generally denies liability for negligently inflicted economic loss. There are exceptions to this rule where liability is not denied.

Dobbs, Hayden and Bublick¹⁰²² identify five commonly occurring factual settings where economic torts are applicable:

- "(1) The defendant's improper communications to third persons cause the plaintiff financial harm. [1023]
- (2) The defendant's false statements to the plaintiff herself induce the plaintiff to enter into an economically damaging transaction [1024]
- (3) The defendant appropriates some intangible value belonging to the plaintiff, a trade secret for example.
- (4) The defendant provides a defective tangible product or services, causing pure economic harm such as losses in production or added costs without physical harm to other property.

¹⁰¹⁶ See Dobbs, Hayden and Bublick *Hornbook on torts* 723.

¹⁰¹⁷ See Dobbs, Hayden and Bublick *Hornbook on torts* 717.

¹⁰¹⁸ See *Bayer CropScience LP v Schafer* 385 SW 3d 822 (Ark 2011); Dobbs, Hayden and Bublick *Hornbook on torts* 1064.

¹⁰¹⁹ See *Restatement Third of Torts (Liability for Economic Harms)* § 1 (2012).

¹⁰²⁰ Dobbs, Hayden and Bublick *Hornbook on torts* 1061.

¹⁰²¹ (*Liability for Economic Harms*) § 1 (2012).

¹⁰²² *Hornbook on torts* 1063.

¹⁰²³ For example, where the defendant tells the plaintiff's customers that there is a defect with the products he is selling and if customers stop buying the products from the plaintiff, the plaintiff may have a claim for economic loss resulting from intentional interference with business relations or contracts. See in general Dobbs, Hayden and Bublick *Hornbook on torts* 1113-1142 with regard to either intentional or negligent misrepresentations causing economic loss.

¹⁰²⁴ These claims occur mainly as a result of misrepresentation, deceit or fraud. Where the plaintiff relies on a statement made, one of the questions asked is whether the plaintiff was justified in relying on the statement. See Dobbs, Hayden and Bublick *Hornbook on torts* 1064.

(5) The defendant causes physical harm to person or property of another person which in turn causes pure economic harm to the plaintiff. [1025]"

In instances where A negligently causes physical harm to B or his property, subsequently resulting in C sustaining economic loss; A will not be held liable for the economic loss sustained by C. C is considered a stranger. This rule is referred to as the “stranger rule” and this rule denying liability for pure economic loss was confirmed in *Robins Dry Dock & Repair Co v Flint*.¹⁰²⁶ In this case, the plaintiff hired a steam boat from third parties, the owners. The boat’s propeller broke and the owners hired the defendant to replace the propeller. The defendant’s employee negligently dropped the propeller and a new one was ordered. There was a two-week delay, during which the plaintiff was unable to use the boat resulting in him sustaining pure economic loss. The plaintiff sued the defendant for his loss and the Supreme Court held that the defendant did not owe a duty of reasonable care to the plaintiff as the plaintiff did not own the boat. He therefore had no proprietary interest in the boat.¹⁰²⁷ The *Restatement Third of Torts* sanctions the rule.¹⁰²⁸ This rule where no duty is owed applies to instances where a factory loses power supply due to another’s negligence and ceases production and sale of products to third parties. Thus no duty of reasonable care is owed to the third parties who suffer pure economic loss.¹⁰²⁹ The same principle applies where roadways are blocked due to the negligent conduct of the defendant subsequently affecting the plaintiff’s business resulting in pure economic loss.¹⁰³⁰

Some of the reasons advanced for denying liability for pure economic loss include: liability could hinder economic freedom and competition;¹⁰³¹ indeterminate liability¹⁰³²

¹⁰²⁵ For example, where a defendant cuts the power supply to a manufacturing plant resulting in loss of production and in turn loss of sales – a claim for such loss will most likely be barred. See Dobbs, Hayden and Bublick *Hornbook on torts* 1065.

¹⁰²⁶ 275 US 303, 48 S Ct 134, 72 L Ed 290 (1927).

¹⁰²⁷ See Epstein *Torts* 607-608.

¹⁰²⁸ (*Liability for Economic Harms*) § 7 (2014). See Dobbs, Hayden and Bublick *Hornbook on torts* 1066.

¹⁰²⁹ See *Kaiser Aluminium & Chem Corp v Marshland Dredging Co* 455 F2d 957 (5th Cir 1972) as well as other cases cited by Dobbs, Hayden and Bublick *Hornbook on torts* 1067 fn 47.

¹⁰³⁰ See *532 Madison Ave Gourmet Foods Inc v Finlandia Ctr Inc* 96 NY 2d 280, 750 NE 2d 1097, 727 NYS 2d 49 (2001); Dobbs, Hayden and Bublick *Hornbook on torts* 1067.

¹⁰³¹ Dobbs, Hayden and Bublick *Hornbook on torts* 1071.

¹⁰³² Where A’s loss results in B’s loss and C’s loss causing a domino effect. There may be liability to indeterminate persons, for an indeterminate time and an indeterminate sum. See *Louisiana ex rel Guste v M/V Testbank* 752 F 2d 1019 (5th Cir 1985); *Ultramares Corp v Touche* 255 NY 170, 174 NE 441 (1931); Dobbs, Hayden and Bublick *Hornbook on torts* 1071-1072.

is unfair and unjust;¹⁰³³ the law of contract may be applicable as opposed to tort law and should not be undermined;¹⁰³⁴ and the plaintiff should assess his risk which includes economic loss he may sustain and should either insure against such loss or contract with another for protection, especially where the cost of insurance is relatively low.¹⁰³⁵ Some courts bar economic loss claims when the parties are considered “sophisticated business entities”¹⁰³⁶ or the plaintiff is the “sophisticated party”.¹⁰³⁷ If the plaintiff is however lacking bargaining power he may be entitled to an economic loss claim in tort and need not be limited to a claim in contract.¹⁰³⁸ For the duty in tort to be actionable it must not be intertwined with a contract (known as the “contract rule”).¹⁰³⁹ The “stranger rule” and the “contract rule” limit liability for pure economic loss in general whether in the tort of negligence or the intentional torts such as deceit and fraud where there is a contractual or semi-contractual relationship.¹⁰⁴⁰

Exceptions apply to the general rule where there is a special relationship between the parties and a duty of care to prevent economic loss or protect economic interests exists is recognised. A special relationship exists in instances where it would be equitable to impose such a duty.¹⁰⁴¹ Examples of special relationships which may lead to liability for pure economic loss apply to professionals, such as accountants,¹⁰⁴² insurance

¹⁰³³ See Dobbs, Hayden and Bublick *Hornbook on torts* 1072-1073.

¹⁰³⁴ See *eToll Inc v Elias/ Savion Advertising Inc* 811 A 2d 10 (Pa Super Ct 2002); *Heath v Palmer* 181 Vt 545, 915 A 2d 1290 (2006); *Smith Mar Inc v L/B Kaitlyn Eymard* 710 F 3d 560 (5th Cir 2013); Dobbs, Hayden and Bublick *Hornbook on torts* 1079, 1081.

¹⁰³⁵ *Below v Norton* 751 NW 2d 351 (Wis 2008).

¹⁰³⁶ See *Cumberland Valley Contractors v Bell County Coal Corp* 238 SW 3d 644, 652 (Ky 2007); *PTI Assocs LLC v Carolina Int'l Sales Co Inc* 2010 WL 363 330 (D Conn 2010); *425 Beecher LLC v Unizan Bank Nat'l Ass'n* 186 Ohio App 3d 214, 927 NE 2d 46 (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 1083.

¹⁰³⁷ *Desert Healthcare District v PacificCare FHP Inc* 94 Cal App 4th 781, 793, 114 Cal Rptr 2d 623, 632 (2001); *Rissler & McMurry Co v Sheridan Area Water Supply* 929 P 2d 1228, 1235 (Wyo 1996); *Palmetto Linen Servs Inc v UNX Inc* 205 F 3d 126, 129-30 (4th Cir 2000); *Grynberg v Questar Pipeline Co* 70 P 3d 1 (Utah 2003); Dobbs, Hayden and Bublick *Hornbook on torts* 1083-1084.

¹⁰³⁸ See *Alloway v General Marine Indus LP* 149 NJ 620, 628, 695 A 2d 264, 268 (1997); Dobbs, Hayden and Bublick *Hornbook on torts* 1083.

¹⁰³⁹ *Huron Tool & Eng'g Co v Precision Consulting Servs Inc* 209 Mich App 365, 532 NW 2d 541 (1995). See Dobbs, Hayden and Bublick *Hornbook on torts* 1084.

¹⁰⁴⁰ Dobbs, Hayden and Bublick *Hornbook on torts* 1088.

¹⁰⁴¹ See *Blahd v Richard B Smith Inc* 141 Idaho 296, 301, 108 P 3d 996, 1001 (2005); Dobbs, Hayden and Bublick *Hornbook on torts* 1073.

¹⁰⁴² See for example, *Congregation of the Passion, Holy Cross Province v Touche Ross & Co* 159 Ill 2d 137, 161, 636 NE 2d 503, 514, 201 Ill Dec 71, 82 (1994). See Dobbs, Hayden and Bublick *Hornbook on torts* 1074.

brokers,¹⁰⁴³ attorneys,¹⁰⁴⁴ and so forth. In an instance where a termite inspector negligently reports that the property is free of termites allowing the property to be sold at full price, the inspector may be held liable to a subsequent buyer. The loss is referred to as transferred loss; it is transferred to the next buyer and is not indeterminate.¹⁰⁴⁵ In *People Express Airlines Inc v Consolidated Rail Corp*,¹⁰⁴⁶ due to the defendant's negligent handling of dangerous chemicals, the plaintiff's offices had to be evacuated, resulting in pure economic loss. The court held that a duty of reasonable care was owed to prevent economic loss to an identifiable class of plaintiffs, as long as the defendant knew or ought to have known of the harm.¹⁰⁴⁷

Intentionally inducing breach of a contract and interference with the plaintiff's contract or economic interests may result in pure economic loss whereby liability for the pure economic loss may follow. Usually as a result of the defendant's conduct, a third party breaches the contract with the plaintiff or causes economic loss in the form of a reasonably likely gain or profit.¹⁰⁴⁸

A duty of reasonable care not to be negligent in supplying information is seen as an exception where liability is allowed. The defendant undertakes the duty or it exists as a result of a special relationship. The plaintiff relies on the inaccurate or incorrect information and is led to reasonably expect reasonable care of his interests.¹⁰⁴⁹ There must be justified reliance (in other words, reasonable reliance) on the statements made. That is, would the reasonable person attach significance to the statement made?¹⁰⁵⁰ The statement must be materially factual and not, for example, a mere

¹⁰⁴³ See for example, *Graff v Robert M Swendra Agency Inc* 800 NW 2d 112 (Min 2011); other cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 1074 fn 95 as well as other special relationships where a duty to prevent pure economic loss may be owed.

¹⁰⁴⁴ See *Collins v Reynard* 154 Ill 2d 48, 607 NE 2d 1185 (1992); *Clark v Rowe* 428 Mass 339, 701 NE 2d 624 (1998); Dobbs, Hayden and Bublick *Hornbook on torts* 1074.

¹⁰⁴⁵ See *Barrie v VP Exterminators Inc* 625 So 2d 1007 (La 1993); Dobbs, Hayden and Bublick *Hornbook on torts* 1076.

¹⁰⁴⁶ 100 NJ 246, 495 A 2d 107 (1985).

¹⁰⁴⁷ Dobbs, Hayden and Bublick *Hornbook on torts* 1076.

¹⁰⁴⁸ Economic loss caused intentionally or the economic intentional torts will not be discussed further but see in general Dobbs, Hayden and Bublick *Hornbook on torts* 1089-1112; Keeton *et al Prosser and Keeton on torts* 978-1005.

¹⁰⁴⁹ See in general Dobbs, Hayden and Bublick *Hornbook on torts* 1123-1127.

¹⁰⁵⁰ See *Restatement Second of Torts* § 538(2)(b) (1965); Keeton *et al Prosser and Keeton on torts* 753.

opinion on future uncertain projections or statements about a product amounting to mere “puffing” or “exaggeration”.¹⁰⁵¹

The influence of reasonableness on the requirements for a claim for pure economic loss is partially explicit and partially implicit. The influence of reasonableness is implicit where policy considerations are considered. It is apparent that there is a reluctance to award compensation for pure economic loss and in order to limit liability, the courts may make use of a number of rules or policy considerations. It is submitted that compensation for economic loss is awarded where it is generally reasonable and fair depending on the circumstances of the case. For example, the “stranger rule” negates the element of a duty to prevent economic loss. From the outset, a court may state that there is no duty of reasonable care to prevent pure economic loss. Some of the other reasons advanced for denying liability for pure economic loss such as that liability is indeterminate and therefore the defendant should not be held liable,¹⁰⁵² that it is unfair and unjust to hold the defendant liable,¹⁰⁵³ the law of contract may be applicable as opposed to tort law,¹⁰⁵⁴ that the plaintiff should bear the loss because he should protect himself from loss by obtaining insurance where the cost of insurance is relatively low,¹⁰⁵⁵ or that the plaintiff is the “sophisticated party”,¹⁰⁵⁶ are all reasons which lend to the reasonableness of not holding the defendant liable for the economic loss. Compensation for pure economic loss is awarded where a special relationship exists and according to the circumstances of the case, it would be equitable to impose a duty of care to prevent economic loss.¹⁰⁵⁷ In respect of negligent misrepresentations, the defendant may have a duty of care to prevent the economic loss if a special relationship exists between the parties, for example, that of the accountant and the client. The influence of reasonableness is explicit with regard to the requirement of reasonable reliance on the negligent misrepresentation which leads the plaintiff to reasonably expect that reasonable care is applied to looking after his interests.¹⁰⁵⁸ In

¹⁰⁵¹ See *Ruff v Charter Behaviour Health Sys of Nw Ind Inc* 699 NE 2d 1171 (Ind Ct App 1998); *Sales v Kecoughtan Housing Co Ltd* 279 Va 475, 690 SE 2d 91 (2010); *Restatement Second of Torts* § 537 (1965); Dobbs, Hayden and Bublick *Hornbook on torts* 1131-1132; Keeton *et al Prosser and Keeton on torts* 749-750; Keeton *et al Prosser and Keeton on torts* 755-758.

¹⁰⁵² Dobbs, Hayden and Bublick *Hornbook on torts* 1071-1072.

¹⁰⁵³ Dobbs, Hayden and Bublick *Hornbook on torts* 1072-1073.

¹⁰⁵⁴ Dobbs, Hayden and Bublick *Hornbook on torts* 1079, 1081.

¹⁰⁵⁵ See *Below v Norton* 751 NW 2d 351 (Wis 2008).

¹⁰⁵⁶ Dobbs, Hayden and Bublick *Hornbook on torts* 1083-1084.

¹⁰⁵⁷ Dobbs, Hayden and Bublick *Hornbook on torts* 1073.

¹⁰⁵⁸ See in general Dobbs, Hayden and Bublick *Hornbook on torts* 1123-1127.

terms of reasonable reliance, the reasonable person standard is applied, in that the question asked is whether the reasonable person would attach significance to the statement made.¹⁰⁵⁹ The statement itself must be materially factual.¹⁰⁶⁰

3.5 Defences to the tort of negligence

The two common defences against negligence are contributory negligence and assumption of risk.¹⁰⁶¹ These two defences will be discussed briefly and the influence of reasonableness on these defences will be referred to.

3.5.1 Contributory fault and comparative fault

In American law “comparative fault” and “comparative negligence” are terms commonly used to refer to the plaintiff’s fault and negligence respectively. For the sake of convenience the term “contributory negligence” and “contributory fault” will be used to refer to the plaintiff’s fault and negligence as is referred to in the *Restatement Third of Torts*.¹⁰⁶² The plaintiff has a duty to take reasonable care of himself and should the reasonable plaintiff have foreseen the risk of harm and taken steps to prevent such harm under similar circumstances, then the plaintiff may be found contributorily negligent.¹⁰⁶³ There are two comparative fault systems where according to one of the systems, if the plaintiff’s negligence is of certain degree, he may be barred from recovery. This will be discussed further shortly.¹⁰⁶⁴ In general, a plaintiff’s award for compensation may be reduced depending on his contributory negligence. The weighing of risks and utilities is also applied in determining the plaintiff’s fault.¹⁰⁶⁵ The

¹⁰⁵⁹ See *Restatement Second of Torts* § 538(2)(b) (1965); Keeton *et al Prosser and Keeton on torts* 753.

¹⁰⁶⁰ See *Restatement Second of Torts* § 537; Dobbs, Hayden and Bublick *Hornbook on torts* 1131-1132; Keeton *et al Prosser and Keeton on torts* 749-750; Keeton *et al Prosser and Keeton on torts* 755-758.

¹⁰⁶¹ Keeton *et al Prosser and Keeton on torts* 451.

¹⁰⁶² (*Liability for Physical and Emotional Harm*) § 3 (2010).

¹⁰⁶³ See *Basham v Hunt* 332 Ill App 3d 980, 773 NE 2d 1213 (2002); *Pleiss v Barnes* 260 Neb 770 619 NW 2d 825 (2000); *Sawyer v Comerci* 264 Va 68, 563 SE 2d 748 (2002); Dobbs, Hayden and Bublick *Hornbook on torts* 381.

¹⁰⁶⁴ See *Restatement Third of Torts (Apportionment of liability)* § 7 reporters note to cmt a (2000); Green and Cardi in Koziol (ed) *Basic questions of tort law* 496 fn 318.

¹⁰⁶⁵ See *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 3 cmt b (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 381; Keeton *et al Prosser and Keeton on torts* 453.

same tests applied in finding negligence on the part of the defendant are applied to the plaintiff, such as, the reasonable person standard, negligence *per se* rules¹⁰⁶⁶ or no duty rules.¹⁰⁶⁷ However, the same conduct expected from the defendant is not expected from the plaintiff in the same situation as the defendant may *inter alia* have more knowledge of the risks of harm, and may be in a better position to prevent the harm.¹⁰⁶⁸ The same rules applicable to defendants in respect of factual causation¹⁰⁶⁹ and the scope of liability¹⁰⁷⁰ are applicable to plaintiffs.¹⁰⁷¹ Dobbs, Hayden and Bublick¹⁰⁷² refer to the example where a plaintiff negligently mounts a slippery platform and the defendant subsequently negligently causes a brick to fall on the plaintiff. Even though the plaintiff creates the risks of slipping and falling, it does not materialise. Therefore the plaintiff's fault is not within the scope of liability and the plaintiff will not be barred from recovery. At times the plaintiff's negligent conduct may be regarded as a superseding cause excluding liability on the part of the defendant.¹⁰⁷³ Generally, if the plaintiff cannot foresee harm or does indeed foresee harm but takes steps to avoid the harm, or if his negligence is not the factual cause of his harm or within the scope of liability, then such plaintiff is not negligent. His award for damages will not be reduced.¹⁰⁷⁴ Under certain circumstances, courts have held that contributory fault cannot apply as a defence, for example, where a minor fails to protect herself against sexual abuse.¹⁰⁷⁵ There are instances where it may be held that the plaintiff does not owe a duty of reasonable care based on principles or policy.¹⁰⁷⁶ These include

¹⁰⁶⁶ See for example, *Russell v Mathis* 686 So 2d 241 (Ala 1996) in respect of a violation of a statutory rule; *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 14 (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 382.

¹⁰⁶⁷ See Epstein *Torts* 192-193. See paras 3.1-3.3 above.

¹⁰⁶⁸ See Keeton *et al Prosser and Keeton on torts* 454-455.

¹⁰⁶⁹ See for example *Rascher v Friend* 279 Va 370, 689 SE 2d 661 (2010); *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 26 cmt m (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 382; Keeton *et al Prosser and Keeton on torts* 456.

¹⁰⁷⁰ See *Norfolk Southern Railway Co v Sorrell* 549 US 158, 166 (2007); *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 29 cmt m (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 382; Keeton *et al Prosser and Keeton on torts* 457-458.

¹⁰⁷¹ *Restatement Third of Torts (Apportionment of Liability)* § 4 (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 390.

¹⁰⁷² *Hornbook on torts* 390.

¹⁰⁷³ See *Exxon Co USA v Sofec Inc* 517 US 830 116 S Ct 1813, 135 L Ed 2d 113 (1996); *Wright v NYC Transit Auth* 633 NYS 2d 393 (App Div 1995); Green 2002 S C L Rev 1103; Hayden 2000 *Loyola LA L Rev* 887; Dobbs, Hayden and Bublick *Hornbook on torts* 391. See para 4 above with regard to causation and superseding causes.

¹⁰⁷⁴ Dobbs, Hayden and Bublick *Hornbook on torts* 391.

¹⁰⁷⁵ See for example, *Christensen v Royal Sch Dist No 160*, 124 P 3d 283 (Wash 2005); Dobbs, Hayden and Bublick *Hornbook on torts* 391.

¹⁰⁷⁶ See *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 7 cmt h (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 391.

instances: where the plaintiff is very young or old; where there is a special relationship between the parties, such as that between parent and child, jailer and prisoner,¹⁰⁷⁷ employer and employee¹⁰⁷⁸ etcetera; and where the defendant due to his control, superior knowledge, or experience is expected to take better reasonable care of the plaintiff's interests than the plaintiff himself. The *Restatement Third of Torts*¹⁰⁷⁹ provides a rule that a child under the age of five cannot be held to be contributorily negligent. This rule has also been applied to an institutionalised elderly person.¹⁰⁸⁰

Generally an employer owes a duty of reasonable care to provide his employees with a safe working environment.¹⁰⁸¹ The employer must warn or remove any danger of which the employer knows of or should have known.¹⁰⁸²

There are currently two types of comparative fault systems applied in the United States of America. The first system is referred to as the "complete" or "pure comparative fault system" in which the plaintiff is not completely barred from obtaining compensation due to his contributory negligence. Comparative fault applies to all plaintiffs in all negligence cases.¹⁰⁸³ Fifteen to twenty states as well as the major federal statutes have adopted this system.¹⁰⁸⁴ Dobbs Hayden and Bublick¹⁰⁸⁵ refer to a hypothetical example where the jury finds the plaintiff sixty percent negligent and the defendant forty percent negligent; the plaintiff will be entitled to forty percent of his proven

¹⁰⁷⁷ See for example, *Sandborg v Blue Earth Cty* 615 NW 2d 61 (Minn 2000) where the prisoner committed suicide; *Gregoire v City of Oak Harbour* 244 P 3d 924 (Wash 2010) where an inmate committed suicide; Dobbs, Hayden and Bublick *Hornbook on torts* 395.

¹⁰⁷⁸ See for example, *Vendetto v Sonat Offshore Drilling Co* 725 So 2d 474, 479 (La 1999); Dobbs, Hayden and Bublick *Hornbook on torts* 394.

¹⁰⁷⁹ (*Apportionment of Liability*) § 10 cmt e (2000). See Dobbs, Hayden and Bublick *Hornbook on torts* 392.

¹⁰⁸⁰ See *Fields v Senior Citizens Ctr Inc* 528 So 2d 573, 581 (La Ct App 1988); Dobbs, Hayden and Bublick *Hornbook on torts* 392.

¹⁰⁸¹ See *Hastings v Mechalske* 336 Md 663, 650 A 2d 274 (1994); Dobbs, Hayden and Bublick *Hornbook on torts* 603.

¹⁰⁸² See *Bennett v Trevecca Nazarene Univ* 216 SW 3d 293 (Tenn 2007); *Brewster v Colgate-Palmolive Co* 279 SW 3d 142 (Ky 2009) in respect of unknown asbestos; Dobbs, Hayden and Bublick *Hornbook on torts* 603 fn 2.

¹⁰⁸³ See *Restatement Third of Torts (Apportionment of liability)* § 7 reporters note to cmt a (2000); Green and Cardi in Koziol (ed) *Basic questions of tort law* 496 fn 318.

¹⁰⁸⁴ Alaska, Arizona, California, Florida, Kentucky, Louisiana, Mississippi, Missouri, Michigan, New Mexico, New York, Rhode Island, Washington. See *Restatement Third of Torts (Apportionment of Liability)* § 17 151-159 (2000); Dobbs, Hayden and Bublick *Hornbook on torts* 385 fn 52; Keeton *et al Prosser and Keeton on torts* 472; Epstein *Torts* 211.

¹⁰⁸⁵ *Hornbook on torts* 385.

damages.¹⁰⁸⁶ The second system is referred to as the incomplete or “modified comparative fault system”¹⁰⁸⁷ where the plaintiff may be barred from claiming compensation. The plaintiff will be barred from claiming compensation where his fault is equal to that of the defendant’s or exceeds the fault of the defendant.¹⁰⁸⁸ Therefore if the plaintiff’s fault is equal to or greater than the defendants (“greater fault bar”), the plaintiff is not entitled to any compensation.¹⁰⁸⁹ In the example given above, the plaintiff’s fault is greater than the defendant’s fault and will therefore be barred from claiming compensation. A plaintiff who is found to be forty-nine percent negligent is entitled to recover fifty-one percent of his proven damages, while a plaintiff who is found to be fifty-one percent negligent is not entitled to any compensation.¹⁰⁹⁰ The “equal fault bar system” has been criticised.¹⁰⁹¹ The “pure comparative fault system” is preferred by a number of courts,¹⁰⁹² legal writers¹⁰⁹³ and federal statutes such as FELA.¹⁰⁹⁴

The unjustified risks taken by the plaintiff are compared with those of the defendant under the circumstances.¹⁰⁹⁵ The *Restatement Third of Torts*¹⁰⁹⁶ states that the negligence compared is based on the conduct “relevant for determining percentage shares of responsibility only when it caused the harm and when the harm is within the scope of the person’s liability”. Subjective factors such as a person’s state of mind are considered relevant in judging the unreasonable risks created by his conduct “when his state of mind bears upon the utility of his conduct”.¹⁰⁹⁷ For example, where the

¹⁰⁸⁶ Dobbs, Hayden and Bublick *Hornbook on torts* 385.

¹⁰⁸⁷ There are five states that apply the complete bar to recovery. See *Restatement Third of Torts (Apportionment of Liability)* § 7 reporters note to cmt a (2000); Green and Cardi in Koziol (ed) *Basic questions of tort law* 497 fn 318.

¹⁰⁸⁸ Followed in Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Vermont, Wisconsin, and Wyoming. See for example, NH Stats Ann § 507:7-d; Ark Code Ann § 16-64-122. See Epstein *Torts* 211.

¹⁰⁸⁹ See cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 385 fn 55; Keeton *et al Prosser and Keeton on torts* 473.

¹⁰⁹⁰ See *Restatement Third of Torts (Apportionment of Liability)* § 7.

¹⁰⁹¹ See Campbell 1956 *Wis L Rev* 4, 21; Keeton 1968 *Vand L Rev* 906, 911. Wisconsin in 1971 amended the 50% bar from recovery to the 51% bar. See Keeton *et al Prosser and Keeton on torts* 473 fn 42.

¹⁰⁹² See authority cited by Dobbs, Hayden and Bublick *Hornbook on torts* 386 fn 57.

¹⁰⁹³ See Prosser 1953 *Cal L Rev* 25; Dobbs, Hayden and Bublick *Hornbook on torts* 386.

¹⁰⁹⁴ 45 USC A § 53.

¹⁰⁹⁵ Dobbs, Hayden and Bublick *Hornbook on torts* 386.

¹⁰⁹⁶ (*Apportionment of Liability*) § 8 cmt b (2000).

¹⁰⁹⁷ See *Smith v Fiber Controls Corp* 268 SE 2d 504, 507-509 (NC 1980); Dobbs, Hayden and Bublick *Hornbook on torts* 388.

defendant exceeds the speed limit while rushing his child to hospital in order to save his life; his reason for speeding has utility. The *Restatement Third of Torts*¹⁰⁹⁸ suggests taking into consideration a “person’s actual awareness, intent, or indifference with respect to the risks created by the conduct”.¹⁰⁹⁹

In assessing relative negligence, Drowota J in *Eaton v McLain*¹¹⁰⁰ stated that the following factors should be considered:¹¹⁰¹

“(1) the relative closeness of the causal relationship between the conduct of the defendant and the injury to the plaintiff; (2) the reasonableness of the party’s conduct in confronting a risk, such as whether the party knew of the risk, or should have known of it; (3) the extent to which the defendant failed to reasonably utilize an existing opportunity to avoid the injury to the plaintiff; (4) the existence of a sudden emergency requiring a hasty decision; (5) the significance of what the party was attempting to accomplish by the conduct, such as an attempt to save another’s life; and (6) the party’s particular capacities, such as age, maturity, training, education, and so forth”.

In instances where a defendant acts intentionally in causing harm to the plaintiff, contributory negligence on the part of the defendant will generally not be applied as a defence.¹¹⁰² The same applies where the plaintiff acts intentionally and the defendant negligently; the plaintiff will be barred from recovery.¹¹⁰³ In respect of provocation, if a plaintiff taunts the defendant who then strikes him, the plaintiff’s negligent taunting will not apply in reducing his award for compensation.¹¹⁰⁴ However, if the plaintiff’s conduct is deemed intentional then his award for compensation may be reduced (as

¹⁰⁹⁸ (*Apportionment of Liability*) § 8(b) (2000).

¹⁰⁹⁹ See Dobbs, Hayden and Bublick *Hornbook on torts* 388.

¹¹⁰⁰ 891 SW 2d 587, 592 (Tenn 1994).

¹¹⁰¹ See also *Purvis v Grant Parish Sch Bd* 144 So 3d 922 (La 2014) where four of the five factors were considered; Dobbs, Hayden and Bublick *Hornbook on torts* 388.

¹¹⁰² The defence is not extended to intentional torts such as battery or assault (see *Jackson v Brantley* Ala App 1979, 378 So 2d 1109; *Peterson v Campbell* 1982, 105 Ill App 3d 992, 61 Ill Dec 572, 434 NE 2d 1169). See for example, *Wightman v Consolidated Rail Corp* 86 Ohio St 3d 431, 715 NE 2d 546 (1999) where the defendant acted with malice; *Christensen v Royal Sch Dist No 160*, 124 P 3d 283 (Wash 2005) where a thirteen-year-old student’s sexual contact could not be considered as consensual or fall within the ambit of comparative fault; authority cited by Dobbs, Hayden and Bublick *Hornbook on torts* 399 fn 154; Keeton *et al Prosser and Keeton on torts* 462. Some statutes codify this common law rule –see Dobbs, Hayden and Bublick *Hornbook on torts* 399 fn 155.

¹¹⁰³ See *Ardis v Griffin* 1962 239 SC 529, 123 SE 2d 876; *Restatement Second of Torts* §§ 482(2) and 503(3); authority cited by Keeton *et al Prosser and Keeton on torts* 462 fn 10.

¹¹⁰⁴ See *Withlock v Smith* 297 Ark 399, 762 SW 2d 782 (1989); Dobbs, Hayden and Bublick *Hornbook on torts* 399.

provocation is not a complete defence).¹¹⁰⁵ The *Restatement Third of Torts*¹¹⁰⁶ recommends that a no-duty rule could be applied to the plaintiff in order to eliminate his carelessness from consideration “in a suit against an intentional tortfeasor”.¹¹⁰⁷ In instances where the plaintiff acts negligently and the defendant recklessly or with wanton misconduct according to the Uniform Comparative Responsibility Act,¹¹⁰⁸ the plaintiff’s award may be reduced. Some courts have allowed recovery as long as the “reckless” conduct is not construed as intentional conduct¹¹⁰⁹ but some have not allowed the plaintiff to recover in full, his proven damages.¹¹¹⁰ Where a plaintiff suffers harm as a result of his own seriously immoral or illegal act¹¹¹¹ he may not be entitled to compensation, based on the idea that one cannot profit for one’s own wrong, even though the defendant owes him a duty of care. For example, in *Barker v Kallash*¹¹¹² where the plaintiff (a fifteen-year-old child) made a bomb from ingredients supplied by the defendant (a nine-year-old child) whereafter the bomb exploded causing injury to the plaintiff, the plaintiff was barred from claiming.¹¹¹³ In *Orzel v Scott Drug Co*¹¹¹⁴ where the plaintiff obtained drugs from a pharmacist without a prescription and was subsequently harmed by taking the drugs, the court held that the plaintiff had no claim against the pharmacist.

The *Restatement Third of Torts*¹¹¹⁵ provides that in instances where the defendant causes harm to the plaintiff and the plaintiff subsequently fails to mitigate the injury, apportionment may be applied based on comparative fault instead of the “rules of avoidable consequences”. For example, if the plaintiff’s leg was injured in a motor

¹¹⁰⁵ See *Landry v Bellanger* 851 So 2d 943 (La 2003); Dobbs, Hayden and Bublick *Hornbook on torts* 399 fn 156.

¹¹⁰⁶ (*Liability for Physical and Emotional Harm*) § 7 cmt h (2010). See *Restatement Third of Torts (Apportionment of Liability)* § 3 cmt d (2000); Dobbs, Hayden and Bublick *Hornbook on torts* 399.

¹¹⁰⁷ Dobbs, Hayden and Bublick *Hornbook on torts* 399.

¹¹⁰⁸ Of 2002 §1.

¹¹⁰⁹ See *Yerkes v Asberry* 938 SW 2d 307 (Mo Ct App 1997); *Cartwright v Equitable Life Assurance Soc’y* 276 Mont 1, 914 P 2d 976 (1996); *Weaver v Lentz* 348 SC 672, 561 SE 2d 360 (Ct App 2002); authority referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 400 fn 162-163.

¹¹¹⁰ See *Davies v Butler* 95 Nev 763, 602 P 2d 605 (1979); *Zeroulías v Hamilton Am Legion Assocs Inc* 705 NE 2d 1164 (Mass App Ct 1999); Dobbs, Hayden and Bublick *Hornbook on torts* 400 fn 164.

¹¹¹¹ See *Winschel v Brown* 171 P 3d 142 (Alaska 2007); *Ardringer v Hummell* 982 P 2d 727 (Alaska 1999); cases cited by Dobbs, Hayden and Bublick *Hornbook on torts* 402 fn 177-180.

¹¹¹² 63 NY 2d 19, 468 NE 2d 39 (1984).

¹¹¹³ See Dobbs, Hayden and Bublick *Hornbook on torts* 402.

¹¹¹⁴ 449 Mich 550, 537 NW 2d 208 (1995).

¹¹¹⁵ (*Apportionment of Liability*) §3 cmt b (2000).

vehicle accident as a result of the defendant's negligent conduct and thereafter the plaintiff suffers further harm as a result of not taking prescribed antibiotics, the further harm sustained is a result of the combined conduct of both parties. The defendant is liable in full for the first injury. Apportionment is applied to the further harm.¹¹¹⁶ Where a plaintiff fails to wear a seatbelt, his damages may be reduced as a result of his contributory negligence¹¹¹⁷ but a number of states have barred this defence.¹¹¹⁸ Where a statute prohibits the defence of contributory negligence, the plaintiff's claim for compensation may be reduced by using the mitigation of damage rule in order to deduct that portion of the damage that the plaintiff could have reasonably avoided by wearing a seatbelt.¹¹¹⁹ Some statutes allow a reduction of the plaintiff's claim but then limit it to a capped amount (such as five percent) or limit damages for pain and suffering.¹¹²⁰

The influence of reasonableness on contributory negligence is explicit. It is unreasonable to hold the defendant fully liable for the harm suffered by the plaintiff when the plaintiff had a duty to take reasonable care of himself, and where the reasonable person in a similar situation would have foreseen the risk of harm and would have taken steps to prevent the harm. Similarly it is reasonable for the defendant to compensate the plaintiff for harm resulting from his unreasonable conduct. The rules relating to comparative fault lend to justice and fairness between the parties. The applicable standard of the reasonable person or its equivalent is used to judge both parties' conduct and the plaintiff is compensated depending on the contribution of his unreasonable conduct. In instances where either party acts intentionally and the other negligently, intention as a form of fault is more serious than negligent conduct. It is therefore reasonable in cases where the plaintiff acts intentionally that he should be barred from recovery. Where the defendant acts intentionally, then it is reasonable that contributory negligence should not be considered as a defence.

¹¹¹⁶ See Dobbs, Hayden and Bublick *Hornbook on torts* 406.

¹¹¹⁷ See *Hutchins v Schwartz* 724 P2d 1194 (Ala 1986); *Ridley v Safety Kleen Corp* 693 So 2d 934 (Fla 1996); cases cited by Dobbs, Hayden and Bublick *Hornbook on torts* 407 fn 216.

¹¹¹⁸ About 30 statutes follow this approach, see Ala Code § 32-5B-7; 75 Pa Cons Stat Ann §4581 (e); authority cited by Dobbs, Hayden and Bublick *Hornbook on torts* 408 fn 220.

¹¹¹⁹ See *Spier v Barker* 35 NY 2d 444, 323 NE 2d 164 (1974) failure to wear a seatbelt; *Halvorson v Voeller* 336 NW 2d 118 (NS 1983) cyclist's failure to wear a helmet; Dobbs, Hayden and Bublick *Hornbook on torts* 407.

¹¹²⁰ See authority cited by Dobbs, Hayden and Bublick *Hornbook on torts* 407 fn 217-218.

3.5.2 Assumption of risk

Generally assumption of risk is not a frequently upheld defence and whether there is assumption of risk is usually decided by the jury.¹¹²¹ In the 1950s, courts were prepared to discard this defence.¹¹²² However, it is still available as a defence whether the assumption of risk was given expressly or implied.¹¹²³ A plaintiff may agree in terms of a contract to assume the risk of harm (express consent) and the defendant will not be held liable in tort unless such agreement is unenforceable as a result of overriding provisions of a statute or law of contract¹¹²⁴ or if it is against public policy. That is, generally if the terms of the contract are unfair, oppressive or if the plaintiff is in a weak bargaining position when compared to the defendant who may be in a better position to guard against risk and absorb or spread costs through insurance, the contract will be unenforceable.¹¹²⁵ In terms of a contractual waiver of liability, where the plaintiff for example takes part in a dangerous activity such as sky-diving; the defendant will not be held liable in tort if the plaintiff is injured while partaking in such activity. The loss is contractually shifted from the defendant to the plaintiff.¹¹²⁶ Epstein¹¹²⁷ submits that the question asked is, was “there a meeting of the minds between the two parties, objectively manifested, over the risks [the plaintiff] assumed as part of the transaction? And assuming its terms are clear, do any background conditions justify allowing [the plaintiff] to disregard the contract and to sue in tort?” Liability in tort will generally not

¹¹²¹ See for example *Phelps v Firebird Raceway Inc* 210 Ariz 403, 111 P3d 1003 (2005). However, some courts may find that whether there is assumption of risk must be determined by the adjudicator – see for example, *Tucker v ADG, Inc*, 102 P 3d 660 (Okla 2004); authority cited by Dobbs, Hayden and Bublick *Hornbook on torts* 421 fn 91.

¹¹²² See *Meistrich v Casino Arena Attractions Inc* 31 NJ 44, 155 A 2d 90, 82 ALR 2d 1208 (1959); *Gilson v Drees Bros* 19 Wis 2d 252, 120 NW 2d 63 (1963); *Williamson v Smith* 83 NM 336, 491 P 2d 1147 (1971); *Arnold v City Cedar Rapids Iowa* 443 NW 2d 332 (Iowa 1989). See authority cited by Dobbs, Hayden and Bublick *Hornbook on torts* 418 fn 70-72, 421 fn 92-93.

¹¹²³ See for example *Boyle v Revici* 961 F 2d 1060 (2nd Cir 1992); Dobbs, Hayden and Bublick *Hornbook on torts* 409.

¹¹²⁴ Dobbs, Hayden and Bublick *Hornbook on torts* 409.

¹¹²⁵ See for example, *Bagley v Mt Bachelor Inc* 340 P 3d 27, 43-45 (Ore 2014); *Hughes v Warman Steel Casting Co* 1917, 174 Cal 556, 163 P 885; *Restatement Second of Torts* § 496B, cmt f (1965); Keeton *et al Prosser and Keeton on torts* 482, 483 fn 34; Epstein *Torts* 201.

¹¹²⁶ See for example *Schutkowski v Carey* 725 P 2d 1057 (Wyo 1986) where the exculpatory clause was enforced; *Jones v Dressel* 623 P 2d 370 (Colo 1981); *Wyoming Johnson Inc v Stag Industries, Inc Wyo* 662 P 2d 96 (1983); Dobbs, Hayden and Bublick *Hornbook on torts* 410, 420 fn 84; Epstein *Torts* 200-201.

¹¹²⁷ *Torts* 200.

be waived in instances of gross negligence, recklessness or intentional conduct on the part of the defendant.¹¹²⁸

In respect of “implied assumption of risk” which is also referred to as primary assumption of risk¹¹²⁹ (as opposed to secondary assumption of risk, which is considered a variation of contributory negligence),¹¹³⁰ liability may be excluded if the plaintiff: knew of the risk; appreciated the nature of the risk; subjectively consented to the risk of harm;¹¹³¹ and voluntarily proceeded to encounter it nevertheless.¹¹³² Through consensual relations between the parties, the loss is shifted from the defendant to the plaintiff.¹¹³³ The plaintiff must with the knowledge and awareness “act unreasonably in choosing to confront the risk”, in order for the defence to succeed - this element is common to establishing fault in the form of negligence.¹¹³⁴ In instances where the danger is so obvious such as diving into a clearly visible shallow body of water, the plaintiff should have known and appreciated the risk of diving into the shallow water. The plaintiff clearly acts unreasonably in assuming the risk of harm.¹¹³⁵ For the plaintiff to have voluntarily confronted the risk means that the plaintiff had to have some other

¹¹²⁸ See *Tayar v Camelback Ski Corp Inc* 47 A 3d 1190 (Pa 2012); *Laeroc Waikiki Parkside LLC v KSK (Oahu) Ltd P'Ship* 115 Haw 201, 166 P 3d 961 (2007); *City of Santa Barbara v Superior Court* 41 Cal Rptr 3d 527 (2007). See *contra* *Murphy v North Am River Runners Inc* 186 W Va 310, 412 SE 2d 504 (1991); *Restatement Second of Torts* § 496 B & cmt b (1965); *Restatement Third of Torts (Apportionment of Liability)* § 2 cmts g & f (2000) where express waivers may be allowed for intentional, reckless conduct as long there is no gross “unequal bargaining power” and it is clearly expressed (Dobbs, Hayden and Bublick *Hornbook on torts* 410); Keeton *et al Prosser and Keeton on torts* 484.

¹¹²⁹ As formulated by Fleming 1952 *Yale LJ* 141 and followed by the courts, see for example, *Mestrich v Casino Area Attractions Inc* 155 A 2d 90 (NJ 1959). Primary assumption of risks covers instances where there is no duty of reasonable care owed, or where the plaintiff expressly assumed the risk by contract. This would apply to sporting injuries. See Epstein *Torts* 207-208.

¹¹³⁰ Secondary assumption of risk is where there is breach of a duty of reasonable care by the defendant and the plaintiff assumes the risk of harm created by the defendant when it is reasonable to do so under the circumstances. For example, if the defendant leaves an obstacle on a private walkway and the plaintiff instead of stepping aside from the walkway as the simple risk free alternative comes into contact with the obstacle, then he acts unreasonably and contributorily negligent (Epstein *Torts* 197, 209).

¹¹³¹ See *Poole v Coakley & Williams Constr Inc* 423 Md 91, 31 A 3d 212 (2011); *Duda v Phatty McGees* 758 NW 2d 754 (S.D 2008); *Jay v Moog Auto Inc* 264 Neb 875, 652 NW 2d 872 (2002); Dobbs, Hayden and Bublick *Hornbook on torts* 417.

¹¹³² See *Myers v Boleman* 151 Ga App 506, 260 SE 2d 359 (1979); *Duda v Phatty McGees* 758 NW 2d 754 (SD 2008); cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 415 fn 49-54.

¹¹³³ Epstein *Torts* 203.

¹¹³⁴ See Shapo *Tort* 203.

¹¹³⁵ See *Glittenberg v Doughboy Recreational Indus Inc* 462 NW 2d 348, 359 (Mich 1990); *Glittenberg v Doughboy Recreational Indus. Inc* 491 NW 2d 208, 215 (Mich 1992 on rehearing); Shapo *Tort* 203-204.

reasonable course of action available to him.¹¹³⁶ For example, a passenger in a car who discovers that the driver is dangerous but cannot find an alternative way home because it is dark, cold and unfamiliar outside, does not voluntarily expose himself to the risk of harm.¹¹³⁷ Keeton *et al*¹¹³⁸ point out that a plaintiff who is aware of the risk but decides to take such risk anyway may be negligent but it is rare that it could be said that the defendant reasonably understands the plaintiff's conduct to mean that he subjectively consented to the risk of harm. For example, a jaywalker does encounter a risk but it cannot be said that the driver of a motor vehicle reasonably believes that the jaywalker consents to the driver's negligence – the jaywalker is negligent.¹¹³⁹ Some states however still follow the complete bar to a claim rule.¹¹⁴⁰ The *Restatement Third of Torts*¹¹⁴¹ has done away with the defence of implied assumption of risk but kept the defence of express assumption of risk.¹¹⁴² In many instances the court may circumvent the harsh effect of the defence of implied assumption of risk by finding no negligence on the part of the defendant,¹¹⁴³ no duty of reasonable care owed,¹¹⁴⁴ or that the plaintiff acted contributorily negligent by acting unreasonably in making his choice.¹¹⁴⁵ The defence of contributory fault is considered to be less harsh and is favoured more by the courts. It is based on an objective test of the reasonable person

¹¹³⁶ Dobbs, Hayden and Bublick *Hornbook on torts* 418.

¹¹³⁷ See *Ridgway v Yenny* 223 Ind 16, 57 NE 2d 581 (1944); Dobbs, Hayden and Bublick *Hornbook on torts* 417.

¹¹³⁸ *Prosser and Keeton on torts* 485, 490.

¹¹³⁹ See Dobbs, Hayden and Bublick *Hornbook on torts* 418.

¹¹⁴⁰ See for example, *Thomas v Panco Management of Maryland LLC* 423 Md 387, 31 A 3d 583 (2011); Dobbs, Hayden and Bublick *Hornbook on torts* 415.

¹¹⁴¹ (*Apportionment of Liability*) § 2 cmt I (2000).

¹¹⁴² Some states have abolished the defence in instances of liability of the employer to his employee or driver to his passenger. New Jersey has completely abolished it in all instances and other states have followed this – see Keeton *et al Prosser and Keeton on torts* 494 fn 40.

¹¹⁴³ See for example *Kirsch v Plovitba* 971 F 2d 1026, 1033-1034 (3rd Cir 1992); discussion of this case by Shapo *Tort* 205-206.

¹¹⁴⁴ See for example, *Beninati v Black Rock City LLC* 175 Cal App 4th 650, 96 Cal Rptr 3d 105 (2009) where it was held that a festival promoter owed no duty to a person who walked into burning embers as the risk of harm was obvious; *Gulfway Gen'l Hosp Inc v Pursley* 397 SW 2d 93, 94 (Tex Civ App 1965) where the court denied liability where the plaintiff slipped on icy steps of the hospital. The court held that there was no duty on the defendant since the danger the plaintiff encountered was obvious and she was aware and appreciated the risks; *Turcotte v Fell* 68 NY 2d 432, 510 NYS 2d 49, 502 NE 2d 964 (1986); *King v Kayak Mfg Corp* 182 W Va 276, 378 SE 2d 511 (1989); Dobbs, Hayden and Bublick *Hornbook on torts* 416, 419-420; Keeton *et al Prosser and Keeton on torts* 481.

¹¹⁴⁵ See for example *Rountree v Boise Baseball LLC* 296 P 3d 373 (Idaho 2013) where it was held that assumption of risk is no longer a valid defence; *Simons v Porter* 312 P 3d 345 (Kan 2013) where it was held that assumption of risk is not viable anymore after the advent of comparative fault; Dobbs, Hayden and Bublick *Hornbook on torts* 419 fn 77; cf Keeton *et al Prosser and Keeton on torts* 495.

as opposed to the subjective test associated with assumption of risk.¹¹⁴⁶ Statutes have abolished the defence of implied assumption of risk in the context of employment¹¹⁴⁷ and some states have also completely abolished the general application of the defence.¹¹⁴⁸

Assumption of risk is often raised with regard to sporting injuries. Professional sport players may be presumed to act more voluntarily because they have more knowledge as opposed to amateurs who partake in activities for recreation.¹¹⁴⁹ In respect of spectators, before comparative negligence was applicable, courts often found that spectators assumed the risk of harm when struck by errant balls and so on. Nowadays courts may hold that the managers of the sports events do not owe a duty of reasonable care to the spectators for inherent risks of the game.¹¹⁵⁰ Thus organisers and managers of sports events do not owe a duty of reasonable care to spectators to protect them from ordinary risks inherent in sporting activities or to protect them “against inherent risks that remain after due care is exercised”.¹¹⁵¹ For example, in an instance where a hot dog was thrown into the stands by a mascot,¹¹⁵² or a spectator in a sports bar injured another spectator after diving for a souvenir, were not considered inherent risks of watching a sports match.¹¹⁵³

Participants also assume the ordinary risks inherent in the sporting activity they partake in. Participants may be expected to endure negligently caused injuries which are ordinarily encountered. However, a defendant will not escape liability where

¹¹⁴⁶ See for example *Simons v Frazier* 277 Ark 452, 642 SW 2d 314 (1982) where it was held that a hitchhiker who falls asleep near the edge of the highway does not assume the risk of being struck by a negligent driver, he is just negligent; Keeton *et al Prosser and Keeton on torts* 495.

¹¹⁴⁷ See Federal Employers' Liability Act (FELA) with regard to railroad employees 45 USC A § 53; Dobbs, Hayden and Bublick *Hornbook on torts* 417.

¹¹⁴⁸ See Ind Code § 34-6-2-45 where fault may include assumption of risk; Mass Gen L Ann Ch 231, §85 where the defence was abolished; Dobbs, Hayden and Bublick *Hornbook on torts* 418 fn 73.

¹¹⁴⁹ See *Turcotte v Fell* 502 NE 2d 969; Shapo *Tort* 212.

¹¹⁵⁰ See *Edward C v City of Albuquerque* 148 NM 646, 241 P 3d 1086 (2010); *Creel v L & L Inc* 287 P 3d 729 (Wyo 2012); *Mc Garry v Sax* 158 Cal App 4th 983, 70 Cal Rptr 3d 519 (2008); cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 422 fn 94.

¹¹⁵¹ *Hurst v East Coast Hockey League Inc* 371 SC 33 637 SE 2d 560 (2006). See also *King v Kayak Mfg Corp* 182 W Va 276, 387 SE 2d 511 (1989); Dobbs, Hayden and Bublick *Hornbook on torts* 422.

¹¹⁵² See *Coomer v Kansas City Royals Baseball Corp* 437 SW 3d 184 (Mo 2014); Dobbs, Hayden and Bublick *Hornbook on torts* 422 fn 100.

¹¹⁵³ *FCH1, LLC v Rodriguez* 335 P 3d 183 (Nev 2014); Dobbs, Hayden and Bublick *Hornbook on torts* 422 fn 100.

through his negligence he adds new risks to the sporting activity or increases the risks inherent in the activity.¹¹⁵⁴ Courts often state that the duty of the participants is to avoid reckless or intentional harm¹¹⁵⁵ and a few states have statutes also sanctioning this approach.¹¹⁵⁶ A violation of a rule of a game does not necessarily ground liability, but usually grounds liability where the defendant performs a serious foul act, or acts recklessly or intentionally. In such instances, the conduct exceeds the rules of the game and customary practices.¹¹⁵⁷ The limited duty rule stems from the plaintiff's "limited expectations of safety"¹¹⁵⁸ and has been applied to professional sporting activities as well as recreational sporting activities.¹¹⁵⁹ If assumption of risk is framed in terms of consent, the reasonable expectations of the parties as to their conduct must be considered.¹¹⁶⁰ For example in *Feld v Borkowski*¹¹⁶¹ where it was held that a batter who allowed the bat to fly from his hand resulting in the bat striking and injuring the plaintiff; such conduct was not expected and was considered reckless. A hunter who is generally aware of risks of harm is not expected to consent to being shot by a fellow hunter.¹¹⁶² Players must act with reasonable care and expect fellow players to exercise reasonable care. It comes down to reasonableness of conduct and may also

¹¹⁵⁴ See for example, *Cohen v Five Brooks Stable* 159 Cal App 4th 1476, 72 Cal Rptr 3d 471 (2008) where it was held that the reckless conduct of the trail guide was not an inherent risk of horse riding; *Luna v Vela* 169 Cal App 4th 102, 86 Cal Rptr 3d 588 (2008) where it was held that the host of the match owed a duty of reasonable care to not increase the risks of the sporting activity; Dobbs, Hayden and Bublick *Hornbook on torts* 423.

¹¹⁵⁵ See for example, *Knight v Jewett* 3 Cal 4th 296, 11 Cal Rptr 2d 2, 834 P 2d 696 (1992) where it was held that reckless conduct must be completely outside the range of ordinary sporting activity; *Nabozny v Barnhill* 31 Ill App 3d 212, 334 NE 2d 258, 77 ALR 3d 1294 (1975) where it was held that a prohibited and intentional kick in a soccer match could be actionable; cases cited by Dobbs, Hayden and Bublick *Hornbook on torts* 424 fn 106.

¹¹⁵⁶ See *Noffke v Bakke* 315 Wis 2d 350, 760 NW 2d 156 (2009) which applied Wisc Stat Ann § 895.525 (4m)(a). California however has held that an intentional tort (in respect of battery) may be an inherent risk of the sporting activity – see *Avila v Citrus Cmty Coll Dist* 38 Cal 4th 148, 162, 131 P 3d 383, 392, 41 Cal Rptr 3d 299, 309 (2006); Dobbs, Hayden and Bublick *Hornbook on torts* 424.

¹¹⁵⁷ See *Nabozny v Barnhill* 334 NE 2d 258 (Ill App 1975) where a soccer player deliberately kicked the goalie in the head in the penalty area; *Hackbart v Cincinnati Bengals Inc* 601 F 2d 516 (10th Cir 1979) in respect of a serious foul; *Gauvin v Clark* 404 Mass 450, 537 NE 2d 94 (1989) where a player butt ended another with the wrong end of a hockey stick resulting in internal injuries; Dobbs, Hayden and Bublick *Hornbook on torts* 424; Epstein *Torts* 10.

¹¹⁵⁸ Dobbs, Hayden and Bublick *Hornbook on torts* 424. See *Turcotte v Fell* 68 NY 2d 432, 510 NYS 2d 49, 502 NE 2d 964 (1986).

¹¹⁵⁹ See cases cited by Dobbs, Hayden and Bublick *Hornbook on torts* 424-425 fn 112-121.

¹¹⁶⁰ Dobbs, Hayden and Bublick *Hornbook on torts* 425.

¹¹⁶¹ 790 NW 2d 72 (Iowa 2010).

¹¹⁶² See *Hendriks v Broderick* 284 NW 2d 209 (Iowa 1979).

depend on awareness of risks that are obvious.¹¹⁶³ Some courts¹¹⁶⁴ have applied the standard of ordinary care based on breach of negligence instead of assumption of risk, but Dobbs, Hayden and Bublick¹¹⁶⁵ point out that it is possible that the results would be the same, because determining reasonable care under the circumstances also takes into account the customs, practices and reasonable expectations of the parties.

The influence of reasonableness on the defence of assumption of risk is explicit. It is apparent that it is not a favoured defence when compared with contributory negligence, which is less harsh and perhaps a more fair defence to apply where both parties' conduct is tested against the standard of reasonableness. Furthermore liability may be limited instead of excluded. At the heart of succeeding with the defence is still reasonableness of conduct coupled with the knowledge of reasonableness of taking the risk and then nevertheless freely and voluntarily choosing to take the risk.¹¹⁶⁶ Naturally where the risk of harm is obvious it is unreasonable to hold the defendant liable but reasonable to hold the defendant liable in instances of gross negligence, recklessness or intentional conduct on the part of the defendant.¹¹⁶⁷ In respect of sporting activities, reasonableness of conduct depends on whether the participants followed the rules of the game, practices or custom. Thus if the rules, practices or customs are not followed then the defence will fail and it is reasonable to hold the defendant liable.¹¹⁶⁸ Shapo¹¹⁶⁹ suggests that a general reasonableness test would suffice as the doctrine of assumption of risk adds a layer of complexity. In terms of the plaintiff's knowledge with regard to assumption of risk, the test is more subjective, the plaintiff must not only act unreasonably but voluntarily confront a known risk, while with contributory negligence the test is objective.¹¹⁷⁰

¹¹⁶³ See *Jagger v Mohawk Mountain Ski Area Inc* 269 Conn 672, 849 A 2d 813 (2004); as well as cases cited by Dobbs, Hayden and Bublick *Hornbook on torts* 425 fn 122-126.

¹¹⁶⁴ See *Pfenning v Lineman* 947 NE 2d 392 (Ind 2011); *Allen v Dover Co-Recreational Softball League* 148 NH 407, 807 A 2d 1274 (2002); as well as other cases cited by Dobbs, Hayden and Bublick *Hornbook on torts* 426 fn 129.

¹¹⁶⁵ *Hornbook on torts* 426.

¹¹⁶⁶ See Dobbs, Hayden and Bublick *Hornbook on torts* 415.

¹¹⁶⁷ See *Restatement Third of Torts (Apportionment of Liability)* § 2 cmts g & f (2000); Dobbs, Hayden and Bublick *Hornbook on torts* 410; Keeton *et al Prosser and Keeton on torts* 484.

¹¹⁶⁸ See Dobbs, Hayden and Bublick *Hornbook on torts* 424; Epstein *Torts* 10.

¹¹⁶⁹ Shapo *Tort* 211-212.

¹¹⁷⁰ See Shapo *Tort* 167, 233.

4. Causation

Causation is required for intentional torts, strict liability as well as the tort of negligence.¹¹⁷¹ The defendant's negligent conduct which created unreasonable risks must be the cause of the plaintiff's harm.¹¹⁷² Factual causation and scope of liability (more or less equivalent to legal causation in South African law are required). The *Restatement Third of Torts*¹¹⁷³ refers to "factual cause" (hereinafter referred to as "factual causation" for the sake of convenience) and "scope of liability".

4.1 Factual causation

Factual causation is determined from the facts. In most instances "common knowledge" and "experience" are sufficient for the trier of the facts to conclude that there is a causal link between the harm and negligent conduct.¹¹⁷⁴ Where it is not easy to find a causal link, scientific or medical evidence may be relied on. For example, where the plaintiff has to prove that a certain drug taken during pregnancy caused harm to the foetus,¹¹⁷⁵ the plaintiff must show that the drug can cause such harm and that the baby suffered the harm.¹¹⁷⁶ Where expert testimony is required, the admissibility of the evidence and whether it is sufficiently reliable is important.¹¹⁷⁷

In respect of factual causation, the but-for test is usually applied.¹¹⁷⁸ In cases of omission, relevant hypothetical or so-called counter-factual conduct is inserted.¹¹⁷⁹ For example, in *Salinetto v Nystrom*,¹¹⁸⁰ the plaintiff was involved in a motor vehicle

¹¹⁷¹ Epstein *Torts* 248.

¹¹⁷² See *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 26 (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 312.

¹¹⁷³ (*Liability for Physical and Emotional Harm*) § 26 cmt a and chapter 6 Special Note on Proximate Cause (2010). See Oliphant 2011 *William Mitchell L Rev* 1599ff.

¹¹⁷⁴ Dobbs, Hayden and Bublick *Hornbook on torts* 314.

¹¹⁷⁵ See *Turpin v Merrell Dow Pharms Inc* 959 F 2d 1349 (6th Cir 1992); Dobbs, Hayden and Bublick *Hornbook on torts* 313.

¹¹⁷⁶ Dobbs, Hayden and Bublick *Hornbook on torts* 313.

¹¹⁷⁷ See *Coombs v Curnow* 219 P 3d 453 (Idaho 2010); further cases referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 314 fn 21.

¹¹⁷⁸ See for example, *Garr v City of Ottumwa* 846 NW 2d 865 (Iowa 2014); *Robinson v Washington Metro Transit Auth* 774 F 3d 33 (DC Cir 2014); *Friedrich v Fetterman & Assocs PA* 137 S 3d 362 (Fla 2013); *Berte v Bode* 692 NW 2d 368 (Iowa 2005); *City of Jackson v Spann* 4 So 3d 1029 (Miss 2009); *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 26 (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 317; Keeton *et al Prosser and Keeton on torts* 266.

¹¹⁷⁹ Keeton *et al Prosser and Keeton on torts* 265.

¹¹⁸⁰ 341 So 2d 1059 (Fla Dist Ct App 1977).

accident. When the medical practitioner attended to her, he took x-rays of her lower back and abdomen without asking her if she was pregnant. She subsequently learned that she was pregnant and underwent an abortion after her doctor advised her to terminate the pregnancy due to the foetus's exposure to the x-rays. The pathology report stated that the foetus was not alive at the time of the abortion. The plaintiff sued for medical malpractice. The court held that even though the medical practitioner had failed to check whether the plaintiff was pregnant, there was no causation. If hypothetical conduct was inserted, in other words if the medical practitioner would have asked the plaintiff if she was pregnant, she would have replied "no" as she in fact testified when asked what her response would have been. The x-rays would have in any event been taken. The court found that the negligent omission was not the but-for cause of the foetus's death.¹¹⁸¹ Dobbs, Hayden and Bublick¹¹⁸² point out that it is not always clear what sort of positive hypothetical counter fact should be inserted. For example, the medical practitioner could have insisted on further tests to determine whether she was pregnant thereby avoiding taking x-rays. Or if the plaintiff was asked if she was pregnant at the time, she could have questioned why it is important and once notified of the importance, could have gone for a pregnancy test to confirm whether she was pregnant or not.

In some instances, the but-for test cannot be applied as the causal link is weak and inferences cannot easily be made from the facts. Alternative tests are applied. In *Landers v East Texas Salt Water Disposal Company*,¹¹⁸³ two defendants acting independently caused excessive salt and oil to flow into the plaintiff's lake which led to the death of the plaintiff's fish. In this case, the joint wrongdoers were both held liable for the indivisible loss sustained by the plaintiff. Each defendant's conduct on its own was sufficient in causing the plaintiff's loss. The *Restatement Third of Torts*¹¹⁸⁴ recommends that in such instances where two or more causes sufficiently cause the plaintiff's harm, each cause is regarded as a factual cause, and the but-for test is not applied, because if it were applied it would absolve each defendant from liability. The

¹¹⁸¹ Dobbs, Hayden and Bublick *Hornbook on torts* 319.

¹¹⁸² Dobbs, Hayden and Bublick *Hornbook on torts* 319-320.

¹¹⁸³ 151 Tex 251, 248 SW 2d 731 (1952).

¹¹⁸⁴ (*Liability for Physical and Emotional Harm*) §27 (2010). See Dobbs, Hayden and Bublick *Hornbook on torts* 322.

“substantial factor” test is applied.¹¹⁸⁵ The *First Restatement of Torts*¹¹⁸⁶ states that all defendants “who are substantial factors in the harm are factual causes”.¹¹⁸⁷

In instances where a defendant’s conduct is not sufficient on its own to cause harm, but when combined with multiple defendants’ conduct causes harm to the plaintiff, the but-for test is applied to the collective conduct of all the defendants.¹¹⁸⁸

Where it cannot be ascertained which of the defendants caused the plaintiff harm or loss, the *Restatement Third of Torts*¹¹⁸⁹ recommends the reversal of the burden of proving the causal link on the defendants. This rule was initially applied in *Summers v Tice*,¹¹⁹⁰ where two hunters negligently fired a shot independently and one of the shots struck the plaintiff’s eye. The court held that only one of the defendant’s shot caused the harm. The court shifted the burden requesting each defendant to prove that his shot did not cause the injury to the plaintiff. If either were unable to prove that they did not cause the harm, then they would be held jointly and severally liable to the plaintiff. Thus in terms of policy and what is fair and just in the circumstances, the plaintiff as the innocent person should not bear his own loss and be without redress. Each defendant created a doubt with respect to causation and in a sense denied the plaintiff of the opportunity to present evidence that would have been available to him.¹¹⁹¹ In order to shift the burden, all the defendants must have acted negligently.¹¹⁹² The courts have adopted this principle.¹¹⁹³

¹¹⁸⁵ See *Anderson v Minneapolis St Paul & Sault Ste Marie Railway Co* 1920 146 Minn 430, 179 NW 45; *Carney v Goodman* 1954, 38 Tenn App 55, 270 SW 2d 572; Keeton *et al Prosser and Keeton on torts* 267.

¹¹⁸⁶ § 432(2) (1934). See Dobbs, Hayden and Bublick *Hornbook on torts* 322.

¹¹⁸⁷ See for example, *Glover ex rel Glover v Jackson State Univ* 968 So 2d 1267, 1277 (Miss 2007); *Mitchell v Gonzales* 54 Cal 3d 1041, 1 Cal Rptr 2d 872 (1991); Dobbs, Hayden and Bublick *Hornbook on torts* 322.

¹¹⁸⁸ *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 27 cmt f (2010). See *Spaur v Owens-Corning Fibreglass Corp* 510 NW 2d 854, 858 (Iowa 1994); Green 2011 *Tex L Rev* 41; Dobbs, Hayden and Bublick *Hornbook on torts* 324; Keeton *et al Prosser and Keeton on torts* 268.

¹¹⁸⁹ *(Liability for Physical and Emotional Harm)* § 28 cmt b, f, g (2010);

¹¹⁹⁰ 33 Cal 2d 80, 199 P 2d 1 (1948).

¹¹⁹¹ See *Hellums v Raber* 853 NE 2d 143 (Ind Ct App 2006); *Gardner v National Bulk Carriers Inc* 310 F 2d 284, 91 ALR 2d 1023 (4th Cir 1962); Dobbs, Hayden and Bublick *Hornbook on torts* 328; Keeton *et al Prosser and Keeton on torts* 271.

¹¹⁹² See *Cunzo v Shore* 958 A 2d 840 (Del 2008); Dobbs, Hayden and Bublick *Hornbook on torts* 329.

¹¹⁹³ See for example, *Murphy v Taxicabs of Louisville Inc Ky* 1959 330 SW 2d 395 where the plaintiff was injured by more than one negligently driven motor vehicle and was unable to prove which driver caused his injuries; *Huston v Konieczny* 52 Ohio St 3d 214, 556 NE 2d 505 (1990) in

In the DES cases,¹¹⁹⁴ prescription drugs to prevent miscarriages were manufactured by numerous companies and it was uncertain which of the manufacturers' drugs caused cancers to the particular plaintiffs. Because it took some time before the cause of the drug was discovered, it was not possible to pinpoint the manufacturers and many did not even exist at the time when the cancers manifested. The "market share liability" principle was proposed "in a law review comment" dealing with the Des cases.¹¹⁹⁵ According to this principle, if a manufacturer sold for example fifty percent of all DES marketed, then such manufacturer should be held fifty percent liable for the plaintiff's claim. Thus the manufacturer should be held liable for a percentage of damage based on the manufacturer's market share of DES. Some courts adopted this principle¹¹⁹⁶ while others rejected it.¹¹⁹⁷ The *Restatement Third of Torts*¹¹⁹⁸ has not pronounced whether the rule should be adopted.

Due to the fact that there must be a causal link between the harm suffered and the negligent conduct, legal practitioners will specify conduct which, but for the plaintiff's conduct, whether in the form of an omission of a commission, would not have occurred or by specifying the harm where it is actual harm or the loss of chance.¹¹⁹⁹

respect of several possible suppliers of alcohol to an underage drinker; Stapleton 2002 *Tort LJ* 276; Dobbs, Hayden and Bublick *Hornbook on torts* 329 fn 105; Keeton *et al Prosser and Keeton on torts* 271-272.

¹¹⁹⁴ See *Sindell v Abbott Labs* 26 Cal 3d 588, 163 Cal Rptr 132, 607 P 2d 924 (1980); *Conley v Doyle Drug Co* 570 So 2d 275 (Fla 1990); *Smith v Cutter Biological Inc* 72 Haw 416, 823 P 2d 717 (1991); *Hymowitz v Eli Lilly & Co* 73 NY 2d 487, 541 NYS 2d 941, 539 NE 2d 1069 (1989); *Martin Abbott Labs* 102 Wash 2d 581, 689 P 2d 368 (1984); *Collins v Eli Lilly Co* 116 Wis 2d 166, 342 NW 2d 37 (1984); Dobbs, Hayden and Bublick *Hornbook on torts* 330 fn 108. See chapter 6 para 3.

¹¹⁹⁵ Comment, *DES and a Proposed Theory of Enterprise Liability* 46 *Fordham L Rev* 963 (1978). See Porat 2011 *Yale L J* 110; Dobbs, Hayden and Bublick *Hornbook on torts* 330.

¹¹⁹⁶ See Porat and Stein *Tort liability under uncertainty* 59-67 who refer to different jurisdictions and the courts' mind-sets towards the market share principle; Porat 2011 *Yale L J* 111 fn 83; Geistfeld 2007 *U Pa L Rev* 451; and Rostron 2004 *UCLA L Rev* 153 who submits that this principle was applied by the courts as a result of the unusual circumstances surrounding the DES drugs instead of being applied generally.

¹¹⁹⁷ See *Smith v Eli Lilly & Co* 137 Ill 2d 222, 560 NE 2d 324 (1990); *Zafft v Eli Lilly & Co* 676 SW 2d 241 (Mo 1984); *Gorman v Abbott Labs* 599 A 2d 1364 (R1 1991); Dobbs, Hayden and Bublick *Hornbook on torts* 330 fn 110.

¹¹⁹⁸ (*Liability for Physical and Emotional Harm*) § 28 cmt p (2010).

¹¹⁹⁹ See Dobbs, Hayden and Bublick *Hornbook on torts* 324-325.

Apportionment may be applied to causation, for example where one person causes injury to the plaintiff's leg and the other acting independently causes injury to the plaintiff's arm.¹²⁰⁰

The lost chance of recovery principle, commonly applied in medical malpractice claims, has been rejected in sixteen states but accepted in twenty-two states.¹²⁰¹ In some instances where the plaintiff proves a loss of chance of fifty percent or more,¹²⁰² the courts allow the jury to find causation and then award damages for all harm or loss,¹²⁰³ while in other instances the courts acknowledge that the medical practitioner's conduct may not have caused the plaintiff's death but the loss of the plaintiff's chance of a more beneficial medical outcome,¹²⁰⁴ life expectancy¹²⁰⁵ or the chance to live.¹²⁰⁶ The plaintiff may recover the amount reflecting the percentage of the chance lost that was caused by the negligent conduct.¹²⁰⁷

The influence of reasonableness on factual causation is implicit. It is reasonable to hold the defendant liable in negligence only if he factually caused harm to the plaintiff. If a factual causal link cannot be found between the conduct and the consequences then factual causation is absent and so is liability in negligence. In respect of omissions and the but-for test, hypothetical non-negligent, reasonable conduct must be inserted in order to determine a factual causal link, thus the influence of reasonableness is evident here. Alternative tests are used besides the but-for test in order to bring about a reasonable and fair outcome. Where there are a number of defendants who independently cause harm to the plaintiff, the substantial factor test may be used to

¹²⁰⁰ Dobbs, Hayden and Bublick *Hornbook on torts* 316.

¹²⁰¹ According to the recent contribution by Koch 2010 *NCL Rev* 595 (referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 332).

¹²⁰² In Connecticut the loss of chance is allowed only if the plaintiff proves a 50% or more loss of chance. See *Boone v William W Backus Hosp* 272 Conn 551, 574, 864 A2d 1, 18 2005; Dobbs, Hayden and Bublick *Hornbook on torts* 333 fn 132.

¹²⁰³ See *Thompson v Sun City Cmty Hosp Inc* 141 Ariz 597, 688 P 2d 605 (1984); *Mayhue v Sparksman* 653 NE 2d 1384 (Ind 1995); Dobbs, Hayden and Bublick *Hornbook on torts* 332.

¹²⁰⁴ See for example, *Lord v Lovett* 770 A 2d 1103 (NH 2001). See also King 1998 *Mem L Rev* 492; King 1981 *Yale LJ* 1353; Dobbs, Hayden and Bublick *Hornbook on torts* 332;

¹²⁰⁵ See for example, *Alexander v Scheid* 726 NE 2d 272 (Ind 2000); Dobbs, Hayden and Bublick *Hornbook on torts* 332.

¹²⁰⁶ Where a patient dies as a result of the medical practitioner's negligence, then the claim is regulated by Wrongful life statutes. See Dobbs, Hayden and Bublick *Hornbook on torts* 333 fn 133.

¹²⁰⁷ See authority referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 333-334 fn 134-139.

establish factual causation.¹²⁰⁸ In instances where a defendant's conduct is not sufficient on its own to cause harm but when combined with other defendants' conduct causes harm to the plaintiff, then the but-for test is applied to the aggregate conduct of all the defendants.¹²⁰⁹ Where it cannot be ascertained which of the defendants caused the plaintiff harm or loss, the burden of proving the causal link is reversed and each defendant must prove that his negligent conduct did not cause the harm.¹²¹⁰ Alternative methods applied in finding factual causation leads to the reasonableness of finding factual causation in instances where the strict application of the but-for test would lead to unjust results. In certain cases where the plaintiff is able to prove a loss of chance of a more beneficial medical outcome, life expectancy or the chance to live, then the plaintiff may be entitled to recover a percentage of the damage sustained as a result of such damage sustained due to the defendant's negligent, unreasonable conduct.¹²¹¹ Thus in such instances involving a loss of chance it may be reasonable and fair to hold the defendant liable for the loss of chance.

4.2 Scope of liability (*proximate cause, legal causation*)

The plaintiff must prove that the harm he suffered was "within the defendant's scope of liability".¹²¹² The scope of liability is a "policy orientated doctrine designed to be a method for limiting liability after cause-in-fact has been established".¹²¹³ In respect of the tort of negligence, it deals with the "policy or justice issue" and in terms of the tort of negligence, "limiting liability to the risks the defendant negligently created".¹²¹⁴ In reference to proximate cause rules it would be unjust and impractical to impose liability on a defendant for harm resulting from his negligent conduct which falls outside the

¹²⁰⁸ See the *Restatement Third of Torts (Liability for Physical and Emotional Harm)* §27 (2010). See Dobbs, Hayden and Bublick *Hornbook on torts* 322.

¹²⁰⁹ See *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 27 cmt f (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 324.

¹²¹⁰ See *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 28 (2010).

¹²¹¹ See Dobbs, Hayden and Bublick *Hornbook on torts* 333-334.

¹²¹² *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 29 (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 337.

¹²¹³ *Pittway Corp v Collins* 409 Md 218, 973 A 2d 771, 772 (2009). See Dobbs, Hayden and Bublick *Hornbook on torts* 338 fn 7.

¹²¹⁴ Dobbs, Hayden and Bublick *Hornbook on torts* 344.

scope of risks he created.¹²¹⁵ The *Restatement Third of Torts*¹²¹⁶ has pronounced a preference for the term “scope of liability” over the terms “legal causation” or “proximate cause”, and calls for value-based judgments which is determined by the jury.¹²¹⁷ According to the *Restatement Third of Torts*,¹²¹⁸ the “scope of liability” limits liability to harm arising from risks created by the defendant’s tortious conduct. Thus harm that ensues from reasonable and unforeseeable risks is excluded from the scope of liability.¹²¹⁹ Furthermore the defendant cannot be held liable for unknown risks or risks not reasonably known due to administrative costs or out of fairness.¹²²⁰ Dobbs, Hayden and Bublick, in their book, follow the *Second and Third Restatements* use of the term “scope of liability” where it aids in understanding but fall back “on the still-commonly used term *proximate cause* where use of a different term would itself produce confusion”. Hence in this paragraph, where possible the term “scope of liability” will be referred to, but the term proximate cause will also be used.

There is no uniform test to determine the scope of liability and instead it is determined with different theories depending on the type of situation encountered.¹²²¹ It depends on whether the consequence was reasonably foreseeable or directly caused by the defendant’s conduct and where an intervening, abnormal, unforeseeable act breaks the chain of causation. Thus the courts refer to directness, reasonable foreseeability, or natural and probable consequences of the defendant’s conduct.¹²²² The theory of adequate causation is foreign to American law.¹²²³ The reasonable foreseeability of

¹²¹⁵ See *McCain v Florida Power Corp* 593 So 2d 500 (Fla 1992); *Goldberg v Florida Power & Light Co* 899 So 2d 1105 (Fla 2005); *Staelens v Dobert* 318 F 3d 77 (1st Cir 2003); *Poskus v Lombardo’s of Randolph Inc* 670 NE 2d 383, 423 Mass 637 (1996); *Zaza v Marquess and Nell Inc* 144 NJ 34 675 A 2d 620 (1996); *Caputzal v Lindsay Co* 48 NJ 69 222 A 2d 513 (1966); Dobbs, Hayden and Bublick *Hornbook on torts* 338-340.

¹²¹⁶ (*Liability for Physical and Emotional Harm*) § 26 and chapter 6, Special note on Proximate Cause (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 338.

¹²¹⁷ See *Rascher v Friend* 279 Va 370, 689 SE 2d 661 (2010); *Anselemo v Tuck* 325 Ark 211, 924 SW 2d 798 (1996); *Cramer v Slater*, 146 Idaho 868 204 P 3d 508 (2009). However, some states prefer the scope of liability to be determined by the court and not the jury – see for example, *Kim v Budget Rent A Car Systems Inc.* 143 Wash 2d 190 15 P 3d 1283 (2001); Dobbs, Hayden and Bublick *Hornbook on torts* 341 fn 23.

¹²¹⁸ (*Liability for Physical and Emotional Harm*) § 29 (2010).

¹²¹⁹ See *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 3 cmt g and cmt j (2010); Green and Gilead *Wake Forest Univ Legal Studies Paper No. 2014874* 6.

¹²²⁰ Green and Gilead *Wake Forest Univ Legal Studies Paper No. 2014874* 8 with reference to Holmes *Common law* 94-96.

¹²²¹ See Prosser 1950 *Cal L Rev* 369; Keeton *et al Prosser and Keeton on torts* 279.

¹²²² Zweigert and Kötz *Comparative law* 610.

¹²²³ Green and Cardi in Koziol (ed) *Basic questions of tort law* 500.

the general type of harm¹²²⁴ is the predominant test applied in establishing the scope of liability.¹²²⁵ The precise manner in which the harm occurs, or the time when the harm occurs, need not be foreseeable. All that is required is the foreseeability of the general type of harm.¹²²⁶ For example, in *Derdiarian v Felix Contracting Corp*¹²²⁷ the plaintiff was employed by a construction company. He was posted to work at a construction site where he was exposed to traffic and not adequately protected from traffic. A driver suffered a seizure, lost control of the motor vehicle and struck the plaintiff. The plaintiff sued the construction company (for failing to maintain a safe working environment) as well as the driver who did not take his anti-seizure medication. The plaintiff succeeded with his claim in the lower court. The construction company appealed, alleging that the driver's conduct was an intervening cause. The court held that it was not an intervening cause as harm to the plaintiff by oncoming traffic was foreseeable in light of the construction company negligently failing to provide a safe work site. Dobbs, Hayden and Bublick¹²²⁸ point out that in this case harm to the plaintiff was foreseeable, if however, the plaintiff was struck by a falling aircraft then harm by an aircraft is not foreseeable.

The English *Wagon Mound No. 1*¹²²⁹ decision where liability on the part of the defendant was excluded for the unforeseeable harm caused by fire, serves as the authority for the reasonable foreseeability of harm theory applied in determining the scope of liability.¹²³⁰ The American decision, *Palsgraf v Long Island Railroad Co*¹²³¹ (hereinafter referred to as "*Palsgraf*") is the *locus classicus* case for finding that liability must be limited only to the risks created by the defendant's negligent conduct.¹²³² In this case, a passenger was attempting to get on a moving train owned by the defendant. Employees of the defendant tried to assist the passenger whereby one

¹²²⁴ See *Craig v Driscoll* 262 Conn 312, 813 A 2d 1003 (2003); Dobbs, Hayden and Bublick *Hornbook on torts* 356-357.

¹²²⁵ Dobbs, Hayden and Bublick *Hornbook on torts* 339.

¹²²⁶ See *Johnson v Kosmos Portland Cement Co* 64 F 2d 193 (6th Cir 1933) where harm by explosion was reasonably foreseeable even though it occurred as a result of a lightning strike. See discussion by Dobbs, Hayden and Bublick *Hornbook on torts* 356-360. Cf Keeton *et al Prosser and Keeton on torts* 273, 316-317.

¹²²⁷ 51 NY 2d 308, 434 NYS 2d 166, 414 NE 2d 666 (1980).

¹²²⁸ *Hornbook on torts* 358.

¹²²⁹ *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* 1961 AC 388. See chapter 4 para 4.2.

¹²³⁰ See Dobbs, Hayden and Bublick *Hornbook on torts* 347-348.

¹²³¹ 248 NY 339, 162 NE 2d 99 (1928).

¹²³² See Dobbs, Hayden and Bublick *Hornbook on torts* 348.

employee tried to help him on while the other pushed him in. In trying to assist the passenger, the employees caused him to drop a parcel covered in newspaper he was holding which contained fireworks. When the parcel hit the ground, the fireworks exploded and knocked down some scales at the other end of the platform which struck and injured the plaintiff. The plaintiff sued the railroad company, the defendant, and was successful at the trial and first appeal (Appellate Division). The Defendant appealed. Cardozo CJ stated that the employees did not know of the contents of the parcel and could not have reasonably foreseen the ensuing harm. Even though a wrong was done to the passenger, there was no wrong done to plaintiff, there was no violation of her bodily security, and no negligence.¹²³³ Cardozo CJ held that even the “most cautious mind” would not have expected the ensuing harm.¹²³⁴ If the harm is unintended, the plaintiff must show that “the act had possibilities of danger so many and apparent as to entitle him to be protected against the [harm]”.¹²³⁵ Cardozo CJ found that there was no proximate cause. Thus judgment was reversed and the defendant was found not liable.¹²³⁶ Andrews J, dissenting, stated that everyone owes a duty to the public at large to refrain from acts that may unreasonably threaten the safety of others. Thus if such acts occur, the defendant injures not only those that are reasonably expected to be harmed but also others outside of the danger zone, those not reasonably expected to be harmed.¹²³⁷ He further stated¹²³⁸ that what is meant by “‘proximate’ is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics”. He opined¹²³⁹ that the defendant should have been held liable for the proximate causes which were not remote in time or space and were the direct consequences of the original negligent act.¹²⁴⁰ There is still some support for finding liability for “all harms directly caused” as opposed to only reasonable foreseeable harm.¹²⁴¹

¹²³³ *Palsgraf v Long Island Railroad Co* 248 NY 339, 162 NE 2d 99 (1928).

¹²³⁴ *Palsgraf v Long Island Railroad Co* 248 NY 339, 162 NE 2d 99, 100 (1928).

¹²³⁵ *Palsgraf v Long Island Railroad Co* 248 NY 339, 162 NE 2d 99,101 (1928).

¹²³⁶ *Palsgraf v Long Island Railroad Co* 248 NY 339, 162 NE 2d 99, 101 (1928).

¹²³⁷ *Palsgraf v Long Island Railroad Co* 248 NY 339, 162 NE 2d 99, 103 (1928).

¹²³⁸ *Palsgraf v Long Island Railroad Co* 248 NY 339, 162 NE 2d 99, 103 (1928).

¹²³⁹ *Palsgraf v Long Island Railroad Co* 248 NY 339, 162 NE 2d 99, 105 (1928).

¹²⁴⁰ According to re *Polemis and Furness, Withy & Co Ltd* 1921 3 K B 560, the English decision. See chapter 4 para 4.2.

¹²⁴¹ See for example, *Busta v Columbus Hosp Corp* 276 Mont 342, 916 P 2d 122 (1996); *Rockweit v Senecal* 197 Wis 2d 409, 541 NW 2d 742 (1995); Dobbs, Hayden and Bublick *Hornbook on torts* 350. Cf Keeton *et al Prosser and Keeton on torts* 273-274, 295-297.

In respect of intervening causes, the defendant is not held liable because the risk is not within the scope of risk negligently created by the defendant. For example, in *Sheehan v City of New York*,¹²⁴² a bus stopped at an intersection to let passengers on or off the bus instead of stopping at a designated stop. While the bus was stationary at the intersection, it was struck from the rear by a sanitation truck. It transpired that the driver of the sanitation truck lost control of the truck because the breaks had failed. The plaintiff, a passenger in the bus, was injured and sued the owner of the sanitation truck as well as the owner of the bus. It was held that the conduct of the sanitation truck driver was the proximate cause of the plaintiff's injuries and the owner of the bus was not held liable as vehicles do frequently stop at intersections. Thus the failing brakes of the sanitation truck were considered a supervening cause.¹²⁴³

In instances where the defendant negligently creates an opportunity for a subsequent intervening (reasonably unforeseeable, intentional¹²⁴⁴ or criminal) act to cause harm to the plaintiff, the defendant may escape liability. For example, if the defendant leaves his keys in the car and a thief steals it causing an accident as well as injury to the plaintiff; the defendant may not be held liable because the defendant's act is not the proximate cause of the harm. Furthermore, there may also be no negligence on the part of the defendant as the theft or negligence of the thief is not foreseeable.¹²⁴⁵ Dobbs, Hayden and Bublick¹²⁴⁶ however point out that depending on the circumstances of the case, the courts may find criminal or intentional intervening conduct as foreseeable. For example, it is possible to find that a crime was foreseeable and that the defendant had a duty of reasonable care to protect the plaintiff from being a victim of crime.¹²⁴⁷

The thin-skull rule applies and the defendant upon finding his conduct negligent and the factual cause of the plaintiff's harm must take the victim as he finds him. In such

¹²⁴² 40 NY 2d 496, 387 NYS 2d 92, 354 NE 2d 832 (1976).

¹²⁴³ See Dobbs, Hayden and Bublick *Hornbook on torts* 370.

¹²⁴⁴ See *Wiener v Southcoast Childcare Centers Inc* 32 Cal 4th 1138, 88 P 3d 517, 12 Cal Rptr 3d 615 2004; Dobbs, Hayden and Bublick *Hornbook on torts* 364.

¹²⁴⁵ See *Ross v Nutt* 177 Ohio St 113, 203 NE 2d 118 (1964); authority cited by Dobbs, Hayden and Bublick *Hornbook on torts* 363 fn 159. Cf *Keeton et al Prosser and Keeton on torts* 314.

¹²⁴⁶ Dobbs, Hayden and Bublick *Hornbook on torts* 364.

¹²⁴⁷ See *re September 11 Litig* 280 F Supp 2d 279 (SDNY 2003); Dobbs, Hayden and Bublick *Hornbook on torts* 364.

an instance, the defendant is liable for a greater extent of harm than that suffered by a normal person.¹²⁴⁸ The defendant is liable for foreseeable harm as well as unforeseeable harm due to the plaintiff's infirmities.¹²⁴⁹

In the well-known decision of *Wagner v International Railway*,¹²⁵⁰ a man fell from a train into a gorge. His cousin, the plaintiff, went in search of him and also fell. The trial court held that even though the defendant's conduct was negligent *vis-a-vis* the man who first fell off the train, such initial negligent act could not support the claim by the plaintiff as rescuer. However, on appeal Cardozo CJ held that the plaintiff was entitled to a claim and the chain of causation was not broken as a result of the cousin's rescue attempt. Whether the cousin's fall was as a result of the defendant's negligence and whether the rescue attempt was unreasonable in the circumstances, were to be decided by the jury.¹²⁵¹ It is accepted that the defendant is liable to a rescuer where there is a reasonable rescue attempt¹²⁵² and the rescuer reasonably believes that a person is in peril.¹²⁵³ The rescue attempt does not need to be immediate or spontaneous and may be an attempt to save the defendant himself from peril.¹²⁵⁴ Rescuing a person in peril is a natural human response.¹²⁵⁵ If the rescuer acts in an

¹²⁴⁸ See for example, *Rowe v Munye* 702 NW 2d 729 (Minn 2005); *Vaughn v Nissan Motor Corporation in USA Inc* 77 F 3d 736, 738 (4th Cir 1996); *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 31 (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 356.

¹²⁴⁹ See for example *Chicago City Ry Co v Saxby* 213 Ill 274 72 NE 755 (1904); *Hammerstein v Jean Development West* 111 Nev 1471 907 P 2d 975 (1995); Dobbs, Hayden and Bublick *Hornbook on torts* 355. Cf *Rowe v Munye* 702 NW 2d 729 (Minn 2005) – the defendant is liable for the unforeseeable aggravation of the plaintiff's pre-existing condition.

¹²⁵⁰ 232 NY 176, 133 NE 437 (1921).

¹²⁵¹ *Wagner v International Railway* 232 NY 176, 133 NE 437 (1921) 438. See Dobbs, Hayden and Bublick *Hornbook on torts* 348-349.

¹²⁵² See *Espinoza v Schulenburg* 212 Ariz 215, 109 P 3d 937 (2006); Dobbs, Hayden and Bublick *Hornbook on torts* 366.

¹²⁵³ See *Rasmussen v State Farm Mut Auto Ins Co* 278 Neb 289, 770 NW 2d 619 (2009); *Solomon v Shuell* 435 Mich 104, 457 NW 2d 669 (1990); *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 32 cmt b (2010); cases cited by Dobbs, Hayden and Bublick *Hornbook on torts* 349 fn 61-66.

¹²⁵⁴ See *Wagner International Railway Co* 1921, 232 NY 176, 133 NE 2d 437; *Parks v Starks* 1955, 342 Mich 443, 70 NW 2d 805; *Hollingsworth v Schminkey* 553 NW 2d 591, 598 (Iowa 1996); *contra Star Transport Inc v Byard* 891 NE 2d 1099 (Ind App 2008); Dobbs, Hayden and Bublick *Hornbook on torts* 349; Keeton *et al Prosser and Keeton on torts* 308.

¹²⁵⁵ See *Ruth v Ruth* 1963, 213 Tenn 82, 372 SW 2d 285; *Provenzo v Sam* 1968, 23 NY 2d 256, 296 NYS 2d 322, 244 NE 2d 26; *Sears v Morrison* 76 Cal App 4th 577, 90 Cal Rptr 2d 528 (1998); Dobbs, Hayden and Bublick *Hornbook on torts* 349; Keeton *et al Prosser and Keeton on torts* 308.

unreasonable manner, that is, completely foolish or in an extraordinary manner,¹²⁵⁶ his award for damages may be reduced as a result of his contributory negligence.¹²⁵⁷

The question of scope of liability is not determined before fault in the form of negligence. Reasonable foreseeability of harm plays a role in determining a duty of care, fault in the form of negligence and the scope of liability. In respect of negligence, the defendant should have foreseen some kind of harm to the plaintiff or his property and should have taken steps to prevent harm if the reasonable person in a similar position would have done so. In terms of the scope of liability, the question is whether the defendant should have foreseen the type of harm that ensued and whether the plaintiff “was within the class of persons to whom such harm might foreseeably befall”.¹²⁵⁸ Thus a duty of reasonable care is owed only to reasonably foreseeable plaintiffs.¹²⁵⁹ Liability is limited in various ways by the different elements in the tort of negligence. What must be determined *inter alia* is whether the defendant had a legal duty to use reasonable care under the circumstances and whether the defendant's conduct was the proximate cause of the harm sustained by the plaintiff.¹²⁶⁰ Green and Cardiac¹²⁶¹ state that there is an anomaly in American law with regard to the limiting of liability stemming from *Palsgraf*.¹²⁶² Cardozo CJ opined that duty and negligence were both limited by harm that could be reasonably foreseen at the time of the negligent conduct. Cardozo CJ was of the opinion that there was no duty owed to the plaintiff and that the enquiry into causation was not even necessary.¹²⁶³ To him duty was a relational concept.¹²⁶⁴ As a result of this, in establishing the scope of liability, the question has shifted from the jury (a factual enquiry) to the court (a question of law to

¹²⁵⁶ See for example, *Robinson v Butler* 1948, 226 Minn 491, 33 NW 2d 821 where an excited passenger seized the wheel; *Cone v Inter County Telephone & Telegraph Co* Fla 1949, 40 So 2d 148 where the plaintiff foolishly exposed himself to danger; *Keeton et al Prosser and Keeton on torts* 309 fn 79.

¹²⁵⁷ See for example, *Illinois Central Railway Co v Oswald* 1930, 338 Ill 270, 170 NE 247; *Wolfinger v Shaw* 1940 138 Neb 229,292 NW 731; *Keeton et al Prosser and Keeton on torts* 308.

¹²⁵⁸ Dobbs, Hayden and Bublick *Hornbook on torts* 342.

¹²⁵⁹ See for example, *Splendorio v Bilray Demolition Co* 682 A 2d 461 (RI 1996); *Fisher v Swift Transport Co* 342 Mont 335 181 P 3d 601 (2008); Dobbs, Hayden and Bublick *Hornbook on torts* 347 fn 49.

¹²⁶⁰ See Dobbs, Hayden and Bublick *Hornbook on torts* 344.

¹²⁶¹ Green and Cardiac in Koziol (ed) *Basic questions of tort law* 499.

¹²⁶² *Palsgraf v Long Island Railroad Co* 248 NY 339, 162 NE 2d 99 (1928).

¹²⁶³ *Palsgraf v Long Island Railroad Co* 248 NY 339, 162 NE 2d 99,101 (1928).

¹²⁶⁴ Green and Cardiac in Koziol (ed) *Basic questions of tort law* 499.

be determined by the adjudicator).¹²⁶⁵ As already mentioned,¹²⁶⁶ a number of academic writers¹²⁶⁷ prefer the question of reasonable foreseeability of harm not to be a question at the duty stage and blame the confusion for its role at the duty stage due to the decision of *Palsgraf* where risk of harm to a certain class of persons was not reasonably foreseen. The issue of reasonable foreseeability of harm was dealt with by Cardozo CJ at the duty stage. Andrew J in the dissenting judgment dealt with reasonable foreseeability of harm at the proximate cause stage.¹²⁶⁸

It is submitted that a recent contribution written by Cardj¹²⁶⁹ is important as he extensively researched the law, provides a succinct summary, and illustrates the uncertainty found in the American tort of negligence, where *inter alia* the use of the concept of reasonableness (particularly reasonable foreseeability of harm and preventability of harm), fairness, justice, morality, policy considerations and community values lend to the confusion. He illustrates the many factors that are used to determine a duty of reasonable care, which include the factors used in determining fault in the form of negligence as well as “proximate cause”. It is submitted that this problem is common in the English tort of negligence as well as in the South African law of delict, specifically with the elements of wrongfulness, negligence and legal causation which require value judgments and are policy laden. This has in all probability occurred as a result of the influence of English tort law principles on American and South African law.

Cardi's contribution is intended to provide clarity in American law. In analysing *Palsgraf*,¹²⁷⁰ he looks at the following three questions: “(1) [w]hat is the nature of duty – is it relational or act-centered? (2) Is plaintiff-foreseeability a duty inquiry or an aspect

¹²⁶⁵ Green and Cardj in Koziol (ed) *Basic questions of tort law* 499.

¹²⁶⁶ See para 3.1 above.

¹²⁶⁷ See Green 1930 *Col L Rev* 789; Goodhart 1930 *Yale LJ* 449; Campbell 1938 *Wis L Rev* 402; Cowan 1938 *Minn L Rev* 46; Gregory 1938 *U Chi L Rev* 36; Eldredge 1952 *Pa B A Q* 158; James 1953 *Nev U L Rev* 778; Dias 1955 *Camb L J* 198; Dias 1956 *Tulane L Rev* 377; Fleming 1961 *Can Bar Rev* 489; Green 1961 *Col L Rev* 1401; Goodhart 1960 *L Q Rev* 567; Payne 1962 *Mod L Rev* 1; Wilson and Slade 1952 *Mod L Rev* 458; Prosser 1953 *Mich L Rev* 1; Dobbs, Hayden and Bublick *Hornbook on torts* 344; Keeton *et al Prosser and Keeton on torts* 274-275, 280-281, 284-290.

¹²⁶⁸ *Palsgraf v Long Island Railroad Co* 248 NY 339, 162 NE 2d 99, 103 (1928).

¹²⁶⁹ 2011 *B U L Rev* 1873ff.

¹²⁷⁰ *Palsgraf v Long Island Railroad Co* 248 NY 339, 162 NE 2d 99 (1928).

of proximate cause? (3) Is a court or a jury the proper arbiter of foreseeability?”¹²⁷¹ Cardozo J writing for the majority of the court found that duty is relational and that is a matter of law determined by the adjudicator. Cardo¹²⁷² explains that after researching “hundreds of duty cases”, the current state of the element of duty is “frustratingly inconsistent, unfocused, and often nonsensical”. This is due to the common law being developed by adjudicators who are human beings and not perfect. After examining “fifty-one jurisdictions (the fifty states and the District of Columbia)” he concludes that no court considers the key aspect of duty as one of “relation” but that it is “articulated as a multi-factorial policy decision”.¹²⁷³ The main factors considered in establishing a duty according to *Biakanja v Irving*¹²⁷⁴ and *Rowland v Christian*¹²⁷⁵ include:

“(1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered injury, (3) the closeness of the connection between the defendant’s conduct and the injury suffered, (4) the moral blame attached to the defendant’s conduct, (5) the policy of preventing future harm, (6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and (7) the availability, cost, and prevalence of insurance for the risk involved”.¹²⁷⁶

Cardo¹²⁷⁷ refers to eight jurisdictions that embraced the factors *verbatim* and a further five that have adapted them. The above-mentioned cases where these factors were enunciated, not surprisingly dealt with cases involving economic harm and liability of a landowner. The above-mentioned jurisdictions currently use these factors in imposing a duty in all cases. Cardo¹²⁷⁸ extensively refers to cases in another thirty jurisdictions which refer to other factors including:

“(1) the foreseeability of some general risk of harm, (2) the foreseeability of the harm that in fact materialized, (3) the relationship between the parties, (4) the nature of the activity in which the defendant engaged, (5) the type of injury risked by the defendant’s conduct, (6) the nature of the plaintiff’s injured interest, (7) the social utility of the defendant’s conduct, (8) the burden on the defendant of taking precautions against the risk, (9) the defendant’s ability to exercise due care, (10) the consequences on society of imposing the burden on the defendant, (11) public policy, (12) the normal expectations of participants in the defendant’s activity, (13) the expectations of the parties and of society, (14) the goal of preventing future injuries by deterring conduct in which the defendant engaged, (15) the desire to avoid an increase in litigation, (16) the decisions of other jurisdictions, (17) the balance of the foreseeable risk of injury versus the burden of preventing it (i.e., the Learned Hand formula), (18) fairness, (19) logic and science, (20) the desire to limit the consequences of wrongs

¹²⁷¹ Cardo 2011 *B U L Rev* 1874.

¹²⁷² Cardo 2011 *B U L Rev* 1875.

¹²⁷³ Cardo 2011 *B U L Rev* 1878.

¹²⁷⁴ 320 P 2d 16, 19 (Cal 1958).

¹²⁷⁵ 443 P 2d 561, 564 (Cal 1968).

¹²⁷⁶ Cardo 2011 *B U L Rev* 1878.

¹²⁷⁷ 2011 *B U L Rev* 1879.

¹²⁷⁸ 2011 *B U L Rev* 1879-1883.

(expressed in New York as the desire to curb the likelihood of unlimited or insurer-like liability), (21) the hand of history, (22) ideals of morality and justice, (23) the convenience of administration of the resulting rule, (24) social ideas about where the plaintiff's loss should fall, (25) whether there is social consensus that the plaintiff's asserted interest is worthy of protection, (26) community mores, (27) whether the injury is too remote from the defendant's conduct, (28) whether the injury is out of proportion to the defendant's wrong, (29) whether the imposition of a duty would open the way to fraudulent claims, (30) whether the recognition of a duty would enter a field with no sensible stopping point, (31) the cost and ability to spread the risk of loss, (32) the court's experience, (33) the desire for a reliable, predictable, and consistent body of law, (34) public policies regarding the expansion or limitation of new channels of liability, (35) the potential for disproportionate risk and reparation allocation, (36) whether one party had superior knowledge of the relevant risks, (37) whether either party had the right to control or had actual control over the instrumentality of harm, (38) the degree of certainty that the plaintiff suffered injury, (39) the moral blame attached to the defendant's conduct, (40) the foreseeability of the plaintiff, (41) economic factors, and (42) a consideration of which party could better bear the loss".¹²⁷⁹

Thus reasonable foreseeability is almost always referred to as the prevalent factor in establishing a duty.¹²⁸⁰ The second most cited factor is "public policy",¹²⁸¹ and the third factor referred to by fifteen jurisdictions is "the relationship between the parties".¹²⁸² In respect of whether the foreseeable plaintiff falls under the enquiry of duty or the scope of liability, thirty three jurisdictions deal with it under the duty stage while four states deal with it under the scope of liability.¹²⁸³ The rest of the jurisdictions are uncertain of the doctrinal place for the foreseeable plaintiff.¹²⁸⁴ Cardī¹²⁸⁵ submits that a duty of reasonable care is determined by the adjudicator using an *ex ante* approach taking into account moral and policy considerations while "proximate cause" is determined firstly by the jury using an *ex post facto* approach with a focus on limiting liability according to the specific facts of the case. Cardī¹²⁸⁶ concludes that forty-seven jurisdictions hold that the foreseeability of the plaintiff falls within the context of duty; twenty of the jurisdictions favour the jury deciding on the foreseeability of the plaintiff while sixteen favour the court deciding on foreseeability of the plaintiff. Eleven jurisdictions are either divided or have not addressed whether the jury or the court should decide on foreseeability of the plaintiff. Furthermore four jurisdictions are in favour of the foreseeability of the plaintiff being decided within the context of proximate cause. Turning to *Palsgraf*, Cardī concludes with regard to duty that neither Cardozo CJ nor Andrew J's dictum were adopted but rather the courts have encompassed

1279 Cardī 2011 *B U L Rev* 1883-1884.
1280 Cardī 2011 *B U L Rev* 1884-1886.
1281 Cardī 2011 *B U L Rev* 1887.
1282 Cardī 2011 *B U L Rev* 1887.
1283 Cardī 2011 *B U L Rev* 1890-1892.
1284 Cardī 2011 *B U L Rev* 1893-1894.
1285 2011 *B U L Rev* 1897-1898.
1286 2011 *B U L Rev* 1901-1912.

Prosser's "aphorism that duty 'is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection'".¹²⁸⁷ Geistfeld¹²⁸⁸ states that there are two facets of foreseeability in *Palsgraf*. One, where "the question of whether duty should ever be limited by the foreseeability of the plaintiff" is a question to be determined by the adjudicator as a matter of law. The other, depending on the facts of the case, "whether the plaintiff was, in fact, foreseeable" which is a question for the jury to be dealt with under the element of duty or proximate cause.

Whether a cause was direct or indirect may be dispensed with by the courts as all that needs to be determined is whether "the injury that occurred was within the risk created by the defendant".¹²⁸⁹ Adjudicators typically instruct juries by stating that a defendant is liable for the "natural and probable consequences" of his conduct or that the proximate cause of the harm occurs where there is a "natural and continuous sequence, without any efficient intervening cause".¹²⁹⁰ Thus a new or intervening cause, also referred to as a superseding cause, which occurs after the defendant's negligent conduct may depending on the circumstances result in an exclusion of liability, for example, where an abnormal consequence such as drowning occurs as a result of the weight of a plaster cast on an arm when the deceased falls out of a boat.¹²⁹¹ In instances of suicide, proximate cause may be present if the suicide is foreseeable and within the ambit of the risks created by the defendant.¹²⁹² Therefore suicide would be deemed an intervening cause only if it was unforeseeable and outside the scope of the risk created by the defendant.¹²⁹³ For example, in *Perez v Lopez*,¹²⁹⁴ a locksmith picked a trigger lock of a rifle as requested by a minor. The

¹²⁸⁷ Keeton *et al Prosser and Keeton on torts* 358.

¹²⁸⁸ 2011 *Yale LJ* 154 fn 32.

¹²⁸⁹ Dobbs, Hayden and Bublick *Hornbook on torts* 345.

¹²⁹⁰ Dobbs, Hayden and Bublick *Hornbook on torts* 346. See *Milwaukee & St PR Co v Kellogg* 94 US 469, 24 L Ed 256 (1876); *CSX Transp Inc v Continental Ins Co* 343 Md 216, 680 A 2d 1082 (1996); *Gilmore v Shell Oil Co* 613 So 2d 1272 (Ala 1993).

¹²⁹¹ See for example, *Linder v City of Payette* 1943, 64 Idaho 656, 135 P 2d 440; Dobbs, Hayden and Bublick *Hornbook on torts* 346; Keeton *et al Prosser and Keeton on torts* 310.

¹²⁹² See *Young v Swiney* 23 F Supp 3D 596, 619 (D Md 2014) where the defendant was denied summary judgment. The court found that there was a sufficient link between the act and the (consequence) suicide which was committed two years after an accident.

¹²⁹³ See *Rains v Bend of the River* 124 SW 3d 580 (Tenn App 2003); *Jutzi-Johnson v United States* 263 F 3d 753 (7th Cir 2001); cases cited by Dobbs, Hayden and Bublick *Hornbook on torts* 372 fn 221-224.

¹²⁹⁴ 74 SW 3d 60 (Tex App 2002).

locksmith was aware that the request was made by a minor and efforts were made to contact the parents but to no avail. The minor was jovial with the locksmith and when asked what he was going to do with it, replied that he was just going hunting. The locksmith then gave the rifle back to the minor who subsequently used it to commit suicide. The court found that suicide was not foreseeable according to the circumstances of the case and the locksmith was not held liable. The defendant will also not be held liable for abnormal and unforeseeable events of nature such as an unpredictable flood.¹²⁹⁵ The plaintiff's own conduct may qualify as an intervening cause or the proximate cause of his own harm where liability is excluded.¹²⁹⁶ However, in most instances the plaintiff's claim will be reduced due to his contributory fault.¹²⁹⁷ Comparative fault, where apportionment of liability is applied in respect of the plaintiff's and the defendant's fault, as well as joint and several liability, relating to joint defendants, are an option to temper the all or nothing proximate cause rule or scope of liability rule excluding liability.¹²⁹⁸

The influence of reasonableness on the scope of liability is partly explicit and partly implicit depending on which theory or tests are applied. It would be unreasonable and unjust to impose liability on a defendant for harm resulting from his negligent conduct which falls outside the scope of risks he created. The scope of liability is determined from the facts and is a value-based judgment determined by the jury. It is generally unreasonable to impose liability on the defendant for reasonably unforeseeable risks¹²⁹⁹ and risks not reasonably known as a matter of fairness.¹³⁰⁰ In order to determine legal causation, the courts refer to the direct consequences theory, the reasonable foreseeability theory, or if the consequences are a natural and probable consequences of the defendant's conduct without any intervening cause.¹³⁰¹ An intervening cause breaks the chain of causation and it would be unreasonable to hold

¹²⁹⁵ See for example, *Gerber v McCall* 1953 175 Kan 433, 264 P 2d 490; other examples referred to by Keeton *et al Prosser and Keeton on torts* 312.

¹²⁹⁶ See *Exxon Co USA v Sofec Inc* 517 US 830 116 S Ct 1813, 135 L Ed 2d 113 (1996); *Komlodi v Picciano* 217 NJ 387, 89 A 3d 1234 (2014); cases cited by Dobbs, Hayden and Bublick *Hornbook on torts* 373 fn 232.

¹²⁹⁷ See *Gunnell v Arizona Public Service Co* 202 Ariz 388 46 P 3d 399 (2002); *Soto v New York City Transit Authority* 6 NY 3d 487, 846 NE 2d 1211, 813 NYS 2d 701 (2006); Dobbs, Hayden and Bublick *Hornbook on torts* 375.

¹²⁹⁸ See discussion by Dobbs, Hayden and Bublick *Hornbook on torts* 375-377.

¹²⁹⁹ See Gilead and Green *Wake Forest Univ Legal Studies Paper No. 2014874* 6.

¹³⁰⁰ See Gilead and Green *Wake Forest Univ Legal Studies Paper No. 2014874* 8.

¹³⁰¹ Zweigert and Kötz *Comparative law* 610.

the defendant liable for the consequences of a superseding or intervening cause. The defendant may be held liable for harm caused to a rescuer where there is a reasonable rescue attempt¹³⁰² and the rescuer reasonably believes that a person is in peril.¹³⁰³ It is reasonable to hold a defendant liable in instances of suicide if the suicide is reasonably foreseeable and within the ambit of the risks created by the defendant.¹³⁰⁴ It is unreasonable to hold a defendant liable for abnormal and unforeseeable acts of nature.¹³⁰⁵ *Cardi inter alia* has pointed out the confusion surrounding the use of reasonable foreseeability of harm and the foreseeable plaintiff in determining the element of duty and scope of liability. Even the factors for determining a breach of a duty is used to determine the existence of a duty. This is indeed a common problem in English and South African law mainly because the elements of duty (in English law), fault in the form of negligence, legal causation, and wrongfulness (in the South African law of delict) are based on value judgments. These value judgments involve policy considerations, community values and the concepts of reasonableness, fairness and justice. In no system is the difference between the various elements quite as clear as one would have wished for.

5. Harm, loss or damage

5.1 Introduction

The influence of reasonableness on the award of damages is predominantly explicit and partly implicit. The influence of reasonableness with regard to some of the different heads of damages will now be discussed.

Compensation is generally awarded for harm, loss or damage sustained.¹³⁰⁶ The aim of compensation is traditionally to put the plaintiff in the position he would have been in, had the tort not occurred. In this sense tort law has a restorative function.¹³⁰⁷ It is not possible in a strict sense in all instances to put the plaintiff in the position he would

¹³⁰² See Dobbs, Hayden and Bublick *Hornbook on torts* 366.

¹³⁰³ See Dobbs, Hayden and Bublick *Hornbook on torts* 349 fn 61-66.

¹³⁰⁴ See *Young v Swiney* 23 F Supp 3D 596, 619 (D Md 2014).

¹³⁰⁵ See Keeton *et al Prosser and Keeton on torts* 312.

¹³⁰⁶ Dobbs, Hayden and Bublick *Hornbook on torts* 4, 5.

¹³⁰⁷ Green and Cardi in Koziol (ed) *Basic questions of tort law* 442.

have been in had the tort not occurred. For example, where a person is disabled, has a loss of a bodily function, or dies, a price cannot be put on the loss of life or bodily function.¹³⁰⁸ Compensation encompasses the idea of corrective justice in that out of fairness, the defendant who caused harm or loss to the plaintiff should pay for such loss or damage.¹³⁰⁹ Compensation also encompasses a reparation function, based on the idea of balancing the moral scales whereby the defendant pays for the wrong done to the plaintiff.¹³¹⁰ Punitive damages are awarded with the aim of deterring further misconduct, thus there is a deterrent function too.¹³¹¹ It is submitted that all these functions are aimed at fairness and justice between the parties, and are reasonableness aims in tort law in bringing about such fairness and justice.

Restitution and injunctions as remedies in tort law are distinct from the award of damages. Restitution is a remedy whereby the defendant must restore or return any gains “wrongfully obtained by tort”.¹³¹² An injunction is applied in order to prevent or stop the defendant from continuing the tortious conduct.¹³¹³ The defendant is forbidden to act in a manner causing harm or loss.¹³¹⁴ In American tort law, the general rule is that the successful party in a case is not entitled to recover his legal fees from the other party. Each party must pay their own attorney’s fees. There are, however, exceptions to this rule.¹³¹⁵

Generally, the plaintiff may recover all damages that are reasonably foreseeable.¹³¹⁶ There must be some form of harm or loss¹³¹⁷ and nominal damages are generally not awarded in respect of the tort of negligence.¹³¹⁸ With regard to the intentional torts

¹³⁰⁸ Shapo *Tort* 531, 533.

¹³⁰⁹ Fischer 1999 *Tenn L Rev* 1136.

¹³¹⁰ Shapo *Tort* 532-533.

¹³¹¹ Dobbs, Hayden and Bublick *Hornbook on torts* 4.

¹³¹² Dobbs, Hayden and Bublick *Hornbook on torts* 4.

¹³¹³ Dobbs, Hayden and Bublick *Hornbook on torts* 4.

¹³¹⁴ Dobbs, Hayden and Bublick *Hornbook on torts* 851.

¹³¹⁵ Specific statutes may entitle parties to recover reasonable fees as well as in cases dealing with civil rights. See Dobbs, Hayden and Bublick *Hornbook on torts* 43.

¹³¹⁶ Dobbs, Hayden and Bublick *Hornbook on torts* 190.

¹³¹⁷ See *Reardon v Larkin* 3 A 3d 376 (Me 2010) where the claim failed as the harm was not caused by the defendant’s conduct; Dobbs, Hayden and Bublick *Hornbook on torts* 189 fn 14.

¹³¹⁸ See *Right v Breen* 277 Conn 364, 890 A 2d 1287 (2006); Dobbs, Hayden and Bublick *Hornbook on torts* 189.

however, nominal damages may be awarded.¹³¹⁹ Shapo¹³²⁰ explains that the value of nominal damages (currently one dollar) lies in the “normative signal sent by the award – its power in providing a vindication for the violation of rights”. Proof of loss is generally not required for intentional torts.¹³²¹ Compensatory damages are awarded for all past and prospective loss.¹³²² Jury awards are supervised by adjudicators and an award may be increased (*additur* – where the plaintiff challenges the award, alleging it is inadequate) or decreased (*remitter* – where the defendant challenges the award, alleging it is excessive).¹³²³

Compensation may be awarded for non-pecuniary loss consisting of pain and suffering; emotional harm or distress; loss of enjoyment of life; loss of consortium; and dignitary harm (relating to infringement of personality rights). Pecuniary loss may be claimed for loss of earnings; hospital and medical costs; or damage to property including consequential loss.¹³²⁴

Damages stemming from personal injury and damage to property (tangible property) falling within the ambit of “physical harm”,¹³²⁵ are readily awarded in the United States of America when compared to damages resulting from “pure economic loss” or “emotional harm” (intangible harm).¹³²⁶ Bodily harm includes “physical injury, illness, disease, impairment of bodily function, and death”.¹³²⁷ There are wrongful death statutes that generally regulate compensation to family members of the deceased as a result of death of the deceased caused by “a wrongful act, neglect or default of another”.¹³²⁸ The study of these statutes falls beyond the scope of this study and will not be discussed further, suffice it to say that damages for wrongful death are awarded

¹³¹⁹ See *Gross v Capital Elec Line Builders Inc* 253 Kan 798, 861 P 2d 1326 (1993) where nominal damages were awarded for trespass to land; Dobbs, Hayden and Bublick *Hornbook on torts* 189.

¹³²⁰ *Tort* 535.

¹³²¹ Dobbs, Hayden and Bublick *Hornbook on torts* 851.

¹³²² Dobbs, Hayden and Bublick *Hornbook on torts* 852.

¹³²³ Epstein *Torts* 441.

¹³²⁴ Green and Cardin in Koziol (ed) *Basic questions of tort law* 442.

¹³²⁵ See *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 4 (2010) where physical harm relates to “physical impairment of the human body (‘bodily harm’) or of real property or tangible (‘property damage’)”.

¹³²⁶ Dobbs, Hayden and Bublick *Hornbook on torts* 189.

¹³²⁷ Dobbs, Hayden and Bublick *Hornbook on torts* 311-312.

¹³²⁸ See for example NM Stat Ann §41-2-1 (1996 Repl); in general Wex 1965 *Stan L Rev* 1043 with regard to the development of these claims; Shapo *Tort* 537.

where it is deemed reasonable and fair.¹³²⁹ In contrast survival statutes generally regulate compensation for injury sustained by the deceased between the time of injury and death.¹³³⁰

5.2 Compensatory damages for personal injury (pecuniary loss)¹³³¹

The influence of reasonableness on past and future loss of earnings is explicit in that it is reasonable that the plaintiff should be entitled to recover reasonably incurred past earnings and future earnings which are reasonably likely to occur. The plaintiff would not have sustained such loss as well as expected loss had the tort not occurred. The defendant should also only pay for past and future loss that is proven.

Where a plaintiff is entitled to compensation and is unable wholly or in part to work, the plaintiff may recover actual lost wages and fringe benefits¹³³² as well as future loss of earnings.¹³³³ The plaintiff must provide proof of his earning before and after the tort as well as prove that the tort was the proximate cause of the loss.¹³³⁴ If an increase in salary in the future is reasonably expected and has been lost, such loss may also be recovered.¹³³⁵ Loss of earning capacity “reflects the value of work the plaintiff could have done but for the injury”.¹³³⁶ The injury reduces the future earning capacity even though there is no actual lost income.¹³³⁷ Projections of future loss of earnings take

¹³²⁹ See for example NM Stat Ann §41-2-3 (1996 Repl) referred to by Shapo *Tort* 537 fn 32; Epstein *Torts* 453.

¹³³⁰ See Shapo *Tort* 538-539.

¹³³¹ Compensatory damages for personal injury includes what is called patrimonial or pecuniary loss and non-patrimonial or non-pecuniary loss referred to in other jurisdictions discussed in this thesis.

¹³³² See for example *Rivera v Philadelphia Theological Seminary of St Charles Borromeo Inc* 510 Pa 1, 507 A 2d 1 (1986); Dobbs, Hayden and Bublick *Hornbook on torts* 852.

¹³³³ See for example, *Fuqua v Aetna Casualty & Surety Co* 542 So 2d 1129 (La Ct App 1989); Dobbs, Hayden and Bublick *Hornbook on torts* 852.

¹³³⁴ *Robinson v Greeley & Hansen* 114 Ill App 3d 720, 725, 70 Ill Dec 376, 380, 449 NE 2d 250, 254 (1983); Dobbs, Hayden and Bublick *Hornbook on torts* 852.

¹³³⁵ See *Felder v Physiotherapy Assocs* 215 Ariz 154, 158 P 3d 877 (Ct App 2007); *Henry v National Union Fire Ins Co* 542 So 2d 102, 107 (La Ct App 1989); Dobbs, Hayden and Bublick *Hornbook on torts* 852.

¹³³⁶ Dobbs, Hayden and Bublick *Hornbook on torts* 852.

¹³³⁷ See for example, *American Nat'l Watermattress Corp v Manville* 642 P 2d 1330 (Alaska 1982) where a 72 year old woman as a result of injury was unable to work and had been working for 48 hours a week in a family business. She was only paid a nominal salary but was entitled to full lost earning capacity. In *Rubio v Davis* 231 Ga App 425, 500 SE 2d 367 (1990) where a 3 year old child's arm was amputated and entitled to loss of earning capacity (Dobbs, Hayden and Bublick *Hornbook on torts* 853 fn 17).

into account factors such as the age of the plaintiff, education, life expectancy, job status, etcetera.¹³³⁸ Compensation for household services may also be awarded. These costs relate to instances where for example the injured spouse was the home maker who cooked, cleaned etcetera and the loss is reflected as a lost financial contribution.¹³³⁹ Damages may also be awarded to injured persons who are family members and perform tasks such as gardening services or other handy work.¹³⁴⁰

The influence of reasonableness on claims for medical and related expenses is explicit in that generally only reasonable past and probable future medical and related costs¹³⁴¹ “proximately resulting from the tortious injury” may be recovered.¹³⁴² This may apply to costs relating to *inter alia* surgery, hospital and medical bills, other aids relating to rehabilitation and recovery, medical practitioner’s fees, medication, devices or artificial limbs¹³⁴³ required, diagnostic tests (medical monitoring) etcetera.¹³⁴⁴ The reasonable value of the services and or appliances required are recoverable and only if the services are reasonably required.¹³⁴⁵ In instances where a plaintiff has been exposed to a toxic substance such as asbestos where a disease (such as cancer) may develop after a prolonged period, the logical way to minimise harm is to undergo regular check-ups. In such instances “reasonable monitoring expenses” may be recovered.¹³⁴⁶

¹³³⁸ See Dobbs, Hayden and Bublick *Hornbook on torts* 853; Epstein *Torts* 443-445.

¹³³⁹ See Epstein *Torts* 445.

¹³⁴⁰ See *McKinney v California Portland Cement Co* 96 Cal App 4th 1214, 117 Cal Rptr 2d 849, 858-859 (2002).

¹³⁴¹ See *Donovan v Philip Morris USA* 455 Mass 215, 914 NE 2d 891 (2009).

¹³⁴² Dobbs, Hayden and Bublick *Hornbook on torts* 853.

¹³⁴³ See for example *Haudrich v Howmedica Inc* 169 Ill 2d 525, 662 NE 2d 1248, 215 Ill Dec 108 (1996) in respect of a knee replacement; Dobbs, Hayden and Bublick *Hornbook on torts* 853.

¹³⁴⁴ See Epstein *Torts* 441-442.

¹³⁴⁵ See *Pexa v Auto Owners Ins Co* 686 NW 2d 150 (Iowa 2004); Dobbs, Hayden and Bublick *Hornbook on torts* 854.

¹³⁴⁶ See *Ayers v Jackson Township* 525 A 2d 287, 312-314 (1987); *Potter v Firestone Tire & Rubber Co* 863 P 2d 795 (Cal 1993); *Hagerty v L & L Marine Servs Inc* 788 F 2d 315 (5th Cir 1986); *Donovan v Philip Morris USA* 455 Mass 215, 914 NE 2d 891 (2009); *contra Metro-North Commuter Railway v Buckley* 521 US 424 (1997) where medical monitoring costs were not allowed; Dobbs, Hayden and Bublick *Hornbook on torts* 854; Epstein *Torts* 442.

5.3 Mental and physical pain and suffering¹³⁴⁷ (non-pecuniary loss)¹³⁴⁸

The influence of reasonableness on claims for non-pecuniary loss is implicit, the claim is based on the pain and suffering subjectively felt by the plaintiff. It is therefore reasonable to consider subjective factors such as duration of pain and the plaintiff's age etcetera in order to quantify the damages as each person deals with pain and suffering differently. Damages for pain and suffering are referred to as non-objective awards as pain suffered is subjective, because no one knows the pain suffered by another.¹³⁴⁹ Damages for pain and suffering whether experienced mentally, emotionally¹³⁵⁰ or physically,¹³⁵¹ which was proximately caused as a result of tortious conduct may be recovered. Expert testimony may be provided but is not necessary where the injury itself and the treatment required are sufficient to award damages for pain and suffering.¹³⁵² Awards for pain and suffering are not easy to quantify and prior comparable awards may be referred to as a guide in conjunction with subjective factors (such as the duration of the pain, age of person etcetera).¹³⁵³ Pain and suffering includes pain and suffering experienced as a result of *inter alia* losing a body part¹³⁵⁴ or bodily function,¹³⁵⁵ or sustaining disfigurement. Damages may also be claimed for:

¹³⁴⁷ See Shapo *Tort* 541 who refers to noneconomic damages 541.

¹³⁴⁸ Damages for mental and physical pain and suffering would be regarded as non-pecuniary or non-patrimonial loss in the other jurisdictions discussed in this thesis.

¹³⁴⁹ Dobbs, Hayden and Bublick *Hornbook on torts* 43.

¹³⁵⁰ See for example, *Wood v Mobil Chem Co* 50 Ill App 3d 465, 8 Ill Dec 701, 365 NE 2d 1087 (1977) where pain and suffering was found recoverable for depression and anxiety after a brain injury; Dobbs, Hayden and Bublick *Hornbook on torts* 854.

¹³⁵¹ See for example, *Black v Comer* 38 So 3d 16 (Ala 2009) where the plaintiff was entitled to damages for physical pain and suffering after tissue was removed from the plaintiff's abdomen. The plaintiff sustained internal bleeding; Dobbs, Hayden and Bublick *Hornbook on torts* 854.

¹³⁵² See for example, *Choi v Anvil* 32 P 3d 1 (Ala 2001); Dobbs, Hayden and Bublick *Hornbook on torts* 855.

¹³⁵³ See for example, *Meyers v Wal-Mart Stores, East Inc* 257 F 3d 625 (6th Cir 2001) where comparable awards were considered to reduce an award for pain and suffering; *Bissell v Town of Amherst* 56 AD 3d 1144, 867 NYS 2d 582 (2008) where prior cases were considered in order to determine reasonable compensation; *contra Ritter v Stanton* 745 NE 2d 828 (Ind Ct App 2001) where an Indiana court held that prior awards should not be considered in that each person is entitled to their own award by the jury. See Dobbs, Hayden and Bublick *Hornbook on torts* 855.

¹³⁵⁴ Such as an eye, see for example, *Mileski v Long Island Rail Road* 499 F 2d 1169 (2nd Cir 1974); Dobbs, Hayden and Bublick *Hornbook on torts* 855.

¹³⁵⁵ Such as one's excretory or sexual functions, see for example *Kenton v Hyatt Hotels Corp* 693 SW 2d 83 (Mo 1985); Dobbs, Hayden and Bublick *Hornbook on torts* 855.

loss of enjoyment of life;¹³⁵⁶ fear for one's own death, mental anguish¹³⁵⁷ or fear of developing a disease (such as cancer);¹³⁵⁸ consortium;¹³⁵⁹ and bereavement.¹³⁶⁰ Generally various forms of non-pecuniary loss are claimed together as a global amount and are determined by the jury.¹³⁶¹ Awards for non-pecuniary loss try to quantify personal subjective experiences.

5.4 Damage to property

In respect of damage to property, the diminished value rule (the difference between the value of the property immediately before and after the tort)¹³⁶² or the cost rule (cost of repair or replacement of the property) is applied.¹³⁶³ If the cost of repair is higher than the diminished value of the property, the diminished value may be imposed.¹³⁶⁴ It is submitted that this is reasonable as it makes economic sense and the defendant should generally not pay more than required. However, even if the cost of repair is high, it may be imposed where the property is important to the plaintiff such as lost shade from trees or vegetation¹³⁶⁵ or injury to one's beloved pet. It is submitted that this may be justified too and reasonable as the subjective value of the loss to the plaintiff such as his pet is taken into account. The courts have awarded damages for the medical treatment of the pet even though it exceeds the fair market value of the

¹³⁵⁶ See for example *Averyt v Wal-Mart Stores Inc* 265 P 3d 456 (Colo 2011) where personality changes, depression, difficulty in sleeping and concentrating affected the plaintiff's loss of enjoyment of life; *Flannery v United States* 297 SE 2d 433, 437-438 (W Va 1982); Dobbs, Hayden and Bublick *Hornbook on torts* 856. In some states such loss can be claimed even where the victim is in a coma, see *Holston v Sisters of the Third Order of St Francis* 618 NE 2d 334 (Ill App 1993) where it was allowed but not in *McDougald v Garber* 536 NE 2d 372 (NY 1989). See also Green and Cardi in Koziol (ed) *Basic questions of tort law* 460 fn 133.

¹³⁵⁷ See *Haley v Pan American World Airways* 746 F 2d 311, 317 (5th Cir 1984).

¹³⁵⁸ See *Ferrara v Galluchio* 5 NY 2d 16, 176 NYS 2d 996, 152 NE 2d 249, 71 ALR 2d 331 (1958); Dobbs, Hayden and Bublick *Hornbook on torts* 856.

¹³⁵⁹ Loss of companionship usually awarded to spouses as a result of marital relations but has been extended to children for injuries sustained by their parents (see *Frank v Superior Court* 722 P 2d 955, 960 (Ariz 1986)) and even siblings (see *Dubaniewicz v Houman* 910 A 2d 897, 902 (Vt 2006)). See Shapo *Tort* 545.

¹³⁶⁰ Emotional distress as a result of the death of another, see *Elliott v Willis* 442 NE 2d 163, 167-168 (Ill. 1982); Shapo *Tort* 545.

¹³⁶¹ Shapo *Tort* 545.

¹³⁶² See for example, *Ross v A Betterway Rent-A-Car Inc* 213 Ga App 288, 444 SE 2d 604 (1994); Dobbs, Hayden and Bublick *Hornbook on torts* 857.

¹³⁶³ See for example, *Halpin v Schultz* 917 NE 2d 436 (Ill 2009); Dobbs, Hayden and Bublick *Hornbook on torts* 857.

¹³⁶⁴ Dobbs, Hayden and Bublick *Hornbook on torts* 857.

¹³⁶⁵ See *Andersen v Edwards* 625 P 2d 282, 288 (Alaska 1981); *Weitz v Green* 230 P 3d (Idaho 2010); *Restatement Second of Torts* § 929 cmt b (1979); Dobbs, Hayden and Bublick *Hornbook on torts* 857.

particular animal.¹³⁶⁶ Again reasonable and necessary costs relating to the medical treatment of the pet may be recovered.¹³⁶⁷ Where the property has been contaminated, the plaintiff may be entitled to the costs of cleaning up the property even if it exceeds the diminished value of the property.¹³⁶⁸ It is submitted that this is fair and reasonable as the idea is to put the plaintiff in the position he would have been in had the delict not occurred. Part of restoring the position as it was before requires the cleaning up of the property. Consequential loss flowing from inability to use one's property, such as a motor vehicle, while it is being repaired or is still to be replaced, is recoverable. The existence of the lost use and amount "must be proven with reasonable certainty".¹³⁶⁹ Reasonable expenses incurred in order to minimise damages are also recoverable.¹³⁷⁰ The influence of reasonableness on damage to property is explicit.

5.5 Punitive damages

Punitive damages (exemplary damages) are usually awarded in instances where the plaintiff has suffered a legally recognisable harm and the defendant has acted reprehensibly,¹³⁷¹ deliberately, or with intention to harm coupled with some form of outrageous behaviour.¹³⁷² Malice,¹³⁷³ fraudulent conduct,¹³⁷⁴ bad motive,¹³⁷⁵

¹³⁶⁶ See *Kimes v Grosser* 195 Cal App. 4th 1556, 126 Cal Rptr 3d 581 (2011); *Burgess v Shampooch Pet Indus Inc* 35 Kan App 2d 458, 131 P 3d 1248 (2006); Dobbs, Hayden and Bublick *Hornbook on torts* 857.

¹³⁶⁷ See *Zager v Dimilia* 138 Misc 2d 448, 524 NYS 2d 968 (J Ct 1988); Dobbs, Hayden and Bublick *Hornbook on torts* 857.

¹³⁶⁸ Dobbs, Hayden and Bublick *Hornbook on torts* 858.

¹³⁶⁹ See *Nichols v Sukaro Kennels* 555 NW 2d 689, 61 ALR 5th 883 (Iowa 1996); *Scheele v Dustin* 998 A 2d 697 (Vt 2010)

¹³⁷⁰ Dobbs, Hayden and Bublick *Hornbook on torts* 858.

¹³⁷¹ *Day v Woodworth* 54 US 363, 371 (1851). See Epstein *Torts* 459.

¹³⁷² See for example, *Battle v Kilcrease* 1936 54 Ga App 808, 189 SE 573 with regard to a hit-and-run claim; *Miller v Blanton* 1948 213 Ark 246, 210 SW 2d 293 with regard to an intoxicated defendant; *Restatement Third of Torts (Liability for Physical Harm)* § 908 (2005); Keeton *et al Prosser and Keeton on torts* 9; Epstein *Torts* 459.

¹³⁷³ See *Jones v West Side Buick Co* 1936, 231 Mo App 187, 93 SW 2d 1083; *Owens-Illinois Inc v Zenobia* 325 Md 420, 601 A 2d 633 (1992); *Ross v Louise Wise Servs Inc* 8 NY 3d 478, 836 NYS 2d 509, 868 NE 2d 189 (2007); authority cited by Dobbs, Hayden and Bublick *Hornbook on torts* 862 fn 100-107; cases referred to by Keeton *et al Prosser and Keeton on torts* 10 fn 24.

¹³⁷⁴ See *Augusta Bank & Trust v Broom-Field* 1982, 231 Kan 52, 643 P 2d 100; Keeton *et al Prosser and Keeton on torts* 10 fn 25.

¹³⁷⁵ See *Hintz v Roberts* 1923 98 NJL 768 121 A 711 as well as other cases referred to by Keeton *et al Prosser and Keeton on torts* 10 fn 26.

deliberate concealment of facts,¹³⁷⁶ “grossly unreasonable”,¹³⁷⁷ “wanton misconduct” or acting “with a conscious indifference to risk” may also result in award of punitive damages.¹³⁷⁸ Punitive damages have been awarded in a number of tort cases¹³⁷⁹ involving *inter alia*¹³⁸⁰ assault and battery,¹³⁸¹ trespass¹³⁸² child molestation,¹³⁸³ fraud,¹³⁸⁴ intentional infliction of severe mental harm,¹³⁸⁵ and repeated misconduct.¹³⁸⁶ The purpose of punitive damages is to punish and deter future misconduct. The point is to send a message to the community that such conduct is not acceptable.¹³⁸⁷ Awarding of punitive damages has been criticised for *inter alia* it resembling criminal fines or civil damages, and for the award of damages being unpredictable and

¹³⁷⁶ As in *Philip Morris USA v Williams* 549 US 346, 127 S Ct 1057, 166 L Ed 2d 940 (2007) where the manufacturer sold cancer causing cigarettes stating that they were safe, and *BMW of North America v Gore* 517 US 559, 116 S Ct 1589, 134 L Ed 2d 809 (1996) where BMW sold a repainted vehicle as a new vehicle without disclosing the repaint as a result of minor damage prior to delivery which reduced the resale value of the vehicle. The jury awarded compensatory damages \$4000 and punitive damages of \$4 000 000 later reduced to \$2 000 000. The punitive award was reversed and Stevens J stated that there was no deliberate false statements made (576-579), the ratio was excessive 500 to 1(582-583).

¹³⁷⁷ *Jones v Fletcher* 166 NW 2d 175, 180 (Wis 1969).

¹³⁷⁸ See for example, *Wangen v Ford Motor Co* 294 NW 2d 437,462 (Wis 1980); *Leichtamer v American Motors Corp* 424 NE 2d 568, 580 (Ohio 1981); *Sebastain v Wood* 1954 246 Iowa 94, 66 NW 2d 841 (in respect of drunken driving); *Toole v Richardson-Merrell Inc* 1967, 251 Cal App 2d 689, 60 Cal Rptr 398 where vital information regarding sale of drugs was withheld; *Pouzanova v Morton* 327 P 3d 865 (Ala 2014); Dobbs, Hayden and Bublick *Hornbook on torts* 862; cases referred to by Keeton *et al Prosser and Keeton on torts* 10 fn 27, 31.

¹³⁷⁹ See cases cited by Dobbs, Hayden and Bublick *Hornbook on torts* 863 fn 111-121.

¹³⁸⁰ Punitive damages has also been awarded in cases of libel, slander, deceit, seduction, malicious prosecution, conversion, private nuisance, alienation of affections – see Keeton *et al Prosser and Keeton on torts* 10-11.

¹³⁸¹ See *Maxa v Neidlein* 1932, 163 Md 366, 163 A 202; *Hough v Mooningham* 139 Ill App 3d 1018, 487 NE 2d 1281, 94 Ill Dec 404 (1986) where the plaintiff was hit with a shovel; Dobbs, Hayden and Bublick *Hornbook on torts* 863; cases referred to by Keeton *et al Prosser and Keeton on torts* 10 fn 33.

¹³⁸² To land. See for example, *Oden v Russell* 1952 207 Okl 570, 251 P 2d 184; *Cox v Stolworthy* 1972 94 Idaho 683, 496 P 2d 682; Keeton *et al Prosser and Keeton on torts* 11.

¹³⁸³ See *Hutchinson v Luddy* 896 A 2d 1260 (Pa Super Ct 2006) with regard to child molestation by a clergyman; Dobbs, Hayden and Bublick *Hornbook on torts* 863.

¹³⁸⁴ See *Talent Tree Personnel Services v Fleenor* 703 So 2d 917 (Ala 1997); Dobbs, Hayden and Bublick *Hornbook on torts* 863.

¹³⁸⁵ See *Fletcher v Western National Life Insurance Co* 1970, 10 Cal App 3D 376, 89 Cal App 3d 376, 89 Cal Rptr 78; *Amsden v Grinnel Mutual Reinsurance Co Iowa* 1972 203 NW 2d 252; Keeton *et al Prosser and Keeton on torts* 11.

¹³⁸⁶ See *West v Western Casualty & Surety Co* 846 F 2d 387 (7th Cir 1988); Dobbs, Hayden and Bublick *Hornbook on torts* 863.

¹³⁸⁷ See *BMW of North America v Gore* 517 US 559, 116 S Ct 1589, 134 L Ed 2d 809 (1996) and *State Farm Mutual Automobile Insurance Company v Campbell* 538 US 408, 123 S Ct 1513, 155 L Ed 2d 585 (2003) where the United States Supreme Court set aside a punitive award as being constitutionally excessive; *Exxon Shipping Co v Baker* 554 US 471, 492, 128 S Ct 2605, 2621, 171 L Ed 2d 570 (2008); Dobbs, Hayden and Bublick *Hornbook on torts* 863, 868-873; Keeton *et al Prosser and Keeton on torts* 9.

potentially excessive,¹³⁸⁸ but they are still awarded.¹³⁸⁹ Generally, the punitive award should have some kind of reasonable relationship or there must be a reasonable proportion between “the potential for harm created by the defendant’s conduct” or the “actual damages suffered by the plaintiff”.¹³⁹⁰ The influence of reasonableness is explicit with regard to this requirement. Some courts have found that there need not be a relationship with the actual damages.¹³⁹¹ The reprehensibility of the defendant’s conduct is an important factor “of the reasonableness of a punitive damages award”.¹³⁹² The defendant’s financial status may be considered in order for the court to determine an appropriate amount of punitive damages as an award of a certain sum may bankrupt one person, but merely cause annoyance to another.¹³⁹³ There are a number of states which allow punitive damages for particular torts such as trespass.¹³⁹⁴

5.6 General principles applicable to compensatory damages for personal injury (pecuniary and non-pecuniary loss)

Damages for future loss may be discounted to their present day value and adjusted to take into account inflation.¹³⁹⁵ The collateral source rule whereby the defendant is not entitled to deduct from the plaintiff’s claim, payments the plaintiff has received from third parties is applied, making the defendant fully liable even though the plaintiff gains

¹³⁸⁸ See *Exxon Shipping Co v Baker* 554 US 471, 499, 128 S Ct 2605, 2625, 171 L Ed 2d 570 (2008); Owen 1982 *U Chi L Rev* 1; Ellis 1982 *South Cal L Rev* 103; Wheeler 1983 *Va L Rev* 269; Keeton *et al Prosser and Keeton on torts* 11fn 47-48, 14 fn 68; as well as books and articles referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 864 fn 129-130.

¹³⁸⁹ Keeton *et al Prosser and Keeton on torts* 12.

¹³⁹⁰ See *Palmer v Ted Stevens Honda Inc* 193 Cal App 3d 530, 238 Cal Rptr 363 (1987); Dobbs, Hayden and Bublick *Hornbook on torts* 866. However this is not always the case, see for example, *Toomey v Farley* 1956 2 NY 2d 71, 156 NYS 2d 840, 138 NE 2d 221 dealing with libel where 6 cents was awarded as actual damages and an additional \$5000 awarded as punitive damages; *Livesay v Stock* 1929, 208 Cal 315, 281 P 70 in regard to a battery claim where the actual damages amounted to \$750 and \$10 000 punitive damages (see Keeton *et al Prosser and Keeton on torts* 14-15).

¹³⁹¹ See for example, *Malco Inc v Mid-West Aluminium Sales Inc* 1961, 14 Wis 2d 57, 109 NW 2d 516 as well as other cases referred to by Keeton *et al Prosser and Keeton on torts* 15 fn 75

¹³⁹² Dobbs, Hayden and Bublick *Hornbook on torts* 870.

¹³⁹³ See *TXO Production Corp v Alliance Resources Corp* 509 US 443, 462-464 (1993); *Zarcone v Perry* 572 F 2d 52, 56 (2nd Cir 1978); *Phelan v Beswick* 1958 213 Or 612, 326 P 2d 1034; Dobbs, Hayden and Bublick *Hornbook on torts* 866; cases referred to by Keeton *et al Prosser and Keeton on torts* 15 fn 76 .

¹³⁹⁴ Which is beyond the scope of this study and will not be discussed further. See Keeton *et al Prosser and Keeton on torts* 11.

¹³⁹⁵ See *Schleier v Kaiser Found Health Plan* 876 F 2d 174 (DC Cir 1989); Dobbs, Hayden and Bublick *Hornbook on torts* 859; Epstein *Torts* 445-447.

an advantage or saving from collateral sources such as his own insurance or donations etcetera.¹³⁹⁶ Lump sum awards are usually made for future loss but structured settlements may be agreed to.¹³⁹⁷ However, in line with tort law reform approximately half of the states have either limited or abolished the collateral source rule for certain claims. These claims relate mainly to those against public entities and for medical malpractice claims.¹³⁹⁸ Some statutes allow evidence of collateral benefits,¹³⁹⁹ while others require the trier to deduct the collateral benefits.¹⁴⁰⁰ The plaintiff whose award has been reduced as a result of deducting collateral benefits may be entitled to add back into the calculation of the award amounts expended for insurance premiums.¹⁴⁰¹ Some courts have found the statutes unconstitutional¹⁴⁰² while others have upheld them.¹⁴⁰³ It is submitted that where the legislature as a matter of policy provides legislation limiting or capping damages due to increased or excessive litigation, such as with medical malpractice claims, it may not be reasonable when only the plaintiff's interests are considered but reasonable when considering all parties interests. Furthermore not all plaintiffs will have taken out insurance for whatever reasons and it may be unfair and unreasonable to deduct insurance pay-outs where a person is prudent enough to take out insurance. Furthermore it is trite that once a person claims from insurance, his premiums may be affected and should he require insurance in future, the history of claims affects the premiums making it higher. Nonetheless, the legal position created by such legislation may be viewed as an attempt to find a reasonable balance between the interests of the plaintiff and other

¹³⁹⁶ See for example, *Helfend v Southern Cal Rapid Transit Dist* 2 Cal 3d 1, 84 Cal Rptr 173, 465 P 2d 61, 77 ALR 3d 398 (1970); *Willis v Foster* 229 Ill 2d 393, 3233 Ill Dec 26, 892 NE 2d 10 18 (2008); *Restatement Second of Torts* §§ 920A & 920 (1979); Dobbs, Hayden and Bublick *Hornbook on torts* 859.

¹³⁹⁷ See *Nguyen v Los Angeles County Harbor/UCLA Medical Center* 48 Cal Rptr 2d 301 (Cal App 1995); Epstein *Torts* 447.

¹³⁹⁸ See for example, Mont Code Ann § 27-1-308; NY CPLR § 4545; Dobbs, Hayden and Bublick *Hornbook on torts* 860-861.

¹³⁹⁹ See for example, Ala Code § 12-21-45.

¹⁴⁰⁰ See for example, NY CPLR § 4545; Colo Rev Stat § 13-21-116.6; Idaho Code Ann § 6-1606.

¹⁴⁰¹ See for example, Mont Code Ann § 27-1-308 covering the period of 5 years before the injury, premiums paid from date of injury to judgment and those to be paid within the next 3 years; Dobbs, Hayden and Bublick *Hornbook on torts* 860 fn 88.

¹⁴⁰² See for example, *Thompson v KFB Ins Co* 252 Kan 1010, 850 P 2d 773 (1993) where discrimination against greater harm was alleged; *Farley v Engelken*, 241 Kan 663, 740 P 2d 1058, 74 ALR 4th 1 (1987) where discrimination against medical malpractice victims was alleged; Dobbs, Hayden and Bublick *Hornbook on torts* 861. See Keeton *et al Prosser and Keeton on torts* 9 fn 20 with references to cases where the courts rejected an award of punitive damages.

¹⁴⁰³ See *Easton v Broomfield* 116 Ariz 576, 570 P 2d 744 (1977); authority referred to by Dobbs, Hayden and Bublick *Hornbook on torts* 861 fn 91.

interests, such as the policy-based interest of the state to keep medical malpractice litigation within reasonable bounds. Opinions will always diverge on how reasonable the end result of such attempts is.

The duty to mitigate loss or damage caused by the defendant's tortious conduct is generally applicable.¹⁴⁰⁴ Thus it is only reasonable, fair and just that the plaintiff should mitigate the loss in so far as possible not to make the defendant pay for loss the plaintiff could have avoided with ease.

Dobbs, Hayden and Bublick¹⁴⁰⁵ point out that there has been a move towards limiting tort liability as part of "tort reform". Reform legislation has been aimed at regulating damages by modifying the collateral source rule, capping awards and limiting punitive damages awards.¹⁴⁰⁶ Over half the states have capped recovery on damages. Some caps apply to particular tort claims such as professional malpractice claims,¹⁴⁰⁷ claims against public entities¹⁴⁰⁸ and claims against suppliers of alcohol.¹⁴⁰⁹ Some statutes impose a cap on all recoverable damages¹⁴¹⁰ and some on non-pecuniary loss¹⁴¹¹ such as for "pain and suffering".¹⁴¹² It is submitted that by limiting damages it may not be fair and reasonable in respect of the plaintiff's interests but for reasons of policy there is a need to address the award of damages.

6. Conclusion

As is evident from the previous chapter on English law, American law is based on English law. Separate torts are recognised each with their own specific requirements

¹⁴⁰⁴ See *McGinley v United States* 329 F Supp 62 (ED pa1971); Epstein *Torts* 447.

¹⁴⁰⁵ *Hornbook on torts* 873.

¹⁴⁰⁶ Green and Cardi in Koziol (ed) *Basic questions of tort law* 432.

¹⁴⁰⁷ For example, in California for professional negligence claims (Cal Civ Code § 3333.2).

¹⁴⁰⁸ See *Boiter v South Carolina Dept of Transport* 393 SC 123, 712 SE 2d 401 (2011); further authority cited by Dobbs, Hayden and Bublick *Hornbook on torts* 873 fn 193.

¹⁴⁰⁹ In Utah, (Utah Code Ann § 32A-14-101(5)) the cap applied to liability of alcohol suppliers is \$500 000. See Dobbs, Hayden and Bublick *Hornbook on torts* 874.

¹⁴¹⁰ See Colorado code – Colo Rev Stat § 13-64-302; Va Code § 8.01-581.15 where a million dollar cap is placed on all damages claimed from a health care provider. See Dobbs, Hayden and Bublick *Hornbook on torts* 873 fn 199.

¹⁴¹¹ See <http://www.atra.org/issues/noneconimc-damages-reform> (Date of use: 9 September 2017); Green and Cardi in Koziol (ed) *Basic questions of tort law* 461.

¹⁴¹² California has placed a cap of \$250 000 on damages for pain and suffering (Cal Civ Code § 3333.2). See King Jr 2004 *SMU L Rev* 205; Green and Cardi in Koziol (ed) *Basic questions of tort law* 461; Dobbs, Hayden and Bublick *Hornbook on torts* 874.

and applicable defences. The influence of reasonableness is generally referred to explicitly on the tort of negligence and the torts of trespass to the person discussed in this chapter. In respect of the torts of trespass to a person as well as the tort of negligence, the elements of the tort must be present in order to ground liability and it is only reasonable to find the defendant liable if all the elements are present.

Conduct although not explicitly referred to as a requirement, is required for the torts of trespass to the person and the tort of negligence. At the very least the requirement of conduct refers to making a voluntary choice to act or not.¹⁴¹³ If the actor makes a choice to act and such act leads to the causing of harm, then his act is judged according to the standard of the reasonable person or its equivalent. If the actor chooses not to act, his failure to act under the circumstances may also be judged according to the standard of the reasonable person or its equivalent. American law does not make a conceptual difference between wrongfulness and fault as in South African law but wrongfulness is generally subsumed under fault. The various interests of the plaintiff, the defendant and those of the community are weighed in reaching decisions in tort law. Generally, the courts' decisions coincide with the community or public opinion.¹⁴¹⁴ Ultimately infringement of any interests must be reasonable in light of all circumstances whether with the torts of trespass to a person, or the tort of negligence. Whether the infringement of the interests is unjustified and unreasonable or the conduct is unreasonable, depends on the views of the community.¹⁴¹⁵ Justice requires the plaintiff to be compensated for harm he sustained as a result of the unreasonable infringement of his interests. The role of the jury in American tort law is unique and they reflect the reasonable people. With the mix of different people, reasonable value judgements are made based on the particular circumstances of the case. Where a defence is applicable, the infringement of the interests, as well as the conduct in respect of infringing those interests is deemed reasonable. In respect of the tort of negligence, reasonableness is a central concept in that a duty of reasonable care must exist to begin with, the conduct is tested against the standard of the reasonable person or its equivalent and the breach of the duty of reasonable care must be unreasonable for the conduct to be considered negligent. The influence of

¹⁴¹³ See Green and Cardi in Koziol (ed) *Basic questions of tort law* 438, 483

¹⁴¹⁴ Keeton *et al* *Prosser and Keeton on torts* 17-18

¹⁴¹⁵ Keeton *et al* *Prosser and Keeton on torts* 6-7.

reasonableness on factual causation is implicit. The influence of reasonableness on the scope of liability may be explicit or implicit depending on which test is applied. Reasonable foreseeability of harm plays a role in determining a duty of reasonable care, fault in the form of negligence and in determining the proximate cause or scope of liability. Due to the influence of policy considerations and the concept of reasonableness common in these elements uncertainty and confusion is often prevalent. This is in fact a common problem in South African, English and American law. However, the influence of reasonableness taking into account the purpose and function of each element can be differentiated. In this way the nature and function of each element may not be undermined. In terms of the award of compensation for harm or loss sustained, the influence of reasonableness is predominantly explicit, in that it is fair and reasonable to award compensation for reasonably incurred costs sustained by the plaintiff as well as future loss which is reasonably likely to occur. As a matter of policy, damages are capped and limited in terms of tort law reform in the United States of America. On the one hand it may seem unfair and unreasonable to deny the plaintiff his full compensation but on the other hand there may have been a justifiable and in that sense a reasonable need to address the crisis of litigation with particular claims such as for medical malpractice.

Thus it is evident also in American law that fairness, justice, equity, policy considerations, the community's views and reasonableness are all intertwined.

Chapter 6: Law of France

“French courts traditionally refer to the *bonus pater familias* (bon père de famille), mentioned in several articles of the Civil Code. The good family father represents >>the normally prudent and diligent person, who is neither extremely vigilant, nor abnormally negligent, neither a hero nor a coward, neither a pure egoist nor an exceptional altruist, but between the two: an ordinary human being.<<”¹

1. Introduction

In this chapter, numerous French concepts or terms are referred to in their original language. As far as possible an analogous concept or definition in English will be provided (as the French terms are introduced into the text), but in truth some French terms or concepts cannot be translated meaningfully or with precision in English. In most of the literature written in English on French “extra-contractual civil liability”, the phrase “tort law” is used as opposed to the “law of delict”. However, the use of either of the phrases is acceptable. The terms “delict” and the “law of delict” will be referred to in this chapter instead of “tort law” or “extra contractual civil liability”. In France, the term “victim” is synonymous with the term “plaintiff” or “claimant” used in other jurisdictions.² For the sake of convenience, where appropriate, the term “plaintiff” and “defendant” (instead of “tortfeasor”) will be used.

To begin with: the aim of the law of delict in France; sources of the French law of delict; procedural characteristics unique to the French legal system in dealing with delictual liability; other influences on the development of the law of delict in France; as well as a general background relating to French law and principles held dear by the French will be discussed briefly. A more detailed discussion of the implicit and explicit influence of reasonableness on liability for one’s own personal conduct; acts of things under one’s custody; and acts of others for whom one is responsible will follow. Thereafter a brief discussion of liability of public entities, liability for: pure economic loss; mental harm; wrongful conception, wrongful birth, and wrongful life claims will follow, highlighting the influence of reasonableness.

¹ Moréteau in Koziol (ed) *Basic questions of tort law* 63.

² Borghetti 2012 *JETL* 173 fn 48.

The aim of the law of delict in France is simply to protect the plaintiff from harm and to compensate the plaintiff for harm or damage suffered as fully as possible as if the delict had not occurred.³ The French law of delict, as will be shown, is more favourable to the plaintiff encouraging a floodgate approach to litigation, but this has unpredictably not occurred in France.⁴ The aim of compensating the plaintiff⁵ has been the catalyst for the development of strict liability rules and the sharing of risk through social security, various compensation schemes and insurance.⁶ French social security is quite well developed, covering *inter alia* health care related costs.⁷ There are also a number of compensation funds which compensate victims of *inter alia* asbestos-related injuries and harm resulting from motor vehicle accidents where the state provides for compensation over and above social security.⁸ Besides social security and compensation funds regulated by the state, private insurance taken out by people living in France plays a major role in providing additional cover.⁹ Moréteau¹⁰ points out that “strict liability is often coupled with insurance, making the tortfeasor easily liable but mitigating the consequences by compulsory insurance coverage, whereas fault-based liability keeps developing in areas of higher risk that may not be insured or uninsurable”. All these various sources of compensation reduce the role of fault-based liability in delict. Social security and the private insurance industry are however the catalyst behind developing the French law of delict as the state and private insurance companies endeavour to recover payments made to the plaintiff. Naturally it is only fair and reasonable for the insurance companies or state (in respect of social security) to have a right of recourse under certain circumstances against a defendant in mitigating their loss.¹¹ In turn, most defendants have civil liability insurance.¹² It is compulsory for certain professionals (such as medical practitioners and building contractors) to take out insurance, as well as all motor vehicle owners. Furthermore

³ See Viney in Bermann and Picard (eds) *French law* 238, 242; Borghetti 2012 *JETL* 173.

⁴ Borghetti 2012 *JETL* 158ff.

⁵ Moréteau in Koziol (ed) *Basic questions of tort law* 4 explains that prior to the current victim favoured approach; the notion that the victim must bear his own loss (except where harm or loss was caused by another) was applicable.

⁶ See Moréteau in Koziol (ed) *Basic questions of tort law* 4; Moréteau 2013 *JCLS* 761.

⁷ See Borghetti 2012 *JETL* 164.

⁸ Also providing compensation for non-pecuniary or non-patrimonial loss. See Borghetti 2012 *JETL* 164.

⁹ Borghetti 2012 *JETL* 164.

¹⁰ In Koziol (ed) *Basic questions of tort law* 23.

¹¹ See Moréteau in Koziol (ed) *Basic questions of tort law* 5-7.

¹² Borghetti 2012 *JETL* 165-166.

most household insurance contracts cover civil liability incurred by anyone residing on the property “in the ordinary course of life”.¹³ Article L 124-3 of the French Insurance Code (*Code des assurances*) provides for compensation to be paid out directly to the victim.¹⁴

The law of delict in France generally does not elicit noticeable political debate or media attention. This is evident based on the fact that the French Civil Code (hereinafter referred to as the “CC”) has not yet been reformed, at least not significantly, since its inception in 1804. The media’s interest falls more on criminal law and is prominent in cases of medical malpractice or liability of pharmaceutical companies.¹⁵

Under the instruction of the French Minister of Justice, a commission of experts of which Professor Viney¹⁶ was the appointed law of delict expert, were requested to draft a new law of obligations. This included the law of delict. The commission published the “*Rapport Catala*” in 2005 which included a draft bill for delictual liability (*responsabilité civile*).¹⁷ This draft proposed a “strong pro-victim stance” expanding the law of delict further as part of a broader reform of the law of obligations with a preference for a general approach and “a reluctance to define concepts precisely for fear of being overly restrictive”.¹⁸ In 2008¹⁹ and 2011²⁰ proposals were put forward by a commission chaired by Professor Terré to reform the law of delict but no further action has been taken.²¹ This reform project aimed to “strike a balance between interests of various stakeholders” and to “limit judicial discretion” with a preference for definitions.²²

¹³ Borghetti 2012 *JETL* 158 fn 22 states that it costs less the €30 per annum for civil liability insurance in France (at the time of writing the contribution). Civil liability insurance is quite affordable.

¹⁴ Borghetti 2012 *JETL* 168.

¹⁵ Borghetti 2012 *JETL* 170.

¹⁶ Referred to as the most “famous and influential tort law scholar in France in the last thirty years” by Borghetti 2012 *JETL* 174.

¹⁷ *Avant-projet de réforme du droit des obligation et du droit de la prescription* 22 September 2005. See Moréteau 2005 *European tort law yearbook* 2005 270ff; Van Dam *European tort law* 53.

¹⁸ Borghetti 2012 *JETL* 176, 178. This draft will not be discussed further in this thesis.

¹⁹ Terré *Pour une réforme du droit des contrats* 2008.

²⁰ Terré *Pour une réforme du droit de la responsabilité civile* 2011. See Moréteau 2011 *European tort law yearbook* 216-221; Moréteau and On 2012 *European tort law yearbook* 229-237.

²¹ See discussion by Moréteau 2005 *European tort law yearbook* 270-274. Cf Van Dam *European tort law* 53.

²² Borghetti 2012 *JETL* 176, 178.

Recently, under the instruction of the French Minister of Justice, a draft Bill dealing with the reform of civil liability which includes delictual liability was published on 13 March 2017.²³ This Bill refers to the aim of full reparation²⁴ and also has a preference for definitions. Chapter II refers to requirements for liability and Section 1²⁵ refers to provisions “on contractual and extra-contractual liability” where the concepts of “reparable harm or damage”²⁶ and “the causal link”²⁷ are defined. Section 2(1)²⁸ (dealing with delictual liability), Article 1241 in reference to *faute* (literally translated as “fault” but includes wrongfulness and fault)²⁹ states that one is responsible for the damage caused by one’s *faute* and Article 1242 states that a “violation of a statutory requirement or the failure in a general duty of care or diligence constitutes a *faute*”.³⁰ Article 1243 refers to liability stemming from the “act of things”.³¹ Section 2(2) deals with the attribution of harm or damage caused by others referring to *inter alia* the acts of minors.³² Chapter III refers to “grounds for exoneration”³³ where the scope of *force*

²³ *Projet de réforme de la responsabilité civile* Mars 2017. See http://www.justice.gouv.fr/publication/Projet_de_reforme_de_la_responsabilite_civile_13032017.pdf (date of use: 28 December 2017).

²⁴ Article 1258 states that “the aim of reparation is to put the victim as far as possible in the position he would have been had the harmful act not occurred. The victim should not take a loss nor gain an advantage” (own translation).

²⁵ Of Chapter II.

²⁶ Article 1235 states that “[a]ny damage which is certain is reparable as long as it results from harm and consists of a harm to a lawful interest, whether patrimonial or non-patrimonial” and Article 1236 states that “[f]uture damage is reparable where it is the certain and direct continuation of an existing state of affairs”. Article 1237 states that the “[e]xpenses incurred by a claimant in order to prevent the imminent occurrence of harm or to prevent its deterioration, is recoverable loss provided it was reasonably incurred”. Article 1238 states that loss of a chance is compensable “only where the claimant is deprived of a favourable possibility that was present and certain. Article 1238 further states that in determining the lost chance, such loss “cannot be equal to the advantage that would have been obtained had it been realised” (own translations).

²⁷ Article 1239 states that “[l]iability presumes the existence of a causal link between the conduct of the defendant and the harm. A causal link may be proven by any means”. Article 1240 states that “[w]here a bodily injury is caused by an unidentified person among a group of identified persons acting in concert or have similar motives, each person is responsible for the whole, unless he proves that he could not have caused it” (own translation).

²⁸ Of Chapter II.

²⁹ See para 2.2 below.

³⁰ Own translation.

³¹ And provides that a person “is strictly liable for harm caused by the act of the corporeal things under one’s custody. The act of the thing is presumed while it is in motion and harms when it comes into contact. In other cases, the victim must prove the act of the thing, by establishing either the abnormality of its position, its state or conduct. The custodian of the thing is the one who has the use, control and direction of the thing at the time of the damaging act or event. The owner of the thing is presumed to have custody” (own translation).

³² Articles 1246-1247.

³³ Articles 1253-1256.

*majeure*³⁴ is outlined and Article 1255 specifically states that a *faute* committed by a person who lacks discernment is not exonerated from liability. Article 1257 refers to exclusion of liability and states that a damaging act or event does not lead to liability when one finds oneself in one of the situations mentioned in Articles 122-4 to 122-7 of the Penal Code (*Code pénal*). These situations refer to instances of necessity, self-defence, and legitimate authority. The damaging act or event which infringes an interest of which the victim has the power to dispose of, will not lead to liability, if the victim consented to the infringement.³⁵

Chapter IV refers to reparation either “in kind” or reparation for damage sustained. In respect of reparation in kind,³⁶ the aim is to suppress, mitigate, or compensate the damage. Reparation in kind cannot be imposed on the victim nor can it be “ordered in the case of impossibility”, or if it would lead to a disproportionate cost for the responsible person when weighed against the victim’s interest.³⁷ Chapter IV (2) provides that damages are assessed at the time of judgment and includes past damage as well as its “reasonably foreseeable progression”.³⁸ If the plaintiff suffers further damage (aggravated damages) after the date of judgment, the plaintiff may request further compensation.³⁹ Chapter IV (4), Article 1266 makes provision for courts to award a civil fine where the wrongdoer deliberately committed a *faute* when it generated a gain or economic saving for the wrongdoer. The fine must be in proportion to the “seriousness of the *faute* committed, to the ability of the defendant to pay or to the profit he obtained from it”.⁴⁰ A maximum amount is prescribed. Articles 1267 to 1277 refer to rules applicable to compensation for damages resulting from bodily harm while Articles 1278 to 1279 refer to rules applicable to compensation for “material damage” (damage to property).

It is submitted that this draft legislation reflects the current principles applied in determining delictual liability in France as will become apparent from the discussion

³⁴ “[F]orce majeure is an event whereby the [occurrence and consequences could not have been prevented by the taking of appropriate measures by the defendant or the person for whom he is responsible” (Article 1253 – own translation).

³⁵ Article 1257-1 (own translation).

³⁶ Articles 1260-1261.

³⁷ Article 1261 (own translation).

³⁸ Own translation.

³⁹ See Article 1262.

⁴⁰ Own translation.

below. It is evident though that there has been a reluctance in the past to reform the CC and we have yet to see whether the CC will be reformed. These reform projects will not be discussed further.

The purpose of criminal law in France is to deter and punish the offender.⁴¹ Even though criminal law and the law of delict refer to two different branches of the law in France, there is some common ground in that a victim who suffers harm from a criminal infraction may be entitled to redress in terms of a civil action. The victim has the option of lodging his claim for compensation with either the criminal or civil courts.⁴² If the victim opts to claim through the criminal court, he has the right to appear as a party to the criminal proceedings. The highest civil court in France, the *Cour de Cassation* (the “Supreme Court” in France for both civil and criminal matters)⁴³ does not focus on facts but rather on the whether the lower courts applied the law correctly based on established facts.⁴⁴ The *Cour de Cassation* simultaneously confers on the victim the right to request the public prosecutor to begin an action and control the development of the criminal trial.⁴⁵ It is possible for the victim to institute an action through the civil court but in such instances, the criminal nature of the origin of the loss or harm will not be considered. In practice this is not the usual route the victim will take because of the principle of supremacy of criminal matters over civil. When an adjudicator is faced with a case where delictual liability is alleged and a criminal prosecution has already begun based on the same facts; the adjudicator of the civil court must suspend the civil proceedings and await the outcome of the criminal proceedings.⁴⁶

French civil law provides for two main branches of civil liability: a contractual and an extra-contractual (delictual) system of liability.⁴⁷ French law upholds the rule of “non-concurrence” (*non-cumul*) whereby if the requirements are met to sue in contract, the plaintiff cannot sue in delict.⁴⁸ There is an overlap though between rules in contract and the law of delict especially in respect of medical malpractice claims where the

⁴¹ Viney in Bermann and Picard (eds) *French law* 239.

⁴² Viney in Bermann and Picard (eds) *French law* 239.

⁴³ Galand-Carval in Spier (ed) *Unification of tort law: liability for damage caused by others* 85.

⁴⁴ Borghetti 2012 *JETL* 179-180.

⁴⁵ Viney in Bermann and Picard (eds) *French law* 239.

⁴⁶ Viney in Bermann and Picard (eds) *French law* 240; Viney *Introduction à la responsabilité* 490.

⁴⁷ Viney in Bermann and Picard (eds) *French law* 241.

⁴⁸ Moréteau in Koziol (ed) *Basic questions of tort law* 7.

Cour de Cassation initially regarded such liability as falling within the domain of the law of contract but has recently been dealing with such claims within the law of delict.⁴⁹

French law is rather unique in that: there is an overlap between civil and criminal law; there is an overlap between the law of contract and the law of delict; there is a dominance of strict liability over fault-based liability in the law of delict; different courts have jurisdiction to hear matters depending on whether the matter involves a state or a private entity; the state compensation schemes and private insurance has a great impact on delictual liability; and the most important source of the law of delict is the CC.

French decisions are different from other jurisdictions discussed in this thesis, in that their judgments may range from a paragraph to no more than a few pages in length and the parties names are seldom referred to. Van Dam⁵⁰ explains that the:

“main features of the *Cour de cassation*’s decisions are its concise wording, its apodictic way of reasoning, and often the lack of reasoning at all. Decisions are usually not much more than one page long, rather abstract, and therefore are not always immediately clear. The courts do not discuss opinions of legal writers (as in the case in Germany), nor does it make any reference to its earlier decisions (as in the case in England, German, and European cases). French civil procedure law maintains a strict principle of anonymity that prohibits disclosing individual diverging or dissenting opinions. ... A single judgment focusing on a narrowly formulated ratio and containing no obiter dicta is considered essential for ensuring uniform interpretation and coherence of the law”.

The French law of procedure does not follow the precedent system.⁵¹ The courts are not bound by their own decisions or that of the *Cour de Cassation*.⁵² The appeal courts can make findings on facts on the same basis as the court *a quo*.⁵³ In practice though, decisions seldom digress from previous decisions of the *Cour de Cassation*.⁵⁴ French legal writers are held in high regard and their contributions are considered important

⁴⁹ See cases cited by Moréteau in Koziol (ed) *Basic questions of tort law* 7 fn 13.

⁵⁰ *European tort law* 54. See also Borghetti 2012 *JETL* 180 who states that the *Cour de Cassation*’s judgments are usually one page and does not “state the considerations underlying its conclusions”; neither will it explain its interpretations. Judgments are rarely longer than five pages and some may even be a paragraph or a few lines long.

⁵¹ Followed in other jurisdictions such as in the United Kingdom, United States of America and South Africa.

⁵² Borghetti 2012 *JETL* 180; Van Dam *European tort law* 55.

⁵³ Van Gerven, Lever and Larouche *Tort* 693 fn 13.

⁵⁴ Van Dam *European tort law* 55.

by adjudicators in developing the law.⁵⁵ Moréteau⁵⁶ points out that compared with other jurisdictions “in Europe, French doctrine is not dogmatic but rather pragmatic”. What is characteristic about the French civil liability system is that it is not rigid but open and readily able to change according to society’s needs. Furthermore an all-or-nothing approach to liability is not favoured but rather apportionment of liability (which may apply to the element of fault or causation).⁵⁷

The French law of delict is regulated by the much celebrated CC⁵⁸ which was commissioned by Napoleon Bonaparte after the French Revolution.⁵⁹ The CC did away with specific delicts in favour of a more general approach. According to the general approach, certain elements, namely: a damaging act or event; *faute* (except in cases of strict liability where fault is not required); a causal link; and damage must be present in order to ground liability. There is no definition of a delict, wrong, damaging act or event, *faute*, causal link or damage in the CC. At the heart of the CC is the law of obligations.⁶⁰ It contains a general clause for delictual liability found in Article 1382 which states that “[a]nyone who, through his fault, commits an act which causes harm to another is responsible to compensate that other person for the harm that occurred”.⁶¹ French delictual liability generally stems from five provisions (Articles 1382-1386) contained in the CC which has as mentioned remained almost unchanged for over 200 years. Moréteau⁶² explains that four out of the five articles remain unchanged. Slight amendments were made to Article 1384(2) and even though Article 1384(1) of the CC remained in its original draft, it was further developed into “an overarching doctrine of strict liability for damage caused by the act of a thing”. Articles 1382 to 1386 contained under the heading “CHAPTER II. DELICTS AND QUASI-DELICTS” in the CC are referred to throughout the chapter. For ease of reference, the translated provisions are provided hereunder:

⁵⁵ Van Dam *European tort law* 55.

⁵⁶ In Koziol (ed) *Basic questions of tort law* 8.

⁵⁷ Moréteau in Koziol (ed) *Basic questions of tort law* 7.

⁵⁸ The CC was the basis for civil law in a number of countries such as Italy, Belgium, Luxembourg, Netherlands, Poland, Spain, Portugal and some African countries. See Van Dam *European tort law* 52; Van Gerven, Lever and Larouche *Tort* 5.

⁵⁹ See Van Dam *European tort law* 51; Van Gerven, Lever and Larouche *Tort* 2.

⁶⁰ See Van Dam *European tort law* 51; Van Gerven, Lever and Larouche *Tort* 2.

⁶¹ Translated by Viney in Bermann and Picard (eds) *French law* 239. See also Van Gerven, Lever and Larouche *Tort* 2.

⁶² 2013 JCLS 760-761.

“Article 1382

Every act whatever of man that causes damage to another, obliges him by whose fault it occurred to repair it.

Article 1383

We are responsible not only for the damage occasioned by our own act, but also by our own negligence or imprudence.

Article 1384

[1] We are responsible not only for the damage caused by our own act, but also for that which is caused by the acts of persons for whom we are responsible, or by things that are in our custody.

[2] Nevertheless, a person who possesses, regardless of the basis thereof, all or part of an immovable or movable things in which a fire has originated is not liable towards third parties for the damages caused by that fire unless it is proven that the fire must be attributed to his fault or to the fault of persons for whom he is responsible.

[3] This provision does not apply to the relationships between owners and lessees which are governed by Articles 1733 and 1734 of the Civil Code.

[4] The father and the mother, in so far as they exercise parental authority, are solidary liable for the damage caused by their minor children who reside with them.

[5] Masters and employers, for the damage occasioned by their servants and employees in the exercise of the functions in which they are employed;

[6] Teachers and artisans, for the damage caused by their pupils and apprentices during the time when they are under their supervision.

[7] The liability outlined above occurs, unless the father and mother or the artisans prove that they could not have prevented the act that gives rise to that liability.

[8] As to teachers, the fault, imprudence, or negligence invoked against them as having caused the damaging act will have to be proven by the plaintiff at the trial in accordance with the general law.

Article 1385

The owner of an animal, or the person using it, while he uses it, is liable for the damage the animal has caused either because the animal was in his custody or because the animal strayed or escaped.

Article 1386

The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by a failure to maintain it or by a defect in its construction.”⁶³

These five articles relating to delictual liability are as important today as they were when they were formulated. They are interpreted by the courts, in particular, the *Cour de Cassation*⁶⁴ which has led to the significant development of case law.⁶⁵ Viney⁶⁶ refers to “the liability trilogy” in reference to three categories of civil liability: liability for one’s own personal acts based on *faute (la responsabilité du fait personnel)*; strict

⁶³ French Civil Code as at 1st July 2013 translated by Professor Gruning, Professor of Law, Loyola University, School of Law, New Orleans Revision: Juriscope Expert Committee: Prof Levasseur, Moyse, SR and Professor Plauché, Dart Professor of Law; Director, European Studies Program; Louisiana State University Paul M Hebert Law Center; Fondation *Pour Le Droit Continental, Conseil Scientifique*, and Professor Trahan, Professor of Law, Louisiana State University, Law Center, Baton Rouge and available at <https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations> (date of use: 6 April 2017) – hereinafter referred to as “Legifrance-translations”.

⁶⁴ Van Dam *European tort law* 52.

⁶⁵ Viney in Bermann and Picard (eds) *French law* 237.

⁶⁶ In Bermann and Picard (eds) *French law* 254. See also Van Dam *European tort law* 52.

liability for the acts of things under one's custody (*la responsabilité du fait des choses*); and strict liability for the acts of other persons (*la responsabilité du fait d'autrui*). In addition "special liability regimes" stemming from case law namely, the "abuse of right"⁶⁷ and "abnormal or excessive disturbance of neighbourhood"⁶⁸ was established.⁶⁹

Articles 1382 and 1383 relate to liability for one's personal conduct where *faute* (which includes wrongfulness and fault in the form of either intention or negligence is required).⁷⁰ They are known as the general clauses, referring to the obligation to compensate the plaintiff fully for the damage caused by some form of *faute*.⁷¹ These two Articles do not apply exclusively but apply generally and are considered as "safety net" provisions.⁷² The general clauses are supplemented by the strict liability rules contained in Articles 1384 to 1386 relating to liability for: things under one's custody; buildings; animals; persons for whom one is responsible (such as employees and children); personal injury, damage to property, and loss emanating from the death of a person.⁷³ Fault liability is nowadays seen as an exception to the numerous strict liability rules.⁷⁴ Strict liability in French law refers to: liability without *faute* (*responsabilité sans faute*); or "objective liability" (*responsabilité objective*).

The French courts' have been able to interpret these five articles relating to delictual liability throughout time, keeping in step with society's changing views.⁷⁵ In developing strict liability compensation regimes and rules, the delictual function of compensation is encouraged as opposed to the function of deterrence applicable in criminal law.⁷⁶ Thus all kinds of socially unacceptable, wrongful conduct causing injury or loss, whether to primary or secondary victims, can in principle lead to delictual liability and compensation as long as the interest is not "illicit".⁷⁷ According to Jossérand and other

⁶⁷ See para 2.2.4 below.

⁶⁸ Which deals with neighbour law based on strict liability. For purposes of this study neighbour law will not be discussed further. See Viney in Bermann and Picard (eds) *French law* 254.

⁶⁹ Viney in Bermann and Picard (eds) *French law* 254.

⁷⁰ Van Dam *European tort law* 52, 297.

⁷¹ Viney in Bermann and Picard (eds) *French law* 237.

⁷² Van Dam *European tort law* 56-57.

⁷³ See Van Dam *European tort law* 52; Van Gerven, Lever and Larouche *Tort* 3.

⁷⁴ Van Dam *European tort law* 52.

⁷⁵ Van Dam *European tort law* 52.

⁷⁶ See Moréteau in Koziol (ed) *Basic questions of tort law* 19.

⁷⁷ Van Gerven, Lever and Larouche *Tort* 3.

legal writers, civil liability is based on two pillars, *faute* and risk. It is about opposing and balancing rights, the right to act on the one hand, and the right to security which belongs to all, on the other hand.⁷⁸ In addition to the provisions relating to delictual liability in the CC, the legislator may provide guidelines.⁷⁹ The French value the notion of solidarity⁸⁰ whereby all “members agree to share and equalise the burden of risk”.⁸¹ As Moréteau⁸² puts it “you share the road, you share the risk”. The CC’s primary aim was to assert the notions of liberty, equality and fraternity, stemming from the French revolution.⁸³

In cases of liability of public entities (such as state hospitals, state departments etcetera), the administrative courts must hear the matters and not the civil courts.⁸⁴ The highest administrative court is the *Council d’État* (State Council). Having different courts with the jurisdiction to hear certain matters depending on whether it involves private or public civil liability, has resulted in different decisions. Thus different rules may for example apply to private and state hospitals dealing with claims for medical malpractice.⁸⁵

Troper⁸⁶ explains that France’s current Constitution of 1958, known as the Constitution of the Fifth Republic, is really just a document regulating government. The CC is still the important text that shapes French society. In France there was initially no single constitution but different constitutions developed over time which may be amended.⁸⁷ The different constitutions dealt with regulating government and the separation of powers.⁸⁸ The “Declaration of the Rights of Man and the Citizen”⁸⁹ (hereinafter referred

⁷⁸ See Starck, Roland and Boyer *Obligations volume 1: responsabilité délictuelle* 19, 41 referred to in Van Gerven, Lever and Larouche *Tort* 14.

⁷⁹ Van Dam *European tort law* 52.

⁸⁰ Cited in the preamble of the French Constitutions’ of 1946 and 1958. See Moréteau in Koziol (ed) *Basic questions of tort* 19.

⁸¹ Moréteau in Koziol (ed) *Basic questions of tort law* 4.

⁸² In Koziol (ed) *Basic questions of tort law* 71.

⁸³ Van Dam *European tort law* 51.

⁸⁴ Van Dam *European tort law* 55.

⁸⁵ Van Dam *European tort law* 55. See para 6 below.

⁸⁶ In Bermann and Picard (eds) *French law* 1.

⁸⁷ Depending on how they are counted, up until now there have been 12 or 15 Constitutions from 1791. See Troper in Bermann and Picard (eds) *French law* 1.

⁸⁸ Troper in Bermann and Picard (eds) *French law* 2-3.

⁸⁹ Of 1789.

to as the “Declaration”)⁹⁰ relate to human rights. The Declaration was initially regarded as a “political document expressing the ideology of the Enlightenment” and not legally binding.⁹¹ However, in 1971 the Constitutional Council in a landmark decision⁹² (dealing with the freedom of association) referred to the preamble of the Constitution⁹³ and the Declaration in rejecting legislation. From this decision, the Declaration became legally binding.⁹⁴ From 1971, legislation as well as administrative acts has been subject to the Declaration and fundamental rights are protected from infringements.⁹⁵ Statutes are regarded as an “expression of the general will”.⁹⁶ The courts must apply the Constitution of 1958 and protect fundamental rights.⁹⁷ Rights include *inter alia* the right to: equality;⁹⁸ liberty;⁹⁹ property,¹⁰⁰ security,¹⁰¹ and freedom of speech.¹⁰²

France is a member state of the European Union. European Union law, applied and interpreted by the European Court of Justice, takes precedence over French domestic law.¹⁰³ Even though the French courts were initially reluctant to conform to European Union law, they have embraced it and it has resulted in an evolution of French law.¹⁰⁴ Article 55 of the Constitution of 1958 stipulates that international conventions (provided the conventions are also applied by other member parties) take precedence over French domestic law,¹⁰⁵ except constitutional norms.¹⁰⁶ In the well-known decision

⁹⁰ The Declaration of the Rights of Man and the Citizen of 1789 was influenced by the U.S. Declaration of Independence drafted by Thomas Jefferson who worked closely with Lafayette in designing a bill of rights for France.

⁹¹ Troper in Bermann and Picard (eds) *French law* 13-14.

⁹² 71-44 DC 1971.

⁹³ Which states that: “[t]he French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946” (Troper in Bermann and Picard (eds) *French law* 15).

⁹⁴ Troper in Bermann and Picard (eds) *French law* 15.

⁹⁵ Troper in Bermann and Picard (eds) *French law* 15.

⁹⁶ Article 6 of the Declaration of the Rights of Man and the Citizen of 1789.

⁹⁷ Troper in Bermann and Picard (eds) *French law* 14.

⁹⁸ Article 1 of the Declaration of the Rights of Man and the Citizen of 1789.

⁹⁹ See Articles 2 and 4 of the Declaration of the Rights of Man and the Citizen of 1789.

¹⁰⁰ See Articles 2 and 17 of the Declaration of the Rights of Man and the Citizen of 1789.

¹⁰¹ Article 2 of the Declaration of the Rights of Man and the Citizen of 1789.

¹⁰² Article 11 of the Declaration of the Rights of Man and the Citizen of 1789.

¹⁰³ Dutheil de la Rochère in Bermann and Picard (eds) *French law* 43-44.

¹⁰⁴ Dutheil de la Rochère in Bermann and Picard (eds) *French law* 43.

¹⁰⁵ Bermann and Picard in Bermann and Picard (eds) *French law* 74.

¹⁰⁶ Article 88-1 of the Constitution of 1958 stipulates that European Community law takes precedence over French domestic statutes but not constitutional norms. See CÉ Ass 30 October 1998 200286 200287, GAJA 106; CÉ Ass 8 February 2007 (*Société Arcelor Atlantique et Lorraine*) 287110; Bermann and Picard in Bermann and Picard (eds) *French law* 74-75.

referred to as *Francovich*,¹⁰⁷ the European Court of Justice held that member states are responsible for harmful consequences as a result of not complying with European Union law.¹⁰⁸ The administrative courts have in any event been holding public authorities liable for damage caused by their conduct whether based on *faute* or by breach of the principle of “equality”. Furthermore, administrative courts apply a rule (stemming from previous case law) whereby the state in principle must compensate for harm caused by a statute.¹⁰⁹ Generally in respect of liability of the state, French decisions conform closely with the European Court of Justice decisions.¹¹⁰ The European Convention of Human Rights has also had an impact on the protection of individual’s rights.¹¹¹

French administrative law is an “autonomous body of law” which generally regulates administrative entities and officials with regard to *inter alia* their powers, functions, conduct, and their liability.¹¹² It has been described as non-written law and academic writing initially greatly influenced this branch of law. Over time, though, legislation in administrative law has been enacted and there is now a substantial body of case law.¹¹³ Delictual liability of a state entity (that is between the state and individuals) falls within the domain of the administrative courts, not the civil courts.¹¹⁴ The Constitutional Council is not the only authority charged with the task of enforcing constitutional norms. The administrative courts may also enforce constitutional norms when reviewing administrative acts.¹¹⁵ It may happen that when a statute has been promulgated, even though it is unconstitutional, it may have to be enforced by the administrative authorities and courts. The administrative courts do not have the authority to review the constitutionality of legislation prior to promulgation.¹¹⁶ Only the Constitutional Council has the authority to declare a provision in a statute as

¹⁰⁷ *Andrea Francovich and Danila Bonifaci v Italy* 1991 ECR I-5357 (19 November 1991 joined cases C-6/90 and C-9/90).

¹⁰⁸ Dutheil de la Rochère in Bermann and Picard (eds) *French law* 48.

¹⁰⁹ Where “the damage is especially important and specific” and in instances where the “legislature has not explicitly or implicitly excluded compensation” (Dutheil de la Rochère in Bermann and Picard (eds) *French law* 49).

¹¹⁰ Dutheil de la Rochère in Bermann and Picard (eds) *French law* 49.

¹¹¹ Dutheil de la Rochère in Bermann and Picard (eds) *French law* 50-51.

¹¹² Bermann and Picard in Bermann and Picard (eds) *French law* 58-60.

¹¹³ Bermann and Picard in Bermann and Picard (eds) *French law* 60.

¹¹⁴ See CÉ 6 December (*Rothschild*) Rec 1855 707; TC 8 February 1873 *Blanco*, GAJA 1; Bermann and Picard in Bermann and Picard (eds) *French law* 62.

¹¹⁵ Bermann and Picard in Bermann and Picard (eds) *French law* 72-73.

¹¹⁶ Bermann and Picard in Bermann and Picard (eds) *French law* 73.

unconstitutional.¹¹⁷ Administrative courts have the power to “neutralize statutes that impair supranational norms, which often enshrine the same rights or principles as those laid down by the Constitution”.¹¹⁸ The European Convention on Human Rights has affected French Administrative law with regard to limitations on liberties and rights. Seven out of ten French statutes and regulations apply European norms.¹¹⁹ The general principles of liberty and equality apply to all law.¹²⁰

1.1 Conclusion

The explicit aim of the law of delict in France is simply to protect and compensate the plaintiff for harm or loss suffered. Compensation is awarded either reflecting a monetary value or in kind which is a reasonable and practical solution depending on the circumstances of the case. However, as will be shown, such compensation is not awarded without reasonable limits. Certain principles or doctrines are applied in limiting or excluding delictual liability. Other purposes of the law of delict in France include: deterrence and punishment (where for example criminal sanctions and fines may be imposed); vindication (where there is an infringement of a legitimate interest); and justice, where the principles of liberty (or freedom to act within reasonable limits), solidarity (distribution of loss where reasonable) and equality (where it is reasonable and fair to impose delictual liability) are applied. The influence of reasonableness on these aims or purposes is implicit. Even though on the one hand it is reasonable to protect and compensate the plaintiff for harm or loss suffered, or in instances where he has been unduly burdened, or sustained an infringement of his interest; the plaintiff may also be reasonably expected to share or take the loss, act reasonably, and withstand reasonable infringements of his interests. The aim of punishment where a fine or criminal sanction is imposed may be reasonable under the circumstances in deterring socially unacceptable or wrongful conduct. Justice is served through applying the principles of equality, solidarity and liberty where reasonable and appropriate.

¹¹⁷ Bermann and Picard in Bermann and Picard (eds) *French law 78*.

¹¹⁸ Bermann and Picard in Bermann and Picard (eds) *French law 78*.

¹¹⁹ Bermann and Picard in Bermann and Picard (eds) *French law 75*.

¹²⁰ Bermann and Picard in Bermann and Picard (eds) *French law 77*.

In terms of procedural law, French law is rather pragmatic and reasonable. The non-concurrence rule and the option to sue either in delict or in terms of criminal law, ensures that the procedure is simplified for all parties and that there is no over-compensation or duplication of claims. There may not be uniformity with compensation when dealing with private and public entities, but this is reasonable and justified in that the administrative courts have the opportunity to regulate the behaviour of state employees and pay out compensation within their budgets and constraints. At the very least, the state is held accountable and liable in France. The fact that French courts are not expected to follow the precedent system gives them the freedom to take note of society's changing views and values, ultimately reaching a reasonable and fair outcome. It is also commendable that French law upholds its commitment to following principles of European Union law and upholds the protection of fundamental rights within reasonable limits. French decisions are in line with the decisions of the European Court of Justice, which shows that as a nation it is willing to be held accountable to its citizens as well as to others.

Even though under certain circumstances where there is intentional or serious fault, the state or private insurance companies has a right to recover funds paid out to the plaintiff from the defendant. The defendant may not be affected by this because he would be covered by insurance. Here the result is reasonable though, in that the plaintiff is generally compensated no matter what, but at the same time the defendant who may be a man of straw does not suffer financially.

The influence of reasonableness on liability for one's personal conduct, for the act of the thing and for the acts of others will now be discussed.

2. Articles 1382 to 1383 relating to liability for one's own personal conduct where fault is required

2.1 Fait générateur (relating to the requirement of conduct)

According to the requirements of delictual liability under French law, there must be: a "*fait générateur*", a generating, triggering, wrongful act or event; "*faute*", which includes wrongfulness and fault, either in the form of negligence or intention, where fault is

required; “*lien de causalité*”, a causal link; and “*dommage*”, damage, harm or loss.¹²¹ There is no precise definition of “*fait générateur*” in the CC but it is a requirement for liability for one’s own conduct (where fault is required) as well as for strict liability (where fault is not required) for the act of things or acts of other persons for whom one is responsible.¹²² The elements are also usually established in that order.¹²³ The term “conduct” is not explicitly referred to as a requirement for delictual liability in French legal doctrine, but some form of conduct falling within the requirement of *fait générateur* is necessary to ground delictual liability.

In order to ground liability under Articles 1382 to 1383 of the CC, it does not matter whether the conduct was voluntary or not. Thus an involuntary act by the defendant causing injury to the plaintiff will not negate liability. For example, in *Lignon v Avril*,¹²⁴ an inexperienced volleyball player, accidentally fell down during the course of the game coincidentally kicking another player and injuring him. The injured player sued the inexperienced player. The *Cour de Cassation* held that the inexperienced player was liable even though his conduct was involuntary, not in breach of any rules of the game, nor wrongful. The *Cour de Cassation* found that the inexperienced player could not judge distances and should have warned the other player of his lack of judging distances. He was found to be negligent in not informing the injured player.¹²⁵

Article 1382 generally relates to liability for conduct while Article 1383 specifically provides that “everyone is responsible for the damage caused not only by his act but also by his negligence or carelessness”.¹²⁶ Van Gerven, Lever and Larouche¹²⁷ point out that this clause refers to liability not only for a positive act, but also for an omission.¹²⁸ In French law not only a failure to act with regard to a statutory rule, but also “a failure to act in accordance with a non-legally-binding rule of proper social conduct can also entail liability”.¹²⁹ An obligation to act positively in respect of delictual

¹²¹ Galand-Carval in Spier (ed) *Unification of tort law: causation* 53.

¹²² See Van Dam *European tort law* 57; Van Gerven, Lever and Larouche *Tort* 555-556.

¹²³ Although this is the traditional order of establishing the elements, some academic writers begin with the study of damage, then causation and refer to fault and strict liability in separate chapters. See Moréteau in Koziol (ed) *Basic questions of tort law* 36.

¹²⁴ Cass civ 2 3 July 1991 90-13158, Bull civ 1991 II 210 111.

¹²⁵ Van Gerven, Lever and Larouche *Tort* 339.

¹²⁶ Translated by Van Gerven, Lever and Larouche *Tort* 2.

¹²⁷ *Tort* 2 fn 4.

¹²⁸ See also Van Dam *European tort law* 56.

¹²⁹ Van Gerven, Lever and Larouche *Tort* 281.

liability may stem from an “obligation of safety” (*obligation de sécurité*).¹³⁰ However, French law does not place particular importance on the positive legal duty to act. Furthermore the requirement of conduct, whether in the form of an omission or commission, in cases of fault liability is subsumed under the enquiry into *faute*.¹³¹ This is illustrated below with a few examples from case law.

In *Branly v Turpain*,¹³² a historian, Professor Turpain, omitted to refer to the research on wireless telegraphy written by another historian, Professor Branly. The successor in title to Professor Branly alleged that Professor Turpain failed in his duty to provide accurate information of the discovery made by Professor Branly and that such failure constituted a *faute* for which he should be held liable. The court *a quo* and the appeal court dismissed the claim, but the *Cour de Cassation* held that an omission committed negligently could ground liability and referred the case back to the appeal court. The *Cour de Cassation* referred to Articles 1382 to 1383, stating that *faute* referred to either intention or negligence and the conduct may be in the form of a positive act or an omission. Furthermore “not only omissions consisting in a failure to abide by legal or contractual obligations, but also those residing in failures to comply with an-unwritten-general duty” to act positively may lead to liability.¹³³ Thus the historian did not act as the thoughtful cautious historian should have. The requirement of conduct was subsumed under fault.¹³⁴ However, in 1994 after much criticism, the *Cour de Cassation*¹³⁵ held that liability for omissions stemming from a publication would occur if: the presentation of the information was falsified; it resulted in distortion; there was gross negligence; or it was a blatant rejection of the truth.¹³⁶ It is submitted that finding delictual liability in instances where the presentation of the information is deliberately falsified or distorted, or there is gross negligence, or a blatant rejection of the truth, is reasonable.

¹³⁰ This is deemed an obligation of result (*obligation de résultat*) as opposed to an obligation of means (*obligation de moyens*). See Moréteau in Koziol (ed) *Basic questions of tort law* 29.

¹³¹ See Van Gerven, Lever and Larouche *Tort* 298.

¹³² Cass civ 27 February 1951, D 1951 329 note Desbois. See also discussion of this case by Moréteau and Grenier in *Digest of European tort law volume 1: essential cases on natural causation* 114-115; Van Dam *European tort law* 252; Van Gerven, Lever and Larouche *Tort* 282.

¹³³ Van Gerven, Lever and Larouche *Tort* 283.

¹³⁴ Van Gerven, Lever and Larouche *Tort* 283.

¹³⁵ Cass civ 2 15 June 1994, Bull civ 1994 II 218.

¹³⁶ Van Dam *European tort law* 253.

In *Coopérative agricole de Limours v Volinetz*,¹³⁷ a farmer was held liable to compensate a bee keeper when the farmer sprayed insecticide on his crop contaminating the flowers which the bees then visited. The farmer knew that the insecticide was toxic and failed to warn his neighbour whom he knew to be a bee-keeper, even though he did not breach any statutory regulations. The bees that gathered the pollen from the contaminated flowers then died. The court *a quo* awarded damages to the bee-keeper. The appeal court confirmed the decision of the court *a quo* and the *Cour de Cassation* confirmed that even though the farmer abided by the legislation, he could not be excused for the consequences of his *faute*. Thus the defendant violated a general obligation of prudence and diligence required by Article 1382 of the CC and further omitted to warn the bee-keeper that the insecticide which was applied would eventually affect the bees. Thus the requirement of conduct was subsumed under *faute*.

In *L'Olympique Lyonnais v Fuster*,¹³⁸ a young man, while watching a football match in a stadium, sustained severe injury which subsequently led to his death as a result of another unidentified spectator throwing a lit flare into the stadium. The parents and siblings of the deceased sued the football club as well as the organiser of the football match for failing to provide adequate security. The appeal court held that it had to be proven that the managers of the football club and the organiser “failed to fulfil their *obligation de moyens*” (“obligations of means” – a contractual obligation to ensure the safety of the spectators who paid for the tickets). According to the facts, right from the outset of the match, various acts of violence were committed by spectators and the managers were well aware of the likelihood of incidents occurring. Article 20 of the Rules of the National Football League provides that persons in possession of items that may cause injury (such as fireworks and rockets etcetera) are not allowed to enter the stadium. In order to identify whether people are in possession of such items, inspections should take place and there should be adequate supervision. The required supervision and inspection was not carried out adequately or satisfactorily. The requirement of conduct was subsumed under *faute*. The parents’ and siblings’ were

¹³⁷ Cass civ 2 14 June 1972 71-11318, Bull civ 1972 II 180 146, 1973 Jur 423 note Lepointe. See discussion of this case in Van Gerven, Lever and Larouche *Tort* 308-309.

¹³⁸ See CA Lyon 16 December 1988, JCP 1990 II 21510 observations Collomb.

awarded compensation for the grief they suffered as well as for material loss sustained.¹³⁹

In *C v Clinique du Parc*,¹⁴⁰ a patient underwent a surgical operation on her spine whereafter she sustained thrombosis of the cavernous sinus (a known complication) and subsequently lost permanent sight in one eye. The medical practitioner, on hearing that the patient was having trouble with her eye after the operation, immediately changed her treatment and examined her eye where thrombosis of the cavernous sinus was diagnosed. The patient submitted *inter alia* that the medical practitioner failed in his duty to inform her of the risk involved in the operation. A medical practitioner is “bound to give the patient faithful, clear and appropriate information about any serious risks associated with the proposed course of examination and treatment. He is not relieved from this obligation by the mere fact that those risks materialise only exceptionally”.¹⁴¹ The *Cour de Cassation*¹⁴² differentiated between minor and serious risks, stating that minor risks are “inconveniences” which may be foreseeable.¹⁴³ Factors considered in determining the scope of the duty to inform depend on the statistic of risk and the severity of the consequences. The claim was dismissed as it was held that even though the complication was known, it occurs very rarely and was not a normal foreseeable risk. The medical practitioner need only provide information with regard to normally foreseeable risks, thus he need not warn the patient of rare risks. A patient must, however, be informed of serious risks even if they occur rarely. The only instances where a medical practitioner is excused from informing the patient of the serious or grave risks (*risques graves*)¹⁴⁴ of treatment is in cases of emergency, impossibility, or where the patient refuses to be informed.¹⁴⁵ The

¹³⁹ See Van Gerven, Lever and Larouche *Tort* 284-285.

¹⁴⁰ Cass civ 1 7 October 1998 97-10267, Bull civ 1998 I 291 202, JCP 1988 II 10179. See discussion of this case in Van Gerven, Lever and Larouche *Tort* 309-312.

¹⁴¹ See Cass civ 1 14 October 1977 95-19609, Bull civ 1997 I 278 188.

¹⁴² Cass civ 1 17 February 1988 95-21715, Bull civ 1988 I 67 45.

¹⁴³ And the duty to inform of minor risks applies in cases of cosmetic surgery (Van Gerven, Lever and Larouche *Tort* 311).

¹⁴⁴ These risks refer to “fatal, invalidating or even serious aesthetic consequences, in the light of their psychological and social repercussions” – Cass civ 1 14 October 1997, JCP 1997 II 22942 report by Sargos. See Van Gerven, Lever and Larouche *Tort* 311 fn 143.

¹⁴⁵ See Cass civ 1 7 October 1998 97-10267, Bull civ 1998 I 291 202, JCP 1998 II 10179; Cass civ 1 27 May 1998 96-19161, Bull civ 1998 I 187 126, D 1998 Jur 530 observations Laroche-Gisserot; Van Gerven, Lever and Larouche *Tort* 311 fn 142.

breach of the duty to inform¹⁴⁶ deals with a breach of a contractual obligation whereby one “must perform and achieve the promised result”.¹⁴⁷

In French law, an accountant or an auditor who negligently certifies reports or statements, which are relied upon by a shareholder who then increases his shareholding capital based on the certified documents (which in reality are inaccurate), may be held liable.¹⁴⁸ Professionals are usually easily held liable in the law of delict for their acts and omissions. For example, a notary was held liable in delict for failing to advise his client (the sellers) on how to secure payment of the unpaid portion of the purchase price even though the sellers had been advised by a third party and the notary acted in accordance with his client’s instructions. French law emphasises the obligations of professionals to not only follow their client’s instructions, but also to provide effective advice.¹⁴⁹

A distinction is made between an omission where an affirmative duty may be owed (where the defendant played a part in the activity or caused the risk of harm) and a pure omission (where the defendant was not part of any activity or did not create the risk of harm, such as a rescuer).¹⁵⁰ A relationship with a place, object, the plaintiff or the defendant may be an indication of a duty to act positively. For example, the owner of a property owes various (legal) duties (relating to security and safety etcetera) towards his tenant, neighbour, visitor or passer-by.¹⁵¹ Strict liability rules apply to omissions as well in respect of damage caused by the act of things or acts of others one is responsible for.¹⁵² Where there is a relationship between the plaintiff and the defendant, for example parent-child, school-pupil, and employer-employee, there is a strong indication of a duty to act positively.¹⁵³ A look at two examples from case law will suffice in order to illustrate how a relationship with a place, object, the plaintiff or

¹⁴⁶ *Obligation de résultat* (obligation of result).

¹⁴⁷ Such as the duty to deliver goods etcetera; an *obligation de moyens* refers to the contractual obligation to “act with due care”. See Moréteau in Koziol (ed) *Basic questions of tort law* 29.

¹⁴⁸ See for example Cass comm 17 October 1984 83-12414, Bull com 1984 IV 269, JCP 1985 II 20458 note Viandier. The *Cour de Cassation* found *faute* (in terms of Article 1382 of the CC), damage and causation. See also Van Gerven, Lever and Larouche *Tort* 241-242.

¹⁴⁹ See Cass civ 1 21 February 1995 93-10058, Bull civ 1995 I 95 68; Van Gerven, Lever and Larouche *Tort* 242-243.

¹⁵⁰ Van Dam *European tort law* 248.

¹⁵¹ Van Dam *European tort law* 249.

¹⁵² See Van Dam *European tort law* 249-250.

¹⁵³ See Van Dam *European tort law* 250.

the defendant may be an indication of a duty to act positively. In one case¹⁵⁴ a mother had an argument with her son and left him in a trance-like state while in possession of a dangerous weapon. While in such state, he thereafter killed a young boy. The court found *faute* on the part of the mother. In another case,¹⁵⁵ a resident of a building was held liable for failing to maintain the area of his pavement where ice had built up (in that he did not apply ash, sand or salt), resulting in injury to another as a result of slipping on the ice. The resident failed to grit or salt the icy area of the pavement he was supposed to maintain.

2.1.1 Conclusion

French law is unique in that conduct need not be in the form of a voluntary human act or omission, or accompanied by *faute* (in cases of strict liability). For example, in South African law, delictual liability would most likely not follow in *Lignon v Avril*,¹⁵⁶ as it is possible that conduct, wrongfulness and fault would be absent. The inexperienced volleyball player's conduct would most likely not be considered unreasonable. French law in general is more favourable to the plaintiff than other legal systems. In respect of the element of conduct (as it is known to the South African lawyer) French law really requires just a factual enquiry as to whether a generating act or event is present or not. Furthermore the source of the generating act or event may stem from a so-called "act of a thing" or another person (where one is responsible for such person). But the custodian of the thing, or person responsible for another that caused the harm or loss, may be held strictly liable. However, it is unreasonable for delictual liability to follow in France if a generating act or event is absent. The requirement of conduct being "voluntary" involves a normative inquiry (as opposed to the factual inquiry as to whether or not there was conduct) which may lead to the negation of liability on the part of the defendant where his actions are essentially mechanical (as the mental ability to control his muscular movements is absent). It is submitted that in the French law of delict, the element of conduct is a requirement for delictual liability but in an

¹⁵⁴ Cass civ 2 8 October 1967, Bull civ 1967 II 288. See discussion of this case by Moréteau and Grenier in *Digest of European tort law volume 1: essential cases on natural causation* 115.

¹⁵⁵ See Cass civ 1 18 April 2000 98-15770, Bull civ 2000 I 117 78. See discussion of this case by Moréteau and Grenier in Winiger (ed) *Digest of European tort law volume 1: essential cases on natural causation* 115.

¹⁵⁶ Cass civ 2 3 July 1991 90-13158, Bull civ 1991 II 210 111.

attenuated form. This may be justified and reasonable. In French law, strict liability is more the norm and the aim is to protect and compensate the plaintiff. Defendants are in any case generally insured against delictual liability. If we take the hypothetical example of X, while sleepwalking shoots at Y, injuring him, Y as the innocent victim sustains injury and harm. It may therefore be reasonable and justified if the plaintiff receives compensation for his injury or loss. In South African law, X would not be held delictually liable as his conduct was involuntary (fault is also absent). The only instance in South African law where the voluntariness of conduct is ineffectual in negating delictual liability is if there was some prior negligent or intentional conduct on the part of the defendant that subsequently led to his involuntary conduct.¹⁵⁷

In respect of omissions, a failure to act positively, for example by warning a bee-keeper that he is spraying insecticide which will affect the bees;¹⁵⁸ or failing to provide adequate supervision and inspection at a stadium resulting in the death of a spectator,¹⁵⁹ is unreasonable. Furthermore such omissions violate: the general obligation of prudence and diligence; and an unwritten legal duty to act positively which may also be deemed as socially unacceptable conduct according to Articles 1382 and 1383 of the CC. It is submitted that these general obligations and unwritten legal duties to act positively in French law echo the *boni mores* and also relate to the standard of the reasonable person in South African law. They relate to the elements of wrongfulness and fault (in the form of negligence) in South African law which questions the reasonableness of conduct.

In respect of the duty of the medical practitioner to inform the patient of the risks involved with medical treatments and procedures; it is only reasonable that the medical practitioner informs the patient of risks involved taking into account the possibility of a risk materialising. A patient who is informed of such risks therefore has the option of deciding whether to continue with the procedure or not. The patient may then give his informed consent. Thus the patient's right to autonomy is not violated and the medical practitioner's infringement of the plaintiff's right to life, bodily integrity etcetera is

¹⁵⁷ See chapter 3 para 2.

¹⁵⁸ See Cass civ 2 14 June 1972 71-11318, Bull civ 1972 II 180 146, 1973 Jur 423 note Lepointe. See discussion of this case in Van Gerven, Lever and Larouche *Tort* 308-309.

¹⁵⁹ See CA Lyon 16 December 1988, JCP 1990 II 21510 observations Collomb.

justified. In determining the scope of the duty to inform, it is reasonable to expect the medical practitioner to inform the patient of reasonably foreseeable risks. French law refers to “normal” foreseeable risks as opposed to reasonably foreseeable risks, “normal” does not necessarily mean “reasonable”. However, in this instance “normal foreseeable risks” may be regarded as synonymous with the phrase “reasonably foreseeable risks” as referred to in other jurisdictions discussed in this thesis.

Professionals are judged against the standard of a reasonable profession and where a professional acts unprofessionally and without due care and diligence, by for example, not providing important advice to a client,¹⁶⁰ or ensuring that reports are correct¹⁶¹ which results in harm or loss to the plaintiff, then they too violate the general obligation of prudence and diligence or unwritten legal duties (according to Articles 1382 and 1383 of the CC). Such violation is unreasonable, wrongful and negligent as *faute* encompasses wrongfulness and negligence.

It is submitted that in instances where there is a strong indication of a legal duty to act positively such as in the case¹⁶² where the mother left her son in a precarious state and in possession of a dangerous weapon whereafter the son killed a person; or in the case¹⁶³ where the resident failed to maintain the pavement resulting in injury to another, the mother’s and the resident’s omission was unreasonable, wrongful and negligent. It was in violation of Articles 1382 and 1383 of the CC.

The influence of reasonableness on the requirement of a generating act or event is therefore implicit. There is an intertwined link between all the requirements relating to delictual liability and the concept of “reasonableness”.

¹⁶⁰ See Cass civ 1 21 February 1995 93-10058, Bull civ 1995 I 95 68; Van Gerven, Lever and Larouche *Tort* 242-243.

¹⁶¹ See for example Cass comm 17 October 1984 83-12414, Bull com 1984 IV 269, JCP 1985 II 20458 note Viandier.

¹⁶² Cass civ 2 8 October 1967, Bull civ 1967 II 288. See discussion of this case by Moréteau and Grenier in Winiger (ed) *Digest of European tort law volume 1: essential cases on natural causation* 115.

¹⁶³ See Cass civ 1 18 April 2000 98-15770, Bull civ 2000 I 117 78. See discussion of this case by Moréteau and Grenier in Winiger (ed) *Digest of European tort law volume 1: essential cases on natural causation* 115.

2.2 “Faute” (relating to wrongfulness and fault)

2.2.1 Wrongfulness (*illicéite*)

Initially when the CC became applicable in 1804, *faute* played a major role in respect of delictual liability with a “strong moral value” but over time strict liability rules developed¹⁶⁴ and the concept of *faute* changed reducing the “strong moral value”.¹⁶⁵ In 1897 the *Cour de Cassation*¹⁶⁶ interpreted Article 1384(1) of the CC as covering liability caused by the “act of a thing”. Thus liability is based on the fact that a thing caused harm, irrespective of whether the thing was dangerous or not, or used as an instrument by a human. Currently the role of *faute* is limited depending on the type of harm or loss sustained.¹⁶⁷ Nevertheless, *faute* is still required within the ambit of Articles 1382 and 1383 of the CC, whether it relates to the infringement of personality interests, economic interests and so on.¹⁶⁸

The CC does not contain a definition of *faute*.¹⁶⁹ Wrongfulness is considered an important component of fault-based liability and no-fault liability (albeit in an indirect manner in terms of Article 1384(1)).¹⁷⁰ As Galand-Carval¹⁷¹ points out, the element of “wrongfulness” is found in French law and even though it is not clearly and explicitly identified, it forms part of the *faute* enquiry. To begin with, in considering *faute*, legal writers traditionally refer to an objective element (*illicéite* referring to wrongfulness or unlawfulness) and a subjective one (*imputabilité* or discernment in this context in French law, referring to “[f]ull consciousness, together with the capacity of understanding what is being done”).¹⁷² Van Dam¹⁷³ points out that in 1948 Rabut¹⁷⁴

¹⁶⁴ Galand-Carval in Widmer (ed) *Unification of tort law: fault* 89 points out that the change occurred during the latter part of the 19th Century when France experienced industrialisation, mechanisation and an increase in accident related claims.

¹⁶⁵ Galand-Carval in Widmer (ed) *Unification of tort law: fault* 89-90.

¹⁶⁶ Cass civ 16 June 1896, D 1897 433 conclusions Sarrut, note Saleilles. See Galand-Carval in Widmer (ed) *Unification of tort law: fault* 89 fn 2.

¹⁶⁷ Galand-Carval in Widmer (ed) *Unification of tort law: fault* 90.

¹⁶⁸ Galand-Carval in Widmer (ed) *Unification of tort law: fault* 91.

¹⁶⁹ Galand-Carval in Widmer (ed) *Unification of tort law: fault* 90.

¹⁷⁰ Moréteau in Koziol (ed) *Basic questions of tort law* 60.

¹⁷¹ In Widmer (ed) *Unification of tort law: fault* 89-90

¹⁷² See Moréteau in Koziol (ed) *Basic questions of tort law* 59-60, 64; Van Gerven, Lever and Larouche *Tort* 301.

¹⁷³ *European tort law* 58.

¹⁷⁴ *De la notion de faute en droit privé* (Paris: Libr Gén de Droit et de jurispr 1948) 199-200; Van Dam *European tort law* 58.

had found twenty-three different definitions of *faute* in French legal literature. Numerous legal writers have tried to define *faute* and even though Planiol¹⁷⁵ came the closest to defining *faute* as a “violation of a pre-existing duty” and “an act contrary to law (illicit)”,¹⁷⁶ the definition was still criticised. Planiol’s definition was criticised for being vague in that there can be no limit to the “range of pre-existing duties” acknowledged by law.¹⁷⁷ Moréteau¹⁷⁸ submits that the idea of wrongfulness of conduct is similar to the breach of a “duty of care” concept found in other jurisdictions (such as in Anglo-American law relating to the tort of negligence). It should be noted however, that a duty of care is not required in French law, and any kind of relationship can in principle lead to liability.¹⁷⁹ It is submitted that in French law, in a strict sense, a duty is defined more broadly than a duty of care in Anglo-American law or a legal duty in South African law. For example, in English law (with regard to the tort of negligence), a duty of care exists where there is some kind of relationship between the parties. In South African law the application of the breach of a legal duty to prevent harm is generally limited to establishing, for example, whether an omission was wrongful or a legal duty to prevent economic loss was wrongful. A breach of a legal duty in French law can range from a breach of a statutory duty to an infringement of a general duty “such as the duty to behave, in all circumstances, in a careful and diligent way (*le devoir general de prudence et de diligence*)”.¹⁸⁰ Legal writers who support the objective approach to determining fault favour the risk theory as opposed to fault as a foundation of the law of delict. A person (natural or juristic) “is answerable for the risk created” or “for the risk one benefits from”.¹⁸¹ There has however been a fair amount of debate around these concepts and there is still uncertainty.¹⁸²

Generally, wrongfulness is present if there is: a breach of a statutory rule; commission of a non-intentional fault which by default is deemed a civil fault; infringement of a right or “*abuse de droit*”, abuse of a right whether a property right or personality right is

¹⁷⁵ *Traité élémentaire de droit civil volume III/1* referred to by Moréteau in Koziol (ed) *Basic questions of tort law* 3.

¹⁷⁶ See Galand-Carval in Widmer (ed) *Unification of tort law: fault* 92.

¹⁷⁷ See Galand-Carval in Widmer (ed) *Unification of tort law: fault* 92.

¹⁷⁸ Moréteau in Koziol (ed) *Basic questions of tort law* 72.

¹⁷⁹ Van Dam *European tort law* 57.

¹⁸⁰ Galand-Carval in Widmer (ed) *Unification of tort law: fault* 92.

¹⁸¹ Moréteau in Koziol (ed) *Basic questions of tort law* 65.

¹⁸² Moréteau in Koziol (ed) *Basic questions of tort law* 60. Cf Van Gerven, Lever and Larouche *Tort* 301.

infringed;¹⁸³ breach of an unwritten duty stemming from “regulations, morals, customs, and technical standard”;¹⁸⁴ or if the defendant’s conduct deviated from the general norm of behaviour (*une norm general de comportement*).¹⁸⁵ The norm of behaviour is interpreted widely by the courts and it may be interpreted in a way that the defendant acted in a socially unacceptable way or breached the duty of acting carefully and skilfully under the circumstances.¹⁸⁶

It is apparent that *faute* may consist of wrongfulness (from a South African perspective) when dealing with the infringement of property or personality interests or where only so-called objective fault, is required (that is, *faute* without discernment). *Faute* has a broader application where wrongfulness and fault is required for the residual of any cases based on Articles 1382 to 1383.¹⁸⁷ There is no need for a weighing of interests in French law as in South African law. What is important though is whether or not an infringement of a legitimate interest occurred.¹⁸⁸ If an infringement of a fundamental right takes place, it is wrongful and a *faute* has been committed. The investigation stops there, in other words without having to further prove fault in the form of negligence or intention. Moréteau¹⁸⁹ finds this “reasonable given the priority accorded to such rights”. It is submitted that even though the weighing of interests is not required in French law it does indeed in a sense occur where certain interests are held in a higher regard in the circumstances of the case when compared with others. Ultimately a weighing of interests does take place taking into consideration whether the infringement of the interest was reasonable. A look at two examples referred to by Moréteau¹⁹⁰ assist in illustrating this point. There may be no infringement of privacy when harmless facts for example, relating to the birth of the fourth child of the Princess of Monaco are published,¹⁹¹ but facts published relating to the extramarital relations of

¹⁸³ The violation of rights may be considered wrongful either as a *faute* in terms of Article 1382 or a violation of a subjective right, such as privacy (Article 9) or ownership (Article 544). See Moréteau in Koziol (ed) *Basic questions of tort law* 61.

¹⁸⁴ Van Dam *European tort law* 57, 233.

¹⁸⁵ See Viney in Bermann and Picard (eds) *French law* 247.

¹⁸⁶ Galand-Carval in Widmer (ed) *Unification of tort law: fault* 92. See also Moréteau in Koziol (ed) *Basic questions of tort law* 60; Van Gerven, Lever and Larouche *Tort* 336.

¹⁸⁷ See Moréteau in Koziol (ed) *Basic questions of tort law* 66, 72.

¹⁸⁸ See Moréteau in Koziol (ed) *Basic questions of tort law* 62.

¹⁸⁹ In Koziol (ed) *Basic questions of tort law* 61.

¹⁹⁰ In Koziol (ed) *Basic questions of tort law* 62.

¹⁹¹ See Cass civ 13 April 2002 99-19852, Bull civ 2002 I 110 85, D 2002 3164 note Bigot; Moréteau in Koziol (ed) *Basic questions of tort law* 62.

a French President may be an infringement of privacy as it is “regarded as a strictly private matter”. It is submitted that a weighing of interests does take place in order to reach a decision as to whether the plaintiffs’ privacy is infringed. In both examples the interests in freedom of speech and privacy are weighed against each other. In the former case, the interest in freedom of speech may be valued more than the interest in privacy while in the latter case the interest in privacy may be valued more than the interest in freedom of speech. The difference between the two outcomes may be justified though where in the former case, the publication of the facts are harmless and reasonable while in the latter case, the publication of the facts are not harmless. In general some rights such as the right to life, are automatically valued more highly than others.¹⁹²

If it is established that there is a breach of a statutory rule, then the investigation also stops there, there is no need to further prove fault in the form of negligence or intention.¹⁹³ For example, if a driver exceeds the speed limit on an urban road making him unable to avoid hitting a pedestrian, there is a breach of a statutory rule which is wrongful and the driver has committed a *faute* (without having to establish fault in the form of negligence or intention).¹⁹⁴ In the majority of cases, the breach of these rules would amount to a *faute* but not always. For example, a breach of a professional code of ethics need not be regarded as a civil *faute* while on the other hand compliance with the rules does not necessarily mean that *faute* must not be proven.¹⁹⁵

2.2.1.1 Conclusion

In French law, from a South African perspective, the distinction between wrongfulness and fault is somewhat blurred to a certain extent because the concept of *faute* is wide, encompassing wrongfulness and fault. The tests for determining whether the defendant’s conduct constituted a *faute* is similar to the tests for determining both wrongfulness and fault in South African law. Generally in French law, wrongfulness is present when there is a violation of a statutory rule; violation of an unwritten legal duty;

¹⁹² Van Dam *European tort law* 226.

¹⁹³ Galand-Carval in Widmer (ed) *Unification of tort law: fault* 92.

¹⁹⁴ Galand-Carval in Widmer (ed) *Unification of tort law: fault* 98.

¹⁹⁵ See Galand-Carval in Widmer (ed) *Unification of tort law: fault* 91, 94.

or infringement of a legitimate interest. In South African law wrongfulness is established where there is a breach of a legal duty to prevent harm or loss; or where there is an infringement of a right. In South African law reference is made specifically to the *boni mores* yardstick in determining wrongfulness while French law interprets the norm of behaviour widely in a way that the defendant acted in a socially unacceptable way or breached the duty of acting carefully and skilfully under the circumstances. When looking at such wide norms in French law, it is apparent to a South African lawyer that wrongfulness and fault elements are often dealt with in combination and usually without clear differentiation. In South African law reasonableness is explicitly referred to in determining wrongfulness while it is implicit in French law. It may be concluded that the influence of reasonableness on *illicéite* (wrongfulness) in the French law of delict is therefore implicit.

2.2.2 Discernment (*discernement*) or imputability (*imputabilité*)

Moréteau¹⁹⁶ explains that from a French perspective in respect of fault-based liability; wrongfulness (*illicéite* as the objective element), discernment or “imputability” in its attenuated form (the subjective element) and fault in the form of negligence or intention may be required. Moréteau¹⁹⁷ points out that the scope of imputability has been reduced and is presumed as soon as wrongfulness is established.

The concept of *faute* has retained its objective component but not much of the subjective component *imputabilité* (imputability), except in respect of intentional conduct.¹⁹⁸ The terms “imputability”, “discernment” (*discernement*), or “culpability” in French law are used interchangeably and are somewhat similar to the concept, “capacity” in Anglo-American law and “accountability” in South African law. “Imputability” refers to an element of blameworthiness and whether the defendant was aware that his conduct was wrongful which could lead to harmful consequences.¹⁹⁹

¹⁹⁶ In Koziol (ed) *Basic questions of tort law* 66.

¹⁹⁷ In Koziol (ed) *Basic questions of tort law* 66.

¹⁹⁸ Galand-Carval in Widmer (ed) *Unification of tort law: fault* 90, 93.

¹⁹⁹ Van Gerven, Lever and Larouche *Tort law* 332, 354.

The relinquishment of “imputability” as a requirement for liability has affected mainly minors and mentally impaired persons.²⁰⁰

Previously, mentally impaired persons could not be held liable on the ground that such person lacked “imputability”. In *Buguel v Morin*,²⁰¹ a mentally impaired person had just been released from a psychiatric institution. He had not fully recovered but was in a state of “sufficient awareness and free will”. It was expected of him to take care of himself but instead he drank heavily for two days. While in the intoxicated state he shot and seriously injured the plaintiff. Criminal proceedings could not be instituted against him due to the mental state he was in when he shot the plaintiff. However, the *Cour de Cassation* confirmed that he committed a *faute* and that his “mental deficiency which continued to exist, did not deprive him of all awareness and free will”. He was thus held delictually liable.²⁰² Following this decision, Article 489-2²⁰³ was incorporated in the CC (now Article 414-3)²⁰⁴ which states that “[h]e who has caused harm to another while under the control of a mental disturbance is nevertheless obligated to provide reparation”.²⁰⁵ The intention behind the insertion of this new article was to remove (subjective) “imputability” as a requirement for liability. Mental disturbance is defined in a strict sense for purposes of this Article and it does not cover brief intervals of lapse of consciousness.²⁰⁶ After the implementation of Article 489-2, the *Cour de Cassation*²⁰⁷ in 1976 held that the article applied to all mentally impaired person’s

²⁰⁰ Van Gerven, Lever and Larouche *Tort law* 332-333.

²⁰¹ Cass civ 2 15 December 1965, D 1966 Jur 397. See discussion of this case in Van Gerven, Lever and Larouche *Tort law* 313-314.

²⁰² In Cass Ass plén 9 May 1984 (80-93481, Bull crim 1984 164, JCP 1984 II 20255 note Dejean de la Bathie, D 1984 525 note Chabas, RTDciv 1984 509 observations Huet) a five-year-old child ran across the street without observing whether there were any vehicles on the road. She was hit by a motor vehicle and seriously injured. The *Cour de Cassation* found the child contributory negligent (50%) and reduced the parents claim accordingly. The standard applied was that of an adult (the good family father) and whether or not the child understood the consequences of her conduct was considered irrelevant. In Cass Civ 2 12 December 1984 (82-12627; Bull civ 1984 II 193, Gaz Pal 1985 235) a seven-year-old boy who deliberately bumped another child resulting in serious injury to the child was held liable (his conduct was deemed a *faute*). See Galand-Carval in Widmer (ed) *Unification of tort law: fault* 90, 93; Van Dam *European tort law* 272-273; Viney in Bermann and Picard (eds) *French law* 248.

²⁰³ Law no 68-5 of 3 January 1968 inserted Article 489-2.

²⁰⁴ Now Article 414-3 by Law no 2007-308 of 5 March 2007.

²⁰⁵ Légifrance-translations. See Moréteau in Koziol (ed) *Basic questions of tort law* 65.

²⁰⁶ Where for example a person suffers a heart attack and falls unconscious (Cass civ 2 4 February 1981 79-11243, Bull civ 1981 II 21, JCP 1981 IV 136). See Van Dam *European tort law* 272; Van Gerven, Lever and Larouche *Tort* 334.

²⁰⁷ Cass civ 1 20 July 1976 74-10238, Bull civ 1976 I 270 218. See discussion of this case in Van Gerven, Lever and Larouche *Tort* 336.

whether they were minors or majors. The principles applied in *Buguel v Morin* are still valid in that: they apply in instances where the parent or person responsible for the minor cannot be held liable; and where a person who is ill has a duty to take care of himself which includes taking necessary precautions with regard to his condition.²⁰⁸ The *Cour de Cassation* thereafter, in 1984, extended the principle of dispensing with the requirement of imputability to very young children.²⁰⁹ Prior to 1968, children could only be held delictually liable when they had reached the “*âge de raison*” (age of reason or discernment), typically from seven years onwards. The courts²¹⁰ had to establish in each case whether the child had reached the age of discernment. The aim of dispensing with the requirement of discernment was to benefit the plaintiff and protect his rights.²¹¹

In the landmark decision of *SAMDA v Molina*,²¹² a seven year old schoolboy violently pushed his classmate. The classmate fell and struck a bench which subsequently led to the bursting of his spleen causing a haemorrhage. It was held that the schoolboy committed a *faute* and that it was not necessary to prove that he was able to “*appreciate the consequences of his actions*” or that he had sufficient discernment to appreciate the consequences of his actions. Discernment however remains a requirement in criminal law in terms of the French Penal Code (*Code Pénal*).²¹³ This confirms that *faute* in French law is a social concept and a moral element is not required for liability under Article 1382 and 1383 of the CC. A minor in French law is a child under the age of eighteen years and in order for a minor or infant to be at fault it must be shown that he did not act like a “good family father”. Previously the

²⁰⁸ Van Gerven, Lever and Larouche *Tort* 314.

²⁰⁹ Cass Ass plén 9 May 1984 80-93481, Bull crim 1984 164, JCP 1984 II 20255 note Dejean de la Bathie, D 1984 525 note Chabas, RTDciv 1984 509 observations Huet. Even though no age was provided, it is presumed to apply to children under the age of six or seven years. See Galand-Carval in Widmer (ed) *Unification of tort law: fault* 90, 93; Van Dam *European tort law* 272; Viney in Bermann and Picard (eds) *French law* 248.

²¹⁰ See Cass civ 2 8 February 1962, Bull civ 1962 II 180 where it was held that an eight-year-old child did not understand that the fire would spread to other buildings and could therefore not be held liable; CA Paris 6 June 1959, D 1959 76 where a six-year-old child was held liable for running a bicycle against a person who was sitting on a bench; TGI St Etienne 15 May 1974, Gaz Pal 1976 109 where it was held that a fourteen-year-old child was old enough to appreciate the consequences of using an air rifle (Ferreira *Fundamental rights and private law in Europe* 142-143). See also Van Dam *European tort law* 272.

²¹¹ Galand-Carval in Widmer (ed) *Unification of tort law: fault* 90.

²¹² Cass civ 2 12 December 1984 82-12627, Bull civ 1984 II 193. See discussion of this case in Van Gerven, Lever and Larouche *Tort* 335-337.

²¹³ Van Gerven, Lever and Larouche *Tort* 302.

“reasonable child” test was applied to children and age as a subjective factor was considered. A similar approach was applied in assessing the conduct of an elderly person (usually over seventy years of age).²¹⁴ In 1984 a number of decisions²¹⁵ dealing with minors were considered culminating in the decision of *SAMDA v Molina* where the *Cour de cassation* showed a clear shift in determining *faute* in an objective manner relinquishing the requirement of “imputability” in the French law of delict.

Viney and Jourdain²¹⁶ criticise the courts’ approach pointing out that by finding a minor liable is of little value as the plaintiff will still be compensated by turning to the guardians or parents of the minor and that such a finding of liability could have a negative, psychologically damaging impact on a minor that goes against the notion of protecting children, which is contrary to the spirit of French law. They state that the liability of minors must relate to the liability of their parents or person responsible for the minor under Article 1384(4). In France parents take out insurance which covers damage caused by children for whom they are responsible when they take out home insurance or insurance over rental property.²¹⁷

2.2.2.1 Conclusion

It seems that imputability (similar to the concept of capacity or accountability) is not relevant in French law.²¹⁸ This seems to go hand in hand with an objective standard to determining *faute*. However, the outcome reached in *Buguel v Morin*,²¹⁹ is probably the same outcome that would have been reached by the South African courts. In this case where the defendant did not take care of himself but drank heavily whereafter he shot and seriously injured the plaintiff, the South African courts would have in all probability found that the defendant negligently or intentionally created the situation in which he claimed to act involuntary. It is reasonable that the defendant was held

²¹⁴ See Galand-Carval in Widmer (ed) *Unification of tort law: fault* 92; Van Dam *European tort law* 270; Van Gerven, Lever and Larouche *Tort* 336.

²¹⁵ See Cass Ass plén 9 May 1984 80-93481, Bull crim 1984 164, JCP 1984 II 20255 note Dejean de La Bathie, D 1984 525 note Chabas RTDciv 1984 509 observations Huet; Moréteau in Koziol (ed) *Basic questions of tort law* 65; Van Gerven, Lever and Larouche *Tort* 336.

²¹⁶ *Les conditions de la responsabilité* 542-543; Van Gerven, Lever and Larouche *Tort* 336-337. See also Moréteau in Koziol (ed) *Basic questions of tort law* 65 fn 359.

²¹⁷ Moréteau in Koziol (ed) *Basic questions of tort law* 66; Van Dam *European tort law* 273.

²¹⁸ See Widmer in Widmer (ed) *Unification of tort law: fault* 344.

²¹⁹ Cass civ 2 15 December 1965, D 1966 Jur 397.

delictually liable. This then brings us to instances where there is no prior conduct to consider, or where a minor or mentally impaired person commits a delict. It is clear that in French law a minor (no matter what his age) and a mentally impaired person is not excused from liability. This is where South African law and French law diverge. In South African law, generally a child under seven years of age and a mentally impaired person will not be held liable (as accountability and fault are absent). This may be justified in South African law as it may be considered unreasonable to hold a young child or mentally impaired person liable. Furthermore not all South Africans take out insurance to cover delictual liability. On the other hand, the fact that the innocent plaintiff is left without redress or compensation may be considered unreasonable. Holding such minor or mentally impaired person delictually liable can be justified and considered reasonable, especially since most French people take out insurance to cover delictual liability. Again the French approach to reasonableness is more claimant-biased than, for instance, the South African approach.

2.2.3 Negligence

Faute is now (as mentioned above) a “social concept” and not a moral concept (as it does not refer to morals or culpability) and is applied objectively to all persons whether they are minors, mentally impaired and so on.²²⁰

French law recognises different degrees of fault ranging from slight or simple fault (which may manifest itself in a mistake, “error of judgment”, technical fault or a natural reflex) to more serious fault such as recklessness, “*faute grave*” (grave fault) (which is not deemed intentional nor fraudulent) and intention.²²¹ “*Faute inexcusable*” (inexcusable *faute*) which does contain a subjective element as it takes account of a “certain degree of wilful blindness to injury”, is also recognised. “Wilful blindness” encompasses not only actual knowledge of risk but also “constructive knowledge of risk” which is an assessment in *abstracto* (abstract).²²² With regard to delictual liability, the degree of fault is normally irrelevant in accordance with the general *faute* principle

²²⁰ See Van Dam *European tort law* 58; Van Gerven, Lever and Larouche *Tort* 280.

²²¹ See Cass civ 2 17 February 1971 70-10124, Bull civ 1971 II 58, 42; Galand-Carval in Widmer (ed) *Unification of tort law: fault* 94-95. Viney in Bermann and Picard (eds) *French law* 248.

²²² Van Gerven, Lever and Larouche *Tort* 333.

(*principe de l'unité de la faute civile*) except when dealing with liability for “abuse of rights” and liability of employees (in respect of harm or loss caused to employers).²²³

In French law when considering fault beyond the infringement of a legitimate interest, or violation of an unwritten legal duty, the standard of “the good family father” is applied. This standard is the equivalent to the standard of the reasonable person or its equivalent (applied in South African and Anglo-American law in determining negligence). “The good family father” or reasonable person hypothetically acts like the ordinary, just and cautious man under the circumstances, that is, he acts reasonably under the circumstances.

When negligence is determined, the adjudicator must consider whether the risk was known at the time of the delict. For example, the effect of the HIV virus became known around 1983-1984, but only in 1985 was it essential to check whether donor blood was clear of the virus. In such cases there may be a duty to warn others of the potential risks and the impossibility of preventing the risk from materialising.²²⁴

In reaching a conclusion as to whether the defendant’s conduct deviated from that of “the good family father”, the following factors may *inter alia* be considered: the reasonable foreseeability of harm; the magnitude of the risk of harm; the probability of the harm materialising;²²⁵ the cost and effort of taking precautionary measures;²²⁶ customs; professional rules, practices or codes of ethics; technical rules; and private regulations.²²⁷ The defendant’s conduct may be deemed wrongful and encompass *faute* if it deviates even slightly from the standard of the good family father.²²⁸

French law assesses the defendant’s conduct *in abstracto* (as compared to *in concreto*) not considering internal circumstances (subjective factors including *inter alia*: age;

²²³ See Cass soc 19 May 1958, Bull civ 1958 V 612 where the *Cour de Cassation* held that employers can only sue their employees for harm or loss if there was gross negligence (*faute lourde*) on the part of the employees; Galand-Carvel in Widmer (ed) *Unification of tort law: fault* 95.

²²⁴ Van Dam *European tort law* 263.

²²⁵ Van Dam *European tort law* 239.

²²⁶ Van Dam *European tort law* 242.

²²⁷ Galand-Carval in Widmer (ed) *Unification of tort law: fault* 94.

²²⁸ See Galand-Carval in Widmer (ed) *Unification of tort law: fault* 90; Viney in Bermann and Picard (eds) *French law* 248.

cultural and social characteristics of a person; and physical, psychological, or other inherent infirmities of a person) but considering external circumstances (the nature of the conduct as well as time and place where the delict occurred). Certain so-called inferior internal circumstances, such as physical disabilities, or so-called superior factors, such as professional experience or skill, are considered when assessing the degree of caution or diligence required.²²⁹ Statutory provisions may adjust the standard of the “good family father”. For example, in respect of road accidents where the *loi Badinter* is applicable,²³⁰ contributory negligence on the part of: a child under sixteen years of age; a person older than seventy years; and a person more than eighty percent incapacitated can no longer apply as a defence in limiting liability. However, drivers may still be held to be contributorily negligent.²³¹

The standard is adjusted when it comes to professionals like medical practitioners. Good examples of how the adjusted standard of reasonable conduct is assessed are found in cases dealing with medical practitioners. In private hospitals, medical practitioners including staff at clinics may generally be held contractually liable. The patient must still prove *faute*, causation and damage as with delictual liability. The medical practitioner is the debtor in terms of the contractual obligations who must treat the patient with all possible means.²³² In respect of a contractual obligation, *obligation de moyens*, the defences that may be raised are contributory fault on the part of the plaintiff or some extraneous cause which cannot be attributed to the conduct of the defendant.²³³ In some instances, an obligation may be to do the best one can do under the circumstances. For example, a medical practitioner has an obligation to use his best efforts to cure his patient.²³⁴

In one case²³⁵ where a medical practitioner employed at a clinic was negligent in taking care of the patient who lost blood and developed hemiplegia and in another case²³⁶

²²⁹ Van Gerven, Lever and Larouche *Tort* 353.

²³⁰ Law no 85-677 of 5 July 1985 hereinafter referred to as “*loi Badinter*”.

²³¹ Van Gerven, Lever and Larouche *Tort* 314.

²³² See Cass civ 1 20 May 1936 (*Mercier*), DP I 88; Brun 2002 *European tort law yearbook* 180.

²³³ See Van Gerven, Lever and Larouche *Tort* 285.

²³⁴ Van Gerven, Lever and Larouche *Tort* 285-286.

²³⁵ Cass civ 1 9 November 2004 01-17908, Bull civ 2004 I 262 219. See discussion of these cases by Moréteau 2005 *European tort law yearbook* 276.

²³⁶ Cass civ 1 9 November 2004 01-17168, Bull civ 2004 I 260 217. See discussion of these cases by Moréteau 2005 *European tort law yearbook* 276.

where a child sustained cerebral palsy due to a difficult birth caused by the lack of care and supervision by the midwife, the lower courts held the clinics, the medical practitioner and the midwife solidarily liable. However, the *Cour de Cassation* overturned these rulings, finding that the medical practitioner and midwife were acting like reasonable professionals in the course and scope of their functions and were therefore not liable because there was no *faute* on their part. Currently employees may only be held liable if they “wilfully commit a criminal offence” or “act outside the scope of their functions”.

In a case²³⁷ where a patient’s intestine was perforated during a colonoscopy, the patient sued the medical practitioner for damages. The medical practitioner argued that the risk was inherent in the technique and that there was no *faute* on his part. The *Cour de Cassation* confirmed the decision of the lower court in finding that the perforation resulted from the inept conduct of the medical practitioner in that his conduct strayed from that of the reasonable medical practitioner and was thus unreasonable. The purpose of the colonoscopy was to examine the intestinal walls and harm to the intestinal wall was not included. The damages claimed were awarded to the patient. Thus generally, if there is a risk inherent in the medical procedure, then it is likely that there is no *faute* on the part of the medical practitioner. In one case,²³⁸ a medical practitioner was not held liable when he performed an operation on the carpal tunnel of the plaintiff’s left hand. During the operation he severed the median nerve of the plaintiff’s hand. The operation was performed under endoscopy using specific instruments and the procedure itself carries risks, because every individual’s hand is anatomically different. The *Cour de Cassation* found that the medical practitioner’s conduct was reasonable under the circumstances; he took necessary precautions, was not careless or negligent, and did not commit an error and that there was no *faute* on his part. In another case,²³⁹ while operating on a patient’s Achilles tendon, a surgeon damaged the patient’s tibial nerve even though it was five centimetres away from the tendon. The appeal court held that such a lesion was a risk inherent in such a procedure. The *Cour de Cassation* agreed and liability was

²³⁷ Cass civ 1 18 September 2008 07-12170; Bull civ 2008 I 205. See discussion of this case by Moréteau 2009 *European tort law yearbook* 206-208.

²³⁸ Cass civ 1 29 November 2005 03-16308, Bull civ 2005 I 456 383.

²³⁹ Cass civ 1 18 September 2008 07-13080, Bull civ 2008 I 206.

excluded. Moréteau,²⁴⁰ points out that liability on the part of the medical practitioner may still be found even though the medical procedures carry inherent risks.

2.2.3.1 Conclusion

It is apparent that in determining whether a person's conduct strayed from that of the "good family father", reasonable foreseeability and reasonable preventability of harm are considered (although the word reasonable is not referred to in French law). In terms of a professional, whether his conduct deviated from that of the reasonable professional depends on whether the professional acted within the scope of his functions, with the necessary care, skill, and diligence expected of the professional under the same circumstances. In making a careless error, for example, perforating an intestinal wall while undertaking a routine scope, a professional's conduct is considered unreasonable, constituting a *faute*. Wrongfulness and fault in French law are also presumed if the defendant's conduct deviates even slightly from that of the good family father. Thus unreasonable conduct relates to both wrongfulness and negligence. In French law, the test for determining negligence is very similar to the test for determining negligence in both South African and Anglo-American law. The influence of reasonableness on negligence is therefore explicit.

2.2.4 Intention and "abuse of rights"

There are no specific rules requiring intention for delictual liability. In most instances negligence is sufficient, while in others strict liability is applicable.²⁴¹ Liability for intentional conduct is however relevant with respect to "abuse of rights".²⁴² Case law and legal writers provide two different views on the theory of "abuse of rights". The one is referred to as the objective theory of "abuse of rights", based on society's perception of subjective rights.²⁴³ The other is referred to as the subjective theory of abuse of rights, which takes into consideration the defendant's motive for exercising a right or promoting his interests. Thus the defendant abuses a right if, for example, he

²⁴⁰ 2009 *European tort law yearbook* 207-208

²⁴¹ Van Dam *European tort law* 226.

²⁴² Van Dam *European tort law* 226.

²⁴³ See Van Dam *European tort law* 227.

has intention to harm.²⁴⁴ It seems that the *Cour de Cassation* prefers the subjective theory where the courts often refer to the defendant's mental state in terms of intention to harm (*intention de nuire*);²⁴⁵ fraudulent fault (*faute dolosive*);²⁴⁶ or attenuated forms of intention such as bad faith (*mauvaise foi*)²⁴⁷ or *légèreté blamable* ("culpable levity of conduct").²⁴⁸

The CC does not make mention of any "absolutely protected and unprotected rights", however, any type of damage is in principle compensable.²⁴⁹ There is no *numerus clausus* in respect of legitimate interests.²⁵⁰ Ownership is referred to as an absolute right, and property and personality rights are protected.²⁵¹ In French law, in principle all interests as long as they legitimate are protected.²⁵²

Galand-Carval²⁵³ explains that the abuse of rights theory was formulated by Josserand and Saleilles in order to reconcile Article 544 (which states that "[o]wnership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations")²⁵⁴ with Article 1382 of the CC. According to Josserand and Saleilles, the use of any rights falls within the ambit of *faute* where there is an intention to harm. In modern French law, "abuse" is defined with reference to a number of criteria which take into account the nature of the right.²⁵⁵ The abuse of rights theory is flexible and is applicable in a number of situations.²⁵⁶ Van Gerven, Lever and Larouche²⁵⁷ explain that an abuse of a right:

²⁴⁴ Cass civ 1 19 November 1996 94-20207, Bull civ 1996 I 404 283, RTDciv 1997 156 observations Gautier; Van Dam *European tort law* 227.

²⁴⁵ Cass civ 3 12 October 1971 69-14022, Bull civ 1971 III 480 343. See Van Dam *European tort law* 227 fn 5; Viney in Bermann and Picard (eds) *French law* 254.

²⁴⁶ Cass civ 2 11 January 1973 71-12446, Bull civ 1973 II 17 12, Gaz Pal 1973 2 710; Van Dam *European tort law* 227 fn 6.

²⁴⁷ Cass civ 2 11 January 1973 71-12446, Bull civ 1973 II 17 12, Gaz Pal 1973 2 710; Van Dam *European tort law* 227 fn 7.

²⁴⁸ Cass com 22 February 1994 91-18842, Bull civ 1994 IV 79 61; Van Dam *European tort law* 227.

²⁴⁹ Moréteau in Koziol (ed) *Basic questions of tort law* 7.

²⁵⁰ Viney in Bermann and Picard (eds) *French law* 256.

²⁵¹ See Article 544 of the CC; Moréteau in Koziol (ed) *Basic questions of tort law* 13.

²⁵² Van Gerven, Lever and Larouche *Tort* 57.

²⁵³ In Widmer (ed) *Unification of tort law: fault* 95.

²⁵⁴ Legifrance-translations.

²⁵⁵ Galand-Carval in Widmer (ed) *Unification of tort law: fault* 95.

²⁵⁶ Van Dam *European tort law* 59.

²⁵⁷ *Tort* 231.

“occurs when the exercise of a right by its holder, even if lawful, results in harm to a third party, in circumstances, such as where that exercise was not useful to the holder of the right, where the holder of the right could have chosen a less harmful way of exercising his or her right or where the advantages brought to the holder of the right by the exercise of that right are outweighed by the harm done to the third party. The abuse of right doctrine evolved out of the field of disputes between neighbours and is now used throughout the civil law of the Continental countries.”

In French law, the concept of “subjective rights” does not apply to limit rights but to assist the plaintiff. A violation of a subjective right satisfies the requirements of *faute* and damage for purposes of liability under Article 1382 of the CC.²⁵⁸ The concept of subjective rights is not found in English law,²⁵⁹ but in South African law.²⁶⁰ In South African law, where there is an infringement of a subjective right (generally relating to positive conduct), wrongfulness is present but all the other elements of a delict such as conduct, fault, causation and harm must generally also be present for liability to follow.²⁶¹

Viney²⁶² confirms that the doctrine of abuse of rights falls under “liability for fault”. It stemmed from case law pertaining to the “abuse of freedoms” (*abus des libertés*) based on Article 4 of the Declaration,²⁶³ which states “[f]reedom means to be able to do all that does not harm others”. In accordance with the Declaration, law is “the expression of the general will”.²⁶⁴ Fundamental liberties (which include *inter alia* freedom of expression, etcetera) or the exercise of rights are thereby limited by Article 4.²⁶⁵ Exercising a subjective right, such as “property rights, personality rights, voting rights in a shareholders meeting, the right to break off contract negotiations or an engagement, the right to compete, the right to criticize or the right to sue”²⁶⁶ in a manner which is deemed an abuse of a right may lead to liability.²⁶⁷ Fault in the form of intention is required *intention de nuire* – intention to harm.²⁶⁸

²⁵⁸ See Van Gerven, Lever and Larouche *Tort* 236.

²⁵⁹ See Van Gerven, Lever and Larouche *Tort* 236.

²⁶⁰ See chapter 3 para 3.1.7.

²⁶¹ See chapter 3 para 1.

²⁶² In Bermann and Picard (eds) *French law* 256.

²⁶³ Of the Rights of Man and the Citizen of 1789. See Van Dam *European tort law* 58.

²⁶⁴ Drago in Bermann and Picard (eds) *French law* xxxv.

²⁶⁵ Van Dam *European tort law* 58.

²⁶⁶ Viney in Bermann and Picard (eds) *French law* 254.

²⁶⁷ Van Dam *European tort law* 58.

²⁶⁸ See Van Dam *European tort law* 57, 59; Viney in Bermann and Picard (eds) *French law* 248, 254.

2.2.4.1 Conclusion

In determining intention in French law, subjective factors are considered (for example, bad faith and motive). Thus intention is a more serious form of fault when compared to negligence. Delictual liability will in principle follow provided there is *faute*. *Faute* may include, from a South African perspective, wrongfulness, negligence or intention. It is submitted that wrongfulness, negligence and intention are determined by considering whether the defendant's conduct was reasonable. With regard to the abuse of rights, French law generally allows a person to act freely while exercising his rights. However, the moment such person harms another while exercising his rights, he crosses a line. Whether his exercise of his right is deemed an abuse of a right when harming another (crossing the line), depends on *inter alia* as Van Gerven, Lever and Larouche point out above, whether the defendant could have found a less harmful way of exercising his right, or the benefit from exercising his right outweighs the harm done to the plaintiff. Thus a balancing of interests, as mentioned, takes place. The influence of reasonableness on intention and abuse of rights is implicit in French law.

2.3 Grounds of justification (*fait justificatif*) and defences

The following defences are available to a defendant: necessity (*l'état de nécessité*); consent and acceptance or assumption of risk (*le consentement ou l'acceptation des risques*), legitimate or self-defence (*la légitime défense*); the order of law and lawful authority (*l'ordre de la loi et le commandement de l'autorité*); and *force majeure*.²⁶⁹ All these defences except for *force majeure* are defined and applied narrowly.²⁷⁰

2.3.1 Necessity, legitimate defence (self-defence) and lawful authority

The term legitimate defence as opposed to self-defence is used in French law and is mainly applied in French criminal law. Necessity and legitimate defence are referred to in the French Penal Code²⁷¹ and are no longer considered as grounds of justification but rather as a "bar to liability", excluding civil and criminal liability, whether based on

²⁶⁹ Galand-Carval in Widmer (ed) *Unification of tort law: fault* 93, 96.

²⁷⁰ See Galand-Carval in Widmer (ed) *Unification of tort law: fault* 96.

²⁷¹ *Code pénal*.

faute or on the “act of the thing”.²⁷² As mentioned, French law is unique in that depending on the facts of the case, the victim has the option of bringing his claim before the criminal or civil courts, but in practice his claim will most likely be dealt with in the criminal courts. Article 122-4 to 122-7 of the French Penal Code states:

“ARTICLE 122-4

A person is not criminally liable who performs an action commanded by a lawful authority, unless the action is manifestly unlawful.

ARTICLE 122-5

A person is not criminally liable if, confronted with an unjustified attack upon himself or upon another, he performs at that moment an action compelled by the necessity of self-defence or the defence of another person, except where the means of defence used are not proportionate to the seriousness of the attack.

A person is not criminally liable if, to interrupt the commission of a felony or a misdemeanour against property, he performs an act of defence other than willful murder, where the act is strictly necessary for the intended objective the means used are proportionate to the gravity of the offence.

ARTICLE 122-6

A person is presumed to have acted in a state of self-defence if he performs an action
1° to repulse at night an entry to an inhabited place committed by breaking in, violence or deception;
2° to defend himself against the perpetrators of theft or pillage carried out with violence.

ARTICLE 122-7

A person is not criminally liable if confronted with a present or imminent danger to himself, another person or property, he performs an act necessary to ensure the safety of the person or property, except where the means used are disproportionate to the seriousness of the threat.”²⁷³

There is not much written on lawful authority, self-defence and necessity in English on the French law of delict. As will be shown, other defences such as *force majeure*, voluntary assumption of risk and contributory fault feature more prominently in the French law of delict.

Whether in the context of civil or criminal law, the influence of reasonableness on these defences is implicit. In respect of lawful authority, a person in principle will not be held liable for infringing the interest of another while acting under lawful authority “unless the action is manifestly unlawful”. It is submitted that a manifestly unlawful action is therefore an unreasonable action and such action will not negate liability.

²⁷² Moréteau in Koziol (ed) *Basic questions of tort law* 12 (with reference to self-defence).
²⁷³ Legifrance-translations (last amendment: Ordinance No. 2005-759 of 4 July 2005).

A person may rely on the defences of necessity and self-defence when such person reacts *at that moment* to an *unjustified* attack upon himself or another thereby causing harm to the attacker. Such retaliatory conduct must be: immediate (while he or another is in imminent danger); necessary (there should be no alternative to avoiding the attack, such as fleeing in the circumstances); and most importantly not out of proportion when compared with “the seriousness of the attack” according to Article 122-5. It is submitted that the fact that the conduct must be immediate, necessary and not disproportionate when compared with the attack, all point to gauging whether the conduct was reasonable and whether the infringement of the attacker’s interests was reasonable. Therefore if for example, the retaliatory conduct was performed the following day, it was possible for the defendant or other person to flee, or if the defendant beat the victim with a stick till he fell unconscious, then such retaliatory conduct may be considered unreasonable and unjustified (not excluding liability). Article 122-6 specifically states that “a person is presumed to have acted in a state of self-defence if he performs an action” to stop unauthorised entry (whether the break-in or attempted break-in was accompanied by theft, violence or dishonest conduct on the part of the perpetrator) to an inhabited place during the night.²⁷⁴ Thus causing of harm to the perpetrator in protecting one’s property when the perpetrator tries to gain access and commit theft at night is therefore presumed to be reasonable and justified. Article 122-7 specifically states that a person may act out of necessity in protecting “himself, another person or property” when faced with an imminent threat of danger. Thus a person may be justified in infringing the interests of another by harming him in order to protect property as long as the means used are not “disproportionate to the seriousness of the threat”. If for example, the defendant uses excessive force by breaking the plaintiff’s arm over a pencil – then the means used is disproportionate, the infringement of the plaintiff’s interests and conduct is unreasonable and unjustified. Liability will not be excluded. If a *faute* is present on the part of the person relying on the defence then there generally is no ground of justification.²⁷⁵

²⁷⁴ See also English law, chapter 4 para 2.4.3 (self-defence) where conduct maybe justified to protect one’s property from unauthorised intrusion at night.

²⁷⁵ See Van Dam *European tort law* 255.

2.3.2 Force majeure

Force majeure is referred to in Article 1148 of the CC²⁷⁶ in relation to contractual liability. However, in practice it is also used as a defence with regard to delictual liability. *Force majeure* in French law, as will be shown, is not limited to natural forces and has a much wider application than in other jurisdictions such as in South African and Anglo-American law. It has been incorporated in the theory of “extraneous causes” (*causes étrangères*).²⁷⁷ An extraneous cause refers to a cause which is: beyond the control of the defendant whether it stems from an act of nature, conduct of the third party over whom the defendant had no control, or conduct of the plaintiff; “unavoidable” and “unforeseeable” by the defendant that is, the defendant could not have done anything to prevent the harm.²⁷⁸ The last two factors may negate causation as well as fault in French law.²⁷⁹ A look at a few examples from case law which though not intentionally but coincidentally happen to deal with cases involving the national rail carrier of France will suffice in order to illustrate how the courts determine the lack of causation or fault as well as the influence of reasonableness on the defence of *force majeure*.

In a case²⁸⁰ where a woman’s body was found in a Paris underground station between the platform and the rails, there were no witnesses that could explain how the woman died and an investigation into the circumstances of her death remained inconclusive. The widower sued the transportation company (*Reggie Autonomie des Transports Parisiens* - Autonomous Operator of Parisian Transport – “RATP”) for damages in his own name and on behalf of his children in terms of Article 1384(1) of the CC. The Plenary Assembly found *faute* on the part of the deceased and the sole cause of her own death. According to the witnesses’ statements, she had not seemed lucid and did not board the train even though she held a ticket in her hand. Liability on the part of the RATP was excluded based on *force majeure*. *Faute* on the part of the deceased

²⁷⁶ Article 1148 states that “[d]amages are not due when, because of a force majeure or a fortuitous event, the obligor-debtor either was prevented from giving or doing what he was obligated to give or did what he was forbidden to do” – Legifrance-translations.

²⁷⁷ See Van Gerven, Lever and Larouche *Tort* 331; Van Dam *European tort law* 255.

²⁷⁸ See Van Gerven, Lever and Larouche *Tort* 331; Galand-Carval in Widmer (ed) *Unification of tort law: fault* 96.

²⁷⁹ Van Gerven, Lever and Larouche *Tort* 331.

²⁸⁰ Cass Ass plén 14 April 2006 04-18902, Bull Ass plén 2006 6 12, D 2006 1577 note Jourdain. See discussion of this case by Moréteau 2006 *European tort law yearbook* 202-203.

was at the time of the incident unforeseeable and unavoidable. The RATP had adhered to all security requirements and the deceased's conduct was found unpredictable. It is submitted that the outcome in this case was fair and reasonable as the RATP's conduct was reasonable in that they adhered to all safety requirements. They had not committed a *faute* (that is, there was no wrongfulness or fault on their part). Furthermore the woman's conduct was reasonably unforeseeable and could not reasonably have been prevented.

In another case,²⁸¹ a young man jumped off a train because he wanted to get off at a station where the train was not supposed to stop and subsequently died. According to the facts, the young man had forced a sealed lever close to the door which caused a siren to go off and release an "automatic blockage system" designed to secure passengers while in motion. He opened the door and jumped off the train while it was travelling at a speed of one hundred and sixty kilometres an hour. He died as a result of his conduct. The *Cour de Cassation* held that this was not an unforeseeable or unavoidable event and found that the young man's family was entitled to compensation. Thus *force majeure* did not succeed as a defence. It is submitted that perhaps this was not a fair and reasonable result as there was at the very least contributory fault on the part of passenger, especially since he forced the doors open and jumped out of the train while it was travelling at a speed. He could have avoided his own death easily by getting off the train at a stop when it was safe to do so. The passenger committed a *faute* and his conduct was clearly unreasonable. This example may be characterised as more claimant-biased. As is evident from the other cases referred to below, the French courts do not easily exclude liability on the part of the national transport carriers.

In another case,²⁸² a fifteen-year-old boy opened the carriage door of the train while it was in motion and spun around the bar in the middle of the step which was wet at the time from rain. He then fell off the train, sustained fatal injuries and died. His relatives sued the French national rail carrier (*Société nationale des chemins de fer français* -

²⁸¹ Cass civ 2 13 July 2006 05-10250, Bull civ 2006 II 216 204, JCP 2006 1735 note Terré. See discussion of this case by Moréteau 2006 *European tort law yearbook* 204.

²⁸² Cass ch mixte 28 November 2008 06-12307, Bull ch mixte 2008 3. See discussion of this case by Moréteau 2009 *European tort law yearbook* 213-215.

National society of French railways or French National Railway Corporation, hereinafter referred to as the “SNCF”) for patrimonial and non-patrimonial loss. The Court of Appeal (of Amiens) found the SNCF partly liable. The appeal court held that even though the passenger’s conduct was foolish, it was not unpredictable or impossible to prevent. The SNCF appealed this decision, stating that liability should have been excluded based on *force majeure*. The *Cour de Cassation* held that there is a contractual obligation of safety owed to passengers and that due to the lack of adequate systems to keep the doors closed while in motion (the train was built before the 1970’s and could easily be opened by turning the handle 45 degrees), the national rail carrier should have foreseen foolish behaviour by passengers, especially children. The presence of staff on the train could have prevented the doors from being opened by passengers. The *Cour de Cassation* upheld the appeal court’s judgement, reaffirming that the plaintiff’s *faute* must constitute *force majeure* in order to exclude liability. It may be argued that the outcome in this case was fair and reasonable since it was easy to open the door, even to a child. Both the national rail carrier and the child committed a *faute* (wrongfulness and negligence). Thus there was unreasonable conduct on the part of the national rail carrier as well as the child and the national rail carrier was held partly liable.

In a case²⁸³ where a passenger was stabbed on a train, liability on the part of the SNCF was excluded. The *Cour de Cassation* held that the assailant’s conduct was sudden and irrational. There was no verbal or physical warning. Damage could not have been prevented, even if railway staff were present in the carriage. The assault was considered unforeseeable and unavoidable. The *faute* of the third party constituted *force majeure*. It is submitted that this is a textbook example of the application of *force majeure* in excluding liability. The result is undoubtedly fair and reasonable as there was no wrongfulness or fault on the part of the national rail carrier. There was no unreasonable conduct on the part of the national rail carrier and the conduct in fact stemmed from a third party, which was unforeseeable and unavoidable (negating wrongfulness, fault and causation).

²⁸³ Cass civ 1 23 June 2011 10-15811, Bull civ 2011 I 123. See discussion of this case by Moréteau 2011 *European tort law yearbook* 235-236.

The influence of reasonableness on the defence of *force majeure* is implicit. Reasonable foreseeability of harm and reasonable preventability of harm play a key role in the application of the defence of *force majeure* (although the French do not explicitly refer to the word reasonable). In effect if the court deems the harm to the plaintiff as reasonably foreseeable and reasonably preventable, then the defendant cannot escape delictual liability.

2.3.3 Voluntary assumption of risk

Voluntary assumption of risk is usually raised as a defence with regard to medical procedures and sporting activities.²⁸⁴ The unlawful act must stem from simple fault (also referred to as a technical fault) and does not apply where there is grave fault (such as recklessness) or intentional conduct. The risk of harm must be a normal risk encountered, for example, in sporting activities where the rules of the game are adhered to or medical operations.²⁸⁵ A look at few cases will assist in illustrating the application of the defence as well as the influence of reasonableness on the defence.

In *Malherbe v Amar*,²⁸⁶ a squash player was struck on the face with a racquet and injured by a fellow player. The court held that even if Amar's conduct constituted a technical breach of the rules of the game, there was no evidence that he acted negligently, intentionally or with unfair brutality; nor did he create any abnormal risk for the plaintiff. The *Cour de Cassation* noted that squash is a fast-paced game, intense, and not without certain risks. In another case,²⁸⁷ it was held that a sporting club cannot be held liable for the conduct of its member if the member's conduct was "normal". The plaintiff, a rugby player, was injured during a training session. He was in the midst of the tackle and fell when another player evaded him. The plaintiff sued the sporting club as well as its insurers in terms of Article 1384(1). The appeal court found liability on the part of the sporting club, but the *Cour de Cassation* held that there was no fault on the part of other player and there was no violation of the rules of the game. It is

²⁸⁴ Galand-Carval in Widmer (ed) *Unification of tort law: fault* 96.

²⁸⁵ See para 2.2.3 above With regard to normal and abnormal risks encountered with medical treatment and procedures.

²⁸⁶ See Cass civ 2 28 January 1987 85-17327, Bull civ 1987 II 32 17. See Cannarsa *et al* 2004 *European tort law yearbook* 282-285.

²⁸⁷ Cass civ 2 21 October 2004 03-17910 03-18942, Bull civ 2004 II 477 404. See Cannarsa *et al* 2004 *European tort law yearbook* 282-285.

submitted that these are good examples of when the defence should apply as the defendant's conduct was reasonable, not wrongful or negligent. The risks of harm which materialised are normal risks encountered and expected in sporting activities. An abnormal risk (*risque anormal*) such as the risk of death will not lead to the applicability of the defence.²⁸⁸ This is no doubt reasonable. If a player intentionally injures another or breaches the rules of the game, it is deemed that he committed a "fault against the game" (*faute contre le jeu*).²⁸⁹ It is considered an abnormal risk which the plaintiff did not accept.²⁹⁰ The defendant will be held liable in terms of Article 1382 and 1383 of the CC.²⁹¹ Thus it may be reasonable to allow the application of the defence where normal risks are encountered and to deny the defence where abnormal risks are encountered. French, South African and Anglo-American law is similar in that reasonable conduct on the part of the player (the defendant), where the rules and conventions of the sport are followed, will lead to the successful application of the defence. In such instances the plaintiff's infringement of his interests in bodily integrity is reasonable and justified.

The defence is often raised in rescue cases but rarely leads to the exclusion of liability on the part of the defendant. In the French law of delict, liability for omissions is acknowledged, but only in exceptional circumstances. Liability on the part of the defendant for a pure omission in an emergency rescue case is based on Article 223-6 of the Penal Code (*Code pénal*)²⁹² which provides:

"[A]nyone who, through immediate action and without risk to himself or to third parties, could prevent criminal, or delictual violation of bodily integrity and wilfully refrains from doing so' as well as 'anyone who wilfully refrains from helping and assisting a person in danger, when he could have done so or caused others to do so without risk of harm to himself or third parties' [may be punished and or held delictually liable]."²⁹³

For example, a bystander may be held criminally and delictually liable if he does not assist a person in peril, when he is in a position to do so without risking harm to himself or other persons.²⁹⁴ A penalty of five years imprisonment may be imposed or a fine of

²⁸⁸ Galand-Carval in Widmer (ed) *Unification of tort law: fault* 96-97.

²⁸⁹ Van Gerven, Lever and Larouche *Tort* 735.

²⁹⁰ See Cass civ 2 28 January 1987 (*Malherbe v Amar*) 85-17327, Bull civ 1987 II 32 17 (in respect of a game of squash); Van Dam *European tort law* 256.

²⁹¹ Van Gerven, Lever and Larouche *Tort* 735

²⁹² Van Dam *European tort law* 521.

²⁹³ Van Gerven, Lever and Larouche *Tort* 281.

²⁹⁴ Van Gerven, Lever and Larouche *Tort* 111.

seventy-five thousand euros under Article 223-6 of the French Penal Code.²⁹⁵ A criminal offence is, however, regarded as a civil *faute* in terms of Article 1382 of the CC. Therefore, by violating Article 223-6 of the French Penal Code, Article 1382 of the CC provides for civil liability for damage caused.²⁹⁶ The *Cour de Cassation*²⁹⁷ has, however, held that a bystander will be held liable only if the bystander intentionally refused to help when he was in a position to do so. Naturally if he was not aware of the situation requiring action or if he was unable to assist, he will not be held liable. A subjective test is applied to the bystander, taking into account his “personal knowledge and abilities”.²⁹⁸ It is not expected of children to assist in emergency situations.²⁹⁹ For example, in a case, a son-in-law fell through thin ice into a deep canal. The father-in-law refused to help the son-in-law but another bystander came to the son-in-law’s aid. The father-in-law was held liable to pay three thousand eight hundred euros to his son-in-law (in damages).³⁰⁰ If there is “serious fault” that is, not slight or simple fault on the part of the rescuer then it is possible that the defendant’s liability will be limited, based on the contributory fault on the part of the rescuer. A rescuer will be compensated even if there was no fault on the part of the defendant.³⁰¹ It is apparent that in French law, there is a legal duty to act positively by attempting to rescue a person in peril. The breach of this legal duty to prevent harm, where possible under the circumstances, could be considered unreasonable and constitute a civil *faute* (where wrongfulness and fault is present) as well as a crime. This is also reasonable taking into consideration the value placed on a human life. What is interesting, though, is the use of a subjective test taking into consideration subjective factors such as the bystander’s personal knowledge, capabilities and age. The application of a subjective test is reasonable when taking into account the possible repercussions (a fine and or imprisonment) of not assisting when able to do so.

²⁹⁵ Van Dam *European tort law* 522.

²⁹⁶ See Cass crim 16 March 1972 71-92418; Van Dam *European tort law* 522.

²⁹⁷ See Cass civ 2 18 January 1963, JCP 1963 II 13316 note Blaevoët; Cass civ 2 18 October 1962, Bull civ 1962 II 288 201; Cass civ 2 22 May 1968 note 102; Cass civ 2 9 November 1971, D 1972 75; Van Dam *European tort law* 521 fn 2.

²⁹⁸ Van Dam *European tort law* 522.

²⁹⁹ Cass civ 2 17 February 1982, Gaz Pal 1982 2 554 note Chabas where it was held that there was no *faute* on the part of children who did not intervene when another child threw a lighter into the fire. In Cass civ 2 19 April 1985, Gaz Pal 1986 1 252 observations Chabas it was held that the children did not have *faute* when they allowed their friend to set fire to a haystack (Van Dam *European tort law* 522 fn 8).

³⁰⁰ TC d’Aix 27 March 1947, D 1947 304. See Van Dam *European tort law* 522.

³⁰¹ See Van Gerven, Lever and Larouche *Tort* 734.

In instances where an inexperienced or drunken driver, or pilot raises voluntary assumption of risk as a defence, it is rare that it will apply in excluding liability but may apply in limiting liability based on contributory fault on the part of the plaintiff.³⁰²

Currently the defence can no longer be raised in transportation cases and the scope of its application has been restricted in sporting activities. It has also been excluded when liability is based on the “act of thing” in terms of Article 1384(1).³⁰³ For example, the defence was denied with respect to participants in an ocean regatta where it was held that they did not accept the abnormal risk of death.³⁰⁴ In this case, the owner of the sailing boat as well as the six team mates drowned and died. French courts were in any event, as shown above, reluctant to uphold this defence. From 2010³⁰⁵ it is no longer considered as a partial or complete defence in transportation cases. In a landmark decision given in 2010,³⁰⁶ two motorcyclists were practising on a race track before an event. One of the motorcyclists injured the other. The injured motorcyclist sued the other, based *inter alia* on Article 1384(1). As the race occurred on a track, the legislation dealing with road traffic accidents was not applicable. The *Cour de Cassation* held that voluntary assumption of risk could not be raised by the custodian of the motorcycle. This was confirmed in a later judgment by the *Cour de Cassation*³⁰⁷ where a driver was killed and the co-driver (the plaintiff) of a racing car at an automobile rally was seriously injured. The plaintiff sued the organisers’ of the event based on Article 1384(1) of the CC and based on the conduct of the motor vehicle. The organiser’s insurer raised the defence of voluntary assumption of risk but the *Cour de Cassation* rejected the defence, holding that the victim who is injured by the act of a thing may rely on Article 1384(1) of the CC, without assumption of risk being raised.³⁰⁸ Thus it can no longer be raised based on the so-called “act of a thing”.

³⁰² See Van Gerven, Lever and Larouche *Tort* 734.

³⁰³ See Moréteau 2010 *European tort law yearbook* 191.

³⁰⁴ See Cass civ 2 8 March 1995 (*Bizourd v AGF*) 91-14895, Bull civ 1995 II 83 47, D 1995 IR 99, JCP 1995 II 22499 note Gardach; Van Dam *European tort law* 257.

³⁰⁵ See Cass civ 2 4 November 2010 09-65947, JCP 2011 12 note Bakouche; Van Dam *European tort law* 257.

³⁰⁶ See Cass civ 2 4 November 2010 09-65947, JCP 2011 12 note Bakouche; Van Dam *European tort law* 257.

³⁰⁷ In Cass civ 2 21 May 2015 14-14812.

³⁰⁸ See discussion of this case by Séjean and Knetsch 2015 *European tort law yearbook* 213-214.

Moréteau³⁰⁹ explains how this decision had a negative impact in France, in that insurance companies stopped providing insurance for motorbike, bicycle and go-karting competitions. A new provision was inserted in the Sport's Code (Article L 321-3-1 *Code du sport*) by the Act of 12 March 2012 excluding the application of Article 1384(1) of the CC in sporting activities, whether for training or competition purposes. However, this provision applies only to damage to property, *dommage matériel*, that is loss, destruction or damage of things and not to bodily injury.

In a case³¹⁰ where a drunken pedestrian lay in the middle of the street and was then hit by a motor vehicle and died, the appeal court held that the pedestrian voluntarily exposed himself to risk of harm without any justification. His *faute* was "inexcusable". Therefore the pedestrian's sister, who claimed damages, was not entitled to compensation in terms of the legislation dealing with road accidents, the *loi Badinter*.³¹¹ However, the *Cour de Cassation* held that inexcusable *faute* must be voluntary and exceptionally serious, thus exposing the victim without justification to a danger of which he should have been aware. The *Cour de Cassation* held that the pedestrian's conduct did not fall within the scope of inexcusable *faute* and overturned the judgment of the appeal court. An "inexcusable" *faute* is regarded by the *Cour de Cassation* as intentional fault of such a magnitude that it "without valid reason, has exposed the victim to a danger which he should have realized".³¹² Van Dam³¹³ points out that the courts expect suicidal or reckless behaviour in this regard, for example

³⁰⁹ 2012 *European tort law yearbook* 237.

³¹⁰ Cass civ 2 23 January 2003 01-02291. See Lafay, Moréteau and Pellerin-Rugliano 2013 *European tort law yearbook* 174.

³¹¹ Prior to the enactment of the *loi Badinter* in 1986, liability was imposed based on Article 1384(1) of the CC where the driver as custodian of the motor vehicle was held strictly liable. Since 1986 persons injured by a motor vehicle, such as cyclists, pedestrians and passengers are entitled to compensation according to the *loi Badinter*. A driver is held strictly liable as the custodian of the motor vehicle and may not be held liable if the other driver acted intentionally or there was inexcusable fault on the other driver's part. The act does not apply to intentional conduct where in such instances the Criminal Procedure Code is applicable. The focus is not on the conduct as in English law but on distributive justice and solidarity, sharing the burden of costs with the aim of compensating road accident victims. Where the duty previously rested on the driver or custodian of the motor vehicle to compensate an injured victim, the compulsory insurance discharges such duty even where the motor vehicle was stolen or misappropriated. Article 2 of the act specifically states that the defence of *force majeure* cannot be raised. See in general Van Dam *European tort law* 52, 408, 410, 416; Galand-Carval in Widmer (ed) *Unification of tort law: fault* 98; Van Gerven, Lever and Larouche *Tort* 24.

³¹² Ass plén 10 November 1995 94-13912, Bull Ass plén 1995 6 11, D 1995 633, JCP 1996 II 22564 note Vinney, RTDciv1996 183 observations Jourdain; Van Dam *European tort law* 409.

³¹³ In *European tort law* 409.

where a drunken person lies in the middle of the street late at night;³¹⁴ a drunken person crosses the road in the dark at a blind spot;³¹⁵ or a person sits on the top of a stationary bus.³¹⁶

In another case,³¹⁷ a manager of a leisure resort voluntarily climbed onto the rear bumper of motor vehicle while one of her colleagues drove the vehicle. When the vehicle came to a stop, she fell off the bumper and was seriously injured. In view of the manager's experience and level of education it was clear that she could not have thought that her conduct was safe or even necessary. The *Cour de Cassation* found contributory fault of a serious magnitude on her part and that she could not have ignored the risks involved purely for "amusement". She had a duty to observe the rules of safety and security and she should have been conscious of the danger she exposed herself to. But the *Cour de Cassation* held that the woman's actions did not amount to inexcusable *faute* and that there was *faute* on the part of the driver. However, in a case³¹⁸ where a man tried to jump onto a fork-lift that was lifting his car in order to stop it (as it had been illegally parked) and was severely injured; the *Cour de Cassation* confirmed that the man was of sound mind, would have been aware of the risk of harm, and that his *faute* was "inexcusable". Inexcusable *faute* seems to be applicable in cases of extreme recklessness or where a person intentionally tries to commit suicide.³¹⁹

The influence of reasonableness on voluntary assumption of risk is implicit. Ultimately it depends on whether the plaintiff's or defendant's conduct was reasonable under the circumstances. Voluntary assumption of risk does not apply easily where a person is seriously injured or loses his life. In cases of sporting activities; whether or not the

³¹⁴ Ass plén 10 November 1995 94-13912, Bull Ass plén 1995 6 11, D 1995 633, JCP 1996 II 22564 note Vinney, RTDciv 1996 183 observations Jourdain; Van Dam *European tort law* 409.

³¹⁵ Van Dam *European tort law* 409.

³¹⁶ Cass civ 2 8 November 1993 91-18127, Bull civ 1993 II no 316 176, JCP 1994 IV 84 (the person died after falling off the bus when it began moving, however, the deceased's relatives were awarded compensation because the bus driver was aware of people sitting on the roof of the bus. See Van Dam *European tort law* 410.

³¹⁷ Cass civ 2 5 June 2003 01-16405. See Lafay, Moréteau and Pellerin-Rugliano 2003 *European tort law yearbook* 175.

³¹⁸ Cass civ 2 3 July 2003 (referred to by Lafay, Moréteau and Pellerin-Rugliano 2003 *European tort law yearbook* 176).

³¹⁹ See Cass Ass plén 14 April 2006 04-18902, Bull 2006 Ass Plén 6 12, D 2006 1577 note Jourdain; Lafay, Moréteau and Pellerin-Rugliano 2003 *European tort law yearbook* 176; Moréteau 2006 *European tort law yearbook* 202-203.

conduct was reasonable depends on whether the rules and conventions of the sport were followed, as well as whether the risk of harm encountered was a reasonable normal risk. In rescue cases voluntary assumption of risk would only apply (but not as a complete defence) where the rescuer acted beyond simple fault in terms of French law, for example, if the rescuer acted recklessly and unreasonably in endangering his life or that of another. The defence is applicable if “inexcusable” *faute* is present but “inexcusable” *faute* generally relates to unreasonable conduct such as recklessness or in cases of suicide.

2.3.4 Consent

A medical practitioner has a duty to inform a patient with “honest, educated and appropriate information” relating to “serious risks” of proposed treatment. If the patient is informed of the risks then he is able to make an informed decision. The medical practitioner need not, however, convince the patient of the danger of proposed medical treatment.³²⁰ If the medical practitioner does not inform the patient of such risks, then there may be a breach of the duty to inform which could lead to liability.³²¹ The *Cour de Cassation*³²² has held that the patient in such instances is not, however, entitled to full compensation, but to a portion based on the lost chance of making a choice of avoiding the risk of harm that subsequently occurred. There is no loss of chance when it is clear that the patient would in any event (even if informed of the risks) have continued with the medical treatment. For example, in a case³²³ where a patient underwent carotid surgery, the surgeon forgot to inform the patient about the possible risks which were known but rare, as well as complications associated with the procedure. The operation was not urgent. A complication did in fact materialise and the patient suffered hemiplegia, subsequently deteriorated in health and died three years later. His rightful heirs then sued the surgeon in their personal capacity for their own harm or loss (non-patrimonial) as well as in their representative capacity on behalf of the patient,

³²⁰ See Massot 2001 *European tort law yearbook* 194 as well as the cases referred to.

³²¹ See Cass civ 1 3 June 2010 09-13591, Bull civ 2010 I 128, D 2010 1484 observations Gallmeister, RTDciv 2010 571 observations Jourdain; Van Dam *European tort law* 258.

³²² Cass civ 1 7 December 2004 02-10957, Bull civ 2004 I 302 253. See discussion of this case as well as other cases referred to by Moréteau, Lafay and Anterion in Winiger (ed) *Digest of European tort law volume 1: essential cases on natural causation* 210-212.

³²³ See Cass civ 1 6 December 2007 06-19301, Bull civ 2007 I 380; Moréteau 2008 *European tort law yearbook* 269-270.

submitting that there was a loss of chance to postpone the operation and not suffer harm. The appeal court held that the patient would in any event have consented to the surgery, even if he had been informed of the possibility of the rare risks materialising. The *Cour de Cassation*³²⁴ confirmed this part of the appeal court's judgement, that is, there was no loss of chance. There was no causal link between the alleged loss of chance and the medical practitioner's fault. If the risks of the medical treatment are not life-threatening, and the medical practitioner fails to inform the patient of inherent risks of the operation which then materialise, the medical practitioner may be held liable. Thus had the patient been informed of such inherent risks, he would have had a chance to decide whether or not to continue with the proposed treatment. The National Office for Compensation for Medical Accidents in conjunction with the National Solidarity Fund currently provides compensation for non-negligent medical conduct (such as in cases where the patient has not been informed of the risks) resulting in abnormal or extraordinary consequences.³²⁵ In a case³²⁶ where a surgeon failed to inform a patient about the risk of impotence before performing a successful prostate adenectomy; the *Cour de Cassation* found the surgeon liable when the patient became impotent based on Article 16-3 (referring to consent of the patient before medical treatment) and 1382 of the CC. The surgeon had breached his duty to inform the patient of the risks. The patient was also entitled to compensation for non-patrimonial loss.

In instances where a patient unreasonably refuses treatment, for example, where a patient on grounds of religious beliefs refuses a blood transfusion and subsequently dies, it is regarded as a *faute* as a result of voluntarily rejecting a chance of survival, culminating in a reduction of the award of compensation.³²⁷ However, the CC was amended in 1994 and Article 16-3 was inserted, which in essence states that the bodily integrity may only be infringed in instances of therapeutic medical treatment that is deemed necessary for the patient. The patient's consent must be obtained beforehand

³²⁴ See Cass civ 1 7 February 1990 88-14797, Bull civ 1990 I 39 30.

³²⁵ See Moréteau, Lafay and Anterion in Winiger (ed) *Digest of European tort law volume 1: essential cases on natural causation* 212.

³²⁶ Cass civ 1 3 June 2010 09-13591, Bull civ 2010 I 128. See discussion of this case by Moréteau 2010 *European tort law yearbook* 176-179; Moréteau in Koziol (ed) *Basic questions of tort* 25.

³²⁷ See Cass crim 30 October 1974 73-93381, Bull crim 1974 308 790, JCP 1975 II 18038 note Mourgeon, D 1975 Jur 178 note Savatier. See also TGI Laval 13 February 1967, D 1968 Jur 39 note Le Roy; Van Gerven, Lever and Larouche *Tort* 810.

unless therapeutic medical treatment is necessary and consent cannot be obtained from the patient.³²⁸

Moréteau³²⁹ points out that during the past seventy-five years and since the decision of *Mercier*,³³⁰ medical malpractice claims fell within the realm of the law of contracts,³³¹ where the test applied was whether the medical practitioner acted with “due care according to established scientific knowledge”.³³² However, there has been a shift which is evident from recent case law to liability for medical malpractice falling within the realm of the law of delict.³³³ Article 1147 of the CC³³⁴ and the Code of Public Health³³⁵ refer to a “legal” obligation instead of a contractual obligation.³³⁶ In 2010 the *Cour de Cassation*³³⁷ confirmed the shift when a medical practitioner failed to look after a patient who had been diagnosed with a dangerous form of the influenza virus. The shift does not affect prescription periods and the test applied in *Mercier* (which is in any event enshrined in the Code of Public Health)³³⁸ is still used to determine negligence.³³⁹ It should be noted that in French law, when dealing with either contractual or delictual liability, the same interests are protected and in principle the same type of awards are awarded.³⁴⁰ In addition, a medical practitioner has a duty to inform the patient of any risks and provide advice in order for the patient to make an informed decision.³⁴¹ The *Cour de Cassation*³⁴² has held in a recent decision that

³²⁸ See Van Gerven, Lever and Larouche *Tort* 810-811.

³²⁹ In 2010 *European tort law yearbook* 177-179.

³³⁰ Cass civ 1 30 May 1936, D 1936 1 88 conclusions Matter, report Josserand.

³³¹ Based on the premise that the medical practitioner had violated a contractual obligation owed to the patient and referred to as an obligation of means “*obligation de moyens*”. See Article 1147 of the CC.

³³² Moréteau in Koziol (ed) *Basic questions of tort law* 29; Moréteau 2006 *European tort law yearbook* 202-203; Van Gerven, Lever and Larouche *Tort* 113.

³³³ See Cass civ 1 3 June 201009-13591, Bull civ 2010 I 128; Cass civ 1 6 December 2007 06-19301, Bull civ 2007 I 380; Moréteau 2008 *European tort law yearbook* 269-270; authority cited by Moréteau in Koziol (ed) *Basic questions of tort law* 30 fn 117.

³³⁴ For example, Moréteau 2010 *European tort law yearbook* 177 fn 9 refers to Cass civ 18 April 2010 08-21058, D 2010 1074 observations Gallmeister where it was stated that the obligation to provide information is a contractual obligation.

³³⁵ Article 1142-1 *Code de la santé publique*.

³³⁶ See Cass civ 1 28 January 2010 08-20755 08-21692, D 2010 1522 note Sargos; Moréteau 2010 *European tort law yearbook* 177 fn 10.

³³⁷ Cass civ 1 14 October 2010 09-69195, Bull civ 2010 I 200.

³³⁸ Article R 4127-32 (Decree no 2004-802 of 29 July 2004).

³³⁹ Galand-Carval in Widmer (ed) *Unification of tort law: fault* 91.

³⁴⁰ Van Gerven, Lever and Larouche *Tort* 113.

³⁴¹ Van Gerven, Lever and Larouche *Tort* 114.

³⁴² Cass civ 1 23 January 2014 12-22123, Bull civ 2014 I 13. See discussion of this case by Séjean and Knetsch 2014 *European tort law yearbook* 200-203.

liability for non-disclosure of information only applies where the risk did actually materialise after the medical procedure.

To begin with, the French government is generous in providing compensation to patients who were not informed of the risks even if there was no negligent conduct on the part of the medical practitioner. This goes hand in hand with the idea of national solidarity, distribution of loss, and a pro-victim attitude. The influence of reasonableness on the defence of consent is also implicit. It is reasonable that a patient should be informed of risks. This is in accordance with the right to autonomy and self-determination. If a patient is not informed of the risks, it may be regarded as an unreasonable infringement of his interests in bodily integrity. Naturally, if the medical practitioner is unable to obtain consent and in instances of emergency performs a procedure without the patient's consent, his conduct is reasonable and justified. It is also reasonable that compensation may be denied or reduced where a patient unreasonably refuses necessary therapeutic medical treatment.

2.3.5 Contributory fault

The CC does not contain any provisions regulating apportionment of liability and neither is apportionment of liability regulated by any statute in France. However, the *Cour de Cassation* has the authority to take into consideration the plaintiff's contributory fault (*faute de la victime*) and decide on the reduction of his claim. The courts,³⁴³ when reaching a decision, must take into account Articles 1381 to 1384. Generally, the plaintiff's contributory fault serves to reduce his claim but in certain circumstances his claim may be excluded if the defendant can prove that the plaintiff's conduct constituted an "extraneous cause" (*cause étrangère*) and was the sole cause of his harm or loss.³⁴⁴ In order for conduct to be deemed an extraneous cause, the damage "must have been unforeseeable and unavoidable (*inprévisible et irresistible*)".³⁴⁵ The gravity of both parties' fault, as well as the "causal impact" of both

³⁴³ See Cass civ 28 February 1910 (*Nourrigat v Pech*), DP 1913 I 43, S 1911 I 329; Cass civ 2 16 July 1953 (*Suter v Sté Le Berry*), JCP 1954 II 7792; Van Gerven, Lever and Larouche *Tort* 691.

³⁴⁴ Van Dam *European tort law* 376.

³⁴⁵ See Cass civ 2 2 April 1997 95-16531, Bull civ 1997 II 109 62; Cass civ 1 6 October 1998 96-12540, Bull civ 1998 I 269 188; Cass civ 2 27 May 1999 97-16200, Bull civ 1999 II 104 75; Van Dam *European tort law* 376; Van Gerven, Lever and Larouche *Tort* 697 fn 45.

parties' conduct, is considered.³⁴⁶ Liability may also be excluded in certain exceptional instances where there is contributory intent on the part of the plaintiff or where the defendant was provoked.³⁴⁷ An objective test is applied even to children (*l'appréciation in abstracto*). For example, in *Lemaire v Declercq*,³⁴⁸ due to the mistake of an electrician, a thirteen year old child was electrocuted while fitting a light bulb and subsequently died. Had a circuit-breaker been disengaged at the time when the child fitted the light bulb, the child would not have been electrocuted. The appeal court found the electrician fifty percent liable for the claim brought by the child's parents as the child was also found to be at fault. Whether the child understood the consequences of his negligent conduct was not considered by the courts as it was considered irrelevant.³⁴⁹ Thus fault on the part of both the child and the electrician was assessed objectively.

The plaintiff's compensation is reduced when: he infringes "a rule of conduct imposed by law"; he breaches a general duty to look after himself; in instances where there is *faute* on the part of another person for whom he is responsible; or for the act of things for which he is the custodian.³⁵⁰ For example, in *Bardèche v Joiner*,³⁵¹ the defendant (Joiner) was felling trees with a chain-saw on his property. The plaintiff (Bardèche) entered the defendant's property. The defendant on several occasions requested the plaintiff to leave because of the risk of harm from the falling branches, but he did not heed the defendant's warning. He stayed on the property and was subsequently injured by a falling branch. The plaintiff sued the defendant relying on Article 1384(1) of the CC as the custodian of the chain-saw. The *Cour de Cassation* held that the custodian of the thing could be exonerated from liability in part if he could prove that the plaintiff contributed to his loss or damage. In this instance, the plaintiff's conduct did not constitute an "extraneous cause" that was unforeseeable and unavoidable and would have resulted in the exclusion of the claim altogether, and therefore a reduction was applicable.

³⁴⁶ Van Gerven, Lever and Larouche *Tort* 692.

³⁴⁷ Van Gerven, Lever and Larouche *Tort* 692.

³⁴⁸ Cass Ass plén 9 May 1984 80-93481, Bull crim 1984 164 D, 1984 Jur 525.

³⁴⁹ See discussion of this case in Van Gerven, Lever and Larouche *Tort* 692-695, 735.

³⁵⁰ See Van Dam *European tort law* 376; Van Gerven, Lever and Larouche *Tort* 694-695.

³⁵¹ Cass civ 2 6 April 1987 85-16387, Bull civ 1987 II 86 49, D 1988 Jur 32 note Mouly, JCP 1987 II 20828 note Chabas 1987, RTDciv 767 note Huet. See discussion of this case in Van Gerven, Lever and Larouche *Tort* 695-696.

In instances where two or more wrongdoers cause harm to the plaintiff (who is not at fault), they are considered as joint wrongdoers and may be held jointly and severally liable. For example, in *Séguier v Sfolcinin*,³⁵² the plaintiff (Sfolcinin) was a passenger on a motorcycle driven by another person (Cavelier). The defendant (Séguier) tried to avoid driving into a parked motor vehicle in front of him but unfortunately collided with it. The driver of the motorcycle (Cavelier) who was driving behind the defendant then collided with the defendant's motor vehicle. The plaintiff sustained injuries and sued the driver of the motorcycle on which he was a passenger as well as the defendant (the driver of the motor vehicle). The court *a quo*, as well as the court of appeal, held both drivers jointly and severally liable for the plaintiff's injuries. In *Scaglia v Ferricelli*,³⁵³ the plaintiff (Scaglia) was a passenger in the defendant's motor vehicle when it collided with another motor vehicle driven by Sellier. The plaintiff sued the driver of the motor vehicle in which she was a passenger (Ferricelli) but not the other driver. The court of appeal agreed with the court *a quo* that both drivers were equally at fault when causing injury to the plaintiff. The appeal court then took into account that the plaintiff only sued one of the drivers and concluded that the driver that had been sued was liable to the plaintiff for half of the proven damages, thereby contravening Article 1382 of the CC. It must be noted, though, that these cases were decided before the *loi Badinter* was applicable.³⁵⁴

If a plaintiff refuses to undergo even a minor operation, contributory negligence as a defence will not be applicable.³⁵⁵ Contributory negligence is generally not applicable to passengers, unless the passenger was at fault in not wearing a seatbelt,³⁵⁶ or his fault was the sole cause of the accident and inexcusable.³⁵⁷ A defendant's claim can in certain instances be reduced due to the fault on the part of the deceased. The defendant must prove that the deceased was at fault and contributed to the occurrence of the loss. For example, in *Mandin v Foubert*,³⁵⁸ Foubert (the deceased) was travelling

³⁵² Cass civ 2 4 March 1970 67-11136, Bull civ 1970 II 76 59.

³⁵³ Cass civ 2 17 March 1971 70-10241, Bull civ 1979 II 123 82.

³⁵⁴ See Van Gerven, Lever and Larouche *Tort* 433-434.

³⁵⁵ Van Dam *European tort law* 379.

³⁵⁶ See Cass civ 2 10 October 1985 (*Coulson v Gliese*) 83-11196, Bull civ 1985 II 152 100; Van Gerven, Lever and Larouche *Tort* 699-670.

³⁵⁷ According to Article 3 of the *loi Badinter*. See Van Dam *European tort law* 379.

³⁵⁸ Cass Ass plèn 19 June 1981 78-91827, D 1982 Jur 85. See discussion of this case in Van Gerven, Lever and Larouche *Tort* 698-699.

in a motor vehicle with his wife and children when they were involved in an accident. Foubert died as a result of the injuries sustained in the accident. The wife and children sued the other driver for damages in respect of personal injury they sustained as well as for damages resulting from the death of the deceased (loss of support). The *Cour de Cassation* confirmed that there was no fault on the part of the wife and children; therefore they were entitled to full compensation in respect of their personal injury. However, the claim for loss of support resulting from the deceased's death was reduced based on the deceased's contributory fault.

The influence of reasonableness on contributory fault is implicit in that the unreasonable conduct on the part of the plaintiff plays a role in the reduction of his award for compensation as occurred in *Lemaire v Declercq*³⁵⁹ and *Bardèche v Jonier*.³⁶⁰ If there is no unreasonable conduct on the part of the plaintiff, it is reasonable that he is entitled to full compensation. Similarly if there is unreasonable conduct on the part of the plaintiff that may be deemed an "extraneous cause" (reasonably unforeseeable and unavoidable) or the sole cause of his harm or loss, then it is reasonable that liability on the part of the defendant should be excluded, as in the above-mentioned case³⁶¹ where a woman's body was found in a Paris underground station. Also contributory intent or provocation of a certain degree on the part of the plaintiff may be considered an "extraneous cause" (reasonably unforeseeable and unavoidable) leading to the exclusion of liability. It is fair and reasonable that the gravity of both parties' fault as well as the "causal impact" of both parties' conduct is considered in reaching a conclusion as to whether and how much the plaintiff's award may be reduced.

2.3.6 Illegality

Loss of income obtained illegally is generally not recoverable.³⁶² In French law the defence was often raised against delictual claims brought by concubines (as

³⁵⁹ Cass Ass plén 9 May 1984 80-93481, Bull crim 1984 164 D, 1984 Jur 525.

³⁶⁰ Cass civ 2 6 April 1987 85-16387, Bull civ 1987 II 86 49, D 1988 Jur 32 note Mouly, JCP 1987 II 20828 note Chabas 1987, RTDciv 767 note Huet.

³⁶¹ Cass Ass plén 14 April 2006 04-18902, Bull Ass plén 2006 6 12, D 2006 1577 note Jourdain. See discussion of this case by Moréteau 2006 *European tort law yearbook* 202-203.

³⁶² See Moréteau in Koziol (ed) *Basic questions of tort law* 37-38.

secondary victims) claiming compensation as a result of the death of their companions. However, the *Cour de Cassation* disallowed the raising of this defence.³⁶³ Currently this defence can only be raised if compensation itself would lead to “an illicit or immoral result”.³⁶⁴ This may be regarded as a fair and reasonable principle to apply.

3. Causation

Causation is an essential element in the French law of delict³⁶⁵ and limitation of liability predominately occurs with the element of causation.³⁶⁶ Neither the *CC* nor the *Cour de Cassation* has provided a specific definition of “causation” and whether causation is present is often determined in a pragmatic manner.³⁶⁷ Causation is referred to in Articles 1382 to 1386 of the *CC*, which state that the damage must have been caused by the *faute* of the defendant or act of an animal or thing in his custody.³⁶⁸ Once it is established that the defendant’s conduct “was a necessary cause of the damage”, then he is generally liable for the full extent of the damage.³⁶⁹

According to French doctrine, factual and legal causation is not explicitly referred to but is considered implicitly in determining causation. In this regard, Moréteau³⁷⁰ provides the following insight on causation in the French law of delict”:

“French doctrine did not feel the need to conceptualise a distinction between *natural* and *legal* causation, though authors are well aware that equivalence is more on the factual side and adequacy on the legal side.

The French view the chain of causation as a continuum. As a rule, the addition of new acts will cause liability to be split, unless such new acts interrupt the causal chain. When the >>novus actus<< is less serious than the original fault, liability will be split. When the subsequent act of the victim or of a third party is at least as serious as the act of the original perpetrator, the causal link is interrupted. This implies a value judgement. An example of the interruption of the causal link by the victim is where the victim of an

³⁶³ See Cass ch mixte 27 February 1970 68-10276, Bull ch mixte 1970 I 1, D 1970 201 note Combaldieu, JCP 1970 II 16305 conclusions Lindon note Parlange, RTDciv 1970 353. See authority referred to by Van Gerven, Lever and Larouche *Tort* 734 fn 293.

³⁶⁴ Van Gerven, Lever and Larouche *Tort* 736-737.

³⁶⁵ Galand-Carval in Spier (ed) *Unification of tort law: causation* 53.

³⁶⁶ See Van Dam *European tort law* 309.

³⁶⁷ Galand-Carval in Spier (ed) *Unification of tort law: causation* 54; Van Gerven, Lever and Larouche *Tort* 418.

³⁶⁸ See Galand-Carval in Spier (ed) *Unification of tort law: causation* 53.

³⁶⁹ Galand-Carval in Spier (ed) *Unification of tort law: causation* 53.

³⁷⁰ In Koziol (ed) *Basic questions of tort law* 82-83.

accident caused by negligence runs at full speed to catch the tortfeasor and dies of a heart attack: the author of the accident is not liable for the death of the victim. A recent case provides an example of interruption by a third party.³⁷¹ During a celebration that took place at a private home, the hostess had lit candles downstairs. She later went to bed without giving advice regarding the burning candles, thereby acting negligently. One of the guests subsequently brought the burning candles upstairs where the party went on all night, one of the candles causing a deadly fire in the early morning. In the opinion of the lower court, the original negligence of the hostess was held to have contributed to the final disaster, but the Court of Cassation considered that the fault of the third party in bringing the candles upstairs without making sure they would be extinguished in due course interrupted the causal chain. The original fault was no longer the direct cause, and we must conclude ... that the subsequent fault constituted adequate cause.”

There is no desire among French legal writers or the French courts to refer to or develop theories of causation.³⁷² A number of theories were put forth by legal writers³⁷³ such as the “equivalence of conditions” (*equivalence des conditions*, where all acts leading to harm or loss are considered as causal facts)³⁷⁴ or but-for test, the adequate causation theory where the “wrongful act” must have resulted from what is to be expected “in the normal course of things”,³⁷⁵ and the proximate cause theory (“*la proximité temporelle*”) which takes into account “only the cause that is closest in time”.³⁷⁶ The courts have rejected the proximate cause theory³⁷⁷ as it is considered a “rough” and “unfair” approach to determining causation.³⁷⁸ However, the courts tend to use the “equivalence of conditions” for fault liability regimes or where intention is present, in order to determine whether causation in fact exists.³⁷⁹ The courts apply the adequate cause theory for no-fault liability regimes or in instances of non-intentional fault in “areas of objective liability in order to ensure that damages are kept in reasonable bounds”.³⁸⁰ The adequate cause theory and the but-for theory are not considered as complementary theories, but rather as polar opposite theories. The but-

³⁷¹ Cass civ 2 28 April 2011 10-17380, Bull civ 2011 II 95, RTDciv 2011 538 referred to by Moréteau in Koziol (ed) *Basic questions of tort law* 82.

³⁷² Van Dam *European tort law* 319.

³⁷³ See Van Gerven, Lever and Larouche *Tort* 423 who refer to different legal writer’s views.

³⁷⁴ Galand-Carval in Spier (ed) *Unification of tort law: causation* 127. According to the equivalence theory there is no distinction between all causal events, that is, whether the cause is direct, indirect, normal, abnormal, adequate or inadequate. The equivalence theory still has the same effect as the but-for test. See Moréteau and Lafay in Winiger (ed) *Digest of European tort law volume 1: essential cases on natural causation* 26.

³⁷⁵ The focus is on the cause that led directly to the loss, discarding causal facts which played a trivial or minor part in the outcome. See Moréteau and Lafay in Winiger (ed) *Digest of European tort law volume 1: essential cases on natural causation* 26.

³⁷⁶ Viney in Bermann and Picard (eds) *French law* 258. See also Galand-Carval in Spier (ed) *Unification of tort law: causation* 54.

³⁷⁷ Spier in Spier (ed) *Unification of tort law: causation* 134.

³⁷⁸ Galand-Carval in Spier (ed) *Unification of tort law: causation* 54.

³⁷⁹ Moréteau in Koziol (ed) *Basic questions of tort law* 48.

³⁸⁰ Viney in Bermann and Picard (eds) *French law* 258. See also Van Gerven, Lever and Larouche *Tort* 420; Moréteau in Koziol (ed) *Basic questions of tort law* 48.

for test is considered to lead to “excesses” while the adequate cause theory is considered ambiguous and less logical than the but-for test.³⁸¹ Galand-Carval³⁸² states that adjudicators freely apply the two contradictory theories (the but-for test and adequate cause theory) and “it is not infrequent to see cases reaching opposite results on very similar facts”. Galand-Carval³⁸³ refers to a case³⁸⁴ where a bank sent a cheque book to a client using ordinary mail. The bank was subsequently held liable for the consequences of the stolen cheque book. In another case,³⁸⁵ the owner of a motor vehicle did not lock it and when the vehicle was stolen, the court did not hold the owner liable for the consequences of an accident caused by the thief.

Where required, as will be shown below *inter alia*: the adequate cause theory; direct consequences theory; reasonable foreseeability of harm; reasonable preventability of harm; fault in the form of negligence or intention; the efficient cause theory; probability of harm; presumptions; and policy considerations are all factors that may be applied in determining causation.³⁸⁶ It is rare for the courts not to find a causal link.³⁸⁷ It is submitted that because French law makes use of a number of theories and factors which are considered appropriate and practical depending on the circumstances of the case, they do follow a somewhat flexible approach in keeping liability within reasonable limits. A look at some examples from case law is necessary in order to highlight the influence of reasonableness on the different theories and principles applied in determining causation in French law.

In an instance where the consequence would have occurred whether or not the defendant acted wrongfully or with fault, it is possible that liability on the part of the defendant may be excluded or limited. This may be illustrated by considering the following hypothetical example. A cyclist is injured by the negligent driving of a motor vehicle. The harm would nevertheless have occurred even if the motor vehicle driver was not negligent, as the cyclist was drunk and did not keep to his side. Thus in such a case (without considering the applicability of the *loi Badinter*), the motor vehicle

³⁸¹ Van Gerven, Lever and Larouche *Tort* 419.

³⁸² In Spier (ed) *Unification of tort law: causation* 55.

³⁸³ In Spier (ed) *Unification of tort law: causation* 55.

³⁸⁴ Cass com 28 February 1989 87-17374, Bull civ 1989 IV 1989 70 46.

³⁸⁵ Cass civ 2 11 January 1995 93-14424, Bull civ 1995 II 21 12.

³⁸⁶ See Spier in Spier (ed) *Unification of tort law: causation* 132.

³⁸⁷ Van Dam *European tort law* 319.

driver would be liable but the victim's *faute* would also be considered and may either exclude liability (due to *force majeure* if the cyclist's *faute* was unforeseeable and the accident unavoidable) or limited (if the cyclist's *faute* was foreseeable and avoidable).³⁸⁸ It is apparent here that reasonable foreseeability and preventability of harm are factors considered in determining causation. These are the same factors considered in determining negligence. The defendant is thus liable for those consequences which he should have reasonably foreseen and prevented.

Causation is often determined using the direct consequences theory in that only the direct and certain consequences of the delict may be recovered.³⁸⁹ However, in practice it is not easy to differentiate between causes that are certain, uncertain, direct and indirect.³⁹⁰ The reason for requiring the causation of damage to be certain and direct is a policy reason, ensuring that the defendant's burden is confined within reasonable limits.³⁹¹ Loss was considered to be certain and direct where a tram company sustained loss of income as a result of an accident which blocked the tram lines.³⁹² In another case,³⁹³ a twelve-year-old child entered a construction site. He was holding a metal bar which came into contact with an electricity cable suspended above. The child was electrocuted and died. The parents sued the contractor, contracting authority and the building surveyor based on Article 1382 of the CC. The *Cour de Cassation* found the building surveyor liable, stating that there was a direct causal link between the building surveyor's negligence and the conduct of the child that resulted in the child's death. Liability was shared between the main contracting authority and the child. The court implicitly relied on *equivalence des conditions* (the but-for test).³⁹⁴ It is submitted that it is reasonable to impute liability upon the defendants in both of the above-mentioned cases. In the case where the tram company sustained loss, the consequences were not too remote – the loss of income from ticket sales was a certain and direct result of the defendant's conduct. It was also reasonable to impute partial

³⁸⁸ Moréteau in Koziol (ed) *Basic questions of tort law* 84.

³⁸⁹ See Van Gerven, Lever and Larouche *Tort* 418.

³⁹⁰ Van Dam *European tort law* 319.

³⁹¹ Van Dam *European tort law* 321.

³⁹² Cass civ 28 April 1965, D 1965 777 note Esmein. See Van Dam *European tort law* 319.

³⁹³ Cass civ 2 6 January 2000 97-21456, Bull civ 2000 II 4 3. See discussion of this case by Moréteau and Lafay in Winiger (ed) *Digest of European tort law volume 1: essential cases on natural causation* 25-26.

³⁹⁴ Moréteau and Lafay in Winiger (ed) *Digest of European tort law volume 1: essential cases on natural causation* 28.

liability for the death of the child on the contracting authority as a result of the direct negligent conduct of the building surveyor.

The loss was not considered “direct” in *X v Gan*³⁹⁵ where a father voluntarily left his well-paid job in Saudi Arabia to live with his son in France after his mother was killed in a motor vehicle accident. The son tried to live with his father in Saudi Arabia but could not adapt to living there, hence the father returned to France with his son. The father sued the person who was responsible for causing the accident in which the mother died. He claimed loss of earnings resulting from him having to leave Saudi Arabia where he had a well-paid job. The *Cour de Cassation* confirmed the appeal court’s ruling that the loss of employment was not caused directly by the accident, there was no causal link.³⁹⁶ It may be argued that it would not be reasonable to impute liability on the defendant in this case because the loss of earnings may be considered as too remote and not direct.

In another case,³⁹⁷ where a widow claimed life insurance benefits from an employer who wrongfully dismissed the deceased prior to their marriage and the husband’s death, the *Cour de Cassation* held that there was no causal link between the loss sustained by the widow and the wrongful dismissal. It transpired that the husband was wrongfully dismissed. After five months of the dismissal, the employee got married and then died the day after he got married. There was factual causation, but the dismissal was not regarded as the “adequate cause” of the widow’s loss. In *Pagane v Zucchelli*,³⁹⁸ a child stole explosives from the defendant’s shack and subsequently injured himself while playing with them. The shack was not in a good condition and it was not locked, therefore anyone could enter the shack. It was not established who entered the shack and how the explosives found their way there. The plaintiff (the

³⁹⁵ Cass civ 2 3 October 1990 89-12937, Bull civ 1990 II 184 94. See Van Gerven, Lever and Larouche *Tort* 422-423.

³⁹⁶ French courts do not always provide adequate reasons for their decisions. This is illustrated by Van Gerven, Lever and Larouche *Tort* 422-425 under the discussion of *X v Gan* (Cass civ 2 3 October 1990 89-12937, Bull civ 1990 II 184 94) and *Ghigo v Surdin* (Cass civ 2 20 June 1985 84-12702, Bull civ 1985 II 125 in respect of an attempted suicide of a minor after committing larceny).

³⁹⁷ Cass civ 2 8 November 2007 06-19655, Bull civ 2007 II 246, RTDciv 2008 307 observations Jordain. See Moréteau in *European tort law yearbook* 2008 273-274; Van Dam *European tort law* 320.

³⁹⁸ Cass civ 2 20 December 1972 71-13530, Bull civ II 332 275. See Van Gerven, Lever and Larouche *Tort* 425.

parent) sued the owners (defendants) of the shack for not looking after the shack and securing it. According to the but-for test, the harm to the child would not have occurred had the shack been locked. The explosives would also not have been placed there had the shack been locked, but the *Cour de Cassation* held that the owners of the shack did not commit a *faute* as there was no causal link between the *faute* and the harm based on the adequate cause theory. Once again, it is submitted that in both these cases it would not be reasonable to impute liability on the defendants, as it may be argued that there was not a close enough relationship between the defendants' conduct and the harm or loss sustained by the plaintiffs. An adequate connection between the defendants' conduct and the plaintiffs' harm is lacking. The resultant harm was not the reasonably expected consequence of the conduct.

In another case,³⁹⁹ the deceased had been a smoker for twenty-five years and eventually died of lung cancer. The deceased's husband and children sued the tobacco company on the basis that it failed to notify the deceased of the harm resulting from smoking. The *Cour de Cassation* dismissed the claim, stating that the deceased's conduct was the legal cause of her own death and not the tobacco company which was "less efficient". According to the "efficient causation" theory, the courts weigh the various factors in determining legal causation.⁴⁰⁰ The question may be asked if it is reasonable to impute liability on the tobacco company for the death of the smoker. If the tobacco company would have been found liable, it is possible that it would open the floodgates to litigation. There could be an indeterminate number of plaintiffs and indeterminate harm or loss. In terms of policy considerations, it may not have been reasonable and fair to hold the tobacco company liable.

In some cases, the probability of damage is the deciding factor in establishing causation, even in cases of strict liability. Van Dam⁴⁰¹ points out that in general, causation and negligence are closely related in that they both involve probability but from different perspectives. With respect to negligence an *ex ante* approach to probability is applied while in respect of causation an *ex post facto* approach to probability is applied. In respect of negligence the question is "how likely it is that harm

³⁹⁹ Van Dam *European tort law* 321

⁴⁰⁰ Van Dam *European tort law* 319.

⁴⁰¹ *European tort law* 308.

would be caused by the negligent conduct ..., whereas in causation the question is how likely it is that the damage was caused by the negligent conduct or by the cause for which the defendant is liable”.

In a landmark decision⁴⁰² where the plaintiff alleged that he developed multiple sclerosis as a result of a Hepatitis B vaccine, the *Cour de Cassation* found that there was a probability that the condition was caused due to the defective vaccine and held the private institute liable, the decision of the court *a quo* was reversed. There was no scientific and statistical evidence confirming that the vaccine could cause the disease. This however, did not affect the court’s decision in confirming liability and other proof based on the circumstances of the case. Presumptions were thus relied upon. In a later case,⁴⁰³ with similar facts where a woman had received thirteen shots of the Hepatitis B vaccine (a rather high number of vaccines) over a period of seven years and was subsequently diagnosed with multiple sclerosis; she sued the manufacturers of the vaccine. The appeal court denied her claim for damages. The court held that the appellant’s condition “could be presumably attributable to the vaccine” but there was no proof that the vaccine was defective. The *Cour de Cassation* upheld the judgment in part. It held that the appeal court was correct in holding that the appellant’s condition could be attributed to the vaccine but stated that the appellate judges should have verified whether “the very same reasons why the damage was presumed to be attributable to the vaccine could support the presumption that the vaccine was also defective”. Séjean⁴⁰⁴ explains that with regard to liability for defective products, what must be established is proof of the damage, the defect, and a causal relationship between the defect and the damage. When the product is a health-related product, a further requirement is required, that is, that the “damage is attributable (*imputable*) to the administration of the product”. “Attributability” refers to the relationship between the damage and the administration of the medical product (vaccine) while causation refers to the link between the damage and defect of the product. Séjean explains “[i]n other words, damage to a patient can be attributed to the vaccine because it was

⁴⁰² Cass civ 1 22 May 2008 06-10967, Bull civ 2008 I 148 (see discussion of this case by Moréteau 2006 *European tort law yearbook* 271-272). See Cass civ 1 26 September 2012 11-17738, Bull civ 2012 I 187; Moréteau and On 2012 *European tort law yearbook* 237-240; Van Dam *European tort law* 326.

⁴⁰³ Cass civ 1 10 July 2013 12-21314, Bull civ 2013 I 157. See discussion of this case by Séjean 2013 *European tort law yearbook* 238-241.

⁴⁰⁴ In *European tort law yearbook* 2013 239.

administered to him or her, but it is only if the vaccine is furthermore defective that the conditions of liability are met". If there is a lack of scientific evidence that the condition is attributable to the administration of the product, the trial courts can determine proof of attributability by presumptions under Article 1353 which provides:

[t]he presumptions which are not established by statute are left to the insight and carefulness of the judges, who shall only admit serious, precise and concurrent presumptions...".⁴⁰⁵

The *Cour de cassation* did not provide a definition of a defect in the vaccine, which may mean that different courts may reach different results with regard to whether a health product is defective.⁴⁰⁶ It is submitted that in the end, the courts reach a decision on whether it is fair and reasonable to impute liability on the defendant based on whether the harm or loss was probably caused or presumably caused by the administration of the defective product.

In certain instances, such as where accidents occur at work,⁴⁰⁷ in cases of nuclear accidents and in cases where transfusion of contaminated blood occurs, causation is presumed.⁴⁰⁸

Where there are successive causes, that is where a second event causes the same damage as the first, the first defendant may be held liable.⁴⁰⁹ In the hypothetical example where a plumber negligently causes a fire in the claimant's house and before any repair can take place an earthquake completely destroys the house, the plumber would still be held liable for the damages. In terms of English law the plumber would not be held liable but in terms of French law, the plumber caused the damage (destruction of home) before the earthquake and the plaintiff's right to compensation arises at the time of the delict. The earthquake is not considered as a *novus actus*

⁴⁰⁵ Translated by Séjean in *European tort law yearbook* 2013 240.

⁴⁰⁶ Séjean 2013 *European tort law yearbook* 241.

⁴⁰⁷ Accidents that take place during the course and scope of employment or at the workplace are considered as "industrial accidents" which are regulated by legislation. Causation is presumed but may be rebutted by the employer. See Galand-Carval in Spier (ed) *Unification of tort law: causation* 55; Viney in Bermann and Picard (eds) *French law* 258 fn 65.

⁴⁰⁸ In instances where a person contracts HIV due to a contaminated blood transfusion, Act 91-1406 of 31 December 1991 provides for compensation by the state. Prior to the enactment of the act, compensation could be claimed in delict. See cases referred to by Viney in Bermann and Picard (eds) *French law* 258 fn 67; Van Gerven, Lever and Larouche *Tort* 122-125.

⁴⁰⁹ Van Dam *European tort law* 335.

interveniens. French and South African law would thus reach the same result, which is different from the result reached in English law.⁴¹⁰

Where the second event increased the damage caused by the first event, the first and second defendants would generally be held jointly and severally liable.⁴¹¹ For example, a plaintiff was injured in a motor vehicle accident and hospitalised. While in hospital he was then seriously injured as a result of fire that broke out. However, the injury resulting from the fire (his burns) were deemed to be a consequence of the initial accident (there is no *novus actus interveniens*).⁴¹² The chain of causation is not broken and continues as the injury resulting from the *novus actus* (fire) is not more serious than the injury resulting from the initial accident. This is indeed a pragmatic way of imputing liability on two separate wrongdoers and the outcome is indeed reasonable and fair where each wrongdoer is liable for his share of the harm or loss sustained by the plaintiff.

A second event could however be considered too remote and the second defendant may then be held solely liable.⁴¹³ For example, a woman was injured in a motor vehicle accident as a result of a motorist's conduct. The motorist was not aware that the woman's condition was serious and that her life was in danger. She was transported to one hospital where that hospital thought it more appropriate to transfer her to another hospital for treatment. On her way to the second hospital, the ambulance transporting her caused an accident resulting in the death of the woman. The *Cour de Cassation*⁴¹⁴ confirmed that the ambulance driver was responsible for the harm emanating from the death of the woman. Even though the first accident affected the woman's chance of survival there were no objective medical reasons for concluding that it would have led to her death. In respect of holding the ambulance driver fully liable, the *Cour de Cassation* applied the thin-skull rule (the ambulance driver must

⁴¹⁰ See Spier in Spier (ed) *Unification of tort law: causation* 142, 148 who refers to the English report by Rogers, the South African report by Neethling and the French report by Galand-Carval.

⁴¹¹ Van Dam *European tort law* 336.

⁴¹² Cass civ 2 6 March 2003, RTDciv 2003 310 observations Jourdain. See Lafay, Moréteau and Pellerin-Rugliano 2003 *European tort law yearbook* 163; Van Dam *European tort law* 336.

⁴¹³ Van Dam *European tort law* 336.

⁴¹⁴ Cass crim 14 June 1990 89-85234, Bull crim 244 627. See Moréteau, Pellerin-Rugliano and Rey in Winiger (ed) *Digest of European tort law volume 1: essential cases on natural causation* 599-600. See also Moréteau in Koziol (ed) *Basic questions of tort law* 50; Van Dam *European tort law* 345.

take the victim as he finds her with her pre-existing condition). This is precisely what Moréteau⁴¹⁵ was referring to in respect of the rule that when the *novus actus* “is less serious than the original fault, liability will be split” but when “the subsequent act ... is at least as serious as the act of the original perpetrator, the causal link is interrupted”. This, as Moréteau points out, involves a value judgement. Thus the value judgment depends on whether the *novus actus* had a bearing on the resultant harm to such an extent that the resultant harm can be imputed to the second wrongdoer (in respect of the second event) which from a South African perspective may be based on public policy, reasonableness, fairness and justice.

The courts often make use of the concept “*cause étrangère*” which refers to a cause which was external (out of the defendant’s control), unforeseeable and unavoidable (*externe, imprévisible et insurmontable*).⁴¹⁶ In respect of the intervening event, the consequences of the conduct causing the harm are deemed unforeseeable and unavoidable, the defendant may not be held liable.⁴¹⁷ Viney and Jourdain⁴¹⁸ point out that the exclusion of liability based on a *cause étrangère* is a “manifestation of the adequacy theory”. A *cause étrangère* may negate causation and fault in French law.⁴¹⁹ Thus the adequate cause theory and a measure of foreseeability are acknowledged when the defence of an external cause is raised. The external cause could manifest itself in *force majeure*, contributory fault on the part of the plaintiff, an act by a third party, a chance occurrence, or conduct of the state.⁴²⁰ In rescue cases, where the rescuer attempts to assist the victim, his conduct is not usually regarded as a *novus actus interveniens*. For example: X causes injury to Y as a result of an accident and Y is left in a position of peril, Z tries to rescue Y and in so doing is also injured. Galand-Carval⁴²¹ explains that it is most likely that the French courts would find that X created a situation of danger where Z found he had a moral duty to intervene and rescue X. Z’s conduct would not be regarded as breaking the chain of causation but a “*normal consequence of the dangerous situation*” created by X. It is submitted that in such

⁴¹⁵ In Koziol (ed) *Basic questions of tort law* 82-83.

⁴¹⁶ Van Dam *European tort law* 320.

⁴¹⁷ Van Gerven, Lever and Larouche *Tort* 421.

⁴¹⁸ *Conditions* 247-249 (referred to by Van Gerven, Lever and Larouche *Tort* 454).

⁴¹⁹ Van Gerven, Lever and Larouche *Tort* 455.

⁴²⁰ Viney in Bermann and Picard (eds) *French law* 259.

⁴²¹ In Spier (ed) *Unification of tort law: causation* 59.

context the “normal consequence” may be considered a “reasonable consequence” of the dangerous situation.

Where there is uncertainty about causation where there are multiple possible defendants, the but-for test is applied in the sense that all the defendants may be held liable for the plaintiff’s harm or loss that was directly caused by them all. The burden of proof is also reversed. The principle benefits the plaintiff in shifting the risk onto one or more defendants. The only instance where a defendant may not be held fully liable is where the plaintiff contributed to his harm or loss by his own fault.⁴²² Thus it is apparent that *inter alia*: the but-for test; the direct consequences theory; policy considerations; whether it is fair, just and reasonable to impute liability on the defendants’; and fault (in the form of intention or negligence) are applied where there are multiple possible defendants.

Galand-Carval⁴²³ states that in the example where a plaintiff contracts a disease from inhaling asbestos dust while employed by different employers (where the disease is contracted only once a certain threshold of dust is inhaled and the threshold is reached at the place of his last employment), the but-for test would apply and all the employers may be held liable on the basis that it is a direct cause of the employee’s illness. The same would apply in Anglo-American law.⁴²⁴ In English law, as in *Fairchild v Glenhaven Funeral Services Ltd*,⁴²⁵ it would be fair, reasonable and just to impose liability on the defendants and the burden of proof would be reversed. The question that would be asked is whether the defendant materially increased the risk of harm towards the plaintiff.

A few cases will now be considered illustrating the approach followed by the French courts. A plaintiff alleged that she developed cervical cancer as a result of her mother taking a DES drug while pregnant. The plaintiff was unable to prove which of the two manufacturers manufactured the drug her mother took during pregnancy. The drug was taken by women between the 1940s-1960s in order to avoid the premature birth

⁴²² Galand-Carval in Spier (ed) *Unification of tort law: causation* 53-54.

⁴²³ In Spier (ed) *Unification of tort law: causation* 56.

⁴²⁴ See chapter 5 para 4.

⁴²⁵ 2003 1 AC 32.

of their babies. One of the effects of the drug was that daughters of mothers who took DES had a high risk of cervical cancer. The court *a quo* dismissed the claim but the *Cour de Cassation* held that each of the manufacturers had to prove that their drug did not cause the cervical cancer. Thus a presumption was created that each manufacturer is jointly and severally liable.⁴²⁶

In *Lizinger v Kintzler*,⁴²⁷ the plaintiff participated in deer hunting with seven other hunters. Towards the end of the day the plaintiff left the defendants to return home. The defendants then simultaneously fired shots to mark the end of the hunting day. One of the shots fired hit the plaintiff who almost lost his eye. The plaintiff sued all the other hunters as it was not possible to determine whose shot injured him. The *Cour de Cassation* held that the firing of the shots did not amount to a normal act of hunting and that all the defendants were negligent. The hunters had collective custody of the guns and bullets. They had *faute commune* (common fault) in terms of Article 1384(1) that caused injury. All the defendants were held jointly and severally liable *in solidum* towards the plaintiff. The result is reasonable as the victim is relieved of the burden of identifying the actual wrongdoer. There is a presumption of causation applicable to all the defendants and if a defendant wants to escape liability, he must prove that he did not cause the harm.⁴²⁸ However, Galand-Carval⁴²⁹ explains that in a scenario where another person hunts separately from the group and fires a shot simultaneously while other members of the hunting group fired shots and it is uncertain who fired the shot that injured the victim; then the theory of *faute commune* cannot apply as causation cannot be proven. There is a legal obligation to take out insurance for hunting and the practice of dangerous sports by certain professionals and persons involved in “profit-making activities”, which is supplemented by a “guarantee fund” in instances where the wrongdoer is unidentified or uninsured. If a person, particularly a professional, does not take out insurance as required, the courts may find such person at fault and negligent in not taking out insurance.⁴³⁰ If the defendant cannot be identified with

⁴²⁶ Cass civ 1 24 September 2009 08-16305, Bull civ 2009 I 187. See also case law referred to by Van Dam *European tort law* 334 fn 132; Moréteau 2010 *European tort law yearbook* 185-188; Moréteau in Koziol (ed) *Basic questions of tort law* 53.

⁴²⁷ Cass civ 2 5 June 1957, D 1957 Jur 493. See also Cass civ 2 13 March 1975 73-13961, Bull civ 1975 II 88 73.

⁴²⁸ See Van Gerven, Lever and Larouche *Tort* 442-444.

⁴²⁹ In Spier (ed) *Unification of tort law: causation* 61.

⁴³⁰ See Van Gerven, Lever and Larouche *Tort* 23.

regard to a hunting accident or if he is insolvent or uninsured, then compensation is awarded by a compensation fund.⁴³¹

In one case, a gang⁴³² armed with rifles and ammunition had a confrontation with a rival gang. When a brawl broke out, a young member of the rival gang was shot and killed. The young member's parents sued five assailants for the harm and loss sustained. The appeal court found that in terms of Article 1382 and 1383 (personal responsibility for one's own conduct) all the assailants were liable. One of the assailants appealed, arguing that there was a lack of causation between his conduct and the death of the young member. The *Cour de Cassation* dismissed the appeal, holding that even though it was not possible to identify whose shot killed the deceased, there was a shared will with an aggressive intention to harm. Furthermore, the appellant took part in the brawl with full knowledge and the death of the deceased was due to their collective conduct, which was "objectively foreseeable". Fault in the form of intention and causation was established. Thus the defendants were held liable for the intended consequences. Intention was used as a criterion to establish causation and the court relied on the idea that intended consequences cannot be too remote.

It may be argued that by shifting the burden of proof a reasonable result is reached as the victim does not go empty-handed because he cannot identify the wrongdoer. He is relieved of this burden of proof as a matter of policy. The question may be asked (as in South African law) whether there is a close enough relationship between the wrongdoers' joint conduct and the harm for such consequences to be imputed to the wrongdoers in terms of policy considerations based on reasonableness, fairness and justice.

3.1 Loss of chance

In French law, the plaintiff can claim compensation for the loss of chance (*la perte d'une chance*) of preventing harm or loss he suffered, as long as *faute* is present on

⁴³¹ Law of 11 July 1966. See Moréteau in *Basic questions of tort law* 52.

⁴³² Cass civ 2 2 April 1997 95-14428, Bull civ 1997 II 112 65. See discussion of this case by Moréteau and Pellerin-Rugliano in Winiger (ed) *Digest of European tort law volume 1: essential cases on natural causation* 366-367.

the part of the defendant and there is a clear causal link between the defendant's conduct and the loss of chance. The principle of "loss of chance" is used to fill in the gap where there is uncertainty in causation⁴³³ or when it is uncertain whether or not the proven fault of the defendant caused the harm.⁴³⁴ Loss of chance is one of the heads of damages that may be claimed but because it relates to causation as well it will be discussed here under "causation" as well as under "harm, loss or damage".⁴³⁵

For example, in cases of failure to provide medical treatment, or failure to inform the patient of risks involved in medical treatment which could have benefited the plaintiff; the loss of chance (the advantage the plaintiff was denied of) which is expressed as a percentage⁴³⁶ "of the actual injury suffered by the plaintiff"⁴³⁷ or "advantage that was denied as a result of the loss of chance" may be claimed.⁴³⁸ Thus liability is apportioned in cases of causal uncertainty.⁴³⁹

The loss of chance is considered a head of damage and compensation can never be one hundred percent but anything between one percent and ninety-nine percent.⁴⁴⁰ Compensation for loss of chance was initially applied to cases of professional negligence and later to medical malpractice claims.⁴⁴¹ Prior to 2014, in order to succeed with a claim for loss of chance, such loss of chance must have been "real and serious".⁴⁴² In 2014, the *Cour de Cassation*⁴⁴³ held that the loss of chance must be "a certain and direct harm resulting from the loss of a reasonable chance". This requirement serves as a limitation to claims in general.⁴⁴⁴ It is only in 2014 that the word "reasonable" was introduced and we have yet to see how adjudicators will apply the concept of "reasonable chance".⁴⁴⁵

⁴³³ See Van Gerven, Lever and Larouche *Tort* 113-114.

⁴³⁴ See Séjean and Knetsch 2014 *European tort law yearbook* 204.

⁴³⁵ See para 4 above.

⁴³⁶ See Req 17 July 1889, S 1891 I 399; Cass civ 1 14 December 1965, JCP 1966 II 14753 note Savatier; Cass civ 1 17 November 1982, JCP 1983 II 20056, D 1984 305; civ 1 8 January 1985 83-14852, Bull civ 1985 I 10 10, D 1986 390 note Penneau; Cass civ 10 June 1986 85-10127, Bull civ 1986 I 163 164; Van Dam *European tort law* 338.

⁴³⁷ Van Gerven, Lever and Larouche *Tort* 460.

⁴³⁸ Séjean and Knetsch 2014 *European tort law yearbook* 204.

⁴³⁹ Van Gerven, Lever and Larouche *Tort* 460.

⁴⁴⁰ Moréteau in Koziol (ed) *Basic questions of tort law* 9.

⁴⁴¹ Séjean and Knetsch 2014 *European tort law yearbook* 204-205.

⁴⁴² Van Gerven, Lever and Larouche *Tort* 113.

⁴⁴³ Cass civ 1 30 April 2014 13-16380, Bull civ 2014 I 76.

⁴⁴⁴ Séjean and Knetsch 2014 *European tort law yearbook* 205.

⁴⁴⁵ Séjean and Knetsch 2014 *European tort law yearbook* 205.

The loss of chance principle supports proportional liability when determining either causation or damages and is seen as a reasonable alternative to the all-or-nothing approach.⁴⁴⁶ In principle, the plaintiff will succeed if he establishes with “reasonable certainty” a causal link between the harm or loss sustained and the defendant’s wrongful conduct.⁴⁴⁷ Generally, the author of the damage must be established. Compensation will not be awarded if the damages are “hypothetical, doubtful, or uncertain”.⁴⁴⁸ There is a distinction between “virtual” and “hypothetical” loss. “Virtual loss”, as Moréteau⁴⁴⁹ puts it, exists potentially as a result of some blameworthy conduct, that is “all the conditions for its existence in the future already exist ... much like an embryo contains all the elements necessary for the development of human life”. In respect of “hypothetical loss”, “the existence depends on events that may or may not occur, much like the eventuality of a human being coming to exist where two persons of the opposite sex and able to procreate have intimate intercourse”. Hypothetical loss is not compensable but virtual loss may be. In cases of personal injury resulting in a disability (for example, injury resulting in loss of vision in an eye, the loss of the ability to procreate, or loss of use of a limb) there is harm but the scope of the future loss is uncertain (virtual) and may be remedied by compensating for the loss of chance.⁴⁵⁰ Thus a virtual loss may be regarded as a loss of a reasonable chance and it is reasonable to compensate such loss.

A look at some examples as to how the courts establish the loss of chance is necessary. In one case, a young woman claimed compensation for the lost chance of becoming a pharmacist as a result of injuries she sustained in a motor vehicle accident. The *Cour de Cassation*⁴⁵¹ confirmed that if the loss of chance is hypothetical and uncertain then damages cannot be awarded. At the time of the delict, the young woman had just failed her *baccalauréat* and she had not yet undertaken studies to

⁴⁴⁶ See Moréteau in *Basic questions of tort law* 56; Borghetti in Winiger (ed) *Digest of European tort law volume 2: essential cases on damage* 434-435.

⁴⁴⁷ Van Dam *European tort law* 338.

⁴⁴⁸ Galand-Carval in Spier (ed) *Unification of tort law: causation* 60.

⁴⁴⁹ In Koziol (ed) *Basic questions of tort law* 56-57.

⁴⁵⁰ Moréteau in Koziol (ed) *Basic questions of tort law* 57-58.

⁴⁵¹ Cass civ 2 12 May 1966, Bull civ 1966 II 564 discussed by Moréteau and Francoz-Terminal in Winiger (ed) *Digest of European tort law volume 1: essential cases on natural causation* 556.

become a pharmacist. Thus in this case there was no reasonable loss of chance, therefore she was not entitled to compensation.

Loss of chance is frequently applied in cases of medical malpractice.⁴⁵² If, for example, a medical practitioner fails to diagnose a patient with cancer or fails to inform the patient about material risks and the patient subsequently suffers harm, the medical practitioner may be held liable for the percentage of the patient's loss of chance of preventing harm or loss of chance to recover.⁴⁵³ Often the plaintiff cannot prove with sufficient certainty that the harm or loss would not have occurred but for the medical practitioner's negligence. The courts award compensation on the basis that the medical practitioner's negligence had deprived him of the chance of recovery.⁴⁵⁴ For example, in one case,⁴⁵⁵ a patient underwent an operation to remove his appendices but thereafter died as a result of uraemia (acute renal failure). The widow sued the medical practitioner for damages. The *Cour de Cassation* confirmed that the medical practitioner was negligent in not conducting pre-operative tests. Even if it cannot be concluded with certainty that the medical practitioner's *faute* had been the cause of the patient's death, his *faute* denied the patient a chance of survival. The courts thus substitute the damage, loss of chance of survival as opposed to death, in order to facilitate establishing causation. For example, if a doctor failed to diagnose cancer in the patient, and had he been diagnosed correctly there was a forty percent chance of recovery (whereas due to the lack of diagnosis there is no chance of recovery) the patient may recover forty percent for the lost chance.⁴⁵⁶ If statistical evidence is provided to the court, causation must be established with sufficient certainty.⁴⁵⁷

⁴⁵² See Cass civ 1 16 July 1991 90-14645, Bull civ 1991 I 248 162; Van Gerven, Lever and Larouche *Tort* 111-113.

⁴⁵³ See Cass civ 1 12 November 1985 84-12759, Bull civ 1985 I 298 264; Cass civ 1 7 February 1990 88-14797, Bull civ 1990 I 39 30; Cass civ 1 3 November 1983 82-12729, Bull civ 1983 I 253; Van Dam *European tort law* 337.

⁴⁵⁴ Galand-Carval in Spier (ed) *Unification of tort law: causation* 60.

⁴⁵⁵ Cass civ 2 18 March 1969, Bull civ 1969 II 117. See discussion of this case by Moréteau and Francoz-Terminal in Winiger (ed) *Digest of European tort law volume 1: essential cases on natural causation* 555.

⁴⁵⁶ Galand-Carval in Spier (ed) *Unification of tort law: causation* 61.

⁴⁵⁷ Galand-Carval in Spier (ed) *Unification of tort law: causation* 61.

French tort law has been applying the loss of chance principle for some time.⁴⁵⁸ In French law, it has been applied to loss of a chance of profit (such as winning a prize)⁴⁵⁹ and to preventing a loss (such as in cases of recovering from an illness). It is applied to damage resulting from personal injury, damage to property and pure economic loss.⁴⁶⁰

For example, in one case,⁴⁶¹ a horse breeder was unable to train his mare for two races as a result of an accident for which the defendant was liable. The mare was unable to take part in the two races. The *Cour de Cassation* concluded that the mare's lost chance to win the races was "certain" and "direct", not hypothetical. The matter was referred to the lower court to determine compensation for the loss of chance. In another case,⁴⁶² a plaintiff was injured by another skier. The plaintiff was not in a position to identify the other skier but the instructor was and had failed to identify the skier. Thus the plaintiff lost the chance of suing the other skier for the harm she sustained. The *Cour de Cassation* allowed the plaintiff's claim against the instructor for the loss of chance to recover compensation from the other skier.

If it is uncertain as to who or what caused the damage (such as whether it was caused by an act of nature) then it is possible that the claim may be dismissed. For example, a child was born with a number of disabilities and there were two possible causes. The one possible cause was due to the mother's pre-existing condition where it was likely that the child would suffer a neurological disorder, and the other possible cause was due to the hospital's negligence during the mother's pregnancy and birth of the child. The appeal court found a seventy-five percent loss of chance due to the hospital's negligence but the *Cour de Cassation*⁴⁶³ dismissed the appeal as a result of the uncertainty.

⁴⁵⁸ See Van Dam *European tort law* 337.

⁴⁵⁹ See Cass Civ 2 3 March 1988 86-17550, Bull civ 1988 II 57 31; Van Gerven, Lever and Larouche *Tort* 201.

⁴⁶⁰ See Van Dam *European tort law* 337-338.

⁴⁶¹ Cass Crim 6 June 1990 89-83703, Bull crim 1990 224 573. See also Cass civ 1 4 June 2007 05-20213, Bull civ 2007 I 217 (with regard to the loss of chance in selling a house which was of an advantage to the plaintiffs). See Moréteau 2007 *European tort law yearbook* 276; Van Dam *European tort law* 338; Van Gerven, Lever and Larouche *Tort* 200-201.

⁴⁶² Cass civ 1 10 June 1986 85-10127, Bull civ 1986 I 163 164.

⁴⁶³ Cass civ 1 28 January 2010 08-20755 08-21692, Bull civ 2010 I 19, D 2010 947 note Maitre JCP 2010 474 Hocquet-Berg, RTDciv 2010 330 observations Jourdain. See Moréteau 2010

In one case⁴⁶⁴ a couple got married in terms of “universal community of property” and then got divorced. After the divorce, the couple realised that their property would be shared between them. The husband, who was dissatisfied with the loss he would sustain, sued the notary who assisted in drafting the marriage contract. He alleged that the notary did not fulfil his professional duty in advising the couple, especially taking into consideration the disparate contributions between them. The husband claimed for the loss of chance of choosing a different matrimonial property regime. The *Cour de Cassation* found that the husband did not establish loss which was certain and direct as a result of a reasonable chance to implement a different matrimonial property regime.

The influence of reasonableness on the loss of chance is explicit in that the *Cour de Cassation*⁴⁶⁵ has expressly stated that the loss of chance must be “a certain and direct harm resulting from the loss of a reasonable chance”. Generally with claims for loss of chance, the defendant fails to act positively (omission) in preventing the loss of a reasonable chance to gain a benefit. The plaintiff must establish with “reasonable certainty” a causal link between the harm or loss sustained and the defendant’s unreasonable conduct in the form of a *faute*.

3.2 Conclusion

In French law, causation is indeed determined pragmatically taking into consideration numerous principles and theories. The influence of reasonableness in determining causation is mostly implicit. Van Dam⁴⁶⁶ correctly states that in many instances the courts reach decisions based on policy considerations as to what is fair, just and reasonable, taking into account the circumstances of the case. However, their decisions’ are provided using the “language the national law provides. For example, the court decides whether the consequences were foreseeable or not, whether they

European tort law yearbook 182; Van Dam *European tort law* 338; Moréteau in Koziol (ed) *Basic questions of tort law* 55-56.

⁴⁶⁴ Cass civ 1 30 April 2014 13-16380, Bull civ 2014 I 76. See Séjean and Knetsch 2014 *European tort law yearbook* 203-205.

⁴⁶⁵ Cass civ 1 30 April 2014 13-16380, Bull civ 2014 I 76.

⁴⁶⁶ Van Dam *European tort law* 343.

were very unlikely or not so unlikely, whether they were direct or indirect, or whether they were within or outside the prospective scope of the rule”.

4. Harm, loss or damage

Damage, like causation and the generating act or event in French law, is referred to as one of *les constantes de la responsabilité* (the requirements for liability).⁴⁶⁷ The founders of the CC left the interpretation of these concepts to the courts.⁴⁶⁸ The aim of compensation for damages is to compensate the plaintiff for his loss as a “result of the defendant’s wrong” and to “restore the equilibrium which has been broken by the damage (*rétablir l’équilibre détruit par le dommage*)”.⁴⁶⁹ The deterrent function of the law of delict is secondary to the compensatory function.⁴⁷⁰ An economic analysis is generally disregarded in the French law of delict,⁴⁷¹ but it is submitted that it is still implicitly considered, for example in determining whether there is a *faute* and even in determining causation according to the efficient cause theory. Compensation is the main remedy available to a victim of a delict in French law and harm or loss is the “sole criterion” in assessing damages.⁴⁷² A *franc symbolique* is awarded where the courts’ recognise a violation of the plaintiff’s right. Importance is attached to the recognition of the violation of the right instead of compensation. This is usually awarded where the plaintiff has not suffered any significant harm⁴⁷³ which is similar to the award of nominal damages in Anglo-American law.⁴⁷⁴ For example, in the case commonly known as the *Benetton* case,⁴⁷⁵ the appeal court awarded the *franc symbolique* to an association defending the interests of AIDS patients and some AIDS patients (who were in addition awarded compensation of fifty thousand francs each). Benetton had advertised their products related to AIDS in a manner resulting in the abuse of “freedom of expression and opinion”.⁴⁷⁶

⁴⁶⁷ Van Dam *European tort law* 347; Galand-Carval in Magnus (ed) *Unification of tort law: damages* 79.

⁴⁶⁸ Van Dam *European tort law* 353.

⁴⁶⁹ Galand-Carval in Magnus (ed) *Unification of tort law: damages* 77.

⁴⁷⁰ Moréteau in Koziol (ed) *Basic questions of tort law* 26.

⁴⁷¹ See Moréteau in Koziol (ed) *Basic questions of tort law* 26.

⁴⁷² Van Gerven, Lever and Larouche *Tort* 740, 764.

⁴⁷³ See Van Gerven, Lever and Larouche *Tort* 740 fn 513; Van Dam *European tort law* 349, 354; Galand-Carval in Magnus (ed) *Unification of tort law: damages* 79.

⁴⁷⁴ See chapter 7 para 2.7

⁴⁷⁵ Paris 28 May 1996 D 1996 Jur 617. See Van Gerven, Lever and Larouche *Tort* 769.

⁴⁷⁶ Van Gerven, Lever and Larouche *Tort* 769.

Punitive or exemplary damages are generally not awarded in France but there is a possibility that in future “disgorgement of illicit benefits” and the award of punitive damages may be awarded.⁴⁷⁷ The *Cour de Cassation* generally does not vary the amount of compensation awarded based on the gravity of the *faute* or profit made by the defendant.⁴⁷⁸ In the assessment of damages the “seriousness of the wrong” or “degree of culpability” is not taken into account but rather the seriousness of the loss or harm.⁴⁷⁹ By not considering the “degree of culpability”, the *Cour de Cassation* has implicitly dismissed the private law penal function of an award aimed at deterring wrongful conduct and instead placed precedence on compensating the plaintiff. Thus in French law, the amount of the award for damages must reflect the amount of harm.⁴⁸⁰ For example, in *SA Cogedipresse v C*,⁴⁸¹ a magazine printed a photograph of a famous musician on his death bed. The photograph was taken without permission (a “paparazzi” photograph). The wife of the musician had taken precautionary measures to secure the room where the mortal remains of her husband lay. She subsequently sued the publisher of the magazine and claimed damages for herself and her children. The appeal court confirmed the decision and award of the court *a quo* in awarding fifty thousand francs to the wife and twenty-five thousand francs to each child. The court also ordered the magazine to publish the judgment. On appeal, the publishers alleged that the order to publish the judgment was punitive. The appeal court held that the publication of the photograph was wrongful and the damages were awarded in order to remedy the harm sustained. Furthermore, by ordering the publication of the judgment, it in fact makes good the harm sustained and acknowledges that the wife did not want nor allow the publication of the photograph of her husband. The appeal court confirmed that the court *a quo*’s award was correct in

⁴⁷⁷ See discussion by Moréteau 2011 *European tort law year* 216 stemming from a case where the *Cour de Cassation* recognised and enforced a foreign judgment (Cass civ 1 1 December 2010 09-13303, Bull civ 2010 I no 248) where punitive damages were awarded. Moréteau also traces references to punitive damages in the Catala draft (reform on the law of obligations) and the Terré’s proposals with regard to reform on the law of delict. See also Moréteau in Koziol (ed) *Basic questions of tort law* 7 fn 14.

⁴⁷⁸ A statute may regulate the compensation of damages. See Galand-Carval in Magnus (ed) *Unification of tort law: damages* 77.

⁴⁷⁹ See *Harang-Martin v Bonneau* Cass civ 2 8 May 1964, JCP 1965 II 14140; Van Gerven, Lever and Larouche *Tort* 765.

⁴⁸⁰ Van Gerven, Lever and Larouche *Tort* 766.

⁴⁸¹ *Cour d’appel de Paris* 26 April 1983, D 1983 Jur 376. See discussion of this case in Van Gerven, Lever and Larouche *Tort* 766-769.

evaluating the harm sustained and that the award was fair. It has been suggested that the award made may seem disproportionate to the profits made by the magazine and perhaps the quantification of the harm could have been established based on the circulation of the magazine. This would serve the compensatory and deterrent function of the law of delict.⁴⁸²

Damages may be recovered for all types of harm or loss, whether for: personal bodily injury (*dommage corporel*); damage to property; moral injuries (*préjudice moral* – a form of non-patrimonial loss);⁴⁸³ loss of affection; loss of profit; loss of a chance; loss emanating from environmental damage; and economic loss (*préjudice économique* – either consequential loss or pure economic loss).⁴⁸⁴ Damages as a remedy, an injunction⁴⁸⁵ by a civil procedure⁴⁸⁶ to prevent wrongful conduct (*supprimer la situation illicéite*), and compensation in kind is also possible.⁴⁸⁷ Compensation in kind may entail replacing a damaged item, restoring an item to its original state, retracting a statement made, disclosing information that was previously unavailable, re-concluding a legal instrument which was defective or correcting incorrect information that was misleading.⁴⁸⁸ Thus “reparation of harm” as opposed to punishing the defendant is the main aim in French law.⁴⁸⁹ There is no *de minimis* rule in the CC as the full reparation principle applies (*principe de réparation intégrale*). The denial of compensation or an injunction (interdict) is however regarded by some as an application of the *de minimus rule*.⁴⁹⁰ In applying the full reparation principle, the plaintiff must be compensated for the full loss, whether patrimonial or non-patrimonial, but no more.⁴⁹¹

⁴⁸² See Van Gerven, Lever and Larouche *Tort* 767.

⁴⁸³ In respect of, for example, defamation and infringement of privacy.

⁴⁸⁴ See Viney in Bermann and Picard (eds) *French law* 257. Galand-Carval in Magnus (ed) *Unification of tort law: damages* 78; Borghetti 2012 *JETL* 158.

⁴⁸⁵ Preventative or reparative injunctions are aimed at preventing infringements of rights. See in general Moréteau in Koziol (ed) *Basic questions of tort law* 11-14.

⁴⁸⁶ See Articles 808-809 of the Code of Civil Procedure. See Moréteau in Koziol (ed) *Basic questions of tort* 13.

⁴⁸⁷ See Van Dam *European tort law* 348; Viney in Bermann and Picard (eds) *French law* 260; Galand-Carval in Magnus (ed) *Unification of tort law: damages* 78-79.

⁴⁸⁸ Viney in Bermann and Picard (eds) *French law* 260.

⁴⁸⁹ Van Dam *European tort law* 352.

⁴⁹⁰ See Moréteau in Koziol (ed) *Basic questions of tort law* 73.

⁴⁹¹ Galand-Carval in Magnus (ed) *Unification of tort law: damages* 78. See also Van Gerven, Lever and Larouche *Tort* 62.

Article 1382 of the CC only makes reference to reparation for the harm done. The courts have also not provided a definition for “damage” and French legal writers adhere to a wide definition of “damage” as “any interference with a legitimate interest”.⁴⁹² The courts have provided guidelines on the concept of damage and the assessment of damage.⁴⁹³ There must be proof of harm and there is generally no specific importance attached to the type of harm or interest affected.⁴⁹⁴ However, most of the no-fault liability regimes cover personal injury, damage to property and consequential damage flowing from personal injury or damage to property.⁴⁹⁵ Infringement of a subjective right is not required but it is sufficient if there was “injury to a legitimate interest” and a “legitimate interest” is interpreted widely.⁴⁹⁶ Identifying the different heads of damages is not crucial in French law since any type of damage is compensable.⁴⁹⁷

The only requirements with respect to damage according to the case law is that damage must be “legitimate”, that is, damage must be sustained as a result of an interference with a “legitimate interest”, it must be certain (not hypothetical), personal (to the plaintiff, not collective or public) and direct.⁴⁹⁸ For example, prohibited activity, such as a criminal infraction or loss of income for undeclared activity⁴⁹⁹ may be regarded as an illegitimate interest.⁵⁰⁰ Generally only loss of legal income is compensated. If the interest is illicit then compensation will not be awarded for such illicit income.⁵⁰¹ The *Cour de Cassation*⁵⁰² has held that a passenger travelling illegally (in that he did not pay his fare) was entitled to compensation for injuries he sustained. Furthermore, if there is no legitimate interest in the success of a claim, Article 30 of

⁴⁹² Borghetti in Winiger (ed) *Digest of European tort law volume 2: essential cases on damage* 24-25.

⁴⁹³ See Van Gerven, Lever and Larouche *Tort* 803.

⁴⁹⁴ Viney in Bermann and Picard (eds) *French law* 256-257.

⁴⁹⁵ Viney in Bermann and Picard (eds) *French law* 257.

⁴⁹⁶ Viney in Bermann and Picard (eds) *French law* 257.

⁴⁹⁷ Borghetti in Winiger (ed) *Digest of European tort law volume 2: essential cases on damage* 25.

⁴⁹⁸ See Cass civ 2 3 October 1990 89-12937, Bull civ 1990 II 184 94; Cass civ 2 20 June 1985 84-12702, Bull civ 1985 II 125 84; Van Dam *European tort law* 353; Galand-Carval in Magnus (ed) *Unification of tort law: damages* 80; Borghetti in Winiger (ed) *Digest of European tort law volume 2: essential cases on damage* 25.

⁴⁹⁹ Civ 2 24 January 2002 99-16576, Bull civ 2002 II 5 4. See Brun 2002 *European tort law yearbook* 195; Van Dam *European tort law* 355.

⁵⁰⁰ Galand-Carval in Magnus (ed) *Unification of tort law: damages* 80.

⁵⁰¹ Cass civ 2 24 January 2002 99-16576, Bull civ 2002 II 5 4. See Brun 2002 *European tort law yearbook* 195-196.

⁵⁰² 17 November 1994 RTDciv 115 observations Jourdain (discussed by Brun 2002 *European tort law yearbook* 196.

the *Code de Procedure Civile* (Code of Civil Procedure) will apply in barring the claim.⁵⁰³ The concept of “certainty” relates to proof of the existence and extent of the loss.⁵⁰⁴ The concept of “directness” relates to causation.⁵⁰⁵ The reason why the loss must be “personal” is to ensure that the plaintiff does not claim for damages suffered by another person. A third party who has suffered harm, for example as a result of witnessing an accident, a secondary victim, known as a “rebound victim” (*un victim par ricochet*) may be entitled to damages in his own right.⁵⁰⁶ Damages considered damages by ricochet are not necessarily considered as indirect damages. The courts distinguish between harm or loss sustained by the plaintiff’s family, where the damage is regarded as direct damage, and loss suffered by other persons such as client’s, employee’s etcetera where the damage is regarded as indirect damage.⁵⁰⁷ Although the rule that the damage must be personal seems reasonable, Galand-Carval⁵⁰⁸ points out that it precludes private entities or trade unions from suing the defendant on behalf of its members or of the community they represent. However, it is now subject to a number of statutory exceptions. The French courts have relied on Articles 1146 to 1155 of the *CC* which are applied to contractual or non-contractual liability.⁵⁰⁹ In respect of the requirement that the damage needs to be “certain”, a liberal interpretation is applied and damages must be “very likely”. This is also applied to the “loss of chance”, however, only if the opportunity was genuine (not hypothetical)⁵¹⁰ and only in respect of the percentage of the likelihood that a beneficial event has been lost.⁵¹¹

The *Cour de Cassation* does not determine the quantification of damages as it considers it a factual enquiry dealt with by the lower courts (court *a quo* and courts of appeal), the triers of fact who have “*pouvoir souverain*” – sovereign power. The lower courts are at liberty to assess damages and their decisions are not subject to review

503 Galand-Carval in Magnus (ed) *Unification of tort law: damages* 86.

504 Galand-Carval in Magnus (ed) *Unification of tort law: damages* 80.

505 Galand-Carval in Magnus (ed) *Unification of tort law: damages* 80.

506 See Van Dam *European tort law* 353.

507 Spier in Spier (ed) *Unification of tort law: causation* 132.

508 In Magnus (ed) *Unification of tort law: damages* 80.

509 Van Dam *European tort law* 353; Galand-Carval in Magnus (ed) *Unification of tort law: damages* 79.

510 Viney in Bermann and Picard (eds) *French law* 257.

511 See Cass crim 6 June 1990 89-83703, Bull crim 1990 224 573, RTDciv 1991 121 observations Jourdain; Van Dam *European tort law* 353.

by the *Cour de Cassation*.⁵¹² However, there is a noticeable lack of transparency and inconsistency by the lower courts.⁵¹³

There is a distinction between patrimonial (*dommage patrimonial*) and non-patrimonial loss (*extra-patrimonial* or *dommage moral*).⁵¹⁴ Patrimonial loss is generally claimed for damage to property or for pure economic loss, while non-patrimonial loss is claimed for the “diminution of the victim’s well-being”.⁵¹⁵ Patrimonial loss is referred to as loss of “assets” (*avoirs*) while non-patrimonial loss is referred to as loss of “being” (*être*).⁵¹⁶

It is clear that in French law the purpose is to compensate the plaintiff as fully as possible so as to place him as far as possible in the position he would have been in had the delict not occurred. The idea behind focusing on compensating the plaintiff as opposed to penalising the defendant is a reasonable aim with respect to the purpose and function of the law of delict. It is reasonable that in assessing damages the seriousness of the loss or harm is of paramount importance, and that the amount of the award for damages should reflect the amount of the harm or loss. French law is very liberal in that any type of harm or loss is compensable. The limitations applied to compensating any loss or harm as long as the harm sustained results from an interference with a “legitimate interest”, and that the damage must be certain, personal and direct are also reasonable.

4.1 Patrimonial loss

Loss of maintenance or support in cases of injury or death of another may be claimed by *inter alia* heterosexual partners, same-sex partners⁵¹⁷ or unmarried partners.⁵¹⁸ A surviving partner has a “legitimate interest” in claiming loss of support, provided there

⁵¹² See Cass civ 2 9 July 1981 80-12142, Bull civ 1981 II 156, Gaz Pal 1982, Jur 109 note Chabas; Cass civ 2 20 January 1993, Gaz Pal 1993 2 491 note Evadé; Van Dam *European tort law* 354; Van Gerven, Lever and Larouche *Tort* 804; Galand-Carval in Magnus (ed) *Unification of tort law: damages* 77.

⁵¹³ Van Dam *European tort law* 354.

⁵¹⁴ Van Dam *European tort law* 354; Galand-Carval in Magnus (ed) *Unification of tort law: damages* 81.

⁵¹⁵ Galand-Carval in Magnus (ed) *Unification of tort law: damages* 81.

⁵¹⁶ Van Dam *European tort law* 363.

⁵¹⁷ A civil partnership may be entered into known as the *Pacte civil de solidarité* in articles 515-518 of the CC. See Van Dam *European tort law* 367.

⁵¹⁸ Van Dam *European tort law* 369.

is “certainty”, which refers to a stable relationship of a continuous nature.⁵¹⁹ An obligation to provide support on the part of the deceased need not be established and it is sufficient if the deceased indeed supported the dependant.⁵²⁰ In a case⁵²¹ where a mother had lost her son in an accident, she claimed possible financial loss of support she could have obtained based on the premise that in her old age he would have possibly supported her. The *Cour de Cassation* held that whether the son would have financially supported his mother in her old age was uncertain, since he was unemployed at the time. Thus the loss of the possibility, the loss of chance to financial support was not considered “real or serious”. This requirement is a limiting factor to prevent a potential opening of the floodgates to claims of this nature. In a case⁵²² where a step-father supported a minor, the *Cour de Cassation* confirmed that the minor was entitled to the financial loss the minor would have sustained as a result of the step-father’s death, even though the biological father of the child was alive and could possibly have been required to provide for the minor. An employer or business partner may be held liable for loss caused as a result of the death of the deceased employee or business partner.⁵²³ Again French law is very pragmatic with regard to assessment and freedom in awarding damages. The principle of compensating the plaintiff is paramount and this is evident from the liberal way in which damages are awarded.

Direct and consequential loss can be claimed. In a case,⁵²⁴ a shop owner had lost business for a total of four hundred and thirty-three working days as a result of his shop remaining closed for such time due to damage caused by a motor vehicle driven into the shop. The insurance company paid out for loss of profits as a result of the shop remaining closed for two hundred days from the driver. The owner of the shop

⁵¹⁹ Cass ch mixte 27 February 1970 68-10276, Bull ch mixte 82 183, D 1970 note Combaldieu, JCP 1970 II 16305 comment Parlange; Van Dam *European tort law* 369; Van Gerven, Lever and Larouche *Tort* 125.

⁵²⁰ Ch mixte 27 February 1970 68-10276, Bull ch mixte 82 183, D 1970 note Combaldieu; Van Dam *European tort law* 369.

⁵²¹ Cass civ 2 5 January 1994 92-14463. See discussion of this case by Borghetti in Winiger (ed) *Digest of European tort law volume 2: essential cases on damage* 1085.

⁵²² Cass crim 17 October 2000 99-86157, Bull crim 2000 297 874, RTDciv 379 observations Jourdain. See discussion of this case by Borghetti in *Digest of European tort law volume 2: essential cases on damage* 222.

⁵²³ See Cass civ 2 12 June 1987 86-10686, Bull civ 1987 II 128 73; Van Dam *European tort law* 369.

⁵²⁴ Cass civ 2 27 March 2003 01-00850, Bull civ 2003 II 76 66. See Borghetti in Winiger (ed) *Digest of European tort law volume 2: essential cases on damage* 220.

sought to recover the loss of profits for the remaining two hundred and thirty-three days that it had been closed. The *Cour de Cassation* confirmed the appeal court's decision in awarding compensation to the shop owner for loss of profit for the remaining two hundred and thirty-three days. The *Cour de Cassation* found that there was a direct causal link between the accident and the consequential loss. It is submitted that the award by the *Cour de Cassation* was reasonable in that the plaintiff was compensated fully for his actual loss.

Loss that may be recovered include hospital and medical related costs.⁵²⁵ Damages may be recovered for the modification of a house or vehicle where for example, a person was rendered disabled and such modification is required.⁵²⁶

In respect of damage to property, the cost of reparation of the property or replacement cost may be claimed by the owner as well as compensation for the "loss of exploitation" of the property. Damages are usually not based on the diminution of value of the property but on repair or replacement costs.⁵²⁷ In one particular case,⁵²⁸ where a motor vehicle (that was not even six months old and in good condition prior to the accident) was damaged, the *Cour de Cassation* held that the owner of the motor vehicle was entitled to the reparation cost as well as the loss of the value of the motor vehicle because it had been involved in an accident. If the property was used for professional purposes and deemed a profit-earning item, damages may be awarded for loss of profit while the property is being repaired or replaced. Loss of enjoyment may be claimed if the property was used privately or by the family.⁵²⁹ The cost of hiring is also recoverable, provided it is reasonable.⁵³⁰ If the plaintiff keeps the car, he can recover the costs of repair, provided it is lower than the cost of replacement. In respect of compensation for reparation or replacement costs, the market value is usually not awarded as it is considered lower and is *contra* to the principle of full reparation which

⁵²⁵ See Article 29 of *loi Badinter* and Article 376-1 of the *Code de la sécurité social*; Moréteau in Koziol (ed) *Basic questions of tort law* 20 fn 66-67.

⁵²⁶ Galand-Carval in Magnus (ed) *Unification of tort law: damages* 84.

⁵²⁷ *Babin v Cie La Union et le Phénix espagnol* Cass civ 2 4 February 1982 80-17139, JCP 1982 II 19849. See discussion of this case in Van Gerven, Lever and Larouche *Tort* 804-805. See also Galand-Carval in Magnus (ed) *Unification of tort law: damages* 82.

⁵²⁸ Cass civ 2 6 October 1966. See discussion of this case by Borghetti in Winiger (ed) *Digest of European tort law volume 2: essential cases on damage* 76.

⁵²⁹ See Viney in Bermann and Picard (eds) *French law* 257; Galand-Carval in Magnus (ed) *Unification of tort law: damages* 82.

⁵³⁰ Galand-Carval in Magnus (ed) *Unification of tort law: damages* 87.

is to put the plaintiff in the position he would have been in had the motor vehicle been replaced.⁵³¹ If the car is unique and cannot be replaced, then the plaintiff can claim the cost of repair, whatever it amounts to.⁵³² Damages may be awarded for loss of use or “inconveniences”.⁵³³ Once again the awards made are reasonable in upholding the full reparation principle in France, where awards are even made for loss of enjoyment, loss of use and replacement costs as opposed to the market value of the property. The limitation sometimes applied is that the cost must be reasonable, such as in respect of the cost of hiring a car.

In a case⁵³⁴ where the defendant had completed some earthworks endangering his neighbour’s property; the neighbour subsequently incurred costs (after the defendant’s earthworks caused unstable masses of earth), requiring drainage and the construction of a wall to prevent risk of a landslide. The *Cour de Cassation* confirmed that the plaintiff was entitled to the costs of the preventative works which were deemed reasonable by the appeal court.

In *Houillères du Bassin du Centre et du Midi v Chabalière*,⁵³⁵ the plaintiff’s house was damaged as a result of subterranean works that had been conducted in the defendant’s coal mine. The appeal court allowed the plaintiff to commence repairing the damage with a contractor of his own choice. The final award of damages was to be determined by an independent expert for foreseen and unforeseen work, and in the interim the court ordered the defendant to make a payment in advance to the plaintiff in order to restore the property as it was before the delict. This decision serves as an example of the court ordering “reparation in kind” (*reparation en nature*) instead of monetary compensation (*par équivalent*) in a broad sense. Monetary compensation would have resulted in the defendant paying the cost of repair assessed at the date of judgment. The *Cour de Cassation* upheld the decision and confirmed the appeal court’s sovereign power in that regard (not subject to review by the *Cour de*

⁵³¹ See Cass civ 2 9 July 1981 80-12142, Bull civ 1981 II 156. See Borghetti in Winiger (ed) *Digest of European tort law volume 2: essential cases on damage* 138-140.

⁵³² Galand-Carval in Magnus (ed) *Unification of tort law: damages* 87.

⁵³³ Galand-Carval in Magnus (ed) *Unification of tort law: damages* 88.

⁵³⁴ Cass civ 2 15 May 2008 07-13483, Bull civ 2008 II 112. See discussion of this case by Moréteau 2008 *European tort law yearbook* 280-281.

⁵³⁵ See Cass civ 2 9 July 1981 Gaz Pal 1982 Jur 109 discussed by Van Gerven, Lever and Larouche *Tort* 806-809.

Cassation). It is submitted that it is reasonable that the courts have the leeway to order reparation in kind as well as consisting of a monetary value. The French courts certainly make it more convenient and practical for the plaintiff.

There is no distinction in French law between *damnum emergens* and *lucrum cessans* and no legal meaning is attached to these concepts.⁵³⁶ In a case⁵³⁷ where two business partners had initially set up a company and the one partner had extricated the other partner, the extricated partner sued the other partner for loss. The *Cour de Cassation* held that the extricated partner was entitled to damages. He had financially contributed to the setting up of the business and sustained loss of profit from the business. He was entitled to the loss of chance from benefiting from the future business, not calculated in terms of expected loss but based on the probability of the business being obtained. The court held that there was *faute* on the part of the defendant in the way in which he behaved towards the other partner. Thus the distinction between *damnum emergens* and *lucrum cessans* is not a formal one. In a case⁵³⁸ where a hotel and restaurant were forced to shut down as a result of an administrative order (for the risk of debris falling from a cliff above); the owners of the hotel and restaurant were entitled to compensation for loss of profits from the owner (the custodian) of the land as a result of being closed and not earning profits. The *Cour de Cassation* held that the hotel and restaurant had to close as a result of the “conduct of the cliff” and the owner as the custodian was liable in terms of Article 1384(1) of the CC. In a case⁵³⁹ where a woman was sent a letter in error by a mail order company that she had won a prize of sixty thousand francs, the *Cour de Cassation* held that the letter had “legitimately” convinced the plaintiff that she had won the prize. The mail order company was at fault in terms of Article 1382 of the CC, and was held liable to pay the plaintiff sixty thousand francs.

⁵³⁶ Borghetti in Winiger (ed) *Digest of European tort law volume 2: essential cases on damage* 25; Moréteau in Koziol (ed) *Basic questions of tort* 36.

⁵³⁷ Cass civ 3 3 December 2002 01-02881. See Borghetti in Winiger (ed) *Digest of European tort law volume 2: essential cases on damage* 301-302.

⁵³⁸ Cass civ 2 26 September 2002 00-18627, Bull civ 2002 II 198 157. See discussion of this case by Borghetti in Winiger (ed) *Digest of European tort law volume 2: essential cases on damage* 394.

⁵³⁹ Cass civ 2 28 June 1995 93-17738, Bull civ II 225 130. See discussion of this case by Borghetti in Winiger (ed) *Digest of European tort law volume 2: essential cases on damage* 432-434.

Future loss may be paid out by a lump sum (*capital*) or periodically by way of periodical payments (*rente*).⁵⁴⁰ French lower courts prefer to award lump sums⁵⁴¹ and lump sums awards are sometimes considered as a penalty.⁵⁴² A once-and-for-all award generally puts an end to the matter and there is no dwelling on the past, but a disadvantage is that there may be over-compensation or under-compensation.⁵⁴³

Future loss may be claimed as long as it is deemed a “certain and direct result of a current state of affairs and capable of immediate assessment”.⁵⁴⁴ In assessing damages the underlying principle is to compensate the plaintiff in full, there must be “equivalence between harm and compensation” to restore the equilibrium or put the victim in the position he would have been in had the delict not occurred.⁵⁴⁵ In reality it is sometimes not possible to restore the equilibrium or put the plaintiff in the position he would have been in had the delict not occurred, especially with regard to personal injury.⁵⁴⁶ Damages must be assessed as close as possible to the date of trial.⁵⁴⁷ Thus factors such as inflation or change in the severity of harm suffered by the plaintiff are taken into account before the date of the decision.⁵⁴⁸ If there are changes in the plaintiff’s condition after the date of judgment, where for example his condition gets worse or the plaintiff proves the “occurrence of a new harm”, further compensation may be awarded. The *res judicata* rule⁵⁴⁹ does not affect the plaintiff claiming compensation when his condition deteriorates.⁵⁵⁰ If the plaintiff’s condition improves, then the defendant cannot generally recover any compensation unless the compensation was paid out periodically with a “revision clause” where the possibility

⁵⁴⁰ Van Dam *European tort law* 361.

⁵⁴¹ Van Dam *European tort law* 362.

⁵⁴² Moréteau in Koziol (ed) *Basic questions of tort law* 25.

⁵⁴³ Van Dam *European tort law* 362.

⁵⁴⁴ Cass civ 1 June 1932, S 1933 1 49 note Mazeaud. See Van Gerven, Lever and Larouche *Tort* 838; Viney in Bermann and Picard (eds) *French law* 257.

⁵⁴⁵ Viney in Bermann and Picard (eds) *French law* 260. Cf Moréteau in Koziol (ed) *Basic questions of tort law* 86.

⁵⁴⁶ Moréteau in Koziol (ed) *Basic questions of tort law* 87.

⁵⁴⁷ See Cass civ 23 March 1942, Gaz Pal 1942 I 224, S 1942 1 135, D 1942 118 whereafter this principle was confirmed in later decisions; Viney in Bermann and Picard (eds) *French law* 260; Galand-Carval in Magnus (ed) *Unification of tort law: damages* 78.

⁵⁴⁸ Viney in Bermann and Picard (eds) *French law* 260; Galand-Carval in Magnus (ed) *Unification of tort law: damages* 78.

⁵⁴⁹ That the matter has already been adjudicated upon by a competent court and further adjudication is barred.

⁵⁵⁰ See Cass civ 2 7 July 1993 91-20681 91-21474, Bull civ 1993 II 251 138; Van Gerven, Lever and Larouche *Tort* 844-845; Viney in Bermann and Picard (eds) *French law* 260.

of the plaintiff's position improving was foreseen.⁵⁵¹ Revision of an award is only possible if there is a change in the physical condition of the plaintiff. A change in one's economic circumstances is irrelevant for this purpose, except for index-linked periodical payment awards, as it is concerned with the monetary assessment of the award where the *res judicata* rule would apply.⁵⁵² A lump sum or periodical payments may be awarded without the plaintiff requesting which form of payment⁵⁵³ and both types of awards may be revised. The only limitation in revising periodical or lump sum payments is the *res judicata* rule.⁵⁵⁴ There are no detailed rules or guidelines on the assessment of future loss and the courts rarely provide reasons or assumptions in respect of their calculations. Thus in French law, the debate on whether a mathematical calculation should be followed, or a gut-feel approach, has not arisen.⁵⁵⁵

Future loss of income is recognised as one of the heads of damages that may be claimed.⁵⁵⁶ The calculation of the award is not based on a mathematical assessment, but on the adjudicator's discretion based on the circumstances of the case (leaning more towards the gut-feel approach). No reasons or mathematical justifications are provided.⁵⁵⁷ Loss of income is usually based on the plaintiff's annual income (concrete element) and life expectancy (based on statistics). In French law, future loss of income is awarded "without any discount for contingencies".⁵⁵⁸ Compensation is, as a rule, not awarded for "loss of earning capacity", only for loss of income. If the plaintiff is a child, retired person or vagabond, then he will not be entitled to loss of chance to earn an income. However, if the plaintiff was temporarily unemployed at the time of the delict, he could then recover compensation for the loss of a chance to earn an income.⁵⁵⁹ A housewife who cannot perform housework as she used to before the delict, is entitled

⁵⁵¹ See Cass Req 30 December 1946, D 1947 Jur 178; Cass civ 2 12 October 1972 70-13459, Bull civ 1972 II 245 200, D 1974 Jur 536; Van Gerven, Lever and Larouche *Tort* 842-844; Viney in Bermann and Picard (eds) *French law* 260.

⁵⁵² Van Gerven, Lever and Larouche *Tort* 876.

⁵⁵³ See Cass civ 2 29 April 1994, Resp Ass 1994 Com 243 (referred to by Van Gerven, Lever and Larouche *Tort* 838-839).

⁵⁵⁴ Van Gerven, Lever and Larouche *Tort* 838.

⁵⁵⁵ Van Gerven, Lever and Larouche *Tort* 838.

⁵⁵⁶ Van Gerven, Lever and Larouche *Tort* 884.

⁵⁵⁷ Van Gerven, Lever and Larouche *Tort* 884.

⁵⁵⁸ Galand-Carval in Magnus (ed) *Unification of tort law: damages* 82, 84.

⁵⁵⁹ The lost chance to earn an income is calculated based on a percentage (representing the lost chance) of the average income the claimant would have earned but for the delict. This calculation would not apply to a young child or student who has not yet decided on his future career. See Galand-Carval in Magnus (ed) *Unification of tort law: damages* 82.

to patrimonial loss in respect of employing someone, which is deemed “loss of working capacity” and is not synonymous with loss of earning capacity.⁵⁶⁰ For example, a twenty-three-year-old woman without a profession was injured in a motor vehicle accident. She claimed damages for loss of “working capacity” and was awarded the damages by the appeal court. However, the defendant stated that the claim for loss of working capacity was hypothetical, as there was no proof of her pursuing any professional activity in the future. The *Cour de Cassation* confirmed that she was entitled to loss of working capacity.⁵⁶¹ The *Cour de Cassation* has held that an injured plaintiff is entitled to damages in spite of voluntary generous assistance from family members and whether or not expenses were in fact incurred. The reason behind providing the injured with compensation is to ensure that he is able to pay for professional assistance, as gratuitous assistance may cease at any time.⁵⁶²

In a case⁵⁶³ where a woman was involved in a motor vehicle accident and became permanently disabled, her chances of being promoted and obtaining a higher pension were affected. She sued the driver of the motor vehicle that caused her injuries for loss of a chance to receive a higher pension. The *Cour de Cassation* held that even though it was uncertain whether the promotion would have materialised, the damage was direct and certain. The defendant’s *faute* had eliminated the probability of the positive event happening. She was therefore entitled to compensation for the loss of chance of being promoted and obtaining a higher pension.

In respect of personal injury or other loss, the plaintiff is not expected to mitigate his loss⁵⁶⁴ and his compensation may not be reduced for failure to mitigate his injury for the benefit of the defendant.⁵⁶⁵ In *Pourpour v Reynaud*,⁵⁶⁶ the plaintiff was injured in a

⁵⁶⁰ Galand-Carval in Magnus (ed) *Unification of tort law: damages* 82.

⁵⁶¹ Cass civ 2 28 April 1966, Bull civ 1996 II 498. See discussion of this case by Borghetti in Winiger (ed) *Digest of European tort law volume 2: essential cases on damage* 176.

⁵⁶² Van Gerven, Lever and Larouche *Tort* 886.

⁵⁶³ Cass crim 4 December 1996 96-81163, Bull crim 1996 445 1301. See discussion of this case by Borghetti in Winiger (ed) *Digest of European tort law volume 2: essential cases on damage* 1084-1085.

⁵⁶⁴ See Cass civ 1 2 July 2014 13-17599 which dealt with monetary loss. See Séjean and Knetsch 2014 *European tort law yearbook* 206-207.

⁵⁶⁵ Cass civ 2 19 June 2003 00-22302, Bull civ 2003 II 203 171. See Moréteau 2003 *European tort law yearbook* 171; Van Dam *European tort law* 379; Viney in Bermann and Picard (eds) *French law* 261.

⁵⁶⁶ Cass crim 3 July 1969, JCP 1970 II 16447. See discussion of this case in Van Gerven, Lever and Larouche *Tort* 809-810.

motor vehicle accident caused by the defendant and refused to undergo surgery which could have improved his condition according to an expert opinion. The *Cour de Cassation* confirmed that the plaintiff did not need to mitigate his loss by undergoing surgery. Thus his damages could not be reduced, as the surgery carried a real risk of harm.⁵⁶⁷ Lafay, Moréteau and Pellerin-Rugliano⁵⁶⁸ point out that this approach is applied generally even where surgical operations are not involved and this may not be in line with the principle of fairness between the defendant and the plaintiff, in the sense that the plaintiff is free to act contrary to the standard of the reasonable person. The plaintiff's refusal to undergo treatment, which may result in increased compensation that the defendant must pay to the plaintiff, may be considered unreasonable, depending on the circumstances. It is submitted though that in such a case, the plaintiff is simply exercising a choice that he is by law entitled to make. Lafay, Moréteau and Pellerin-Rugliano⁵⁶⁹ state that such unreasonable conduct may however be deemed a *faute*, breach of a legal duty or standard. Thus the plaintiff's *faute* should be considered, where present in the circumstances, otherwise it seems unfair to compensate the plaintiff. Another view is that it may result in the plaintiff being overcompensated which is also contrary to the full reparation principle and increases the costs of social solidarity. The principle of "equivalence between the harm and compensation" entails that the plaintiff must not be unduly enriched.⁵⁷⁰

The principle of "equivalence" prevents recovery of compensation exceeding the real value of the damages by combining all benefits received, whether from private insurance benefits, social security benefits, or "guarantee or indemnification funds", with the damages payable by the defendant.⁵⁷¹ Naturally, this does not mean that the defendant pays less as various statutes entitle the insurer, employer and the state to subrogation claims against the defendant.⁵⁷² Benefits which replace a person's income, in terms of an employment contract or social security scheme may be

⁵⁶⁷ See also Cass civ 2 19 June 2003 00-22302, Bull civ 2003 II 203 171 (where the *Cour de Cassation* held that the plaintiff need not mitigate his loss by undergoing psychological treatment); Van Dam *European tort law* 379; Lafay, Moréteau and Pellerin-Rugliano 2003 *European Tort law yearbook* 171-174.

⁵⁶⁸ Lafay, Moréteau and Pellerin-Rugliano 2003 *European Tort law yearbook* 171-174.

⁵⁶⁹ Lafay, Moréteau and Pellerin-Rugliano 2003 *European Tort law yearbook* 171-174.

⁵⁷⁰ Viney in Bermann and Picard (eds) *French law* 261.

⁵⁷¹ See Viney in Bermann and Picard (eds) *French law* 261; Galand-Carval in Magnus (ed) *Unification of tort law: damages* 78.

⁵⁷² Galand-Carval in Magnus (ed) *Unification of tort law: damages* 78.

deducted from the award.⁵⁷³ Donations, as well as monies received from private accident insurance schemes in respect of loss of income, are non-deductible.⁵⁷⁴ The purpose of disability pensions is considered to render assistance and not compensate the plaintiff. Therefore it is not deducted.⁵⁷⁵

South African, Anglo-American and French law seem to take a similar approach in avoiding overcompensating the plaintiff by deducting certain benefits received by the plaintiff as a result of the delict or tort.⁵⁷⁶

4.2 Non-patrimonial loss

In France, compensation for non-patrimonial loss is not readily awarded because the idea behind obtaining money out of one's tears is considered perturbing.⁵⁷⁷ Nevertheless it is awarded and recently the *Cour de Cassation* has even held that it is possible for a juristic person to be entitled to non-patrimonial loss.⁵⁷⁸

Non-patrimonial loss is claimed for the diminution in a person's well-being, which is interpreted widely and includes a claim for: mental and moral harm which includes grief and sorrow (*prejudice physiologique*);⁵⁷⁹ mental and physical harm (*souffrances morales ou physiques*); infringement of personality rights; injury consequential to the infringement of bodily integrity which includes pain and suffering (*pretium doloris*); pain and suffering suffered by persons affected by the injury or death of the primary victim (*prejudice d'affection*)⁵⁸⁰ or due to the death of a beloved animal;⁵⁸¹ "aesthetic damage" (*prejudice esthétique*); loss of amenities or enjoyment (*prejudice*

⁵⁷³ See Cass civ 2 9 November 1976 75-11737, Bull civ 1976 II 302 238; Cass civ 2 17 April 1975 73-14042; Bull civ 1975 II 110 90; Van Dam *European tort law* 373.

⁵⁷⁴ Van Dam *European tort law* 374.

⁵⁷⁵ Van Dam *European tort law* 374.

⁵⁷⁶ See chapter 3 para 6.5; chapter 4 para 5.4; chapter 5 para 5.6; Van Dam *European tort law* 373.

⁵⁷⁷ See Moréteau in Koziol (ed) *Basic questions of tort law* 24-25.

⁵⁷⁸ See Cass com 15 May 2012 11-10278, Bull com 2012 IV 101, D2012 2285 note Dondero, JCP 2012 1224; Moréteau in Koziol (ed) *Basic questions of tort law* 25.

⁵⁷⁹ Galand-Carval in Magnus (ed) *Unification of tort law: damages* 81.

⁵⁸⁰ See Van Dam *European tort law* 352; Van Gerven, Lever and Larouche *Tort* 62.

⁵⁸¹ See Cass civ 1 16 January 1962, D 1962 199, JCP 1962 II 12577 note Esmein: € 230 in respect of a mare; Caen 30 October 1962, D 1962 92, JCP 1962 II 12954, RTDciv 1963 93 observations Tunc: € 135 in respect of a dachshund; Van Dam *European tort law* 354.

d'agrément);⁵⁸² and “sexual injury” (*prejudice sexuel*)⁵⁸³ which is separate from loss of amenities.⁵⁸⁴ There is a list, called the “*Nomenclature Dintilhac*” which is rather long and generally refers to the “possible miseries of our human condition”.⁵⁸⁵ There is a difference between *dommage* and *prejudice*. *Dommage* refers to the harm while *prejudice* refers to the consequence of harm. However, even though there is a distinction, the two terms are used synonymously by the courts and in the CC.⁵⁸⁶

Compensation for non-patrimonial loss often encompasses a punitive element. For example, in an instance of infringement of privacy, substantial compensation is often awarded in order to punish the defendant.⁵⁸⁷ In the French law of delict, there is no specific method or rule in respect of assessing non-patrimonial loss and it is in the discretion of the courts. However the French courts have established “judicial tariffs” (*barèmes d'indemnisation*) or rely on publications published periodically by the *Jurisclasseur* (such as the “*tableaux de jurisprudence des cours d'appel*”), and special publications by the *Gazette du Palais (Indemnités)*. Even though these publications are commonly referred to in particular with regard to personal injuries, the *Cour de Cassation* has emphasised that they should only be used as guidelines. The rule of thumb is to take a prior award and adjust it, taking into account inflation and the “personal, individual and concrete situation of the victim”.⁵⁸⁸

In French law, a plaintiff who is in a coma, completely unconscious or in a vegetative state, may be entitled to claim for non-patrimonial loss.⁵⁸⁹ The *Cour de Cassation*⁵⁹⁰ adopted an objective approach in assessing damage. It is perceived that even though a victim is in an unconscious or vegetative state, such person may feel pain and the

⁵⁸² Van Dam *European tort law* 364. See also Viney in Bermann and Picard (eds) *French law* 257; Van Gerven, Lever and Larouche *Tort* 121.

⁵⁸³ Sexual injury as one of the separate heads of damages refers to loss of sexual capacities to have children. See CA Lyon 2 February 2006, CT 0030 discussed by Borghetti in Winiger (ed) *Digest of European tort law volume 2: essential cases on damage* 525.

⁵⁸⁴ Cass civ 2 6 January 1993 91-15391, Bull civ 1993 II 6 3. See Van Gerven, Lever and Larouche *Tort* 121 fn 168.

⁵⁸⁵ Moréteau in Koziol (ed) *Basic questions of tort law* 41.

⁵⁸⁶ See Moréteau in Koziol (ed) *Basic questions of tort law* 37.

⁵⁸⁷ Galand-Carval in Magnus (ed) *Unification of tort law: damages* 77.

⁵⁸⁸ Galand-Carval in Magnus (ed) *Unification of tort law: damages* 81.

⁵⁸⁹ See Van Dam *European tort law* 365; Galand-Carval in Magnus (ed) *Unification of tort law: damages*; Moréteau in Koziol (ed) *Basic questions of tort law* 40.

⁵⁹⁰ Cass crim 5 January 1994 93-83050, Bull Crim 1994 5 8, JCP 1995 IV 862. See Moréteau in Koziol (ed) *Basic questions of tort law* 40 fn 187.

victim's failure to communicate or move is considered a harm. By excluding compensation for non-patrimonial loss, it would be the same as saying the person was dead which is contrary to human dignity.⁵⁹¹ In one particular case,⁵⁹² the plaintiff was involved in a motor vehicle accident, as a result of which he suffered a brain injury and was in a prolonged coma. The plaintiff sustained temporary incapacity for almost three years, followed by permanent incapacity and considerable aesthetic damage. He was unable to enjoy any recreations or leisure activities. The appeal court found it reasonable to award the plaintiff compensation for: infringement of his bodily integrity; costs relating to medical and hospital expenses; non-patrimonial loss for the plaintiff as well as for his mother, father and siblings (considered as secondary victims).⁵⁹³ The *Cour de Cassation*⁵⁹⁴ held that even a person in a vegetative state is in principle entitled to any of the heads of damages and all of the plaintiff's loss, in full, may be claimed. The principal of "*reparation intégrale*" is applied liberally finding that compensation for non-patrimonial loss is not irrecoverable merely because the victim cannot feel and because he is in a vegetative state.⁵⁹⁵

French law does not limit the type of persons entitled to claim non-patrimonial loss for grief⁵⁹⁶ or loss of affection (*perte d'affection*) stemming from the injury⁵⁹⁷ or death of a loved one. Thus a fiancé,⁵⁹⁸ registered or unregistered partner, is entitled to claim.⁵⁹⁹ Blood relatives or relatives related by marriage are entitled to claim non-patrimonial loss (*prejudice d'affection*). It is presumed (but may be rebutted) that there is an "affectionate relationship between the relative and deceased" and the plaintiff must

⁵⁹¹ See Cass crim 5 October 2010 D 2010 353; Cass crim 26 March 2013, JCP 2013 675 referred to by Moréteau in Koziol (ed) *Basic questions of tort law* 40.

⁵⁹² CA Paris 10 November 1983.

⁵⁹³ See also Cass civ 1 29 November 1989 88-10075, Bull civ 1989 I 369 248; Moréteau in Koziol (ed) *Basic questions of tort law* 41 fn 190. Van Gerven, Lever and Larouche *Tort* 118-119

⁵⁹⁴ Cass civ 2 22 February 1995 92-18731, Bull civ 1995 II 61 34; Cass civ 2 28 June 1995 93-18465, Bull civ 1995 II 224 129. See Van Dam *European tort law* 365; Van Gerven, Lever and Larouche *Tort* 118-120.

⁵⁹⁵ Generally, compensation for patrimonial and non-patrimonial loss are transmissible to the heirs on the death of the injured (who was in an unconscious or vegetative state) - see Cass ch mixte 30 April 1976 74-90280, Bull ch mixte 1976 3 2; Van Gerven, Lever and Larouche *Tort* 122.

⁵⁹⁶ See Cass civ 13 February 1923, DP 1923 1 52 note Lalou. See discussion of this case by Borghetti in Winiger (ed) *Digest of European tort law volume 2: essential cases on damage* 523-524.

⁵⁹⁷ Cass crim 9 February 1989 87-81359, Bull crim 1989 63 173, D 1989 614 note Bruneau. See Van Dam *European tort law* 371.

⁵⁹⁸ Cass crim 5 January 1956, D 1956 216. See Van Dam *European tort law* 371.

⁵⁹⁹ See authority cited by Van Dam *European tort law* 371 fn 129.

prove that he was affected by the deceased's death.⁶⁰⁰ The relative's injury need not be exceptionally serious but there must be certainty.⁶⁰¹

For example, in a case⁶⁰² where a race horse was electrocuted and died in a stable, the owner and trainer of the race horse were entitled to compensation for non-patrimonial loss and loss of affection for the horse. The owner was also entitled to patrimonial loss (for loss of the value of the animal as well as financial loss). In a case⁶⁰³ where an author was entrusted with photos which he required in order to write a book, he sent the photographs back to the owner via the normal postal service and they got lost. The owner then sued the author. The appeal court found the author negligent and he was ordered to pay compensation for "sentimental and financial harm" (*prejudice affectif et financier*). Although this case dealt with contracts, there is no reason why compensation for sentimental harm cannot be claimed in delict.⁶⁰⁴

Even though there are publications and prior awards which provide objective guidance on the award for non-patrimonial loss, the courts take into account inflation and the subjective factors relating to the personal circumstances of the plaintiff. This relates to the fair and reasonable approach applied in South African and Anglo-American law. The principal of "*reparation intégrale*" is applied very liberally in France (when compared to other jurisdictions such as South Africa), in so far as even a person in a vegetative state is in principle entitled to non-patrimonial loss. Furthermore, French law does not limit the type of persons entitled to claim non-patrimonial loss to only family members, which is reasonable as not only a relationship between relatives is deemed to be a close relationship and this is arguably more in step with reality. The plaintiff need only prove that he was affected by the deceased's death and that the harm is certain. The fact that the harm must be certain and direct applies as limiting factors, which are reasonable.

⁶⁰⁰ Van Dam *European tort law* 371.

⁶⁰¹ Cass civ 2 23 May 1977 75-15627, Bull civ 1977 II 139 96, JCP 1977 IV 187. See Van Dam *European tort law* 371; Galand-Carval in Magnus (ed) *Unification of tort law: damages* 83.

⁶⁰² Cass civ 1 16 January 1962, JCP 1962 II 12557 note Esmein, RTDciv 1962 316 observations Tunc. See discussion of this case by Borghetti in Winiger (ed) *Digest of European tort law volume 2: essential cases on damage* 729-730.

⁶⁰³ CA Lyon 27 January 2005 03/06422.

⁶⁰⁴ See discussion of this case by Borghetti in Winiger (ed) *Digest of European tort law volume 2: essential cases on damage* 730.

4.3 Conclusion

Cousy⁶⁰⁵ points out that with the principle of full reparation, the award focuses on the extent of the loss and does not focus on “the gravity of the reprehensible nature of the behaviour which caused the damage”. French law definitely follows a pro-victim approach and the fact that courts may easily award reparation in kind (which includes a retraction of a statement or apology) as well as reparation in terms of monetary value, with the right to award periodical or lump sum payments shows that it employs a practical, flexible method in terms of reparation. Any kind of loss is compensable and a mathematical approach is not always followed. Instead, the courts are at liberty to make an award based on the circumstances of the case. Naturally, the full reparation principle encourages compensating the plaintiff in full but not more than he should be entitled to. This is reasonable and fair.

What is interesting to note in French law, is that if a plaintiff’s condition deteriorates, he may still provide proof of further harm after the date of judgment which means that the once-and-for-all rule as applied in South African and Anglo-American law is not adhered to in France. However, it seems that this rule in France applies to personal injury. This may be justified and reasonable, as in other jurisdictions it is a possibility that a person’s condition may deteriorate in a manner that was not foreseeable at the time of judgment. On the other hand not strictly adhering to the once-and-for-all rule may be considered unreasonable from the defendant’s point of view, because he may never have certainty that his liability has been satisfied, it also does not promote legal certainty and may cause a relative proliferation of litigation. However, with a strong victim bias in France, it may still as a whole be considered to be reasonable. To conclude, though, the influence of reasonableness on the element of damage in French law is mainly implicit. France follows a rather strong pro-victim approach and pro-compensation bias.

The influence of reasonableness on liability for one’s own personal conduct in terms of Article 1382 and 1383 of the *CC* is generally implicit. French law does not specifically refer to the concept of reasonableness in determining the elements of

⁶⁰⁵ 2001 *European tort law yearbook* 32.

personal liability for one's own conduct but it is certainly implied. French law is similar to South African law in respect of the elements required for liability and the generalising approach followed. In French law, a *fait générateur*, a generating or triggering act or event is required. This is similar to the requirement of conduct in South African law. This element is implied and the courts do not theorise about the element or have an issue establishing whether the element is present. Because the conduct does not need to be voluntary in French law, whether there was a generating act or event is purely a factual question. Nevertheless the influence of reasonableness on "*fait générateur*" is implicit as it is in principle reasonable to hold a defendant liable in delict only if a "*fait générateur*" is present with the remaining requirements. A failure to act (omission) even in French law may be considered wrongful and unreasonable in the circumstances of the case if there was a general duty to act positively in order to prevent harm. The concept of *faute* in French law is wide enough to encompass wrongfulness and fault in the form of either negligence or intention. There is a difference between these implicit elements. The influence of reasonableness on wrongfulness and intention is mostly implicit but more explicit on negligence. Wrongfulness lies in the infringement of a right (abuse of a right), breach of a statutory rule (which is considered unreasonable) or general duty to act reasonably. Negligence is established even if there is a slight deviation from the standard of the "good family father". The deviation relates to unreasonable conduct. French law requires simple fault (simple negligence) in certain instances, for example in medical malpractice claims and more serious forms of fault such as intention to harm in respect of infringements of rights. French law is pragmatic and all that is required is a *faute*, whether it is in the form of wrongfulness, negligence or intention. There are different forms of fault, but the French have not found the need to theorise about the forms of fault. Thus if there is intention, whether in the form of intention to harm or in its attenuated form such as bad faith, then it is implicitly unreasonable and a *faute* is present. Wrongfulness, negligence and intention all relate to unreasonable conduct. The influence of reasonableness in determining causation is implicit. The French courts make use of different theories and factors but in the end reach a decision based on whether it is reasonable, to impute liability on the defendant. In determining damages, the aim is to compensate the plaintiff fully for his loss, but no more than is necessary which is reasonable. Any damage is compensable as long as it is not for loss of illegal income, which is also reasonable. The courts then award damages based on a fair

and reasonable approach. In the interest of compensating the plaintiff fully, the plaintiff is even entitled to damages after the date of judgment, provided the damages are personal, certain and direct. Thus the influence of reasonableness on the element of damage is mainly implicit.

5. Strict liability

French law is rather unique in that fault liability is seen as the exception. For example, there is specific legislation regulating *inter alia*: loss or injury due to an accident at work;⁶⁰⁶ loss caused by dangerous installations;⁶⁰⁷ loss or injury resulting from road accidents;⁶⁰⁸ loss or injury resulting from defects in construction of buildings;⁶⁰⁹ and loss or injury sustained by receiving contaminated blood.⁶¹⁰ For the purposes of this study, only strict liability relating to the so-called “act of a thing” and the act of another for whom one is responsible will be discussed.

5.1 *Strict liability for the act of a thing in one’s custody in terms of Article 1384(1) of the CC*

A thing can be an animate or inanimate object, moveable or immovable, but not a live person’s body or snow.⁶¹¹ Liability for the “act of a thing” can ensue if there was: physical contact between the plaintiff or his property and a moveable thing (such as a falling rock); physical contact between the plaintiff or his property and a non-moveable thing (the thing is usually defective or not in a state that is normally expected);⁶¹² and even if there was no physical contact between the plaintiff or his property and the thing. In this latter instance, the plaintiff must still prove that the thing caused harm, for

⁶⁰⁶ Act of 9 April 1898.

⁶⁰⁷ Act of 10 December 1917.

⁶⁰⁸ *Loi Badinter*.

⁶⁰⁹ Law no 78-12 of 4 January 1978 (as amended). See Van Gerven, Lever and Larouche *Tort* 552.

⁶¹⁰ Law no 93-5 of January 1993 (as amended). See Van Gerven, Lever and Larouche *Tort* 553.

⁶¹¹ Van Dam *European tort law* 62.

⁶¹² For example, see Cass civ 2 15 March 1978 77-10342, Bull civ 1978 II 85 67, D 1978 IR 406 where the *Cour de Cassation* held that if a person slips on stairs in a ski resort where it is normal to find snow on the steps, there is no “act of a thing” and therefore the custodian of the stairs is not liable. See Van Dam *European tort law* 63.

example, where the plaintiff swerves his vehicle in order to avoid colliding with another stationary vehicle.⁶¹³

The custodian of the thing (*gardien de la chose*) is therefore the person who is liable for the act of the thing which caused harm to the plaintiff. Even though the owner of the thing is presumed to be the custodian of the thing, this presumption may be rebutted by providing proof that at the time when the harm was caused, another person had obtained “‘effective and independent power of use, direction and control’ over the thing”.⁶¹⁴ In *Connot v Franck*,⁶¹⁵ a thief who was unidentified had stolen a motor vehicle and thereafter caused an accident, in which a person died. The plaintiff, the wife of the deceased, sued the owner of the motor vehicle and the owner submitted that he was not the custodian of the motor vehicle at the time of the delict. The *Cour de Cassation* confirmed that at the time he was not in possession of the thing and could not use, direct, or control it. Therefore he was not liable under Article 1384(1). A defence that may be applied is transfer of custodianship where the defendant must prove that at the time the thing caused damage, he was not the custodian of the thing.⁶¹⁶ However, such transfer of custodianship “often implies a duty on the defendant to inform the recipient of custodianship of the risks of handling the thing and involves the ability of the new custodian to prevent damage”.⁶¹⁷ It is submitted that whether a person is the custodian of a thing at the time of the delict is a factual question. The rule that one must be the custodian of the thing at the time of the delict is a reasonable rule. It would be unreasonable if, for example, an owner is liable for damages caused by his motor vehicle in an accident, where such motor vehicle was under the “effective and independent power of use, direction and control” by another person.

The custodian of the thing may escape liability, or liability may be limited, by proving an external or extraneous cause, (*cause étrangère*) which must have been “an

⁶¹³ Van Dam *European tort law* 63.

⁶¹⁴ See Cass Ch réun 2 December 1941 (*Franck v Connot*), DC 1942 25, S1941 I 217, JCP 1942 II 1766. See Van Dam *European tort law* 64; Van Gerven, Lever and Larouche *Tort* 565; Viney in Bermann and Picard (eds) *French law* 250.

⁶¹⁵ Cass Ch réun 2 December 1941 DC 1942 25, S 1941 I 217, JCP 1942 II 1766. See Van Gerven, Lever and Larouche *Tort* 565.

⁶¹⁶ See Cass civ 2 22 January 1970 68-12064, Bull civ 1970 II 24 17, D 1970 228, RTD civ 1971 150 observations Durry; Van Dam *European tort law* 66.

⁶¹⁷ See Cass civ 1 9 June 1993 91-10608 91-11216, Bull civ 1993 I 213 148, JCP 1994 II 22202; Van Dam *European tort law* 66.

unforeseeable and unavoidable external cause of the damage”.⁶¹⁸ This may be due to an act of nature (*force majeure*); act of a third party; the act of the plaintiff, where contributory negligence on the part of the plaintiff (*faute de la victime*) may be raised; an “accidental event (*les cas fortuit*); or by an act of the state (*le fait du prince*)”.⁶¹⁹

A minor⁶²⁰ or mentally incapacitated person can be a custodian of a thing, even if it is for a moment.⁶²¹ Article 1384(1) does not apply to damage caused by public things.⁶²² There is a distinction between the structure and composition of a thing (*garde de la structure*), and the act of a thing (*garde du comportement*) in that transporters or holders of things can be held liable for the act of things while the owner is the custodian of the structure and composition of the thing. Furthermore the manufacturer of a thing is also the custodian of the composition and structure of the thing. In this way, if the thing is defective, the manufacture may be held liable.⁶²³ In France there is specific legislation regulating product liability.⁶²⁴ It is possible that a number of persons may be custodians of a thing at the same time. This is referred to as common custodianship and each co-custodian can be held liable in full for damage caused by the thing.⁶²⁵

Saleilles and Josserand⁶²⁶ proposed the application of the “risk theory” in the French law of delict. According to this theory, a person who acquires an advantage from an activity that involves risk should bear the loss caused by such risk. Van Dam⁶²⁷ opines that the “risk theory” and “*la théorie de la garantie*” whereby an insured person should bear the risk and loss emanating from an accident, had a hand in creating strict liability

⁶¹⁸ Van Dam *European tort law* 61. See Ass plén 14 April 2006 04-18902, Bull Ass plén 2006 6 12, D 2006 1577.

⁶¹⁹ Viney in Bermann and Picard (eds) *French law* 250. See also Van Dam *European tort law* 60-61, 465; Galand-Carval in Spier (ed) *Unification of tort law: liability for damage caused by others* 87.

⁶²⁰ See Ass plén 9 May 1984 80-93481, Bull crim 1984 164, JCP 1984 II 20255 note Dejean de la Bathie, D 1984 525 note Chabas, RTDciv 1984 509 observations Huet; Van Dam *European tort law* 64.

⁶²¹ Van Dam *European tort law* 64.

⁶²² Van Dam *European tort law* 64.

⁶²³ Van Dam *European tort law* 64-65.

⁶²⁴ Act 98-389 of 19 May 1998. See Van Gerven, Lever and Larouche *Tort* 553. For purposes of this study, this legislation will not be discussed further.

⁶²⁵ See Cass civ 2 7 November 1988 87-11008 87-17552, Bull civ 1988 II 214 116; Van Dam *European tort law* 65.

⁶²⁶ Referred to in Van Gerven, Lever and Larouche *Tort* 554.

⁶²⁷ *European tort law* 61.

rules.⁶²⁸ These strict liability rules reflect solidarity which is linked to fraternity.⁶²⁹ Viney⁶³⁰ explains that Article 1384(1) to which the founders of the CC had not intended to provide any specific meaning, was used as a basis to introduce liability for the acts of things under one's custody. Thus all that is required in addition to the act of the thing, is a causal link between the thing and the harm. *Faute* is not required.⁶³¹ In 1896, the *Cour de Cassation*⁶³² applied this form of strict liability in the well-known decision of *Teffaine*. In this case, damage was caused by an explosion as a result of a defective engine of a tugboat and liability was extended for the act of a thing. Stemming from *Teffaine*, the *Cour de Cassation* liberally applied Article 1384(1) to include holding a defendant liable for damage caused by acts of the person he was responsible for, or things (moveable or immovable) he was responsible for.⁶³³ The Article was applied whether or not the thing was dangerous, had a latent defect, or was controlled by a human being.⁶³⁴ In *Jand'heur II*,⁶³⁵ where a child was hit by a lorry, rebuttable *faute* for damage caused by the act of a thing became strict liability for the act of a thing.⁶³⁶ This case paved the way for the courts to use this provision for general liability as a result of damage caused by a thing. Where a thing causes harm while in motion or explodes, an active role of the thing is presumed as well as a causal link. The plaintiff need not provide evidence pertaining to the causal link.⁶³⁷ For example, the court first applied Article 1384(1) where damage was caused by a lift,⁶³⁸ a falling

⁶²⁸ Van Dam *European tort law* 61.

⁶²⁹ Van Dam *European tort law* 61.

⁶³⁰ In Bermann and Picard (eds) *French law* 239.

⁶³¹ Viney in Bermann and Picard (eds) *French law* 250.

⁶³² Cass Civ 18 June 1896, S 1897 1 17 note Esmein, D 1897 1 4333, note Saleilles. See Van Dam *European tort law* 60; Viney in Bermann and Picard (eds) *French law* 249; Moréteau in Koziol (ed) *Basic questions of tort law* 67.

⁶³³ Van Dam *European tort law* 60.

⁶³⁴ Viney in Bermann and Picard (eds) *French law* 250.

⁶³⁵ Cass réun 13 February 1930, DP 1930 I 57, note Ripert, S 1930 I 121, note Esmein and Josserand DH 1930 25.

⁶³⁶ See Van Dam *European tort law* 60; Van Gerven, Lever and Larouche *Tort* 110.

⁶³⁷ See Viney and Jourdain *Les conditions de la responsabilité* 666; Moréteau in Koziol (ed) *Basic questions of tort law* 69.

⁶³⁸ Req 6 March 1928, DP 1928 I 97 note Josserand, S 1928 I 225 note Hugueney; Van Dam *European tort law* 464. See also Cass civ 2 29 May 1996 94-18129, Bull Civ 1996 II 117 72, D 1996 IR 156. See Van Dam *European tort law* 464 fn 14

tree,⁶³⁹ landslide,⁶⁴⁰ burst dyke⁶⁴¹ and an escalator.⁶⁴² However, if the thing was stationary or if there was no contact between the thing and another person or his property, then the plaintiff must provide proof of the active role of the thing – that is, proof that the thing caused the harm.⁶⁴³ This is usually proved by showing that the thing was defective, “behaved abnormally” or “put in the wrong place”.⁶⁴⁴

It is common to refer to the thing as manifesting abnormal behaviour; that it was “subject to some internal defect”;⁶⁴⁵ or “that it was not maintained properly”.⁶⁴⁶ However, Moréteau⁶⁴⁷ points out that the *Cour de Cassation* has been departing from this approach, finding the active role in stationary things just from contact between the victim and the thing. He states that this approach is a step back towards the orthodox approach requiring contact. Moréteau⁶⁴⁸ refers to two examples from case law: one where a woman was injured after walking into a transparent glass door;⁶⁴⁹ and another where a young man was injured while intending to spring into a pond by using a springboard but slipped and fell in the shallow water.⁶⁵⁰ The *Cour de Cassation* held the owner of the apartment where the glass door was situated liable, based on the premise that the glass door was fragile and therefore it was abnormal, causing damage. However, the *Cour de Cassation* held that the presence of the springboard at the nautical club was not abnormal and the young man was aware and knew the terrain yet knowingly misused the spring board. The springboard, if used normally, is not dangerous. Moréteau questions why the outcome with the woman walking into the

⁶³⁹ Cass civ 30 April 1952, D 1952 471, JCP 1952 II note Blaevoët. See Van Dam *European tort law* 464 fn 12.

⁶⁴⁰ Cass civ 2 12 May 1966, D 1966 700 note Azard. See Van Dam *European tort law* 464 fn 12.

⁶⁴¹ Cass civ 2 26 April 1990 88-19820, Bull civ 1990 II 79 41, JCP 1990 IV 235. See Van Dam *European tort law* 464 fn 12.

⁶⁴² Cass civ 2 2 April 1997 95-17278, Bull civ 1997 II 109 62, D 1997 IR 105. See Van Dam *European tort law* 464 fn 12.

⁶⁴³ See Cass civ 2 19 March 1980 (*SA Shell Français v SA L'Union maritime de Dragage Cacc*) 78-15838, Bull civ 1980 II 65; Cass civ 2 8 July 1992 91-14304, Bull civ 1992 II 201 99. See Van Gerven, Lever and Larouche *Tort* 561-565; Viney in Bermann and Picard (eds) *French law* 250.

⁶⁴⁴ See Cass civ 2 19 March 1980 (*SA Shell Français v SA L'Union maritime de Dragage Cacc*) 78-15838, Bull civ 1980 II 65; Cass civ 2 8 July 1992 91-14304, Bull civ 1992 II 201 99. See also Moréteau and On 2012 *European tort law yearbook* 253; Van Gerven, Lever and Larouche *Tort* 561-565.

⁶⁴⁵ Viney in Bermann and Picard (eds) *French law* 250.

⁶⁴⁶ See Moréteau in Koziol (ed) *Basic questions of tort law* 70.

⁶⁴⁷ 2005 *European tort law yearbook* 278-280.

⁶⁴⁸ 2005 *European tort law yearbook* 278-280.

⁶⁴⁹ Cass civ 2 24 February 2005 03-13536, Bull civ 2005 II 5.

⁶⁵⁰ Cass civ 2 24 February 03-18135, Bull civ 2005 II 52 49.

glass door is any different from the springboard case. He questions whether there was anything abnormal about the transparent glass door.

Examples from case law may be referred to in order to illustrate how the courts interpret whether the thing “behaved abnormally” (*comportement anormal de la chose*). In one instance the plaintiff fell through the door of a lift shaft. The court held that the damage was caused by “the fact of the thing”.⁶⁵¹ In another case, the plaintiff suffered a fit in a changing room of a swimming pool. She fell and her arm rested on a heating pipe, causing injury. The *Cour de Cassation* held that the swimming pool did not commit a *faute* and the plaintiff was also unable to claim based on Article 1384(1). The *Cour de Cassation* found that the heating was installed in the usual manner.⁶⁵² In a case, the custodian of stairs that were slippery from snow at a ski resort was found not liable as there was no act of a thing.⁶⁵³ In a case where a child fell from an escalator, the *Cour de Cassation* held that the custodian of the escalator in a hotel was liable for the damage.⁶⁵⁴

In “*Liebrand 2*”⁶⁵⁵ a shopper walked into a glass panel in a shopping mall. The *Cour de Cassation* confirmed that that the shopping mall and its insurer were liable to the shopper but the damages were reduced by one-third due to the shopper’s own fault of failing to pay adequate attention. The glass was the direct cause of the shopper’s injury. The *Cour de Cassation*⁶⁵⁶ has denied the applicability of the defence *volenti non fit iniuria* with regard to Article 1384(1) of CC. In a case⁶⁵⁷ where a plaintiff tripped in a church which was not well lit. The court held that due to the particular character of the church, the fact that it was semi-lit was justifiable and not abnormal. People visiting the church should be more careful. Thus the church was not held liable.

⁶⁵¹ See Cass civ 2 29 May 1996 94-18129, Bull Civ 1996 II 117 72, D 1996 IR 156. See Van Dam *European tort law* 464 fn 14.

⁶⁵² Cass civ 19 February 1941, DC 1941 85 note Flour. See Van Dam *European tort law* 464.

⁶⁵³ Cass civ 2 15 March 1978 77-10342, Bull civ 1978 II 85 67, D 1978 IR 406. See Van Dam *European tort law* 465.

⁶⁵⁴ Cass civ 2 April 1997 95-17278, Bull civ 1997 II 109 62, D 1997 IR 105. See Van Dam *European tort law* 464 fn 12, 74.

⁶⁵⁵ Cass civ 2 19 February 2004 02-18796, Bull civ 2004 II 75 64. See discussion of this case by Cannarsa *et al* in *European tort law yearbook* 2004 287-288.

⁶⁵⁶ See Cass civ 2 4 November 2010 09-65947, Bull civ 2010 II 176, JCP 2011 12 (note Bakouche). Voluntary assumption of risk while being transported cannot be raised. See Van Dam *European tort law* 61.

⁶⁵⁷ Cass civ 2 19 July 1966, JCP 1967 15228 note Dejean de la Bathie, Gaz Pal 1996 II 222. See Van Dam *European tort law* 477.

If an unauthorised person disregards a notice or warning not to enter a premises and trespasses, his conduct could be regarded as one hundred percent contributorily negligent.⁶⁵⁸ The notice or warning to enter must be clear and visible so that the reasonable visitor will not make a mistake.⁶⁵⁹ If any damage occurs on roads in France, a distinction is made between public and private roads. Most roads are public roads and in such instances, claims are dealt with by the administrative courts. The administrative courts have developed a liability regime relating to public authorities based on fault liability or strict liability (which will be discussed further below).⁶⁶⁰

In respect of a private road, Article 1384(1) may be used to claim damages.⁶⁶¹ The public authority must warn road users of dangerous areas or circumstances, such as a bend in a road or where there is construction work.⁶⁶² However, the public authority need not warn users of for example, heavy rains or oil on the road, unless an accident occurs and the authority is aware of the circumstances. In such instances it is expected of the public authority to as soon as reasonably possible, take measures to avoid further damage.⁶⁶³ For example, the *Council d'État*⁶⁶⁴ did not find the public authority liable for damage where a manhole cover came loose and an accident was caused by it during that same night. The public authority was, however, held liable when the plaintiff fell on icy steps of a pedestrian pass at 10h15. The *Council d'État*⁶⁶⁵ held that by that hour the public authority should have attended to clearing the steps, as by that time pedestrians would be using the pedestrian pass. If a road sign falls on the road, the public authority may be held strictly liable for the damage caused by the road sign (the thing).⁶⁶⁶ The average road user is considered as a reasonable road user.⁶⁶⁷

In respect of strict liability rules, the burden of proof lies with the defendant, whereas in terms of fault liability, the burden of proof generally lies with the plaintiff.⁶⁶⁸

⁶⁵⁸ Van Dam *European tort law* 478.

⁶⁵⁹ Van Dam *European tort law* 479.

⁶⁶⁰ Van Dam *European tort law* 484. See para 6 below.

⁶⁶¹ Van Dam *European tort law* 484.

⁶⁶² Van Dam *European tort law* 485.

⁶⁶³ Van Dam *European tort law* 485.

⁶⁶⁴ CÉ 20 February 1985, RTDpub 1985 78 (Van Dam *European tort law* 485).

⁶⁶⁵ CÉ 21 November 1984, RTDpub 1985 50 (Van Dam *European tort law* 485).

⁶⁶⁶ CÉ 24 April 1985 RTDpub 1986 39 (Van Dam *European tort law* 485).

⁶⁶⁷ Van Dam *European tort law* 488.

⁶⁶⁸ Van Dam *European tort law* 474.

5.1.1 Conclusion

The influence of reasonableness on liability for the act of a thing is predominantly implicit. Firstly the thing must be in a state or behave in a manner that is normally expected. A thing that is defective is considered abnormal and not in a state normally expected or not working as normally expected. Liability will also follow for the act of a thing if it is not put in a place normally expected. Thus it is reasonable to limit liability only to what would normally have been expected. Liability for the act of thing may be excluded if there was an *cause étrangère* that is if damage to the thing was unforeseeable and unavoidable as a result of an act of nature (*force majeure*), act of a third party, act of the plaintiff, an accidental event, or an act of the state. Again, it is reasonable to exclude liability where there is a *cause étrangère*. Liability for the act of a thing may be limited due to the contributory fault on the part of the plaintiff as in *Liebrand*⁶⁶⁹ where liability was reduced due to the shopper's own negligence. Thus the unreasonable conduct of the shopper led to the reduction of her claim for compensation. For example in the case of the church⁶⁷⁰ which was not adequately lit, liability of the church did not follow because of the plaintiff's contributory fault. If a person disregards a notice of warning, such notice of warning (the thing) must be visible and clear to the reasonable visitor and if so the reasonable visitor would heed the warning. Should a person disregard the warning then he acts unreasonably and liability is excluded as a result of his contributory fault.⁶⁷¹ Thus if there is a *faute* on the part of the plaintiff, then liability may be reduced or excluded as a result of the plaintiff's unreasonable conduct.

5.2 *Strict liability for acts of a person for whom one is responsible in terms of Article 1384(1) of the CC*

The French concept of liability for the act of another is somewhat similar to vicarious liability in other jurisdictions, but in French law fault on the part of the person who committed the delict is not a requirement. Common to both concepts is the

⁶⁶⁹ Cass civ 2 19 February 2004 02-18796, Bull civ 2004 II 75 64.

⁶⁷⁰ Cass civ 2 19 July 1966, JCP 1967 15228 note Dejean de la Bathie, Gaz Pal 1996 II 222.

⁶⁷¹ Van Dam *European tort law* 478.

differentiation between personal liability and liability for the act of another.⁶⁷² Article 1384 of the *CC* provides for *inter alia* strict liability of parents for the acts of their children who are still living with them; a teacher or artisan for the acts of their students or apprentices under their supervision; and employers for the act of their employees.⁶⁷³ However, legislation enacted and applicable from 5 April 1997 states that a teacher is no longer held liable for the acts of the student, unless personal fault on the part of the teacher is proven.⁶⁷⁴ In this paragraph, the liability of the employer for the acts of its employee will not be discussed.

For a long period of time it was understood that Article 1384 related to a confined list of instances of strict liability. The liability of the parents and artisans was based on a “rebuttable presumption of fault” while the liability of the employer for the act of his employee was vicarious and strict.⁶⁷⁵ However, stemming from *Teffaine*⁶⁷⁶ and thereafter the landmark decision referred to as “*Blieck*”,⁶⁷⁷ the *Cour de Cassation* held that the general provision in Article 1384(1) permitted it to develop further heads of delictual liability. In *Blieck*, a mentally impaired boy was placed in an institution (Employment Help Centre). He was entrusted to do some unsupervised work outside the centre during the day. One day while working outside the centre, he set fire to the plaintiff’s wood. The damages could not be recovered from the boy. The plaintiff claimed from the institution and the *Cour de Cassation* held that the institution could be held strictly liable in terms of Article 1384(1), as the institution had control and supervision of a permanent nature over the boy. Since this decision, a number of institutions were held liable for acts of persons over which they had permanent or temporary control.⁶⁷⁸ The justification for the liability of the public institution is based

⁶⁷² Galand-Carval in Spier (ed) *Unification of Tort law: liability for damage caused by others* 85.
⁶⁷³ Viney in Bermann and Picard (eds) *French law* 251; Galand-Carval in Spier (ed) *Unification of tort law: liability for damage caused by others* 86.

⁶⁷⁴ See Viney in Bermann and Picard (eds) *French law* 251. Cf Galand-Carval in Spier (ed) *Unification of tort law: liability for damage caused by others* 89-90.

⁶⁷⁵ Galand-Carval in Spier (ed) *Unification of tort law: liability for damage caused by others* 87.

⁶⁷⁶ Cass civ 18 June 1896, S 1897 1 17 note Esmein, D 1897 1 4333, note Saleilles.

⁶⁷⁷ Cass Ass plén 29 March 1991 89-15231, Bull Ass plén 1991 1, D 1991 Jur 324 note Larroumet, JCP 1991 II 21673, conclusions Dontenwille note Ghestin, Gaz Pal 1991 Jur 513 note Chabas. See Van Dam *European tort law* 68-69; Viney in Bermann and Picard (eds) *French law* 253; Galand-Carval in Spier (ed) *Unification of tort law: liability for damage caused by others* 86 fn 4.

⁶⁷⁸ Such as medical and rehabilitation institutions, social services, educational institutions and sports clubs for harm caused by club players. See Cass crim 26 March 1997 95-83957, Bull crim 1997 124 414, JCP 1997 II 22868 and authority cited by Viney in Bermann and Picard (eds) *French law* 253 fn 44-46; Van Dam *European tort law* 69; Galand-Carval in Spier (ed)

on the premise that the public institution takes a “special risk” in running such institution and providing such service (according to the risk theory).⁶⁷⁹ Thus Article 1384(1) allows a plaintiff to claim compensation from the person who cares for, supervises, or has control over the person who caused the damage.⁶⁸⁰ Article 1384(1) may be applied where one is supervising an adult of unsound mind. Liability may be found if the harmful conduct was committed when the defendant had the power to “organize, direct and control the wrongdoer’s way of life”.⁶⁸¹ In a case,⁶⁸² an adult who was mentally impaired and living with his father, attended a specialised institution during the day. On one particular day, he set fire to a building while on his way home from the institution. The plaintiff sued the institution as well as the father, who was his *administrateur legal* (legal guardian). The *Cour de Cassation* held that the claim against the institution failed because, at the time of the delict, he was not under the supervision of the institution. The claim against the father also failed because the child was not a minor. The *Cour de Cassation* has also applied Article 1384(1) in holding amateur sports clubs liable for delicts committed by their players during the course of a game, based on the premise that sports clubs “organize, direct and control activities of their members”.⁶⁸³ Even though liability based on Article 1384(1) has been developed and extended, the *Cour de Cassation* has not extended liability under Article 1384(1) to: school teachers as they are covered by Article 1384(6); extended family members such as grandparents and aunts,⁶⁸⁴ or the legal guardian of a mentally impaired adult, as mentioned above. The *Cour de Cassation* is hesitant to hold natural persons liable under Article 1384(1).⁶⁸⁵

Unification of tort law: liability for damage caused by others 86 fn 5; Van Gerven, Lever and Larouche *Tort* 520-521; Moréteau 2007 *European tort law yearbook* 278.

⁶⁷⁹ Galand-Carval in Spier (ed) *Unification of tort law: liability for damage caused by others* 101.

⁶⁸⁰ Van Dam *European tort law* 69; Galand-Carval in Spier (ed) *Unification of tort law: liability for damage caused by others* 90.

⁶⁸¹ See Galand-Carval in Spier (ed) *Unification of tort law: liability for damage caused by others* 91.

⁶⁸² Cass civ 2 25 February 1998 95-20419, Bull civ 1998 II 62 38, JCP II 10149 note Viney. See Galand-Carval in Spier (ed) *Unification of tort law: liability for damage caused by others* 91.

⁶⁸³ See Cass civ 2 22 May 1995 92-21871, Bull civ 1995 II 155 88, JCP 1995 II 22550 note Mouly; Cass civ 2 3 February 2000 98-11438, Bull civ 2000 II 26 18 (where a rugby player was injured by an unidentified rugby player); Cass Ass plén 29 June 2007, D 2007 2455, JCP 2007 II 10150 note JM Marmayou (where a player was injured when a scrum collapsed and it was not possible to identify who was at fault – the sports club was held liable); Galand-Carval in Spier (ed) *Unification of tort law: liability for damage caused by others* 92; Moréteau 2006 *European tort law yearbook* 278-279.

⁶⁸⁴ Cass civ 2 18 September 1996 94-20580, Bull civ 1996 II 217133, D 1998 Jur 118. See Van Gerven, Lever and Larouche *Tort* 519.

⁶⁸⁵ See Van Gerven, Lever and Larouche *Tort* 519 as well as the cases referred to in fn 311.

In terms of Article 1384(4), the parents of a minor (under eighteen years of age) may be held liable jointly and severally⁶⁸⁶ for damage caused by their minor child if at the time they exercised “parental authority” over such child, that is, if the child still *usually* lives with them.⁶⁸⁷ Thus if a child commits a delict while in another person’s care, the parents will not escape liability. All that needs to be established is that the child is liable to the plaintiff. Fault on the part of the child is not a requirement.⁶⁸⁸ The parents may still be held liable if the child causes harm to another while at school or on a school outing.⁶⁸⁹ It is not necessary to establish that the child directly caused the harm or loss.⁶⁹⁰ Liability is strict, in that the parents cannot raise a defence that “they did not contribute to the child’s harmful act by a lack of supervision or a defective education”.⁶⁹¹ Previously parents were generally not held liable for conduct of older children if they could establish that there was no *faute* on their part; that is, if they could prove that there was no failure on their part in supervising the child, or no failure on their part in respect of the manner in which the child was brought up.⁶⁹² In most instances, the parents were personally at fault but their liability still fell under “*responsabilité du fait d’autrui*” (liability for the act of another).⁶⁹³ But since 1977, stemming from *Bertrand v Domingues*,⁶⁹⁴ lack of supervision as a requirement was discarded.⁶⁹⁵ In this case a twelve-year-old boy caused an accident while riding his bicycle, the *Cour de Cassation* held the boy’s parents strictly liable and lack of supervision as a requirement was discarded. Fault-based liability was changed to so-called objective liability.⁶⁹⁶ Furthermore, stemming from this decision, the only

⁶⁸⁶ Joint liability of both the parents was applicable as a result of legislation of 4 June 1970. See Viney in Bermann and Picard (eds) *French law* 252.

⁶⁸⁷ See Article 1384 (4) of the CC; Cass civ 2 20 January 2000 98-17005, Bull civ 2000 II 15 10; Van Dam *European tort law* 493; Viney in Bermann and Picard (eds) *French law* 252; Galand-Carval in Spier (ed) *Unification of tort law: liability for damage caused by others* 88-89.

⁶⁸⁸ See Galand-Carval in Spier (ed) *Unification of tort law: liability for damage caused by others* 89 fn 14 who refers to an example, Cass civ 2 9 March 2000 98-18095, Bull civ 2000 II 44 31, where a child injured another child with a pencil he was holding. The parents of the boy holding the pencil were held vicariously liable. Cf Van Gerven, Lever and Larouche *Tort* 521.

⁶⁸⁹ Galand-Carval in Spier (ed) *Unification of tort law: liability for damage caused by others* 100.

⁶⁹⁰ Cass Ass plén 9 May 1984 80-93481, Bull crim 1984 164, JCP 1984 II 20255 note Dejean de la Bathie, D 1984 525 note Chabas, RTDciv 1984 509 observations Huet. See Galand-Carval in Spier (ed) *Unification of tort law: liability for damage caused by others* 89 fn 15.

⁶⁹¹ Galand-Carval in Spier (ed) *Unification of tort law: liability for damage caused by others* 85.

⁶⁹² Van Dam *European tort law* 494. Cf Viney in Bermann and Picard (eds) *French law* 252; Galand-Carval in Spier (ed) *Unification of tort law: liability for damage caused by others* 85.

⁶⁹³ Galand-Carval in Spier (ed) *Unification of tort law: liability for damage caused by others* 85.

⁶⁹⁴ Cass civ 2 19 February 1997 94-21111, Bull civ 1997 II 56 32, JCP 1997 II 22848.

⁶⁹⁵ See Viney in Bermann and Picard (eds) *French law* 252.

⁶⁹⁶ Van Gerven, Lever and Larouche *Tort* 523.

defences a parent can rely on is contributory negligence on the part of the plaintiff, or if there was some external cause to the damage.⁶⁹⁷ Article 1384(4) only applies to the parents, not for example to grandparents and there is still uncertainty as to whether it applies to guardians.⁶⁹⁸ In one case,⁶⁹⁹ the parents of a ten-year-old child left him in the care of his grandparents and the child set a canister of petrol alight in a shed. The child sustained burns and the parents sued the grandparents for negligent lack of supervision. The *Cour de Cassation* in terms of Article 1382 of the CC (dealing with personal liability as opposed to strict liability of the parents) dismissed the parents' claim, holding that the child had been staying with his grandparents for over three weeks and was not particularly reckless or undisciplined and therefore did not require special supervision from the grandparents.

The strict liability rule holding the parents liable may apply in instances: where the child committed a *faute* where even an unlawful or wrongful act is sufficient, an “*acte objectivement illicite*” (the child need not be aware of the unlawfulness of his conduct);⁷⁰⁰ if the damage occurred as a result of a “thing” and the child was the custodian of the thing;⁷⁰¹ and where the child directly caused the damage suffered by the plaintiff.⁷⁰² For example, in one case,⁷⁰³ a child injured another child during a rugby game. The child's parents were held liable for the direct causing of injury, even though the child had not committed a *faute*. Article 1384(7) of the CC, however, states that the parents may not be held liable if they could not have prevented the harmful act. This relates to, for example, instances such as *force majeure*⁷⁰⁴ or where there is contributory fault on the part of the plaintiff.⁷⁰⁵ In *Lacouture v Société Pyrotechnique*

⁶⁹⁷ Cass civ 2 19 February 1997 94-21111, Bull civ 1997 II 56 32, JCP 1997 II 22848. See Van Dam *European tort law* 493-494; Viney in Bermann and Picard (eds) *French law* 252.

⁶⁹⁸ See Cass civ 2 25 January 1995 92-18802, Bull civ 1995 II 29 17; Van Dam *European tort law* 493. Galand-Carval in Spier (ed) *Unification of tort law: liability for damage caused by others* 90 refers to Crim 28 March 2000 99-84075, Bull crim 2000 140 416 where the guardian was held liable in an instance where the child accidentally shot and killed a playmate with a rifle.

⁶⁹⁹ Cass civ 2 18 March 2004 03-10600, Bull civ 2004 II 140 118. See Cannarsa *et al* 2004 *European tort law yearbook* 285-287.

⁷⁰⁰ Van Dam *European tort law* 494.

⁷⁰¹ Cass civ 2 10 February 1966, D 1966 332. See Van Dam *European tort law* 494.

⁷⁰² See cases cited by Van Dam *European tort law* 494 fn 17.

⁷⁰³ Cass Ass plén 13 December 2002 00-13787, Bull Ass plén 2002 4 7, D 2003 231 note Jourdain. See Brun 2002 *European tort law yearbook* 199; Van Dam *European tort law* 494.

⁷⁰⁴ See Cass civ 2 19 February 1997 94-21111, Bull civ 1997 II 56 32, JCP 1997 II 22848; Galand-Carval in Spier (ed) *Unification of tort law: liability for damage caused by others* 89.

⁷⁰⁵ See Cass civ 2 1 December 1965, JCP 1966 2 14567; Cass civ 2 2 December 1998 96-22158, Bull civ 1998 292 176; Cass civ 2 20 April 2000 98-18809, Bull civ 2000 66 46; Cass civ 2 9 March 2000 (*Epoux X v Mutuelle Générale de l'Éducation Nationale*) 98-18095, Bull civ 2000

Industrielle et agricole,⁷⁰⁶ a nine-year-old child picked up a discarded firework on the beach which exploded. The parents of the child sued the person looking after the child, the “caretaker”. The caretaker then submitted that there was *faute* on the part of the child, but the *Cour de Cassation* confirmed that there was *faute* on the part of the caretaker and not the child. The *Cour de Cassation* held that the child had not been warned by the caretaker that the firework he picked up was dangerous and that the child could not have been aware that it could explode as the fuses for the firework were already used.

5.2.1 Conclusion

Although the strict liability rule that applies to parents may seem harsh, it is tempered by the fact that almost all French families are protected by liability insurance cover at a minimal cost.⁷⁰⁷ Furthermore most social institutions are insured against civil liability.⁷⁰⁸ It may be argued though that this rule is not really tempered as the parents or institutions have to pay for the insurance but it may be understood and regarded as reasonable where it is apparent that France follows a pro-victim approach ensuring that the plaintiff receives compensation.

The justification for the liability of the acts of the person for whom one is responsible is based on the risk theory. For example, institutions such as medical and rehabilitation institutions, social services, educational institutions and sports clubs take a “special risk” in running such institutions and providing such services. Sports clubs organise, control and direct their member’s activities. Parents who have children living with them have the power and control over their children while raising them. Parents and most institutions therefore have insurance for such potential liability. The responsible parties may, however, not be held liable if there was an extraneous or external cause to the harm sustained. Thus it would not be reasonable to impute liability on the person who

II 44 31; Cass civ 2 29 March 2001 98-20721, Bull civ 2001 II 69 46; Ferreira *Fundamental rights and private law in Europe* 142-143 fn 193.

⁷⁰⁶ Cass civ 2 4 July 1990 89-15177, Bull civ 1990 II 167 84. See discussion of this case in Van Gerven, Lever and Larouche *Tort* 337-338.

⁷⁰⁷ Van Dam *European tort law* 495.

⁷⁰⁸ See Galand-Carval in Spier (ed) *Unification of tort law: liability for damage caused by others* 91.

is responsible for the one who committed a delict if there was an external cause to the harm. Liability may also be limited or excluded due to contributory fault on the part of plaintiff. Thus the unreasonable conduct on the part of the plaintiff can either limit or exclude liability. The influence of reasonableness on strict liability for acts of a person for whom one is responsible in terms of Article 1384(1) of the CC is implicit especially since the word “reasonable” is hardly encountered in French law.

6. Liability of public entities

In respect of liability of public entities, both the law of delict and administrative law (*droit administrative*) may be applicable.⁷⁰⁹ Under French administrative law, there are two liability regimes applicable to public entities. The one is fault-based in instances where an administrative action is deemed unlawful (and is governed by Articles 1382 to 1386 of the CC) and the other is based on a no-fault liability system.⁷¹⁰

With regard to delictual liability of state entities, it will be shown that the influence of reasonableness on the requirements is predominately implicit. There must be: a liability-generating act or omission (*un fait dommageable*); loss or harm suffered by the alleged victim which must be “certain”; an infringement of a “legitimate interest”; and a sufficient causal link between the conduct and the loss or harm.⁷¹¹ A *faute* is usually required, but not in all instances.⁷¹² Loss or injury will usually be deemed “certain” if “it is reasonably certain that a loss will occur”.⁷¹³ The loss or harm must also be “abnormal” which applies as a limitation. If the loss or harm is shared by a substantial portion of society, then the loss or harm will not be considered “abnormal”. The plaintiff must be identified.⁷¹⁴ In respect of the requirement that the loss or harm suffered must be deemed “abnormal” “it must exceed the normal disadvantages to which one can reasonably expect to be exposed in society”.⁷¹⁵ The consequence must be a normal foreseeable and expected consequence of administrative actions.⁷¹⁶ This

⁷⁰⁹ Van Dam *European tort law* 531.

⁷¹⁰ See Van Gerven, Lever and Larouche *Tort* 376-378.

⁷¹¹ Bermann and Picard in Bermann and Picard (eds) *French law* 79.

⁷¹² Bermann and Picard in Bermann and Picard (eds) *French law* 80.

⁷¹³ Bermann and Picard in Bermann and Picard (eds) *French law* 80.

⁷¹⁴ Bermann and Picard in Bermann and Picard (eds) *French law* 80.

⁷¹⁵ Bermann and Picard in Bermann and Picard (eds) *French law* 80.

⁷¹⁶ Bermann and Picard in Bermann and Picard (eds) *French law* 84.

requirement would be fulfilled if a *faute* was present, as loss or harm accompanied by a *faute* is deemed “abnormal”. Damages may also be claimed for the “loss of chance”. In respect of an interest, if an interest is deemed “deeply unworthy under contemporary notions of law and morals”, then damages may not be recovered.⁷¹⁷ Loss or harm must be “reasonably quantifiable” as a monetary value.⁷¹⁸ The full reparation principle is followed and monetary compensation is awarded (not reparation in kind).⁷¹⁹ Both patrimonial and non-patrimonial loss may be claimed and assessed at the date of judgment.⁷²⁰ The adequate causation theory is applied, which provides that an act or omission is the cause of the harm or loss only if it would have in the ordinary course of events produced the normally expected consequences. In terms of this theory, the fact that an act or omission is the but-for cause of the harm is not regarded as sufficient to “justify the imposition of liability”. Thus administrative law does not apply the “theory of equivalent causal conditions”.⁷²¹ If, however, the injury is due wholly or in part to an extraneous cause (*force majeure*, voluntary assumption of risk, conduct of a third party, contributory fault on the part of the plaintiff or an unknown cause), liability on the part of the state may be limited or excluded.⁷²² However, an unknown cause or *faute* of a third party will not lead to the exclusion of liability. The “liability-generating act” (*fait dommageable*) by the state must generally be accompanied by a *faute*; however there are exceptions where a *faute* is not required.⁷²³ A *faute* may take the form of a physical or legal act.⁷²⁴ For example, injuries to the plaintiff may occur as a result of medical treatment at state hospitals or injuries to users of “public works”.⁷²⁵ Generally simple fault is adequate, but at times “serious fault” is required where the public service rendered is “difficult and/or delicate”.⁷²⁶ In terms of state hospitals, liability is regulated by the Public Health Code Article 1142-1. Simple fault relating to medical conduct is required, with a general prescription period of ten years for claims. The aim of the Public Health Code is to compensate plaintiffs based on the notion of national solidarity. The method and procedure relating to compensation are prescribed in the

⁷¹⁷ Bermann and Picard in Bermann and Picard (eds) *French law* 80.

⁷¹⁸ Bermann and Picard in Bermann and Picard (eds) *French law* 80.

⁷¹⁹ See Rebhahn 2005 *European tort law yearbook* 90.

⁷²⁰ Bermann and Picard in Bermann and Picard (eds) *French law* 80.

⁷²¹ Bermann and Picard in Bermann and Picard (eds) *French law* 81.

⁷²² Rebhahn 2005 *European tort law yearbook* 89.

⁷²³ Bermann and Picard in Bermann and Picard (eds) *French law* 81.

⁷²⁴ Bermann and Picard in Bermann and Picard (eds) *French law* 81.

⁷²⁵ Bermann and Picard in Bermann and Picard (eds) *French law* 81.

⁷²⁶ Bermann and Picard in Bermann and Picard (eds) *French law* 81.

code.⁷²⁷ Serious fault is required, for example, for liability of the postal service and the civil and criminal justice systems.⁷²⁸ The courts have recognised a concurrence of *faute* where there is *faute* on the part of an official and the state simultaneously. For example, where there is inadequate supervision of the official by the supervisor.⁷²⁹

In certain instances fault is not required and the theory of “liability for risk” or “liability for breach of equality in the shouldering of public burdens” may be applicable.⁷³⁰ In respect of the “liability for risk” theory, objects (such as explosives and ammunition) or “methods” (such as administration of mental health institutions, performance in state hospitals or juvenile delinquency institutions) employed by public entities are deemed dangerous and the state should bear the risk of harm caused.⁷³¹ Even persons who assist in the administration of a public service (such as persons who assist in extinguishing a fire, apprehending a criminal or providing first aid) may claim compensation from the state where fault is not required. However, the assistance rendered must be necessary and justified in the circumstances.⁷³²

The no-fault liability system is based on the principle of “equality before public burdens”.⁷³³ Thus public entities may be held liable for negligent conduct or strictly liable for lawful acts.⁷³⁴ In France “complete immunity of a public official from liability is unconstitutional”.⁷³⁵ However, the liability of public entities is regulated mainly by administrative law and the administrative courts.⁷³⁶ The administrative courts play a significant role in protecting fundamental rights of citizens when such rights are violated by public entities which is also based on the principle of “equality”.⁷³⁷

⁷²⁷ In cases of defective health products and nosocomial infection. See discussion by Brun 2002 *European tort law yearbook* 182-186.

⁷²⁸ Bermann and Picard in Bermann and Picard (eds) *French law* 82.

⁷²⁹ Bermann and Picard in Bermann and Picard (eds) *French law* 82.

⁷³⁰ Bermann and Picard in Bermann and Picard (eds) *French law* 81.

⁷³¹ Bermann and Picard in Bermann and Picard (eds) *French law* 83.

⁷³² Bermann and Picard in Bermann and Picard (eds) *French law* 82-83.

⁷³³ See Van Gerven, Lever and Larouche *Tort* 376-378.

⁷³⁴ Van Dam *European tort law* 532.

⁷³⁵ Constitution of 28 July 1989 (*Commission des opérations de bourse*). See Van Dam *European tort law* 532 fn 5.

⁷³⁶ See Van Dam *European tort law* 533-534.

⁷³⁷ Van Dam *European tort law* 534.

A look at a few examples from case law illustrates how public entities may be held liable. In *Ville de Paris v Driancourt*,⁷³⁸ (dealing with liability based on fault) the owner of gaming machines was ordered by a police order to stop the operating of the machines on his premises. The order was found to be *ultra vires* due to an error and unlawful by the Paris Administrative Court. The City of Paris was ordered to pay the owner of the gaming machines for his direct and certain loss as a result of enforcing the unlawful order. The gaming owner was entitled to compensation for: loss of profit which he would have made had he not been forced to stop operating the gaming machines; loss from reselling the machines; and loss for disrupting the owner's life (*troubles dans les conditions d'existence*). The City of Paris appealed against the judgment but the *Conseil d'État* upheld the Paris Administrative Court's decision. It is submitted that it was reasonable to impute liability on the public entity for the plaintiff's loss as the state's conduct in forcing the plaintiff to stop operating his gaming machines was unreasonable, a *faute*, including wrongfulness and fault, was present. Furthermore, it was reasonable to compensate the plaintiff as it was in fact the (certain) actual losses he sustained. In *Legoff*,⁷³⁹ (dealing with liability based on fault) a student had failed examinations for a business management degree at a university. The decision to fail the student was found to be incorrect as they had not taken his previous marks into account. As a result of the delay in the review process, the student graduated in 1982 instead of in 1978. He claimed for the chance he lost of earning an income due to his obtaining the business management degree later instead of earlier. The *Conseil d'État* granted him one hundred thousand francs as compensation for the loss of chance. It is submitted that, in the circumstances, it was reasonable, to impute liability on the University as their conduct was unreasonable, it constituted a *faute* and the plaintiff indeed sustained the loss of chance of graduating and earning income earlier. He lost a reasonable chance of earning an income earlier due to the error of the university.

Whether the harm or loss was caused as a result of an omission or commission by the public entity, is not of significant importance in French law. The *Conseil d'État* readily

⁷³⁸ CÉ 26 January 1973 84768. See discussion of this case in Van Gerven, Lever and Larouche *Tort* 379-380.

⁷³⁹ CÉ 27 May 1987 47491. See discussion of this case in Van Gerven, Lever and Larouche *Tort* 380.

awards damages where there is an omission or failure on the part of a public entity that has not properly exercised its authority or function. For example, in *Société Linie*,⁷⁴⁰ ship owners were entitled to claim compensation for loss sustained as a result of the port authorities failing to stop blockaders. In *Giraud*,⁷⁴¹ *franc symbolique* damages were awarded to a father whose child was not taught a main subject. The *Communauté de Lille* was held liable for failing to rescue a child timeously from a burning house.⁷⁴² In *Kechichian*,⁷⁴³ (ten percent) compensation was awarded to clients who had deposited funds and sustained loss because the state failed to supervise the bank employees' conduct effectively. The bank became insolvent due to fraudulent conduct by the managers of the Bank. The French postal service was held liable when a letter allowing the recipient to sit for an examination, did not reach the intended recipient in time.⁷⁴⁴

In the asbestos-injury related decisions,⁷⁴⁵ compensation was awarded to employees exposed to the asbestos dust, based on the omission of the public entities to “evaluate the risk of asbestos” and take suitable action. The conduct of the relevant public entities constituted a *faute*. Rebhahn⁷⁴⁶ points out that in instances like the English decisions of *Stovin v Wise*⁷⁴⁷ and *Hill v Chief Constable of West Yorkshire*,⁷⁴⁸ compensation in France would be awarded only where serious fault is present, but in cases similar to the English decision of *X (Minors) v Bedfordshire County Council*,⁷⁴⁹ compensation would be awarded where simple fault is present.

French administrative law is mainly based on case law and there is not much legislation regulating public entities.⁷⁵⁰ The *Council d'Etat* (the “Supreme Court” for administrative matters in France) is guided and bound by decisions of the *Council*

⁷⁴⁰ CÉ 4 October 1978 04471. See Rebhahn 2005 *European tort law yearbook* 87.

⁷⁴¹ CÉ 27 January 1988 64076. See Rebhahn 2005 *European tort law yearbook* 87.

⁷⁴² CÉ 29 December 1999 197502. See Rebhahn 2005 *European tort law yearbook* 87.

⁷⁴³ CÉ 30 November 2001 (*Kechichian*) 219562. See Rebhahn 2005 *European tort law yearbook* 87.

⁷⁴⁴ CE 22 January 1986 (*Grellier*) 51300. See Van Dam *European tort law* 536.

⁷⁴⁵ CÉ Ass 3 March 2004 241150. See Rebhahn 2005 *European tort law yearbook* 87.

⁷⁴⁶ 2005 *European tort law yearbook* 87.

⁷⁴⁷ 1996 AC 923, 931-932, 943-944. See chapter 4 para 3.3.1.

⁷⁴⁸ 1989 1 AC 53. See chapter 4 para 3.3.1.

⁷⁴⁹ 1995 2 AC 633. See chapter 4 para 3.3.1.

⁷⁵⁰ Van Dam *European tort law* 534.

Constitutionnel.⁷⁵¹ The *Council d'Etat* also considers decisions of the *Cour de Cassation* and, in bringing about legal certainty, often aligns its decisions with those of the *Cour de Cassation*.⁷⁵² Therefore, it is common for the *Council d'Etat* to impose private tort law principles in administrative law. For example, Van Dam⁷⁵³ refers to the possibility of a plaintiff claiming compensation for “injury to feelings”,⁷⁵⁴ the “assignment of a victim’s action in tort to his inheritor’s”,⁷⁵⁵ “and the possibility for a person to sue in respect of the death of her unmarried partner”.⁷⁵⁶ However, the *Council d'Etat* imposes private tort law principles on an “ad hoc” or “discretionary” basis.⁷⁵⁷ Liability of public entities may be fault-based stemming from the application of the principle of “equality” applied where there is a breach of a statutory rule and entitles a plaintiff to compensation.⁷⁵⁸ In respect of liability based on fault (usually *faute de service*, failure to perform a duty associated with wrongfulness) that applies even to objectively unforeseeable and unavoidable harm,⁷⁵⁹ the administrative system is similar to the system of civil liability in terms of Article 1382 of the CC. Harm and causation are still required.⁷⁶⁰ A distinction is made between a “personal *faute*” and “public service-related *faute*”. A personal *faute* “can be attributed personally to the administrator”, whereas a public service-related *faute* is “a *faute* linked with public service”. Generally a claim relating to a “personal *faute*”⁷⁶¹ must be lodged with the civil court, while a claim relating to a “public service-related *faute*” must be lodged with an administrative court.⁷⁶² A plaintiff need not refer to the identity of a specific public official and it is sufficient to prove that the public service was not operating properly. For example, it is sufficient to prove that there was a lack of staff at the public hospital.⁷⁶³ However, it is possible that a public official’s conduct could simultaneously be considered a personal *faute* as well as a public service-related *faute*.⁷⁶⁴ For

⁷⁵¹ See Galand-Carval in Spier (ed) *Unification of tort law: liability for damage caused by others* 88.

⁷⁵² Van Dam *European tort law* 534.

⁷⁵³ *European tort law* 534

⁷⁵⁴ CÉ 24 November 1961 (*Letisserand*) 48841.

⁷⁵⁵ CÉ 29 March 2000 (*Assistance publique-Hospitaux de Paris*) 195662.

⁷⁵⁶ CÉ comm 3 March 1978 (*Dame Muësser*), Rec CÉ 1978 116; Van Dam *European tort law* 535

⁷⁵⁷ See Van Dam *European tort law* 535.

⁷⁵⁸ Van Dam *European tort law* 535.

⁷⁵⁹ See Rebhahn 2005 *European tort law yearbook* 75-76; Galand-Carval in Spier (ed) *Unification of tort law: liability for damage caused by others* 99.

⁷⁶⁰ Rebhahn 2005 *European tort law yearbook* 76.

⁷⁶¹ Galand-Carval in Spier (ed) *Unification of tort law: liability for damage caused by others* 99.

⁷⁶² Van Dam *European tort law* 535.

⁷⁶³ Galand-Carval in Spier (ed) *Unification of tort law: liability for damage caused by others* 99.

⁷⁶⁴ Van Dam *European tort law* 536.

example, a petrol tank driver made a detour to his home village where he crashed into the wall of a house. It was held that the driver committed a personal *faute* as well as public service-related *faute* (thus the state was held liable).⁷⁶⁵ With regard to a public service-related *faute*, all that is required is some connection with the public service.⁷⁶⁶ However, in a case⁷⁶⁷ where an off-duty customs officer killed a person with a revolver, it was regarded as a personal *faute* and the state was not held liable. Where a personal *faute* is committed by a policeman while on duty, the state will be held liable.⁷⁶⁸ Where a policeman is off-duty and commits a personal *faute*, the link with the service may still be established leading to liability, depending on the circumstances of the case. The *Conseil d'Etat*⁷⁶⁹ found the state liable for the death of a policeman where a fellow off-duty policeman was showing him his service weapon and accidentally shot him. A sufficient link with the service was established. It is submitted that this relates to causation where once again borrowing from South African law, the question asked is whether there is a close enough relationship between the policeman's conduct and the death of the fellow policeman. If the relationship is close enough, that is if a link with the service is established, then it is reasonable fair, and just to impute liability on the state for the harm or loss suffered as a result of the death of the policeman.

In another case,⁷⁷⁰ the plaintiff (a visitor of the post office) left via the staff entrance instead of the main public entrance because the post office was closed earlier than usual. Two post office employees did not enquire from the plaintiff why he was exiting via the staff entrance and instead assaulted him and broke his leg. The *Conseil d'Etat* held that the closing of the post office earlier than usual was a public service-related *faute* and the post office employee's conduct was unnecessary and regarded as a personal *faute*. Thus the plaintiff was able to recover compensation for all his damages from the state. The liability of a public entity (in respect of fault liability) must generally stem from an "abnormal generating fact" (*fait générateur anormal*).⁷⁷¹ In a number of

⁷⁶⁵ CÉ 19 November 1949 (*Mimeur, Defaux, Besthelsemer*); Van Dam *European tort law* 536.

⁷⁶⁶ Galand-Carval in Spier (ed) *Unification of tort law: liability for damage caused by others* 99.

⁷⁶⁷ See CÉ 23 June 1954 (*Litzler*); Van Dam *European tort law* 536.

⁷⁶⁸ See CÉ 10 October 1954, Rec 505 arrêt Sadoudi, Rec 603 (referred to by Galand-Carval in Spier (ed) *Unification of tort law: liability for damage caused by others* 99).

⁷⁶⁹ CÉ 26 October 1973 81977.

⁷⁷⁰ CÉ 3 February 1911 (*Anguet*) referred to by Van Dam *European tort law* 536.

⁷⁷¹ Van Dam *European tort law* 537.

cases, though, where the police,⁷⁷² tax entities⁷⁷³ and regulatory or supervisory banking entities⁷⁷⁴ are concerned, the standard of *faute* required is “gross negligence” (*faute lourde*), which is considered equal to intentional fault.⁷⁷⁵ An exception applies to public hospitals where ordinary negligence (simple fault) is sufficient to ground liability.⁷⁷⁶

The *Conseil d'Etat* has found the state liable in instances where prisoners had been released on certain licenses and then went on to commit further crimes such as robbery. The courts reasoned that even though the “policy of licensing prisoners” is socially useful, the risk created is high and justifies the imposition of liability.⁷⁷⁷

In respect of administrative law, strict liability is based on “equality before public burdens” (*égalité devant les charges publiques*) in Article 13 of the Declaration.⁷⁷⁸ The notion behind the principle of “equality” is that the public burdens must be shared equally amongst all the citizens and when a citizen bears more than his share of the burden, that is, if a plaintiff has sustained “abnormal damage” or “disproportionate damage” then he should be compensated. That is, public burdens should not weigh heavily on the claimant, whether the plaintiff is a natural or juristic person.⁷⁷⁹ The principle of “equality” expresses the thoughts and “solidarity” of the community (which are similar to the concept of the *boni mores* in South African law).⁷⁸⁰

Van Dam⁷⁸¹ points out that there are a number of instances where the state is liable to compensate the plaintiff. For example: when being exposed to unusual danger of risk; extraordinary participation in a public service; or where the impact of public works is extraordinary.⁷⁸² The first instance applies where a plaintiff suffers damages

⁷⁷² See CÉ 20 October 1972 80068; Van Dam *European tort law* 536.

⁷⁷³ See CÉ 27 July 1990, AJDA 1991 53 (*Bourgeois*) note Richer where it was held that in implementing usual tax matters ordinary fault as opposed to gross negligence is required; Van Dam *European tort law* 536.

⁷⁷⁴ CÉ 24 January 1964, Leb 1964 43 referred to by Van Dam *European tort law* 536.

⁷⁷⁵ Moréteau in Koziol (ed) *Basic questions of tort law* 85.

⁷⁷⁶ CÉ 10 April 1992 (*Epoux V*) 79027. See Van Dam *European tort law* 536.

⁷⁷⁷ See Galand-Carval in Spier (ed) *Unification of tort law: liability for damage caused by others* 92.

⁷⁷⁸ Of the Rights of Man and of the Citizen (1789). See Van Dam *European tort law* 537.

⁷⁷⁹ Van Dam *European tort law* 537. See also Van Gerven, Lever and Larouche *Tort* 393.

⁷⁸⁰ Van Dam *European tort law* 537.

⁷⁸¹ *European tort law* 537-539.

⁷⁸² See also Van Gerven, Lever and Larouche *Tort* 393.

resulting from dangerous activities carried out or authorised by the state. For example, in 1915, grenades which were stored by the state in the outskirts of a residential area in Paris exploded. The state was held liable for damage caused from the explosion, where people died and property was damaged. The *Council d'Etat* held the state liable, not on *faute* but on the “abnormal risk” it posed by storing such grenades in a residential area.⁷⁸³ It is submitted that due to the abnormal risk, which resulted in unnecessary damage and death, it was reasonable to impose liability upon the state. The same principles apply when an innocent person is shot while police are trying to apprehend a criminal⁷⁸⁴ or where a prisoner escapes after committing a crime.⁷⁸⁵ The second instance where the state can be held liable is where the public takes on a duty that is normally undertaken by persons employed by the state. For example, in a case where a child was carried out to sea and there was no lifeguard on duty, the plaintiff's husband tried to rescue the child, but drowned. The state was held strictly liable for the damages claimed by the deceased's wife. It did not matter that the deceased tried to rescue the child on a voluntary basis. All the court required, was that assistance was urgently required, that is was appropriate and beneficial.⁷⁸⁶ The third instance where abnormal burdens are suffered by a plaintiff in the public interest is where the state due to policy reasons elects not to enforce the law.⁷⁸⁷ Van Dam⁷⁸⁸ refers to the first well-known case where a Mr Couitéas⁷⁸⁹ was notified that he was the owner of a piece of land in Tunisia. He requested assistance from the police to remove nomadic people living on the land, but his request was denied as the police were afraid of the consequences of doing so. The *Council d'Etat* held that Mr Couitéas suffered an “abnormal burden in the public interest” and was compensated for his sacrifice, based on the principle of equality. The same principle was followed where there was an illegal blockade at the French port of Calais. The authorities failed to remove the blockade and a British ferry company, Sealink, which was unable to ferry people to Britain over

⁷⁸³ CÉ 28 March 1919, Rec CE 1919 329 (*Regnault-Desroziers*) referred to by Van Dam *European tort law* 538.

⁷⁸⁴ CÉ 24 June 1949, Rec CE 1949 307 (*Lecomte and Daramy*) referred to by Van Dam *European tort law* 538.

⁷⁸⁵ CÉ 9 April 1987 (*Garde des Sceaux v Banque Populaire de la Région Economique de Srasbourg*) referred to by Van Dam *European tort law* 538.

⁷⁸⁶ CÉ 29 September 1970 (*Commune de Batz-sur-Mer v Tesson*) referred to by Van Dam *European tort law* 538.

⁷⁸⁷ Van Dam *European tort law* 538.

⁷⁸⁸ *European tort law* 538.

⁷⁸⁹ CÉ 30 November 1923, Rec CE 1923 789 (*Couitéas*).

a bank holiday, suffered loss. Sealink was able to recover damages.⁷⁹⁰ Van Dam⁷⁹¹ points out that it would indeed be unlikely that a French company would be able to recover its loss in similar circumstances in English law. In the fourth instance, the state can be held liable for damages resulting from legislation that imposes a disproportionate sacrifice on a natural or juristic person.⁷⁹² Van Dam⁷⁹³ refers to the case known as *Fleurette*,⁷⁹⁴ where a statute stated that the word “cream” could only be used in products that contained real cream. *La Fleurette*, a dairy company which manufactured artificial cream, was unable to market its product. The company claimed damages from the state and the *Conseil d’Etat* awarded the damages, even though it was not the legislator’s intention to impose a “disproportionate burden” on the company. *La Fleurette* went out of business and the court held that the company suffered a disproportionate sacrifice. It is submitted that the dairy company suffered an unreasonable loss as a result of the sacrifice imposed on it. Therefore it was reasonable to impose liability on the state for the dairy company’s loss. Currently it must be determined whether the legislator excluded the possibility of compensation (whether explicitly or implicitly).⁷⁹⁵ However, in most instances the legislator makes provision for compensation, ensuring that the equality principle need not be applied directly.⁷⁹⁶

The principle of “equality” in French law is based on the premise that natural or juristic persons who “disproportionately suffer from measures taken in the general interest may have a right to compensation for damage that is not deemed part of the daily risk of business of life”.⁷⁹⁷ This strict liability rule does not focus on whether the conduct of the public body was correct or not but whether “citizens are treated equally”, so the loss of the individual is shifted to the “collective taxpayers”.⁷⁹⁸

⁷⁹⁰ CÉ 22 June 1984 (*Sealink UK Ltd*) 53630. See Van Dam *European tort law* 539.

⁷⁹¹ *European tort law* 539.

⁷⁹² Van Dam *European tort law* 539.

⁷⁹³ *European tort law* 539.

⁷⁹⁴ CÉ 14 January 1938, Rec CÉ 1938 25 (*SA des produits laitiers La Fleurette*).

⁷⁹⁵ See CÉ 23 September 1988, Rec CÉ 1988 470 D 1989 267 note Moulin (*Martin et Société Michel Martin*); referred to by Van Dam *European tort law* 539 fn 44.

⁷⁹⁶ Van Dam *European tort law* 539.

⁷⁹⁷ Van Dam *European tort law* 581.

⁷⁹⁸ Van Dam *European tort law* 581.

In instances where employees sustain harm due to asbestos intoxication, if the illness is deemed a “professional illness”, limited lump sum compensation is awarded by the National Health to victims or their dependants. The victim maybe entitled to further compensation (which could not be obtained from the National Health) if “unforgiveable fault” is proven. The unforgivable fault has a wide application and is linked to the contractual obligation of the employers to ensure the safety and security of the employees. The breach of the obligation is deemed an “unforgivable fault” in terms of Article L 452-1 of the *Code de la sécurité sociale* if the “the employer knew or should have known the danger the employee was going to be exposed to, and when he did, did not take appropriate measures to protect him”.⁷⁹⁹

6.1 Conclusion

The influence of reasonableness on liability of state entities is implicit. In respect of liability of the state entity based on fault, it is reasonable that all the elements must be present in order to ground delictual liability. Thus a generating act or event must be present, as well as *faute*, which encompasses wrongfulness and fault relating to unreasonable conduct on the part of the state. It must be established whether there is a close enough relationship (which must be certain and direct) between the unreasonable conduct and the harm or loss suffered by the plaintiff. If there was such a close enough relationship then it may be reasonable to impose liability on the state entity. Unreasonable conduct on the part of the plaintiff may result in the limitation or exclusion of liability. Furthermore if an extraneous cause is present, it may not be reasonable to impute liability on the state entity for the reasonably unforeseeable and unavoidable harm or loss suffered by the plaintiff. In respect of strict liability based on the risk theory, the focus is not on the parties unreasonable conduct as a *faute* is not required but on whether the plaintiff suffered a disproportionate and therefore unreasonable burden (according to the thoughts of community) placed on him by the state. If the burden was unreasonable then it is only fair and reasonable that he be compensated for the “abnormal”, and hence unreasonable, loss he sustained.

⁷⁹⁹ See Cass civ Soc 28 February 2002 00-13019, D 2696 JCP I 186 5 observations Viney. See Brun 2002 *European tort law yearbook* 203.

7. Wrongful conception, wrongful birth and wrongful life claims

In wrongful birth or conception claims, an unplanned or unwanted child is born as a result of the defendant's wrongful conduct.⁸⁰⁰ The unwanted pregnancy may result due to for example, defective contraceptives, where the claim may lie against the manufacturer, failed sterilisation or abortion, where the claim may lie against a medical practitioner or institution, or as a result of rape.⁸⁰¹ In France, the wrongful conception leading to the birth of a healthy child cannot be considered as damage. It goes against the dignity of the child. The *Cour de Cassation*⁸⁰² held that the existence of the child itself cannot constitute "a legally reparable loss". The interests in autonomy and self-determination of the mother to not have the child must be weighed against financial implications of the unplanned child as well as the disruption to the family life.⁸⁰³ Even though it is argued that the damage may be set off against the benefit and joy of having the child, not all parents may agree with that and the costs are tangible whereas joy is intangible.⁸⁰⁴ Courts award damages relating to the pregnancy and birth, but not for the upbringing of the child.⁸⁰⁵ Raising the unwillingness or election of the plaintiff to undergo an abortion as a defence by the defendant in minimising damages on the part of the mother, is not allowed.⁸⁰⁶ In French law, a mother cannot claim non-patrimonial loss, unless the child was born disabled,⁸⁰⁷ in which case the parents are entitled to claim for "financial and moral losses", while the disabled child can claim for his handicap.⁸⁰⁸ In a case⁸⁰⁹ where a physically handicapped man consulted a professor on whether there was a chance that the handicap could be passed on to his children, the professor made an error and told the man that the handicap could not be passed onto to his children. Five years later the man's wife gave birth to a child with the same

⁸⁰⁰ Van Dam *European tort law* 193.

⁸⁰¹ See Van Dam *European tort law* 193-194.

⁸⁰² Cass civ 1 25 June 1991 89-18617, Bull civ 1991 I 213 139. See Van Dam *European tort law* 194; Galand-Carval in Magnus (ed) *Unification of tort law: damages* 84; Van Gerven, Lever and Larouche *Tort* 115.

⁸⁰³ Van Dam *European tort law* 194-195.

⁸⁰⁴ Van Dam *European tort law* 195.

⁸⁰⁵ Van Dam *European tort law* 195.

⁸⁰⁶ Van Dam *European tort law* 195.

⁸⁰⁷ See CÉ 2 July 1982 23141, D 1984 425 note D'Onorio, Gaz Pal 1983 193 note Moderne; Cass civ 1 25 June 1991 89-18617, Bull civ 1991 I 213 139; Van Dam *European tort law* 196.

⁸⁰⁸ Galand-Carval in Magnus (ed) *Unification of tort law: damages* 85.

⁸⁰⁹ Cass civ 1 26 March 1996 94-13145, Bull civ 1996 I 155 109, D 1997 35 note Roche- Dahan. See discussion of this case by Borghetti in Winiger (ed) *Digest of European tort law volume 2: essential cases on damage* 910-911.

handicap. The parents sued the professor for damages as a result of the birth of the handicapped child due to the negligent prognosis. The *Cour de Cassation* held that the parents were entitled to such damages.⁸¹⁰

Wrongful life claims refer to claims where the conduct of the defendant resulted in a child being born with a disability.⁸¹¹ The disability usually occurs during pregnancy (prior to birth and may even occur prior to conception) where the mother may sustain injury or illness or is not given proper advice by a medical practitioner about the risks that the child will not be born healthy (due to for example a possible genetic defect or hereditary condition).⁸¹² The child's bodily health and integrity is violated.⁸¹³ In the case of a child that has been affected in a mother's womb, where the mother was not informed of the risks, the basis of liability is generally in contract, but the child, as a third party, has a claim in delict.⁸¹⁴

In a case⁸¹⁵ of an unsuccessful abortion where the child was born with serious disabilities, the defendant, a public hospital, was ordered to pay: six hundred thousand francs to the child as a "reasonable assessment of the physical suffering and aesthetic loss thereby suffered, and the interference with his quality of life";⁸¹⁶ fifty thousand francs to the mother for non-material damage as a "reasonable assessment of the adverse effect on her quality of life, due to the disability suffered by her son";⁸¹⁷ and four hundred thousand francs for medical expenses as a result of the medical practitioner's conduct. Even though the abortion was performed correctly, it was not successful and the medical practitioner failed to check whether or not the abortion was successful, resulting in the child being born with a serious handicap. The unsuccessful abortion caused injury to the fetus. In *Quarez*,⁸¹⁸ the *Conseil d'État* held that the

⁸¹⁰ In *MacFarlane v Tayside Health Board* 2000 2 AC 59 it was held that it was not fair, just and reasonable to award damages for the upbringing of a healthy child. See Van Dam *European tort law* 197; chapter 4 para 3.2.2.1.

⁸¹¹ Van Dam *European tort law* 198.

⁸¹² Van Dam *European tort law* 199.

⁸¹³ Van Dam *European tort law* 199.

⁸¹⁴ Massot in *European tort law yearbook* 2001 203.

⁸¹⁵ CÉ 27 September 1989, D 1991 80 note Verpeaux. See Van Dam *European tort law* 199; Van Gerven, Lever and Larouche *Tort* 115.

⁸¹⁶ Van Gerven, Lever and Larouche *Tort* 116.

⁸¹⁷ Van Gerven, Lever and Larouche *Tort* 116.

⁸¹⁸ CÉ 14 February 1997 133238, JCP 1997 II 22828. See Moréteau 2006 *European tort law yearbook* 199-200.

parents of a child born with severe disabilities were entitled to damages related to the cost of raising a disabled child due to the medical negligence of the public hospital and staff employed by the hospital, in not noticing the disability. In the landmark decision of *Perruché*,⁸¹⁹ a mother contracted rubella during her pregnancy. Although the medical practitioner (in the private sector) advised the mother that she had been immunised, the child was born with “neurological and sensory problems suggestive of congenital rubella”.⁸²⁰ The *Cour de Cassation* allowed the child’s claim for damages stemming from the disability. From 2002, wrongful life claims in France are no longer allowed as a result of legislation⁸²¹ on the premise that “no one can be indemnified for his birth, even if handicapped”.⁸²² Compensation is awarded for handicaps or disabilities, but are limited and not based on liability in delict but national solidarity. In terms of causation, the damage is regarded as caused not by medical negligence, but by a pre-existing condition of the mother or child.⁸²³ This legislation has been criticised *inter alia* for shifting the burden of liability to “national solidarity” where the act made provision for a special fund to compensate parents for the costs of growing up the disabled child, and for going too far as the *Cour de Cassation* was aiming to compensate for the disabled life of the child, but not for the disability.⁸²⁴ This legislation curtails medical malpractice claims and Moréteau⁸²⁵ points out that in electing for national solidarity as opposed to liability, France gives a clear message that “no life is ever wrongful”. Compensation is awarded to the parents and not the child, as awarding compensation to the child means acknowledging the right of the child not to be born.⁸²⁶

The influence of reasonableness on determining whether liability should be imposed for the wrongful birth, wrongful conception and wrongful life claims (before the legislation denied wrongful life claims) is predominantly implicit. The reasonableness of the conduct of the medical practitioners and staff of the institutions are called into question. Whether the infringement of the interests in autonomy and bodily integrity is

⁸¹⁹ Ass plén 17 November 2000 (*Perruche*) 99-1370, Bull Ass plén 2000 9 15, D 2001 332 note Mozeaud and Jourdain. See Ass plén 13 July 2001 97-19282, Bull Ass plén 2001 10 21; Van Dam *European tort law* 201.

⁸²⁰ Van Dam *European tort law* 201.

⁸²¹ Law No 2002-303 of 4 March 2002.

⁸²² Van Dam *European tort law* 201.

⁸²³ See Moréteau 2006 *European tort law yearbook* 200.

⁸²⁴ See Van Dam *European tort law* 201-202.

⁸²⁵ 2006 *European tort law yearbook* 200-201.

⁸²⁶ See Van Dam *European tort law* 201-202 fn 145 who points out that most European countries do not entertain wrongful life claims brought by the child except in Spain and Netherlands.

unreasonable under the circumstances is also considered. If the infringement of the interests and conduct causing harm or loss to the parents or child are considered unreasonable, then it may be considered reasonable to impose liability on the medical practitioner or institution. The courts also assess the damages following a fair and reasonable approach. They make a reasonable assessment on the heads of damages relating to *inter alia* physical suffering, aesthetic loss suffered, and loss suffered as a result of disrupting the quality of life.⁸²⁷

8. Mental harm (psychiatric injury)

All kinds of mental harm are in principle compensable and the mental harm need not result in some form of recognised medical psychological or psychiatric injury.⁸²⁸ As a starting point, the mental harm must result in some damage in terms of Articles 1382 and 1384 of the CC. Any “negative impact on someone’s feelings can amount to mental harm”.⁸²⁹ Even grief is in principle compensable.⁸³⁰ All that is required is a *faute* which immediately, directly and certainly causes the mental harm.⁸³¹ There are no other specific requirements such as “reasonable foreseeability of harm” and the test is not objective.⁸³² The courts assess the subjective mental harm of the plaintiff in each case.⁸³³

A look at some examples from case law illustrates how the courts determine liability for mental harm. For example, there was a certain model of pacemaker that was found to be defective. The manufacturer of the pacemakers stopped selling them and recommended that anyone with that particular pacemaker should undergo regular check-ups. A patient, who was aware of the possibility of the pacemaker being defective, had it surgically removed while undergoing an operation she had to undergo. The pacemaker was in fact not defective, but the patient sued the manufacturer for compensation resulting from stress and shock after learning of the

⁸²⁷ Van Gerven, Lever and Larouche *Tort* 116.

⁸²⁸ See Cass civ 2 22 February 1995 92-18731 93-12644; Chartier and CA Paris 10 November 1983, D 1984 214; Van Dam *European tort law* 175.

⁸²⁹ Van Dam *European tort law* 175.

⁸³⁰ Van Dam *European tort law* 183.

⁸³¹ Van Dam *European tort law* 176.

⁸³² Van Dam *European tort law* 174.

⁸³³ Van Dam *European tort law* 176.

possibility that the pacemaker was defective. The *Cour de Cassation*⁸³⁴ held that generally damages for non-patrimonial loss could be awarded for stress and anxiety in such instances, but found that in this case, the patient had to undergo surgery in any event and that the pacemaker was not defective, therefore damage had not occurred and was in fact hypothetical. It is submitted that harm in this case (stress and shock) was reasonably foreseeable (as some pacemakers were found to be defective) and preventable (by removing it). The costs involved in removing the pacemaker may be considered minimal when compared to the gravity of harm that may ensue if at any time the pacemaker malfunctions. The patient has to live with the constant fear that this may occur thus affecting her mental state. It would be reasonable to compensate the patient for the mental harm.⁸³⁵

The *Cour de Cassation*⁸³⁶ awarded compensation to employees who had suffered anxiety and fear of developing an asbestos-related disease in the future. The employees had been exposed to asbestos for a prolonged period of time and had not yet developed any diseases relating to the exposure. It is trite that after inhaling asbestos, symptoms or a disease may only develop after twenty years. In over fifty asbestos-related cases, the *Cour de Cassation* had to deal with various ex-employees who sued their employers for “prejudice of anxiety” of developing lung cancer at a later stage as a result of being exposed to asbestos. Some of the employees had initially worked on industrial sites that had been recognised as “asbestos-contaminated” sites in an official list of Act 98-1194 of 23 December 1998, entitling them to an early retirement. In some cases, the *Cour d’appel* (appeal court) denied compensation on the ground that anxiety alone of developing a disease could not be compensated and on the ground that the sites where the employees were exposed to asbestos had not been recognised as “asbestos-contaminated” sites. This has been viewed as discriminatory.⁸³⁷ It is submitted that policy considerations played a role in the courts reaching a decision not to compensate the victim. In some cases, damages were awarded to employees who worked on sites which were not officially recognised as

⁸³⁴ Cass civ 1 19 December 2006, JCP 2007 II 10052, note Hocquet-Berg, RTDCiv 2007 352 observations Jourdain. See Moréteau 2006 *European tort law yearbook* 282; Van Dam *European tort law* 181-182.

⁸³⁵ See Van Dam *European tort law* 182-183.

⁸³⁶ Cass Soc 11 May 2010 09-42241, Bull soc 2010 V 206. See Moréteau 2010 *European tort law yearbook* 188-190; Van Dam *European tort law* 182.

⁸³⁷ See authority cited by Séjean and Knetsch 2015 *European tort Law yearbook* 210 fn 12.

asbestos-contaminated sites. The *Cour de Cassation* did, however, rule that damages may be claimed for “prejudice of anxiety” in respect of all mental harm connected with asbestos exposure including loss of “life expectancy” and “disruption of living conditions”.⁸³⁸

Generally, in terms of French labour law, when an employee sustains injury or illness while in the course and scope of employment, he is entitled to social security benefits (which are limited). However, if he is able to prove an inexcusable fault on the part of the employer, that is, a deliberate breach of the safety and hygiene regulations, or gross negligence on the part of the employer, the employee is in principle entitled to compensation of all heads of damages. Since the landmark decisions of the *Cour de Cassation*⁸³⁹ delivered on 28 February 2002, where it was held that an employer has a strict duty to provide a safe work environment, an employer may be held liable whenever an asbestos-related illness can be linked to the working conditions of the employee. An allegation of inexcusable fault is common in claims for workers compensation benefits in asbestos-injury related cases.

In a case where an employee, who had undergone a number of disciplinary procedures, had suffered anxiety and tension fearing dismissal, the Paris Labour Tribunal held that he was entitled to compensation for the “prejudice of anxiety” he had suffered.⁸⁴⁰ Criticism has been raised against this decision, as the employee did not provide proof of the “prejudice of anxiety” he allegedly sustained.⁸⁴¹

Both primary and secondary victims (the latter referred to as a “*victim par ricochet*” or “rebound victim”) are in principle entitled to claim for mental harm.⁸⁴² A secondary victim is usually a family relative who suffers what is commonly referred to as “affection injury” (*prejudice d'affection*). Such victim may also claim damages for

⁸³⁸ See Cass soc 3 March 2015 13-21832, 13-20474, 13-20486, 13-26175; Cass soc 11 May 2010 09-42241 to 09-42257; Jourdain *Les préjudices d'angoisse, La Semaine Juridique Édition Générale* (JCP G) 2015 739; Lemaire 2016 *JETL* 27; Séjean and Knetsch 2015 *European tort law yearbook* 208-209.

⁸³⁹ See Cass soc 28 February 2002 00-10051, 99-18389, 00-11793, 99-21255, 99-17201 and 00-13172; Séjean and Knetsch 2015 *European tort law yearbook* 210 fn 10.

⁸⁴⁰ Paris Labour Tribunal (*Conseil des prud'hommes Paris*), 16 January 2015 F 12/10198.

⁸⁴¹ See also CÉ 27 May 2015 371697 where the *Conseil d'État* confirmed the decision of the lower court in awarding €1 500 to a victim as a result of sustaining “moral distress” from the time he was informed of a blood-related hepatitis infection, till his recovery over a year later.

⁸⁴² Van Dam *European tort law* 176.

bereavement.⁸⁴³ A secondary victim may sustain loss of income, emotional shock, grief and so on.⁸⁴⁴ Thus any kind of mental harm suffered by the secondary victim is compensable.⁸⁴⁵ The courts are lenient and have, for instance, awarded compensation for emotional distress as a result of losing a prized pet.⁸⁴⁶ The secondary victim need not be a relative and what must be proven is a “material or sentimental link” with the primary victim.⁸⁴⁷ In respect of unmarried couples, the relationship between them must have been stable and continuous.⁸⁴⁸ If the secondary victim is family of or related to the primary victim, then there is a presumption of a “link of affection” between them.⁸⁴⁹ At the very least there must be some kind of personal relationship between the primary and secondary victim.⁸⁵⁰ In French law, dependants are considered as the *par ricochet victims* – secondary victims.⁸⁵¹

The influence of reasonableness on determining whether liability should be imposed for the mental harm is implicit. What is generally considered is whether the conduct of the defendant in infringing the plaintiff’s interests in bodily integrity, which includes mental harm, is unreasonable under the circumstances. Policy considerations also seem to play a role and this is evident in the asbestos-injury related cases, where in some cases the courts awarded compensation, while declining it in others. In the French law of delict, the element of causation is used to limit claims, in that the damage must be direct and certain.⁸⁵² At times the courts may find that the damage was hypothetical and exclude liability. French law is however generally liberal in awarding compensation for harm which may manifest itself in grief, sorrow or some form of psychological harm.

⁸⁴³ Cass crim 22 March 1877, Bull crim 1877 86; Van Dam *European tort law* 176.

⁸⁴⁴ Van Dam *European tort law* 176.

⁸⁴⁵ Van Dam *European tort law* 176-177.

⁸⁴⁶ See Cass civ 1 16 January 1962 D, 1962 199 note Rodière, JCP 1962 12577 note Esmein. See Moréteau in Koziol (ed) *Basic questions of tort law* 39; Van Dam *European tort law* 177.

⁸⁴⁷ See Cass ch mixte 27 February 1970, D 1970 Jur 201 note Combaldieu, JCP 1970 II 16305; Crim 17 October 2000 99-86157, Bull crim 2000 297 874; Van Dam *European tort law* 176.

⁸⁴⁸ See Cass ch mixte 27 February 1970, D 1970 Jur 201 note Combaldieu, JCP 1970 II 16305; Van Gerven, Lever and Larouche *Tort* 126.

⁸⁴⁹ Van Dam *European tort law* 176; Van Gerven, Lever and Larouche *Tort* 127.

⁸⁵⁰ Van Dam *European tort law* 176.

⁸⁵¹ Van Gerven, Lever and Larouche *Tort* 127.

⁸⁵² Cass civ 2 22 February 1995 92-18731 93-12644; Chartier and CA Paris 10 November 1983, D 1984 214; Van Dam *European tort law* 175, 183.

9. Pure economic loss

French law generally does not deny compensation for damage to moveable or immovable property and there is no differentiation for the purpose of compensation between damage to property and pure economic loss.⁸⁵³ The idea of “pure economic loss” is generally unfamiliar in French law.⁸⁵⁴ Van Dam⁸⁵⁵ points out that in French law pure economic loss as a topic does not even exist. All that is required, is the infringement of a legitimate interest (an interest deemed worthy of protection by society), then damages may be recovered and that there must be damage which is direct and certain.⁸⁵⁶ Liability for pure economic loss is controlled by all three elements of *faute* (encompassing wrongfulness and fault), causation and damage, but more specifically by the elements of damage and causation.⁸⁵⁷ Damages for pure economic loss are awarded in the same way that damages are awarded for any other loss.⁸⁵⁸ The idea of an indeterminate number of plaintiffs is resolved with the element of causation⁸⁵⁹ and the floodgates idea is not found in so many words in French legal doctrine.⁸⁶⁰

Moréteau⁸⁶¹ refers to a hypothetical example of a motor vehicle running out of fuel and being immobilised in a tunnel, causing a huge traffic jam during peak traffic time. Thousands of people are delayed and miss business opportunities, flights, examinations etcetera. The courts would either find that the damage due to missed opportunities is not the direct consequence of the driver’s negligence; or if causation is admitted, “that it simply caused a loss of chance thus minimising compensation”; or that driving in a busy tunnel is considered voluntary assumption of risk (where liability may be excluded). The element of causation is essentially used to control “unreasonable or excessive claims”.⁸⁶² However, in dealing with the elements with regard to pure economic loss as compared to personal injury or damage to property

⁸⁵³ Van Dam *European tort law* 203.

⁸⁵⁴ Moréteau in Koziol (ed) *Basic questions of tort law* 75; Van Dam *European tort law* 354.

⁸⁵⁵ *European tort law* 210.

⁸⁵⁶ Van Dam *European tort law* 203.

⁸⁵⁷ Van Dam *European tort law* 209.

⁸⁵⁸ Van Dam *European tort law* 210.

⁸⁵⁹ Moréteau in Koziol (ed) *Basic questions of tort law* 75.

⁸⁶⁰ Moréteau in Koziol (ed) *Basic questions of tort law* 76.

⁸⁶¹ Moréteau in Koziol (ed) *Basic questions of tort law* 75.

⁸⁶² Moréteau in Koziol (ed) *Basic questions of tort law* 76.

different standards may be applied. In respect of *faute*, the “good family father” is not applied but “whether one has complied with the principles of *loyauté, honnêteté, et bonne foi* (loyalty, honesty, and good faith)”.⁸⁶³ The damage must be “directly caused”, “personal, certain and legal”.⁸⁶⁴ Generally the courts use the concepts of “direct” and “indirect” causing of damage to allow or disallow a claim for pure economic loss. However, in most instances a direct cause is easily established.⁸⁶⁵ Compensation for pure economic loss is awarded in cases of non-performance of a contractual obligation (loss of anticipated profit).⁸⁶⁶

A look at a few examples from case law illustrate under what circumstances damages may be awarded for pure economic loss. In a hypothetical example where a factory plant loses its supply of electricity due to the negligent act of a building company and suffers a chain of loss, the loss suffered by the customers of the plant and their customers, in French law are considered damages by ricochet (*dommages par ricochet*). The factory plant’s loss is considered to be a direct consequence of the building company’s act and damages for such loss are easily awarded (damage to property as well as consequential loss). In principle, damages by ricochet are recoverable and may be considered direct but are not easily awarded by the courts.⁸⁶⁷ In the example, the plaintiffs would have to prove that their damage was due to the damage that occurred to the factory plant and not other economic factors. Furthermore, they would have to prove that the loss was unavoidable. If for instance they could have contracted with another supplier which, it is submitted, really refers to mitigation of loss or limiting loss to a reasonable loss, then the loss is not unavoidable.⁸⁶⁸

A plaintiff who owned buses was able to recover bus fares as a result of an accident that delayed the buses from their routes, causing loss of revenue in bus fares. The

⁸⁶³ Van Dam *European tort law* 210.

⁸⁶⁴ Van Dam *European tort law* 210.

⁸⁶⁵ Van Dam *European tort law* 210-211.

⁸⁶⁶ See Article 1149 of the CC; Moréteau in Koziol (ed) *Basic questions of tort law* 34.

⁸⁶⁷ The hypothetical example can be compared with the English case, *Spartan Steel & Co Ltd v Martin* 1973 1 QB 27 discussed in chapter 4 para 3.3.3.

⁸⁶⁸ See Galand-Carval in Spier (ed) *Unification of tort law: causation* 58.

court held that the loss was neither hypothetical nor indirect.⁸⁶⁹ In a case⁸⁷⁰ where the defendant caused the suspension of gas to a factory so that it was unable to continue with production, the defendant was held liable for economic loss. The *Cour de Cassation* held that the loss suffered by the plaintiff “was a direct consequence of the cutting of the gas main and that the damage was recoverable”. Therefore, it was reasonable to compensate the plaintiff for the loss sustained. Where a power supply cable was damaged causing the plaintiff’s factory to suspend activities for one hour and ten minutes, the court awarded the plaintiff damages in respect of salaries paid to his employees for the one hour and ten minutes where they remained idle. It was thus reasonable to compensate the plaintiff for the loss sustained.⁸⁷¹ In all three cases mentioned above the loss was considered a “direct consequence” of the defendant’s conduct.

Pure economic loss was not recoverable from the defendant in the following instances: where the defendant caused an accident preventing a singer from performing at a concert, resulting in loss as a result of cancelling the concert;⁸⁷² and where the defendant caused an accident, resulting in the plaintiff (creditor) being unable to recover the debt from the deceased’s estate.⁸⁷³ In both instances, the *Cour de Cassation* found the damages to be indirect. Thus it is apparent that it was considered unfair and unreasonable to compensate the plaintiff under the circumstances as the loss was considered too remote.⁸⁷⁴ In a case⁸⁷⁵ where a couple gave funds to a bank employee to buy and manage stocks, the employee used the funds for herself and did not buy any stocks. Upon the couple finding this out, they sued the employee. The *Cour de Cassation* confirmed that the couple were entitled to damages, but not for loss of profits expected from the stocks portfolio. The *Cour de Cassation* held that profits that were expected from any rise in the stock price were hypothetical and not certain. Therefore where the loss cannot be established with certainty, it may be

⁸⁶⁹ Cass civ 2 28 April 1965, D 1965 777 note Esmein. See Van Dam *European tort law* 211; Van Gerven, Lever and Larouche *Tort* 197-198.

⁸⁷⁰ Cass civ 2 8 May 1970 69-11446, Bull civ 1970 II 60 122. See also CÉ 2 June 1972, AJDA 1972 356 where economic loss was recoverable due to the defendant breaking a high tension cable (Van Dam *European tort law* 211).

⁸⁷¹ CÉ 2 June 1972. See Van Gerven, Lever and Larouche *Tort* 198-199.

⁸⁷² Cass civ 2 14 November 1958, Gaz Pal 1959 31. See Van Dam *European tort law* 211.

⁸⁷³ Cass civ 2 21 February 1979 77-13951, Bull civ 1979 II 56 42, D 1979 IR 344, JCP 1979 IV 145. See Van Dam *European tort law* 211.

⁸⁷⁴ Van Dam *European tort law* 210-211.

⁸⁷⁵ Cass crim 19 February 1975 74-90694, Bull crim 59 161.

unreasonable to compensate the plaintiff for such uncertain loss. There is no doubt that assessing and quantifying the pure economic loss in this case would have been difficult. In a case,⁸⁷⁶ an art collector purchased a Van Gogh painting (*jardin á Auvert*) at a New York Gallery in 1955 for one hundred and fifty thousand francs. In 1981, the collector applied for an export licence with the intention of taking the painting to Geneva. The license was refused. He sued the French government, as they classified the painting as a national heritage. He was unable to sell the painting to a foreign purchaser and the loss was valued at two hundred and fifty million Francs. The state was held liable and was ordered to pay the collector one hundred and forty five million Francs. This decision was criticised and Moréteau⁸⁷⁷ opines that it should have perhaps been dealt with by the administrative courts and under the doctrine of unjustified enrichment.

An expected loss in French law can be compensated, the loss of chance to obtain the expected benefit is compensable provided the “expectation is reasonable and serious enough”.⁸⁷⁸ In French law even though it is apparent that compensation is generally easily awarded, with regard to compensation for pure economic loss; the loss must be certain and direct. These requirements apply as limitations to liability. In South African law, the elements of wrongfulness and legal causation linked with public policy considerations, the concepts of fairness, reasonableness and justice apply as limiting factors, while in Anglo-American law, the duty of care concept, remoteness of damage or the scope of liability linked with public policy considerations, the concepts of fairness, reasonableness and justice, limit liability for pure economic loss.⁸⁷⁹

The influence of reasonableness on determining whether liability should be imposed for the pure economic loss sustained by the plaintiff is implicit. It is implicit because of the various degrees of the influence of reasonableness on the different elements of delictual liability for pure economic loss. There must be an infringement of a legitimate interest and the damages must be certain and direct. It seems that the “good family

⁸⁷⁶ CA Paris 6 July 1994, D 1995 245 note Edelman. See Moréteau in Koziol (ed) *Basic questions of tort law* 87.

⁸⁷⁷ See Moréteau in Koziol (ed) *Basic questions of tort law* 88.

⁸⁷⁸ See discussion of this case by Borghetti in Winiger (ed) *Digest of European tort law volume 2: essential cases on damage* 434-435.

⁸⁷⁹ See chapter 7 para 2.9.4.

father” in respect of determining fault is not required but whether one has complied with the principles of loyalty, honesty, and good faith.⁸⁸⁰ The requirement that the damages must be certain and direct limits liability to instances where the damage can be ascertained and is not indeterminate. This lends to the reasonableness or unreasonableness of imposing liability for pure economic loss.

10. Conclusion

The beauty of French law of delict is that there is no need to over-theorise and develop theories relating to liability. The courts follow a flexible pragmatic approach based on only five provisions from the *CC*, which have predominantly remained unchanged for over 200 years. The fact that the courts’ decisions are unanimous and generally not more than one page in length emphasises the simple pragmatic, flexible approach followed. It is truly remarkable that in trying to reach the objective of compensating the victim as fully as possible for the harm or loss suffered, there has not been a significant increase in litigation. Even the strict liability regimes have been a success thanks to the principle of solidarity which relates to reasonableness and equality. In respect of the principle of solidarity, the burden placed either on the individual (in relation to the loss he sustains) or on all the citizens or inhabitants of the state (in relation to the loss sustained by all) must be reasonable. The courts are generally liberal in recognising all types of conduct (generating act or event) that lead to any type of harm. Any infringement of an interest is recognised, provided it is “legitimate”, not unlawful or illegal. In limiting or excluding delictual liability, the reasonableness of the plaintiff’s and defendant’s conduct is considered. Whether the defendant’s conduct was reasonable in infringing the plaintiff’s interests and whether the infringement of the plaintiff’s interests was reasonable under the circumstances is considered at least implicitly. The concept of *faute* is wide and includes wrongfulness, intention and negligence. Therefore a *faute* may be present whether there is wrongfulness, intention or negligence. In determining *faute*, the reasonableness of conduct is questioned. *Faute* is generally required for personal liability of one’s acts. In respect of fault-based liability as well as strict liability, the damage must be certain and there must be a direct causal link between the generating act or event and the harm or loss suffered. In

⁸⁸⁰ Van Dam *European tort law* 210.

respect of certainty of damage there must either be proof of damage, a certain reasonable loss of chance, or some kind of certain expected future loss. The damages are assessed generally using a practical, flexible, fair and reasonable approach. In respect of causation, various theories and principles are applied but in the end it is submitted that the courts determine whether or not the harm or loss is too remote and whether it is fair and reasonable to impute liability on the defendant. The unreasonable conduct of the plaintiff in the form of contributory fault may limit or exclude liability. An extraneous cause may also depending on the circumstances exclude or limit liability. Naturally it would be unreasonable to impute liability in full on the defendant if the harm or loss was caused wholly or in part due to an extraneous factor. It may be concluded that the influence of reasonableness on the French law of delict is certainly evident and predominantly implicit.

Chapter 7: Conclusion

“[Tort law] strikes a balance between the respective interests of the victim and the injurer, taking into account broader social interests as well. The victim is primarily interested in the protection of his or her physical integrity and property but also, where feasible, of his or her economic interests and prospects. The injurer, in turn is interested in his or her freedom to engage in certain activities without being obstructed by the threat of potential liability. Lastly, society is interested in achieving distributive justice in a cost-efficient way, without stifling economic initiative ... the balancing of these interests is reflected in the way in which a legal system arranges three basic elements of tort law: sanctioned behaviour on the part of the perpetrator of the harm, protected interests on the part of the injured person and corrective remedies for damage caused by the perpetrator of harm to the injured person”.¹

1. Introduction

This final chapter will provide a summary of the findings as well as recommendations, taking into account insights from jurisprudence and the comparative studies done in respect of the influence of reasonableness in determining delictual liability or liability in tort law. Closing thoughts will also be provided at the close of the study. In the different jurisdictions discussed in this study, reference to the implicit and explicit influence of reasonableness on the elements of delictual liability in South Africa and France, and on tort liability in the United Kingdom and the United States of America, especially for the torts of negligence and trespass to the person, have already been pointed out. Those aspects will not be repeated here. The summary in this chapter will focus broadly on some of the main similarities and differences between the different jurisdictions, focusing on the influence of reasonableness and the different understandings of reasonableness which may have been encountered.

2. Summary and discussion

2.1 *Different legal systems*

To begin with, South African and French law follow a more generalising approach to determining delictual liability when compared with Anglo-American law, which has the tort of negligence and many other torts.² For example, English law has approximately

¹ Van Gerven, Lever and Larouche *Tort* 13 with reference to American tort law.

² See chapter 1 paras 3-4.

seventy torts.³ The South African, English and American tort law or the law of delict is based on common law while the French law of delict is based on five provisions of the CC.⁴ South African law and American law have been greatly influenced by English common law.⁵ In South Africa, legislation, customary law and constitutional provisions may affect common law principles.⁶ In the United States of America, legislation and constitutional provisions may affect the common law. Even though it is up to the different states in the United States of America to develop tort law, there is much common ground. This is apparent in the various volumes of the influential *Restatement of Torts*.⁷

Unique among all the jurisdictions that were discussed, is that in the United States of America, the jury as the embodiment of the reasonable people is the trier of facts. The jury does not need to provide reasons for its decisions. A jury may not be appointed in all cases but there is evidence that the adjudicator and jury often reach similar conclusions in similar cases.⁸ The jury as the embodiment of the reasonable people of the United States of America actually plays a part in shaping tort law. Wells⁹ submits that each person's moral response is not the same; we can all see "the clock on the tower reads four o'clock, but not everyone agrees that a particular action is cruel and deplorable". Wells¹⁰ explains that when an adjudicator instructs the jury that a person's conduct must be "reasonable", deliberation and discourse take place among the jury. Different opinions, arguments and perspectives will be identified, but in the end a collective decision is reached, reflecting a group norm and overriding individual views.¹¹ "Jury consensus suggests a justificatory norm" and they usually "include a cross section of normative viewpoints".¹²

A fundamental difference between the United Kingdom and the other jurisdictions discussed is that the United Kingdom does not have a constitution. However,

³ See Koziol in Koziol (ed) *Basic questions of tort law* 697.

⁴ See chapter 1 para 3; chapter 6 para 1.

⁵ See chapter 1 para 3.

⁶ See chapter 1 para 3.

⁷ See chapter 5 para 1.

⁸ See chapter 5 para 1.1.

⁹ 1990 *Mich L Rev* 2397.

¹⁰ 1990 *Mich L Rev* 2400.

¹¹ Wells 1990 *Mich L Rev* 2407.

¹² Wells 1990 *Mich L Rev* 2409.

legislation such as the Human Rights Act¹³ and other instruments may affect the common law.¹⁴ In the United Kingdom, the notion of parliamentary supremacy applies.¹⁵ The principles relating to delictual liability in the CC may be affected by legislation, constitutional provisions, the Declaration¹⁶ and other international instruments.¹⁷ Of all the jurisdictions discussed, France does not follow the precedent system. The adjudicators do not always provide reasons for their decisions and their decisions are uniform in that no majority or dissenting decisions are provided. French decisions are more or less a page in length.¹⁸ Griss¹⁹ sheds some light on the judicial culture in France by pointing out that the *Cour de Cassation* delivers about twenty thousand judgments a year in comparison to the Supreme Court of the United Kingdom that delivers about eighty judgments per year. France furthermore prefers strict liability and this is based on the principles of solidarity and equality.²⁰ With these basic similarities and differences in mind, it is possible to continue with the summary and discussion.

Even though Anglo-American law does not follow a generalising approach as in South Africa and France, in all the jurisdictions discussed, as will be demonstrated below, generally, the elements of: conduct; causation; fault (except in instances of strict liability) under which wrongfulness may be subsumed; and harm are required.

In terms of the concept “reasonableness”, generally South African, English and American law explicitly refer to it in considering a number of elements of delictual or tort liability. In France, the concept is not explicitly referred to, but the concepts of solidarity, liberty and equality are. “Reasonableness” is however considered implicitly, where other terms or phrases, reflecting reasonableness values or standards are used. Fletcher²¹ correctly points out that while jurisdictions such as England and

13 Of 1988.

14 See chapter 4 para 1.

15 See Starr 1984 *Marquette L Rev* 679; chapter 2 para 1.

16 Of the Rights of Man and the Citizen of 1789.

17 See chapter 6 para 1.

18 See chapter 6 para 1.

19 2013 *JETL* 255.

20 See chapter 6 paras 1 and 6. In South African customary law, the emphasis is on solidarity, group interests or rights, duties and obligations. It is also encompassed in the concept of *ubuntu* (see chapter 2 para 1).

21 1985 *Harv L Rev* 949-953.

America, following common law, easily refer to the concept “reasonableness”, other jurisdictions like France rarely do but that does not mean that lawyers of the different jurisdictions think differently, it just means that they speak differently. It is clear that reasonableness pervades all elements of delict or tort in all the studied legal systems. It plays different roles and is utilised in different ways, depending on which element and which legal system one is looking at.

2.2 Conduct, capacity, accountability, discernment or imputability and the standard of the reasonable person

To begin with, in all the jurisdictions discussed in this thesis, some form of conduct, whether in the form of an omission or a commission, is required for liability in delict or tort law. Naturally, it is unreasonable to hold a person liable without conduct which results in the causing of harm or loss. The requirement of conduct is explicitly referred to in South African law²² and is recognised as a separate element of liability. In French law, this requirement goes beyond human behaviour to encompass a generating act or event.²³ In Anglo-American law too, even though conduct is not explicitly referred to as a requirement with the torts of trespass to a person and the tort of negligence, it must be present in order to ground liability.

As shown below, in South African, English and American law, the conduct must be voluntary. If the conduct is involuntary, for example, where the conduct is considered mechanical, then there is no conduct and it is unreasonable to hold the wrongdoer liable. In situations where a person suffers some kind of disability, for example, a sudden heart attack, or a sudden blackout etcetera, not caused by his own fault, then the conduct is not voluntary and fault is absent. If the defendant forgets to take his medication or deliberately does not take it thereby leading to a blackout, the principle of “prior fault” applies and the defendant may be held liable.²⁴ Thus it may be considered unreasonable to hold the person with such condition liable, whether the element of conduct or fault is found to be absent. French law on the other hand, does

²² See chapter 3 para 2.

²³ See chapter 6 para 2.1

²⁴ See for example, chapter 3 para 2; chapter 4 paras 1.2, 2 and 3.4; chapter 5 paras 1, 2.2, and 3.2.

not require the conduct to be voluntary in order to ground liability under Articles 1382 to 1383 of the CC. Even though the reasonableness of this may be questioned, it may be understood in light of the French pro-victim stance with the aim of compensating the victim and the tendency of preferring strict liability over fault liability.²⁵

There are anomalies which apply to liability of children and mentally impaired persons in the different jurisdictions considered in this thesis which require further discussion.

In South African law,²⁶ accountability is a pre-requisite for fault. A person cannot be held accountable or at fault if he is unable to understand the difference between what is right and wrong and thereafter act in accordance with such understanding. Thus in instances where a mentally impaired person or child voluntarily causes harm but cannot be held accountable, such person or child will not be held liable in delict. In English²⁷ law there must be a voluntary act on the part of the mentally disordered person and he must have the “requisite state of mind for liability in the particular tort with which he is charged”.²⁸ For example, in the English decision of *Morris v Marsden*,²⁹ dealing with the tort of battery, intention with the purpose to commit battery was sufficient even though the mentally impaired person could not tell the difference between right or wrong. Thus intention with the purpose to commit battery was sufficient without the requirement for consciousness of wrongfulness as required in South African law.³⁰ In American law,³¹ infancy and mental incapacity generally does not negate intention. The conduct must be voluntary though, that is, the defendant must be able to mentally control his muscular movements when there is contact with the plaintiff. The *Restatement Third of Torts*³² with regard to the tort of battery, makes reference to “single intent”, that is intent without “culpable intent to harm” but the *Restatement Second of Torts*³³ refers to dual intent requiring culpable intent to harm. Thus in using the single intent rule, young children and mentally incapacitated persons

²⁵ See chapter 6 para 2.1.

²⁶ See chapter 3 paras 2 and 4.1.

²⁷ See chapter 4 para 1.2

²⁸ Peel and Goudkamp *Winfield and Jolowicz on tort* 778. See also *Witting Street on torts* 658.

²⁹ 1952 All ER 925.

³⁰ See chapter 3 para 4.2.

³¹ See chapter 5 para 2.1.1.

³² (*Intentional Torts to Persons*) § 101-103 (Tentative Draft No. 1 April 8 2015).

³³ § 19 (1965).

may be held liable.³⁴ Similarly with the tort of negligence in Anglo-American law, a mental impairment or mental incapacity will generally not lead to exclusion of liability in negligence. Furthermore in the tort of negligence, the mentally impaired person is still judged according to the standard of the reasonable person.³⁵

In French law,³⁶ as a result of the pro-victim stance and the support of strict liability, discernment or imputability, which is somewhat similar to the concept of accountability and capacity, is no longer a requirement for liability where a child or mentally impaired person causes harm to the plaintiff. Thus a mentally impaired person is held strictly liable and the parents of the child may be held strictly liable for the conduct of the child. The parent may, however, not be held strictly liable in instances of *force majeure* where the harmful consequences were generally unforeseeable and unavoidable.³⁷ Article 489-2,³⁸ which was incorporated in the CC,³⁹ states that “[h]e who has caused harm to another while under the control of a mental disturbance is nevertheless obligated to provide reparation”.⁴⁰ There is no doubt that the most plausible reason for the application of strict liability is that it may be considered fair and reasonable to compensate the person who sustained harm as a result of the defendant’s risk-creating or harm-producing conduct. Koziol⁴¹ is not convinced of the French approach to holding the mentally impaired strictly liable and the parents of the children strictly liable. He⁴² submits that children may pose “a special source of danger” due to their inability “to recognise dangers and behave appropriately”,⁴³ while the mentally impaired persons are more vulnerable with a special need to protect them.⁴⁴ It is submitted that even children may be regarded as more vulnerable and the mentally impaired persons may pose a special risk. Koziol⁴⁵ submits that even though most parents are insured for liability stemming from the conduct of the children, there may

³⁴ See discussion by Dobbs, Hayden and Bublick *Hornbook on torts* 65-67; chapter 5 para 2.2.

³⁵ See chapter 2 para 4; chapter 5 para 3.2.

³⁶ See chapter 6 para 2.2.2.

³⁷ See chapter 6 para 5.2.

³⁸ Law no 68-5 of 3 January 1968 inserted Article 489-2.

³⁹ Now Article 414-3 by Law no 2007-308 of 5 March 2007.

⁴⁰ Légifrance-translations. See Moréteau in Koziol (ed) *Basic questions of tort law* 65; chapter 6 para 2.2.2.

⁴¹ In Koziol (ed) *Basic questions of tort* 800-801.

⁴² Koziol in Koziol (ed) *Basic questions of tort law* 792.

⁴³ Koziol in Koziol (ed) *Basic questions of tort law* 799.

⁴⁴ Koziol in Koziol (ed) *Basic questions of tort law* 793.

⁴⁵ In Koziol (ed) *Basic questions of tort law* 801.

be rare instances where there is no insurance cover or the full amount claimed is not covered. Therefore, it is rather harsh that the parents would have to pay for the damages. There is also the possibility that the parents are unable to pay for damages. In such an instance, strict liability of the child may be applicable.⁴⁶ Koziol,⁴⁷ when focusing on the positive side of the French approach, proposes that society as a whole should bear the risk and burden in the form “social liability insurance” for harm or loss caused by the conduct of the mentally impaired and children.

Here there are different views on reasonableness, with South African law taking a different approach to the other studied jurisdictions. In South African law, if a child or mentally impaired person cannot be held accountable, fault is absent and it would be unreasonable to hold the child or mentally impaired person liable.⁴⁸ Under the discussion of Anglo-American law,⁴⁹ even though a number of reasons are provided for holding a mentally impaired person to the standard of the reasonable person and holding him liable, it is submitted that the main reason is that it is unfair and unreasonable not to compensate the plaintiff for the harm done to him. French law follows the approach of holding the mentally impaired liable, albeit strictly, because it is fair and reasonable to compensate the plaintiff.

With regard to the standard for determining negligence of children, whether the reasonable person as in South African law,⁵⁰ the reasonable child in English law⁵¹ or the standard of care of a reasonable person “of his own age, intelligence, and experience in similar circumstances”⁵² in American law is applied, subjective factors relating to the particular child are considered. Previously, South African law used a “reasonable child” test which took into account the youthfulness of the child but currently a more objective reasonable person test is applied to the child. When considering the accountability of a child, subjective factors relating to the child’s intelligence, maturity and so on are considered.⁵³ Thus it may be argued that in South

⁴⁶ Koziol in Koziol (ed) *Basic questions of tort law* 791.

⁴⁷ In Koziol (ed) *Basic questions of tort law* 793.

⁴⁸ See chapter 3 para 4.1.

⁴⁹ See chapter 4 para 1.2 and chapter 5 para 3.2.

⁵⁰ See chapter 3 para 4.3.

⁵¹ See chapter 4 para 3.4.

⁵² See Dobbs, Hayden and Bublick *Hornbook on torts* 233; chapter 5 para 3.2-3.3

⁵³ See chapter 3 para 4.1 and 4.3.

African, English, American and French law⁵⁴ the child's age plays a part, directly or indirectly, in excluding or limiting liability when the subjective factors relating to his intelligence, maturity, experience and so on are considered. For example, liability may be excluded where the child is very young, such as a two-year-old child. The child does not have capacity or accountability.⁵⁵ Liability may be limited where the contributory fault of the child, based on the reasonableness of his conduct, is considered.⁵⁶ The subjective factors may have an effect of lowering the standard applied to children, in the sense that they are generally not held to what may be called the base standard of the "reasonable person". The base standard of the "reasonable person", used in this sense for convenience and understanding the comparisons applied, refers to the standard that is applied to a gender neutral adult, over eighteen years of age, without any physical or mental disabilities. Thus Moran's⁵⁷ observations with regard to the generally more lenient standard applied to children where subjective factors are considered; and the base standard of the "reasonable person" applied to the mentally impaired person where his subjective cognitive disability is not considered, is evident in English, American and French law.⁵⁸ Subjecting the mentally impaired person to the base standard of the reasonable person may be considered harsh from the viewpoint of the defendant,⁵⁹ but fair and reasonable towards the innocent victim.

Moran⁶⁰ also refers to the more lenient standard called for the elderly. In France, the age of a person applies as a subjective factor in assessing the conduct of an elderly

⁵⁴ See chapter 6 para 2.2.3 where the *loi Badinter* excludes the defence of contributory negligence on the part of a child under sixteen years of age and a person older than seventy years of age, however, drivers may still be held contributorily negligent.

⁵⁵ See chapter 3 para 4.1 relating to the accountability of children in South African law where a child under seven is presumed unaccountable, a rebuttable presumption applies to a child between seven and fourteen years of age, and a child between the age of fourteen and eighteen may depending on the circumstances be held accountable; chapter 4 para 1.2 where very young children cannot be held to have capacity, however, English law does not refer to a specific age; chapter 5 para 3.2 where generally a child either under five or seven may not be held to have capacity, while a rebuttable presumption applies to children between the age of seven and fourteen years.

⁵⁶ See chapter 3 paras 4.1 and 4.3; chapter 4 paras 1.2 and 3.5.2; chapter 5 paras 3.2, 3.3 and 3.5.1; chapter 6 para 2.3.5.

⁵⁷ *Reasonable person*. See discussion of Moran's observations in chapter 2 para 4.

⁵⁸ See chapter 6 para 2.2.2 and para 5.1.

⁵⁹ See Koziol in Koziol (ed) *Basic questions of tort law* 793 who refers to this harsher liability rule.

⁶⁰ See discussion of Moran's observations in chapter 2 para 4.

person.⁶¹ It may be argued that in respect of children and the elderly, depending on their age as mentioned above, this subjective factor generally lends to lowering the standard of judging the reasonableness of the conduct below the base standard. In respect of persons with physical disabilities, the disability has the effect of lowering the standard from the base standard.⁶² American law specifically refers to the standard of the reasonable person with a similar disability.⁶³ It is reasonable to lower the standard from the base standard to take account of the person's physical disability. While on the other end, when judging the conduct of the professional and applying the standard of, for example, the reasonable doctor, then the conduct is judged at a higher level above the base standard. Thus it is reasonable to lower the standard when dealing with, for example, children, the elderly and persons who offer emergency aid or rescue services.⁶⁴ It is reasonable to raise the standard of judging the reasonableness of conduct when dealing with the conduct of professionals.⁶⁵ Moran⁶⁶ also argues that a different standard applies to judging the reasonableness of conduct of girls and boys as well as men and women. Girls and women may be held to a harsher standard generally because of the perception that girls and women are more attentive with their own safety as well as that of other's. Moran no doubt has valid arguments when she highlights the inequality applied to different standards of reasonableness depending on *inter alia* a person's age, gender, cognitive shortcomings and physical disabilities. It is submitted that the different standards of reasonableness are applied as a result of subjective factors, which may not excuse the inequality prevalent, but lend to the understanding of the different standards of reasonableness applied and provide a logical departure point for law reform.

2.3. The duty of care concept in the tort of negligence in Anglo-American law

In Anglo-American law, in order to succeed with a claim in the tort of negligence, the requirements include: a duty of care; breach of the duty, which relates to finding fault

⁶¹ A more lenient standard is applied to a person over seventy years of age. See chapter 6 para 2.2.2.

⁶² See chapter 2 para 4; chapter 5 para 3.2.

⁶³ See chapter 5 para 3.2.

⁶⁴ See for example chapter 5 para 3.2 where in American law, a person involved in providing emergency aid or rescue services is not held to the base standard in order to encourage them to provide such aid or assistance.

⁶⁵ See chapter 3 para 3.4.3; chapter 4 para 3.4; chapter 5 para 3.2; chapter 6 para 2.2.3.

⁶⁶ See discussion of Moran's views in chapter 2 para 4.

in the form of negligence; causation; and harm.⁶⁷ The breach of the duty of care, causation and harm will be discussed further on. Here, the focus is on whether a duty of care exists to begin with, which is a preliminary question. Even though there is common ground in Anglo-American law in establishing whether a duty of care exists, they offer different approaches to determining a duty of care.

In English law, the duty of care question is considered as a preliminary question of law, demarcating “the range of people, relationships and interests that receive the protection of the law” against negligent conduct.⁶⁸ It relates to whether liability will ensue in the type of situation encountered and whether the defendant owes the claimant a duty of care.⁶⁹ There are three different approaches applied in determining a duty of care in English law:⁷⁰ the three-fold test; the incremental approach which relates to developing the law incrementally; and assumption of responsibility which relates to proximity. Of all the approaches, the three-fold test is the most common and in *Customs and Excise Commissioners v Barclays Bank plc*⁷¹ the court confirmed that the three-fold test may be combined with the incremental approach and the assumption of responsibility approach.

The required elements of the three-fold test are: foreseeability of harm; proximity; and whether it is fair, just and reasonable to impose a duty of care. With regard to foreseeability of harm, specific harm to the claimant need not be foreseeable and all that is required is that the claimant falls within the category of persons that could be reasonably foreseen to be injured as a result of the defendant’s negligence.⁷² The element of proximity takes into consideration positive fact-based elements of the relationship between the parties, but may also involve policy considerations. Proximity encompasses different forms of closeness including physical, assumed, causal and circumstantial closeness. Its use varies depending on the particular case and source of harm.⁷³ The last element, whether it is fair, just and reasonable to impose a duty of

⁶⁷ See chapter 4 para 3.1; chapter 5 para 3.

⁶⁸ Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 102. See also *Witting Street on torts* 36.

⁶⁹ See chapter 4 para 3.1.

⁷⁰ See chapter 4 para 3.2.2.

⁷¹ 2007 1 AC 181,189-192.

⁷² See chapter 4 para 3.2.2.1.

⁷³ See chapter 4 para 3.2.2.1.

care as referred to by Jones⁷⁴ is a test of common sense, ordinary reason, and whether it is right for the court to impose a duty of care in a given case. This last element is also policy-based and has the effect of either excluding a duty of care or recognising a duty of care in terms of policy. It is useful in determining whether a duty of care exists in borderline, novel or difficult cases. Thus it plays a prominent role in *inter alia* cases of omissions; wrongful conception, wrongful birth, and wrongful life claims; psychiatric injury; and pure economic loss.⁷⁵ It is an objective, flexible test enabling a value judgment as to whether the defendant owes the claimant a duty of care and allows the courts to rely on policy as well principles of fairness, justice and reasonableness in deciding whether to exclude or extend a category of duty of care in the tort of negligence.

In American law,⁷⁶ the question of whether a duty of care is owed to the plaintiff is determined by the adjudicator, not the jury. The concept of a duty of care produces confusion in American law. It is considered artificial in character and if a court would so wish to find liability “it would be quite as easy to find the necessary ‘relation’ in the position of the parties toward one another, and hence to extend the defendant’s duty to the plaintiff”. Keeton *et al*⁷⁷ submit simply that whether or not there is a duty “begs the essential question – whether the plaintiff’s interests are entitled to legal protection against the defendant’s conduct”. Keeton *et al*⁷⁸ state nevertheless, that the concept of duty is firmly embedded in American law and cannot be discarded. Duty is “only an expression of the sum total of those considerations of policy which lead the way to say that the plaintiff is entitled to protection”. In American law, a duty may stem from the common law, legislation, a contract, or where the relationship of the parties is of such a nature that the law imposes a duty on the defendant to act reasonably in protecting the plaintiff.⁷⁹ The following factors are *inter alia* considered in determining a duty of care: policy considerations, whether reasonable people would agree that a duty of

⁷⁴ In Jones (gen ed) *Clerk and Lindsell on torts* 450.

⁷⁵ See chapter 4 para 3.3.

⁷⁶ See chapter 5 para 3.1.

⁷⁷ *Prosser and Keeton on torts* 356. See also Dobbs, Hayden and Bublick *Hornbook on torts* 203-204.

⁷⁸ Keeton *et al* *Prosser and Keeton on torts* 358. See also Dobbs, Hayden and Bublick *Hornbook on torts* 204.

⁷⁹ See chapter 5 para 3.1.

care exists; the relationship between the plaintiff and defendant; and reasonable foreseeability of harm.⁸⁰

Reasonable foreseeability of harm as a factor in determining a duty of care has been severely criticised. One important reason for the criticism is that it unnecessarily duplicates the foreseeability of harm enquiry at the duty stage when it is already considered in determining negligence and the proximate cause or scope of liability. Another important reason for the criticism is that if an adjudicator decides that a duty of care does not exist when considering foreseeability of harm as a factor, he in effect takes over the role assigned to the jury.⁸¹ The *Restatement Third of Torts* recommends that, to begin with, all persons owe a duty of care not to “create unreasonable risks to others”.⁸² Foreseeability of harm must not be considered in determining the existence of a duty of care.⁸³ Courts may consider specific policy factors in determining whether *to impose a duty of reasonable care* in exceptional cases, such as:⁸⁴ where a duty of care would be in conflict with social norms;⁸⁵ if a duty of care would be in conflict with other areas of the application of law, such as the law of contract;⁸⁶ if a duty of care would be in conflict with the relationship between the parties or with the assertion of the defendant’s other legally recognised interests;⁸⁷ where the determination of a duty of care would extend beyond the parameters of the function of the courts, such as in cases of defective products relating to the manufacture of motor vehicles.⁸⁸

The consideration of specific policy factors in determining whether *to impose a duty of reasonable care* in exceptional cases in American law no doubt follows the third element of the English three-fold test and corresponds with the recent approach adopted in determining wrongfulness in South Africa law.⁸⁹ All three jurisdictions have this test in common now. Furthermore this test is similar to the test for determining

⁸⁰ See chapter 5 para 3.1.

⁸¹ See chapter 5 para 3.1.

⁸² Except for extraordinary cases of physical harm. See *Restatement Third of Torts (Liability for Physical Harm)* § 7(a) (2010).

⁸³ *Restatement Third of Torts (Liability for Physical Harm)* § 7 cmt j (2010).

⁸⁴ *Restatement Third of Torts (Liability for Physical Harm)* § 7 cmt a (2010).

⁸⁵ *Restatement Third of Torts (Liability for Physical Harm)* § 7 cmt c (2010).

⁸⁶ *Restatement Third of Torts (Liability for Physical Harm)* § 7 cmt d (2010).

⁸⁷ *Restatement Third of Torts (Liability for Physical Harm)* § 7 cmt e (2010).

⁸⁸ *Restatement Third of Torts (Liability for Physical Harm)* § 7 cmt f (2010).

⁸⁹ See chapter 3 paras 3.2-3.3.; chapter 4 para 3.2.2.1.

legal causation in South African law, although the latter test relates to whether or not the consequences and the conduct are remote or not.⁹⁰ This test is also close to the test for determining causation in English⁹¹ and American tort law under certain circumstances.⁹² These tests are indeed very similar; they involve normative questions based on policy, and the common normative concept is reasonableness. In turn, reasonableness is closely linked to the normative concepts of “justice” and “fairness”. However, even though the ways in which the concept of reasonableness is used in the above-mentioned tests are similar, the tests serve to determine *different elements* in the different legal systems.

It is submitted that the adoption of the elements required for a duty of care in English law, namely, foreseeability of harm, a relationship of proximity between the parties and whether it is fair, just and reasonable to impose a duty of care, in American and South African law causes confusion with the duplication of the requirements in other elements of tort or delictual liability.

The *Restatement Third of Torts*, as discussed above, recommends a sound approach which is different from the English approach in that: a duty of care may be owed to all persons; policy considerations may be considered under exceptional circumstances in determining whether it is reasonable to impose a duty of care; and the test of foreseeability of harm should be excluded from determining a duty of care. In South African law, it has been suggested that the existence of a duty of care is similar to the element of wrongfulness and similar to the concept of a legal duty to prevent harm or loss as one of the tests for establishing wrongfulness.⁹³ South African courts have however stated that the duty of care concept is not part of South African law.⁹⁴ In South African law, in determining wrongfulness, reasonable foreseeability of harm may be considered as a factor in determining whether there was a legal duty to prevent harm, but its role is small and controversial.⁹⁵ Even the relationship between the parties under the idea of proximity plays a role in determining whether there was a legal duty

⁹⁰ See chapter 3 para 5.2.

⁹¹ See chapter 4 para 4.

⁹² See chapter 5 para 4.

⁹³ According to Fagan 2000 *Acta Juridica* 65 a legal duty to prevent harm and a duty of care are almost identical. See chapter 3 para 3.3.2.

⁹⁴ See chapter 3 para 4.4.

⁹⁵ See chapter 3 para 4.4.

to prevent harm, but again the role is small.⁹⁶ However, South African law has just adopted the third element of the English three-fold test (in determining a duty of care) in determining wrongfulness.⁹⁷ The influence of reasonableness in determining the existence of a duty of care in Anglo-American law is clearly apparent.

2.4 Protection of interests or rights

In all the jurisdictions discussed in this thesis, tort law and the law of delict implicitly or explicitly considers the protection of interests deemed worthy of protection. Thus it may be argued that all jurisdictions take into consideration whether an interest is infringed in a reasonable or unreasonable manner whether implicitly or explicitly. Furthermore, in judging whether the interest was infringed in a reasonable or unreasonable manner, a balancing of interests takes place where the plaintiff's interests, the defendant's interests and the interests of society are considered.

South African law⁹⁸ makes specific reference to the doctrine of subjective rights. Wrongfulness lies in the infringement of a right or breach of a legal duty to prevent harm or loss. In the former, the infringement of the right is referred to explicitly while implicitly considered in the latter. In respect of breaching a legal duty to prevent harm or loss, ultimately a right must be infringed whether it relates to privacy, bodily integrity etcetera, although such a specific right may not yet have been identified jurisprudentially.⁹⁹ In South African law,¹⁰⁰ the protection of interests or rights is dealt with specifically under the element of wrongfulness, where the reasonableness of the infringement of the interests is considered (according to the traditional approach to determining wrongfulness) and whether it is reasonable to impose liability (according to the recent approach to determining wrongfulness). A balancing of the plaintiff's interests which may require protection and redress from the law, for the alleged unreasonable infringement of such interests; and the defendant's promotion of his own interests which may result in the infringement of the plaintiff's interests are weighed. Ultimately society's interests are considered in determining whether the infringement

⁹⁶ See chapter 3 para 3.1.10.

⁹⁷ See chapter 3 para 3.2.

⁹⁸ See chapter 3 paras 3.1, 3.1.8-3.1.9.

⁹⁹ See Neethling and Potgieter *Delict* 51-52.

¹⁰⁰ See chapter 3 paras 3.1, 3.2.

is reasonable or not by having regard to the *boni mores* and constitutional values. The infringement of interests or rights dealt with under the element of wrongfulness is judged objectively and *ex post facto*.¹⁰¹

English law with its specific torts (approximately seventy individual torts)¹⁰² and specific rules relating to each particular tort protect numerous interests, and relationships against “unacceptable conduct”.¹⁰³ English tort law focuses on remedies rather than rights, as a result of its historical development where writs were required in order to obtain remedies.¹⁰⁴ Even though the courts according to the Human Rights Act must acknowledge the European Convention on Human Rights, they are still hesitant to state that a person has a right.¹⁰⁵ Protected interests are at the very least implicitly acknowledged and the values of the interests are considered.¹⁰⁶ The claimant’s interests are weighed against the “defendant’s freedom to act”.¹⁰⁷ However, there are glimpses of recognitions of rights, for instance, with regard to the patient’s right of autonomy in respect of treatment and the right to family life.¹⁰⁸ English law focuses on the conduct and the way a person should behave.¹⁰⁹ In the tort of negligence, the emphasis is on the duty of care but within the idea of the duty of care, the interests or rights of the claimant are considered.¹¹⁰ With respect to personal injury or damage to property, a duty of care is more easily established than a duty of care for pure economic loss.¹¹¹ However, where the intentional torts of trespass to the person are considered, English law acknowledges infringements of the claimant’s right (of bodily integrity, liberty and so on) but may not explicitly refer to the rights.¹¹²

Therefore, it may be argued that in English law within the specific torts where the focus is on conduct and remedies, there must be a weighing of interests of the plaintiff, the defendant and society. In such weighing process, the infringement of interests is

¹⁰¹ See chapter 3 para 3.1.1.

¹⁰² See Koziol in Koziol (ed) *Basic questions of tort law* 697.

¹⁰³ Van Gerven, Lever and Larouche *Tort* 71.

¹⁰⁴ Van Dam *European tort law* 142.

¹⁰⁵ Van Dam *European tort law* 142.

¹⁰⁶ Van Dam *European tort law* 220.

¹⁰⁷ Van Dam *European tort law* 220.

¹⁰⁸ Van Dam *European tort law* 143.

¹⁰⁹ Van Dam *European tort law* 146.

¹¹⁰ Van Dam *European tort law* 169.

¹¹¹ Van Dam *European tort law* 169.

¹¹² Van Dam *European tort law* 169.

considered in an objective manner. In considering the tort of battery for example,¹¹³ if the defendant intentionally commits battery, he is promoting his freedom to act, while the claimant's bodily integrity may be infringed if such physical contact was unlawful, non-consensual, and undesired. It seems as though acceptable and unacceptable infringement of one's interests in Anglo-American law is similar to the reasonable or unreasonable infringement of interests in South African law. In determining whether the infringement occurred in an unreasonable manner under the circumstances, it is considered objectively, whether such contact may be regarded as acceptable or not. Thus if it is unacceptable, then the defendant has infringed the claimant's interests unreasonably but if it is acceptable, then the plaintiff's interests have not been infringed unreasonably.

In American law, the infringement of a legally protected interest is in principle wrongful requiring redress with regard to the intentional torts. In the tort of negligence, if the defendant did not act in a blameworthy manner, then the loss should not be shifted on the defendant, in light of the principle that the loss lies where it falls.¹¹⁴ In modern American doctrine, rights are recognised but may be overridden in that they are not absolute but relative. For example, there is a "*prima facie*" right to free speech¹¹⁵ which may however be overridden by "clear and present danger", limiting the freedom of speech. For example, shouting "a bomb" in a public train is not protected as free speech because it poses clear and present danger. It poses danger because people would react adversely.¹¹⁶ Thus here too, the interests of all parties are weighed, that is the interests of the defendant in promoting his freedom of speech, the interests of the plaintiffs', that is, all those affected by the statement as well as society's interests. It is submitted that in determining whether the infringement of the interests were infringed in reasonable or unreasonable manner, the competing interests are weighed and are ultimately judged objectively. This objective weighing process is not necessarily explicitly identified as a wrongfulness or unlawfulness issue, as it would be in South African law.

¹¹³ See chapter 4 para 2.1.

¹¹⁴ See Epstein *Torts* 87-88.

¹¹⁵ First Amendment to the United States Constitution.

¹¹⁶ Fletcher 1985 *Harv L Rev* 978-979.

French law¹¹⁷ in general protects any interests as long as they are legitimate, that is, as long as the law deems them worthy of protection. It is submitted that *faute*, when pertaining to infringements of property or personality rights or where only so-called objective fault is required, is closer to the South African concept of wrongfulness than the South African concept of fault.¹¹⁸ Objective fault in this sense means fault without *imputabilité* or discernment (similar to accountability from a South African perspective) referring to consciousness of wrongdoing.¹¹⁹ *Faute* has a broader application beyond wrongfulness, which includes fault, for the residual of any cases based on Articles 1382 to 1383.¹²⁰ Interests or rights are generally not specifically referred to in French law in the manner in which it is specifically referred to in South African law, but they are implicitly considered by the courts when interpreting the *CC*.¹²¹ Most of the strict liability rules encompasses the right to safety and security.¹²² “Equality before public burdens” refers to equal treatment of all. The right to privacy is also codified in Article 9 of the *CC*.¹²³ Reference is made to legitimate interests as well as the abuse of rights.¹²⁴ In French legal doctrine, even though the balancing of interests is not specifically referred to, it is submitted that it does take place. This is illustrated by the examples referred to by Moréteau¹²⁵ with regard to the publication of facts that are considered harmless relating to the birth of the fourth child of the Princess of Monaco, but facts published relating to the extramarital relations of a French President may be considered harmful. In both examples, the defendant’s interest in promoting his speech and the plaintiff’s interest in privacy are weighed against each other where in the former, the infringement is not unreasonable because it is harmless while in the latter instance, the infringement is considered unreasonable because it is harmful. With the idea of balancing the various interests, it is submitted that the question of whether the legitimate interests are infringed in an unreasonable manner or not, and thus how the boundaries of conflicting rights are drawn, an objective approach is applied. In French law it is apparent that an objective *ex post facto* approach is applied when *faute* consists of mainly wrongfulness when dealing with the infringements of

¹¹⁷ See chapter 6 para 2.2.4.

¹¹⁸ See chapter 6 para 2.2.1.

¹¹⁹ See chapter 6 para 2.2.1.

¹²⁰ See Moréteau in Koziol (ed) *Basic questions of tort law* 66, 72.

¹²¹ Van Dam *European tort law* 143.

¹²² Van Dam *European tort law* 143.

¹²³ Van Dam *European tort law* 143, 169.

¹²⁴ See chapter 6 paras 2.2.1 and 2.2.4.

¹²⁵ In Koziol (ed) *Basic question of tort law* 62. See chapter 6 para 2.2.1.

property or personality rights or where only objective fault is required. If it is decided that an infringement of a fundamental right has taken place, it is wrongful and a *faute* has been committed. The investigation stops there and then. In other words, without having to further prove fault in the form of negligence or intention.¹²⁶

Thus in all the jurisdictions mentioned, the protection of interests or rights is recognised. Within the law of delict or tort law, most interests or rights are protected in terms of common law in South African and Anglo-American law, whereas they are protected by the application and interpretation of civil law in a codified form in French law. Additional and enhanced protection is afforded to certain rights such as the right to life, etcetera by constitutional provisions in South Africa,¹²⁷ France¹²⁸ and the United States of America,¹²⁹ while statutes protecting particular rights, such as the Human Rights Act, in the United Kingdom apply in further protecting certain rights. Depending on the source of the protection of the interest or rights, a balancing of the interests takes place and those rights that have been afforded enhanced protection may carry more weight when compared to others as submitted by Costa Neto.¹³⁰ In respect of whether interests or rights have been infringed, the influence of reasonableness is apparent in all jurisdictions.

2.5 The concepts of wrongfulness and fault

Because out of the studied jurisdictions, only South African law recognises wrongfulness clearly as a distinct element separate from fault, it is not possible to neatly organise the comparative discussions. English, American and to an extent French law may, from a South African perspective, be said to combine the elements of wrongfulness and fault into one enquiry. In discussing the comparisons it is not an easy task to clearly distinguish wrongfulness from fault, and therefore an overlap and repetition of some information discussed under this paragraph and others is unavoidable. Where there is a clear difference, such as between negligence and

¹²⁶ See chapter 6 para 2.2.1.

¹²⁷ See chapter 3 para 3.1.3.

¹²⁸ See chapter 6 paras 1 and 2.2.4 with regard to the preamble to the Constitution of 1946 and Declaration of the Rights of Man and the Citizen of 1789.

¹²⁹ See chapter 5 para 1.3.

¹³⁰ 2015 *Rev Direito GV* 159 ff. See chapter 2 para 1.

intention, it will be discussed under a separate heading where comparative conclusions are more easily made.

The concept of wrongful conduct or unlawful conduct is arguably at the centre of fault liability systems, but in several systems in Europe and in English tort law it is not explicitly referred to, with German law and Dutch law constituting notable exceptions.¹³¹ The South African law of delict (which has been influenced by Dutch law)¹³² and German legal dogma recognises the concept of wrongfulness as a separate requirement for delictual liability.¹³³ In South African law, wrongfulness lies in the infringement of a right or breach of a legal duty to prevent harm or loss, in light of the *boni mores*, constitutional provisions and surrounding circumstances. Wrongfulness may also be present where it is reasonable to hold the wrongdoer liable in terms of public policy.¹³⁴ Wrongfulness from the South African perspective is judged objectively *ex post facto* and fault where the blameworthy state of mind and blameworthiness of conduct comes into play is judged more subjectively in comparison to wrongfulness with an *ex ante* approach.¹³⁵

French law also recognises wrongfulness as an element of delictual liability more directly when dealing with fault-based liability and indirectly when dealing with strict liability.¹³⁶ Wrongfulness is specifically referred to as the objective component of fault-based liability.¹³⁷ In the French law of delict, wrongfulness may be present if there is: a breach of a statutory rule; commission of non-intentional fault which by default is deemed civil fault; infringement of a right or “*abuse de droit*” (abuse of a right);¹³⁸ breach of an unwritten duty stemming from “regulations, morals, customs, and technical standard”;¹³⁹ or if the defendant’s conduct deviated from the general norm of

¹³¹ See Van Dam *European tort law* 138; Van Gerven, Lever and Larouche *Tort* 8-9.

¹³² See chapter 1 para 3.

¹³³ See Knobel in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* 236 and the further authority cited in fn 41.

¹³⁴ See chapter 3 para 3.

¹³⁵ See chapter 3 paras 3.1.1 and para 4.

¹³⁶ See chapter 6 para 2.2.1.

¹³⁷ See chapter 6 para 2.2.1.

¹³⁸ The violation of rights may be considered wrongful either as a *faute* in terms of Article 1382 or a violation of a protected subjective right such as privacy (Article 9) or ownership (Article 544). See Moréteau in Koziol (ed) *Basic question of tort law* 61.

¹³⁹ Van Dam *European tort law* 57, 233.

behaviour.¹⁴⁰ It is evident that in determining wrongfulness in French law, an objective *ex post facto* approach may be applied as well as a subjective *ex ante* approach. As stated above,¹⁴¹ an objective *ex post facto* approach may be applied where there is an infringement of a property or personality right or where only objective fault is required. The concept of wrongfulness in French law is however wider than the concept of wrongfulness in South African law and when wrongfulness is established by considering whether the defendant *acted* in a socially unacceptable way or breached the duty of acting carefully and skilfully under the circumstances, then from a South African perspective, the elements of wrongfulness and fault are combined.

Anglo-American law which is based on English common law, do not make the conceptual difference between wrongfulness and fault, but rather combine them into one enquiry thereby using objective, subjective, *ex ante* and *ex post facto* approaches.¹⁴² Holmes¹⁴³ submits that “fault” refers to wrongful conduct or moral shortcomings in that the actor had “the power of avoiding the evil complained of” and failed to avoid such evil. Holmes was, however referring, to fault in the form of negligence where wrongfulness is subsumed.

The standard of the reasonable person, as will be shown, is not applied solely in determining fault in the form of negligence where a partly objective and partly subjective *ex ante* approach is applied. In English law, there are instances where specific reference is made to the criterion of the reasonable person applied not only to the tort of negligence but also to the intentional torts. This is evident when dealing with the defences of trespass to the person. In the tort of negligence reasonable foreseeability and preventability play a role while in the intentional torts, foreseeability may play a role in the sense that the judgment of the hypothetical reasonable person at the time of the tort and the circumstances prevalent at the time of the tort may be considered, but not necessarily foreseeability of harm where with the intentional torts, proof of harm is not required,¹⁴⁴ nor reasonable preventability of harm. The reasonable

¹⁴⁰ See Viney in Bermann and Picard (eds) *French law* 247.

¹⁴¹ In para 2.4.

¹⁴² See chapter 5 para 1.

¹⁴³ *Common law* 95. See Wells 1990 *Mich L Rev* 2356.

¹⁴⁴ Where proof of harm is not required, the torts are actionable *per se* – this will be discussed under par 2.7 below.

person test may in fact, in instances have a wider application encompassing the reasonable views of the community. For example,¹⁴⁵ when trying to establish the existence of consent,¹⁴⁶ the question may be asked whether the reasonable person could conclude under the circumstances that the claimant consented. In respect of informed consent, a reasonable amount of information must be provided to the patient which would influence the judgment of the reasonable patient. In respect of necessity¹⁴⁷ where it is impractical to communicate with the patient, it may be necessary to take action which a reasonable person would if it is in the best interests of the patient. In this latter instance, reasonable foreseeability of harm to the plaintiff is relevant and in acting out of necessity, harm or further harm to the plaintiff may be prevented.

No doubt due to the influence of English law on American law, in American law, different applications of the reasonable person standard are also apparent. In respect of consent, when it is not possible to obtain consent and it reasonably appears that a delay in treatment will result in harm to the patient, consent may be waived where it is probable that the patient would consent (substituted consent) or that a reasonable person would consent.¹⁴⁸ Furthermore, where the consent is determined objectively, particularly in establishing apparent consent (not actual consent), the criterion of the reasonable person is used in determining whether the defendant's belief is reasonable *ex ante*, while the act of infringement of the person's bodily integrity – whether the defendant's reaction to the apparent consent is reasonable is determined partly *ex ante* and partly *ex post facto*. In determining the reasonableness of conduct stemming from the belief, a weighing of the various interests takes place and in this sense from a South African perspective, wrongfulness and fault are combined. In the end an objective, subjective, *ex ante* and *ex post facto* approach is applied.

In South African law, influenced by English law, the criterion of the reasonable person test is in some instances applied in different ways, similar to the approaches followed in Anglo-American law mentioned above. The reasonable person is considered as the

¹⁴⁵ See chapter 4 para 2 with regard to harassment – the question is whether the reasonable person would consider the conduct as harassment.

¹⁴⁶ See chapter 4 para 2.4.1.

¹⁴⁷ See chapter 4 para 2.4.2.

¹⁴⁸ See chapter 5 para 2.5.6.

embodiment of the *boni mores* in the application of certain defences.¹⁴⁹ For example, in respect of self-defence, the conduct of the person relying on the defence may be judged according to the standard of the reasonable person as the embodiment of the objective *boni mores* criterion. With regard to necessity,¹⁵⁰ in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck*,¹⁵¹ the court held that the question that needs to be asked “is whether the conduct that caused the harm was a reasonable response to the situation that presented itself” and whether the reasonable person would have acted in the same manner. The court in this case did not clarify whether necessity excluded wrongfulness or fault and this is apparent where the conduct was judged objectively *ex post facto* and subjectively and *ex ante*. The court here no doubt followed the Anglo-American approach where there is no need to differentiate between wrongfulness and fault. In determining the reasonableness of conduct in establishing provocation,¹⁵² the retaliatory conduct must be reasonable according to the *boni mores*, where reasonableness is equated with the reaction of the reasonable person, or the question asked by the courts is whether the reasonable person in the position of the defendant would have been provoked by the plaintiff’s conduct in the form of *inter alia* assault, defamation or insult. Again an objective *ex post facto* approach as well as a subjective *ex ante* approach is applied. Furthermore the courts have not yet decided whether provocation excludes wrongfulness or fault. In respect of official command¹⁵³ and whether the command is *wrongful*, reference is made to the judgement of the reasonable person in the position of the subordinate who acted upon the official command, in determining wrongfulness. An objective *ex post facto* approach is applied in determining wrongfulness.

It is submitted that grounds of justification or other defences, whether regarded as privileges, excuses and so on in the various jurisdictions, are practical expressions of reasonableness in that if they succeed they are evidence of reasonableness on the part of the person pleading the defence, whether they relate to wrongfulness, fault or other elements of delictual or tort liability.

¹⁴⁹ See Neethling and Potgieter *Delict* 49 fn 83, 92-93, 415, 120-121, 633. See chapter 3 paras 3.4.2, 3.4.3, 3.4.4 and 3.4.7.

¹⁵⁰ See chapter 3 para 3.4.3.

¹⁵¹ 2007 2 SA 118 (SCA) 122-123.

¹⁵² See chapter 3 para 3.4.4.

¹⁵³ See chapter 3 para 3.4.7.

In South African law,¹⁵⁴ grounds of justification generally negate the element of wrongfulness. Thus the defendant's conduct in promoting his own interests with his freedom to act, which results in the reasonable infringement of the plaintiff's interests, is considered reasonable. In South African law, the grounds of justification discussed include: consent to injury or to the risk of injury; private defence or self-defence; necessity; provocation; statutory authority; official capacity; official command; and discipline.¹⁵⁵ In all these grounds of justification, the influence of reasonableness has been shown to be clearly apparent.

In English law, the defences relevant to trespass to the person discussed include: consent; necessity; self-defence; provocation; discipline; illegality; statutory authority and official authority.¹⁵⁶ As mentioned,¹⁵⁷ Witting¹⁵⁸ makes a distinction in English law between "absent element defences," "justification defences" and "public policy defences". Naturally, with absent element defences, an element in a tort is missing. This category includes, for example, the defences of consent "doctrines of inevitable accident", "involuntariness", and "physical compulsion". The justification defences include self-defence, discipline, statutory authority and so on where the reasonableness of conduct may apply in upholding a defence. An example of a public policy defence is illegality where unlawful or grossly immoral conduct must be proven. It is submitted that in general any defence, at the very least, goes to the heart of some element of tort liability and if the defence succeeds in negating that element, then it may be unreasonable to hold the person pleading the defence liable.

In American tort law, defences to tortious conduct may be in the form of a "privilege", or "affirmative defence".¹⁵⁹ In using a privilege, the defendant in essence "injects issues of reasonableness into the case".¹⁶⁰ Fletcher¹⁶¹ refers to justifications as self-defence, consent and so forth negating wrongful conduct, whereas excuses such as

¹⁵⁴ See in general chapter 3 para 3.4.

¹⁵⁵ See chapter 3 para 3.4.

¹⁵⁶ See chapter 4 para 2.4.

¹⁵⁷ See chapter 4 para 2.4.

¹⁵⁸ *Street on torts* 316-317.

¹⁵⁹ See chapter 5 para 2.5.

¹⁶⁰ Dobbs, Hayden and Bublick *Hornbook on torts* 42.

¹⁶¹ 1985 *Harv L Rev* 954-955, 958. See chapter 5 para 2.5.

“insanity, involuntary intoxication, duress or mistake of the law” negate the blameworthiness in respect of conduct.¹⁶² In American law, the defences relevant to the torts of trespass to the person include self-defence, defending another person, defence of property; the merchant’s privilege to detain or arrest another; privileged arrest; discipline; necessity and consent.¹⁶³ Once again, the influences of reasonableness on these defences are clearly evident.

In the French law of delict, the defences considered are necessity, legitimate defence, lawful authority, *force majeure*, voluntary assumption of risk, consent, contributory fault and illegality.¹⁶⁴ In French law, the term *faute* is wide enough to encompass both wrongfulness and fault and the victim may choose to bring his claim before the criminal or civil courts.¹⁶⁵ Necessity, lawful authority and legitimate defence are referred to in the French Penal Code¹⁶⁶ and may apply as a “bar to liability” negating civil or criminal liability, whether based on *faute* or on the so-called “act of the thing”.¹⁶⁷ In respect of the defences of consent,¹⁶⁸ voluntary assumption of risk¹⁶⁹ and contributory fault,¹⁷⁰ the reasonableness of the infringement of interests as well as the reasonableness of conduct is considered. In respect of illegality,¹⁷¹ the defence may be raised if compensation itself would lead to “an illicit or immoral result”¹⁷² which may be considered reasonable. In respect of all the defences, even if not explicit, the influence of reasonableness is to some degree apparent.

Mention should be made briefly of some differences that apply in South African law and Anglo-American law with regard to some of the defences.

In respect of necessity, English law does not recognise so-called private necessity where the defendant harms another innocent person or causes damage to such

¹⁶² Fletcher 1985 *Harv L Rev* 961.

¹⁶³ See chapter 5 para 2.5.

¹⁶⁴ See chapter 6 para 2.3

¹⁶⁵ See chapter 6 para 2.3.1.

¹⁶⁶ *Code pénal*.

¹⁶⁷ Moréteau in Koziol (ed) *Basic questions of tort law* 12 with reference to self-defence.

¹⁶⁸ See chapter 6 para 2.3.4.

¹⁶⁹ See chapter 6 para 2.3.3.

¹⁷⁰ See chapter 6 para 2.3.5.

¹⁷¹ See chapter 6 para 2.3.6.

¹⁷² Van Gerven, Lever and Larouche *Tort* 736-737.

innocent person's property to protect his own interests.¹⁷³ This may be understood in light of the fact that the United Kingdom does not have a constitution and the state's rights are afforded more protection than the individual's rights. Furthermore with the advent of Brexit and the uncertainty of the applicability of the Human Rights Act in English law, it is uncertain whether the rights of the individual will be held to the same status as that of the state. English law makes the distinction on whether the defendant acts out of necessity in respect of his own interests, for those of the claimant, and for those of third parties. Thus the defence is not recognised where he acts out of necessity in protecting his own interest but recognised when acting in the interests of others.¹⁷⁴

In South African law,¹⁷⁵ there is no distinction between private and public necessity and where the defendant acts reasonably in protecting his interests or the interests of others, depending on the circumstances, liability may be excluded.

In American law,¹⁷⁶ a distinction is explicitly made between private and public necessity. Where the defendant acts out of necessity in respect of his own interests he acts out of private necessity and where he acts in the interest of the plaintiff or third parties, it is considered as public necessity. However, private necessity is not considered as a complete defence in that even though, under the circumstances, the defendant's conduct may be considered reasonable, he may still be held liable for the loss sustained by the plaintiff. Here it is considered fair and reasonable that the plaintiff be compensated for his loss.

In Anglo-American law,¹⁷⁷ where the defences consider the defendant's belief of imminent harm or an attack etcetera, the belief must be a reasonable belief. In determining whether the belief was reasonable an *ex ante*, partly subjective and partly objective approach is applied. Thus in order for the belief to be reasonable it must not be blameworthy. However, it is evident, as will be demonstrated below, that when the courts determine whether the conduct stemming from the belief resulted in the

¹⁷³ See chapter 4 para 2.4.2.

¹⁷⁴ See chapter 4 para 2.4.2.

¹⁷⁵ See chapter 3 para 3.4.3.

¹⁷⁶ See chapter 5 para 2.5.5.

¹⁷⁷ See chapter 4 para 2.4.3; chapter 5 para 2.5.1.

infringement of interests, an *ex ante* as well as an *ex post facto* approach is arguably applied. It is submitted that the objective *ex post facto* approach plays a part in determining proportionality and the weighing of various interests. With regard to self-defence,¹⁷⁸ the English case of *Ashley v Chief Constable of Sussex Police*,¹⁷⁹ serves as a good example for the Anglo-American approach. In this case, the police officer alleged that he honestly and mistakenly believed that the deceased was reaching for a weapon. This was in fact not the case. At approximately 4:20 am when the police raided the deceased's flat, he had just gotten out of his bed. At the time the deceased was shot he was in fact unarmed, unclothed and there was no light on.¹⁸⁰ As a result of the mistaken belief, the police officer shot and killed the deceased. The police officer was acquitted on a criminal charge as his actions resulting from the genuine belief were justified. However, the House of Lords held that in a civil claim where the intentional torts of battery and assault were alleged, the belief must be held to be reasonable. In the civil claim, the police officer's mistaken belief resulting in the use of the defensive force in the circumstances was found to be unreasonable. Lord Scott¹⁸¹ stated that the function of tort law is different from criminal law, because its:

"main function is to identify and protect the rights that every person is entitled to assert against, and require to be respected by, others. The rights of one person, however, often run counter to the rights of others and the civil law, in particular the law of tort, must then strike a balance between the conflicting rights. ... The balance between these conflicting rights must be struck by the rules and principles of the tort of negligence. As to assault and battery and self-defence, every person has the right in principle not to be subjected to physical harm by the intentional actions of another person. But every person has the right also to protect himself by using reasonable force to repel an attack or to prevent an imminent attack. The rules and principles defining what does constitute legitimate self-defence must strike the balance between these conflicting rights".

It is submitted that the court in deciding whether the belief and reaction stemming from the belief in causing the death of the deceased were reasonable; applied a subjective, objective, *ex ante* and *ex post facto* approach, in the sense that from a South African perspective the enquiries into wrongfulness and fault were combined.

American law holds that the belief must be one that a reasonable person would also have had under similar circumstances in respect of self-defence.¹⁸² It is submitted that

¹⁷⁸ See chapter 4 para 2.4.3.

¹⁷⁹ 2008 1 AC 962.

¹⁸⁰ *Ashley v Chief Constable of Sussex Police* 2008 1 AC 962 [6] per Lord Scott.

¹⁸¹ *Ashley v Chief Constable of Sussex Police* 2008 1 AC 962 [18] per Lord Scott.

¹⁸² See chapter 5 para 2.5.1.

the belief and more importantly the reaction stemming from the belief, are judged subjectively, objectively, *ex ante* and *ex post facto* in light of all the surrounding circumstances, taking all the parties' interests into account.

The views of Fletcher¹⁸³ provide an interesting insight when comparing American and German law. He¹⁸⁴ submits that American tort law doctrine easily recognises putative defence and a reasonable belief may be regarded as a justification “collapsing the problem of putative self-defense into the analysis of actual self-defense”, thereby equating reasonableness with justifiability. Fletcher¹⁸⁵ submits that the:

“divergence of common law thinking from continental thinking on putative self-defense derives from a matrix of interrelated assumptions. American lawyers tend to think of all available legal defences as analogous, tend to assume that what is permissible is justified, and tend to view rights as trumpable claims. At the foundation of these assumptions lies the cement of reasonableness, a concept that enables Americans to blur distinctions between objective and subjective, self-defense and putative self-defense, wrongdoing and responsibility”.

Fletcher refers to the “incompatibility theory” where logic tells us that only one person can be justified in using force, but in American law a plaintiff who acts in putative defence using defensive force on a reasonable mistaken belief and the defendant who also uses reasonable defensive force may both be justified. It is justified *ex ante* according to so-called conduct rules where the action is justified and it is judged *ex post facto* according to so-called decision rules.¹⁸⁶ Fletcher refers to these approaches in judging conduct where, in American law, there is no clear and consistent conceptual difference between wrongfulness and fault.¹⁸⁷

“Reasonableness – the ubiquitous modifier – provides the lever for th[e] flattening of liability. The reasonable person enables us to blur the lines between justification and excuse, between wrongfulness and blameworthiness, and thus renders impossible any ordering of the dimensions of liability. The standard ‘what would a reasonable person do under the circumstances?’ sweeps within one enquiry questions that would otherwise be distinguished as bearing on wrongfulness or on blameworthiness.”

In Anglo-American law, provocation is not recognised as a complete defence,¹⁸⁸ whereas in South African law the majority of academic writers are of the view that it

¹⁸³ 1985 *Harv L Rev* 973ff.

¹⁸⁴ Fletcher 1985 *Harv L Rev* 973.

¹⁸⁵ Fletcher 1985 *Harv L Rev* 979-980.

¹⁸⁶ Fletcher 1985 *Harv L Rev* 973, 975-976.

¹⁸⁷ 1985 *Harv L Rev* 962-963.

¹⁸⁸ See chapter 4 par 2.4.4; chapter 5 para 2.5.1.

applies as a ground of justification excluding wrongfulness.¹⁸⁹ This may be understood in light of the fact that Anglo-American law does not make the distinction between wrongfulness and fault and therefore it is not crucial to make the distinction of whether it applies as a partial or complete defence. Nevertheless, the influence of reasonableness is apparent in deciding whether to reduce the plaintiff's claim, as the reasonableness of both the plaintiff's and defendant's conduct would have to be considered and weighed objectively where the comparative fault of the parties are considered. The nature and value of the competing interests would also have to be weighed in order to decide whether it is reasonable to reduce the plaintiff's award of damages stemming from provocation or to apply a punitive award as in American law.¹⁹⁰

As stated above, the South African courts have at times followed an *ex ante* approach in determining some grounds of justification, which coincide with the defences that apply to the intentional torts of trespass to the person without appreciating the fundamental distinction between the intentional torts and the tort of negligence in Anglo-American law. Furthermore Anglo-American law does not distinguish between the concepts of wrongfulness and fault but, according to Fletcher's insights as mentioned above, combines (especially from a South African perspective) the tests for wrongfulness and fault. Therefore it is understandable that when a subjective *ex ante* approach is used as well as an objective *ex post facto* approach in actually judging the conduct with regard to self-defence using the concept of reasonableness or the standard of the reasonable person in different ways, Anglo-American law as well as South African law reach the same result. Turning again to the example of *Ashley v Chief Constable of Sussex Police*,¹⁹¹ the police officer honestly and mistakenly believed that the deceased was reaching for a weapon but in actual fact was not and the police officer's shooting and killing of the deceased was not justified. In this case *inter alia* a claim for negligence (in the tort of negligence), assault and battery (intentional torts) were instituted. Liability for negligence was conceded but the Chief Constable in an appeal denied the allegations of assault and battery, relying on the mistaken belief to exclude fault as would apply in criminal law. Looking at it from

¹⁸⁹ See chapter 3 para 3.4.4.

¹⁹⁰ See chapter 5 para 2.5.1.

¹⁹¹ 2008 1 AC 962. See chapter 4 para 2.4.3.

the South African perspective, judged objectively and *ex post facto* in determining wrongfulness, the conduct is wrongful. Fault would also be absent. Looking at it from an Anglo-American perspective, the belief coupled with the conduct was considered unreasonable. Putative defence and actual defence were collapsed into one in reaching a decision. Thus the conduct of both parties, all the surrounding circumstances and the weighing of various interests are considered – a subjective, *ex ante* as well as an objective, *ex post facto* approach is applied.

The objective, subjective, *ex ante* and *ex post facto* approaches that are applied may seem theoretically mutually exclusive or nonsensical from some dogmatic perspectives, but may also be understood looking at the approaches from different angles where both parties' conduct, the weighing of interests, and all the surrounding circumstances are considered using normative standards. In all the jurisdictions studied in this thesis and irrespective of elements or terminology employed, the influence of reasonableness is clearly apparent when conduct is evaluated and interests or rights are evaluated.

2.5.1 Negligence

In all the jurisdictions examined in this thesis, the standard of the “reasonable person”, or terms equivalent to it, is used in determining fault in the form of negligence.¹⁹² In South African and French law, it is dealt with under the element of fault or *faute*, whereas in English and American law it is dealt with under breach of a duty of care in the tort of negligence.¹⁹³ As mentioned,¹⁹⁴ the standard is objective as well as subjective. It is objective in the sense that it applies generally, to cases testing the parties' conduct against the hypothetical model reasonable person. As mentioned above,¹⁹⁵ the standard may be lowered or raised from the base standard depending on subjective factors relative to the person. Depending on the jurisdiction, the standard applicable may be the reasonable child, reasonable person with a physical disability, reasonable professional and so on, where the test is still objective. Thus it is only

¹⁹² See chapter 3 para 4.3; chapter 4 para 3.4; chapter 5 paras 3.2-3.3; chapter 6 para 2.2.3.

¹⁹³ See chapter 3 para 4.3; chapter 4 para 3.4; chapter 5 para 3.3; chapter 6 para 2.2.3.

¹⁹⁴ In para 2.2 above.

¹⁹⁵ In para 2.2 above.

reasonable that subjective factors relating to a person's age, mental and physical capabilities, skill, etcetera are taken into account when judging the reasonableness of conduct. On yet another level, subjective factual factors relevant to the circumstances of the particular case are also considered in judging reasonableness of conduct. Taking into account circumstances of the case "brings flexibility and common sense to the standard".¹⁹⁶ Circumstances of the case may for example relate to being faced with a sudden unforeseen emergency where an *ex ante* approach is applied but is still judged partially objectively based on how the reasonable person faced with such emergency would have acted. Thus the courts place the reasonable person in the position of the defendant at the time of the alleged breach of duty or alleged wrongdoing.¹⁹⁷ The test is furthermore partially subjective in so far as the reasonable person or his equivalent is placed in the position of the defendant at the time of delict or tort, and factors or circumstances that the defendant was aware of, accompanied by those factors or circumstances of which the reasonable person in that position would have been aware of, are taken into account.¹⁹⁸

In general, in determining how far a person's conduct strayed from that of the reasonable person in all the jurisdictions discussed in this thesis, a number of factors may be considered. Reasonable foreseeability of harm is required in the sense that not the precise extent or manner of the harm must be foreseeable but whether harm is probably or most likely to occur, justifying the need to take precautionary measures. If the probability is slight then it may not be reasonably foreseeable but if it is considerable then it may be reasonably foreseeable.¹⁹⁹ The defendant's conduct will be deemed unreasonable and negligent when he "knew of the risk of foreseeable harm or should have known".²⁰⁰ In respect of reasonable preventability of harm, the following factors are weighed: with respect to the foreseeable harm, the degree or extent of the risk of harm materialising and the magnitude of the risk (disadvantages); are weighed against the burden, cost, or utility of reducing or avoiding the risk of harm (advantages). As Green and Card²⁰¹ put it, if the disadvantages outweigh the

¹⁹⁶ Dobbs, Hayden and Bublick *Hornbook on torts* 223.

¹⁹⁷ See chapter 3 para 4.3; chapter 4 para 3.4; chapter 5 para 3.3; chapter 6 para 2.2.3.

¹⁹⁸ See Neethling and Potgieter *Delict*.

¹⁹⁹ See chapter 3 para 4.3; chapter 4 para 3.4; chapter 5 para 3.3; chapter 6 para 2.2.3.

²⁰⁰ Dobbs, Hayden and Bublick *Hornbook on torts* 265.

²⁰¹ In Koziol (ed) *Basic questions of tort law* 480

advantages, then the conduct is negligent. If the cost or utility of preventing the harm is low compared with the degree and extent of the risk of harm, then the reasonable person would have taken the preventative steps. If the cost and difficulty of taking preventative measures is high compared to the degree or extent of the risk of harm, then the reasonable person would not take preventive steps.²⁰² The Hand Formula, albeit in an algebraic formula, considers the following variables in determining negligence: the likelihood that the defendant's conduct will lead to harm; the magnitude or seriousness of the harm; weighed against the cost of preventing such harm. It is submitted that although the algebraic Hand Formula, which is sometimes followed in American law, is not applied expressly in the other jurisdictions discussed in this theses, the three variables are indeed factors that are considered in determining negligence. They are not followed in a strict mathematical way, but in an informal manner based on value judgments.²⁰³

In American law, a violation of a statute, for example the violation of a speed limit, may serve as an indication of negligence;²⁰⁴ and where conduct is *contra* to customs or practices followed in the community²⁰⁵ it may also be an indication of negligence. A weighing of risks and utilities really comes down to a weighing of the plaintiff's and defendant's interests (protected and advanced) and whether harm to the plaintiff could have been prevented by less risky alternative measures that could have been taken under the circumstances.²⁰⁶ In American law, the element of breach of a duty is usually a question for the jury to decide as the representatives of the reasonable people in the community. American law does not make a conceptual difference between wrongfulness and fault but in determining unreasonableness of conduct and breach of a duty of reasonable care, the interests of the parties are weighed, community values are considered, and the conduct is generally tested against a standard of reasonableness.

²⁰² See chapter 3 para 4.3; chapter 4 para 3.4; chapter 5 para 3.3; chapter 6 para 2.2.3.

²⁰³ See chapter 4 para 3.4.

²⁰⁴ See Zipursky 2015 *U Pa L Rev* 2164.

²⁰⁵ Dobbs, Hayden and Bublick *Hornbook on torts* 263.

²⁰⁶ See chapter 5 para 3.3.

In English law,²⁰⁷ common practices and expectations also set the benchmark for conduct. For example, in *Condon v Basi*,²⁰⁸ involving the injury of a soccer player, the tackle was considered foul play and in breach of the rules of the game but the court held that that alone may not lead to a conclusion of negligence. Based on the test of reasonableness with respect to sporting activities, the court found the defendant's conduct unreasonable in that he showed "reckless disregard" of his opponent's safety.

In French law²⁰⁹ too, if conduct is *contra* to customs; professional rules, practices or codes of ethics; technical rules; and private regulations, then the conduct may be negligent. The defendant's conduct may be deemed a *faute* (referring to the elements of wrongfulness and negligence) if it deviates even slightly from the standard of the good family father.²¹⁰ In French law unreasonable conduct may also relate to both wrongfulness and negligence.

In all the jurisdictions discussed the influence of reasonableness whether express or implied is apparent in determining negligence.

2.5.2 Intention

In South African law, intention encompasses: *direction of the will*; and subjective awareness that the willed conduct is wrongful with reference to the criterion of reasonableness, that is, *consciousness of wrongfulness* or unreasonableness of conduct.²¹¹ In some instances, in respect of specific forms of *iniuria* such as unlawful detention or wrongful attachment of goods, the courts, due to policy considerations, may apply intention, in an attenuated form, where only "direction of the will" is required.²¹² The three forms of intent recognised are: direct intent (where the defendant desires to bring about a particular consequence); indirect intent (where the defendant desires to bring about a consequence but simultaneously indirectly causes another consequence which he is aware of); and *dolus eventualis* (where the

²⁰⁷ See chapter 4 para 3.4.

²⁰⁸ 1985 1 WLR 866.

²⁰⁹ See chapter 6 para 2.2.3.

²¹⁰ See Galand-Carval in Widmer (ed) *Unification of tort law: fault* 90, 94.

²¹¹ See chapter 3 para 4.2.

²¹² See chapter 3 para 4.2.

defendant actually subjectively foresees the possibility of a harmful consequence ensuing and, while not desiring it, reconciles himself with such possibility, nevertheless continuing with the conduct.)²¹³ A further distinction is made with definite intent, *dolus determinatus*, where the defendant has a specific person or object in mind and intent may be present in instances of direct intent, indirect intent or *dolus eventualis*. In respect of indefinite intent, *dolus indeterminatus*, the defendant does not have a specific person or object in mind but may have direct intent (in respect of a specific consequence), indirect intent (in realising that other consequences will inevitably occur) or *dolus eventualis* (by foreseeing and reconciling himself with the possibility of the harmful consequence as a result of his conduct).²¹⁴ Even though different forms of intent are recognised, in practice any form of intention is sufficient to ground delictual liability, providing the other elements are present.²¹⁵

The following defences, depending on the circumstances may exclude intent: emotional distress; jest; intoxication; provocation; and mistake.²¹⁶ Naturally, if direction of the will is absent then there is no intent and it will be unreasonable to hold the defendant liable for alleged intentional conduct. With regard to emotional distress, provocation, mistake or joke, the focus must be on the defendant's state of mind at the time of the delict. The defendant must show that the lack of intention was reasonable thus showing that there was no "consciousness of wrongfulness".²¹⁷ In principle whether there is a mistake regarding an aspect of law, a fact, or whether the mistake is reasonable or not, such mistake should exclude fault. Where a person is intoxicated, intention may be absent if the defendant was not conscious of wrongfulness. However, there must be no prior intentional voluntary conduct, which leads to the state of intoxication. In instances of provocation where it does not apply as a full defence but as a mitigating factor reducing the plaintiff's claim, then there is some fault on the part of the plaintiff as well as the defendant which is taken into account.²¹⁸

²¹³ See chapter 3 para 4.2.

²¹⁴ Neethling and Potgieter *Delict* 134-135.

²¹⁵ Neethling and Potgieter *Delict* 134.

²¹⁶ See chapter 3 para 4.2.

²¹⁷ See Van der Walt and Midgley *Delict* 233-234.

²¹⁸ See chapter 3 para 4.2.

In English law it has been mentioned that there is no general definition of “intention” in the intentional torts.²¹⁹ Recklessness in respect of the consequences and also recklessness in respect of the circumstances may fall within the ambit of “intention”.²²⁰ As mentioned above, there are approximately seventy torts in English law and in each intentional tort, the required intention varies.²²¹ In respect of battery, intention refers to the intention to make direct unlawful physical positive contact. However, where X intends to strike Y, but instead strikes Z, intent is present but is referred to as “transferred intent”.²²² In terms of assault, the positive act by the defendant must directly and intentionally cause “the claimant reasonably to apprehend the imminent infliction of battery”.²²³ Intention is required and is sufficient even if the defendant was reckless with regard to the consequences of his actions. Liability depends on whether the victim reasonably believed that the threat could be carried out soon, so as to qualify as an “immediate” threat.²²⁴ In respect of false imprisonment, the defendant must intentionally and directly cause the confinement of the claimant within a specific area. The conduct must be intentional, direct and immediate. With this tort, the claimant need not be aware of his deprivation of liberty.²²⁵ Where the intentional harm is caused indirectly, it does not fall under trespass to the person but the rule in *Wilkinson v Downton*²²⁶ will apply. A defendant may thus still be held liable for wilfully causing harm, which is regarded as physical harm but caused in an indirect manner.²²⁷ Thus with the torts of trespass in English law it is apparent that consciousness of wrongfulness is not required as in South African law. There are a number of defences that may be applied to the intentional torts, as mentioned above.²²⁸

In American law, in the majority of the different states, infancy or mental incapacity does not negate intent.²²⁹ The defendant must have a “purpose” to bring about a particular result, or alternatively if he does not have a purpose but acknowledges with

²¹⁹ See chapter 4 para 2.

²²⁰ Peel and Goudkamp *Winfield and Jolowicz on tort* 51.

²²¹ See chapter 4 paras 2.1-2.3.

²²² See chapter 4 para 2.1.

²²³ See Witting *Street on torts* 249.

²²⁴ See chapter 4 para 2.2.

²²⁵ See chapter 3 para 2.3.

²²⁶ 1897 2 QB 57.

²²⁷ See chapter 4 para 2.3.

²²⁸ In para 2.5 above.

²²⁹ See chapter 5 para 2.1.1.

“substantial certainty” that his conduct will bring about the result, then intent is present.²³⁰ American law, from a South African perspective, acknowledges direct and indirect intent. When establishing intent, the subjective state of mind of the defendant is in question, but the subjective intent is determined from external or objective evidence by the trier of facts. There seems to be a desire to move away from so-called dual intent, where consciousness of wrongfulness of conduct is not required. In the *Restatement Third of Torts*²³¹ reference is made to “single intent” that is, without “culpable intent to harm” but the *Restatement Second of Torts*²³² required the intent to cause “harmful or offensive contact”, dual intent requiring culpable intent to harm.²³³ In American law, excuses such as insanity, involuntary intoxication, duress or mistake of the law may negate the blameworthiness of conduct.²³⁴ Thus the influence of English law on American law and South African law, where the intentional torts of trespass to a person in English law do not require the element of consciousness of wrongfulness as in South African law, aids in understanding why sometimes intention in such attenuated form is applied in South African law.

In French law, there are no specific rules requiring intentional conduct with respect to liability. In most instances, negligence is sufficient while in others strict liability is applicable. Liability for intentional conduct is however relevant with respect to “abuse of rights”. There is the objective theory of “abuse of rights” based on society’s perception of subjective rights and the subjective theory of abuse of rights which takes into consideration the defendant’s motive for promoting his interests. Thus the defendant abuses a right, if for example, he has intention to harm. The subjective theory is preferred by the *Cour de Cassation* and the defendant’s mental state in terms of intention to harm (*intention de nuire*), fraudulent fault (*faute dolosive*), bad faith (*mauvaise foi*) or *légèreté blamable* (“culpable levity of conduct”) are considered.²³⁵ In modern French law, “abuse” is defined with reference to a number of criteria, which take into account the nature of the right.²³⁶ The abuse of rights theory is flexible and applicable in a number of situations. The concept of “abuse of rights” does not apply

²³⁰ See chapter 5 para 2.1.1.

²³¹ (*Intentional Torts to Persons*) § 101-103 (Tentative Draft No. 1 April 8 2015).

²³² § 19 (1965).

²³³ See discussion by Dobbs, Hayden and Bublick *Hornbook on torts* 65-67.

²³⁴ Fletcher 1985 *Harv L Rev* 961.

²³⁵ See chapter 6 para 2.2.4.

²³⁶ Galand-Carvel in Widmer (ed) *Unification of tort law: fault* 95.

to limit rights but to assist the plaintiff. A violation of a right satisfies the requirements of *faute* and damage for purposes of liability under Article 1382 of the CC.²³⁷

The common defences that apply in French, Anglo-American and South African law in respect of fault include contributory fault and voluntary assumption of risk. In French law, *force majeure* is a defence that may negate fault or causation. *Force majeure* as a defence is not limited to natural forces and has a much wider application. In respect of negating fault and causation, what is relevant is whether the harm was unavoidable (not preventable) and unforeseeable. Thus if the harm was unavoidable and unforeseeable, then liability will not follow.²³⁸

In English law, an unfair contract term in terms of the Unfair Contract Terms Act may in principle apply as a defence.²³⁹ The influence of reasonableness is apparent in that the terms of the contract must be fair and reasonable, otherwise such terms may be struck out. A number of factors are considered and weighed in determining the reasonableness of a term.²⁴⁰

In all the jurisdictions discussed in this thesis, contributory fault may either exclude liability or limit liability, depending on the plaintiff's fault.²⁴¹ The influence of reasonableness is apparent where the conduct of the plaintiff is also judged according to the reasonable person or good family father.

In South African law,²⁴² voluntary assumption of risk generally applies as a ground of justification negating wrongfulness. Consent to the risk of injury (being a ground of justification, thus excluding wrongfulness) must not be *contra bonos mores*, that is, it must not be unreasonable, if it is then *volenti non fit iniuria* cannot apply as a defence but contributory fault may.²⁴³ In English law it seems that the defence will succeed

²³⁷ See chapter 6 para 2.2.4.

²³⁸ See chapter 6 para 2.3.2.

²³⁹ 1977.

²⁴⁰ See chapter 4 para 3.5.1.

²⁴¹ See chapter 3 para 4.3; chapter 4 para 3.5.2; chapter 5 para 3.5.1; chapter 6 para 2.3.5.

²⁴² See chapter 3 para 3.4.1.

²⁴³ See chapter 3 para 3.4.1.

where the plaintiff's conduct is clearly unreasonable with some prior fault-related conduct.²⁴⁴

The form of intention known as *dolus eventualis* in South African law is considered as a form of negligence in American law.²⁴⁵ Thus in American law, the requirement that the plaintiff must with knowledge and awareness “act unreasonably in choosing to confront the risk”, in order for the defence to succeed – is considered an element in common with establishing fault in the form of negligence.²⁴⁶ In instances where the danger is obvious, such as diving into a clearly visible shallow body of water, the plaintiff should have known and appreciated the risk of diving into such shallow water; the plaintiff clearly acts unreasonably assuming the risk of harm.²⁴⁷ The *Restatement Third of Torts*²⁴⁸ has done away with the defence of implied assumption of risk but kept the defence of express assumption of risk. The court may circumvent the harsh effect of the defence of implied assumption of risk by finding that there is no negligence on the part of the defendant; no duty of reasonable care owed; or that the plaintiff acted contributorily negligent by acting unreasonably in making his choice. Implied risk does not apply in the context of employment and some states have also completely abolished the general application of the defence.²⁴⁹

In French law, voluntary assumption of risk seems to succeed where the victim has “inexcusable” fault, which does contain a subjective element as it takes account of a “certain degree of wilful blindness to injury”²⁵⁰, usually involving recklessness and suicidal behaviour. Currently the defence can no longer be raised in transportation cases and the scope of its application has been restricted in sporting activities.²⁵¹ It has also been excluded when liability is based on the “act of thing” in terms of Article 1384(1).²⁵² The effect of this is that if for example, a person is injured while racing in a rally, voluntary assumption cannot be raised as the injury is caused by the so-called act of a thing, the act of the motor vehicle.

²⁴⁴ See chapter 4 para 3.5.3.

²⁴⁵ See chapter 5 para 2.1.1.

²⁴⁶ Shapo *Tort* 203.

²⁴⁷ Shapo *Tort* 203-204.

²⁴⁸ (*Apportionment of Liability*) § 2 cmt I (2000).

²⁴⁹ See chapter 5 para 3.5.2.

²⁵⁰ See chapter 6 para 2.2.3.

²⁵¹ See chapter 6 para 2.3.3.

²⁵² See Moréteau 2010 *European tort law yearbook* 191.

It is apparent in all the jurisdictions that voluntary assumption of risk is not a defence that succeeds often. The defence of contributory negligence is upheld more frequently. No doubt, part of the reason why contributory negligence is preferred is because it is judged more objectively as opposed to voluntary assumption of risk where the test is more subjective, requiring subjective consent, which is more difficult to prove.²⁵³ Furthermore, the presence of the defence need not lead to exclusion of a claim. Nevertheless, it is apparent that reasonableness of conduct is important in determining the success or failure of the defence of voluntary assumption of risk.

Even though Anglo-American law does not make the distinction between wrongfulness and fault and in French law the concept of *faute* encompasses both wrongfulness and fault, at the heart of the enquiries, even in South African law, is the reasonableness of harm-causing conduct. Furthermore, whether the reasonableness of the harm-causing conduct is considered objectively or subjectively, *ex ante* or *ex post facto*; reasonableness lies at the heart of the enquiries.

2.6 Causation

In all the jurisdictions that were discussed, the consequences must have been factually caused by conduct, either in the form of an omission or commission, with the caveat that in French law, the consequences may also have been factually caused by an event or so-called act of a thing. The role of causation thereupon moves from the factual inquiry into the sequence of events to a “normative assessment of the objective imputability of the plaintiff’s injury to the defendant”.²⁵⁴ South African,²⁵⁵ English,²⁵⁶ and American law explicitly make a distinction between factual and legal causation (where either proximate cause, remoteness or scope of liability is the more or less equivalent term to legal causation used in South African law) while in French law²⁵⁷ the distinction is implicit.

²⁵³ See chapter 5 para 3.5.2.

²⁵⁴ See Van Gerven, Lever and Larouche *Tort* 456.

²⁵⁵ See chapter 3 para 5.

²⁵⁶ See chapter 4 para 4.

²⁵⁷ See Koziol in Koziol (ed) *Basic questions of tort law* 773-774.

All the studied legal systems begin the inquiry into causation with the *conditio sine qua non* theory or but-for test. South African, English and American law explicitly refer to the but-for test while French law refers to “equivalence of conditions” (*l'équivalence des conditions*) where all acts leading to the harm are considered as causal facts.²⁵⁸ Therefore, if the harmful consequences would have resulted without conduct or a generating event, there is no factual causation and it would be unreasonable to hold the wrongdoer liable. Whenever the but-for test produces unfair results, the test may be varied or different tests may be applied including common sense standards, either as part of the but-for test, or as an independent, additional criterion. It ultimately leads to establishing factual causation where it is reasonable to do so.

In instances where the harm results from the defendant's conduct and some other natural or innocent cause, factual causation may be present if the defendant's conduct is considered to be a material cause or contribution to the harm, thereby entitling the plaintiff to recover compensation.²⁵⁹ In English and American law, where the defendant's breach of a duty increases the risk of harm to the claimant, factual causation is difficult to prove using the but-for test. It is then sufficient for the claimant only to prove the material increase in risk of harm in order to establish causation.²⁶⁰ The courts take *inter alia* policy considerations into account in order to reach a reasonable outcome.²⁶¹

In English, American and French law, looking at the example of *Fairchild v Glenhaven Funeral Services Ltd*²⁶² where the victims were unable to prove which of the defendants caused the harm, a pragmatic approach is applied where the burden of proof is reversed, requiring each defendant to prove that he did not cause the harm. If the defendants are unable to prove that they did not cause the harm, then they may all be held jointly liable. In effect, where the defendants are unable to prove that they did not cause the harm, the but-for test is applied to the aggregate conduct of the defendants. Thus in terms of policy, it is reasonable in such circumstances to find a causal link. The claimant as the innocent person should not bear his own loss and be

²⁵⁸ See chapter 6 para 3.

²⁵⁹ See chapter 3 para 5.1; chapter 4 para 4.1; chapter 5 para 4.1.

²⁶⁰ See chapter 4 para 4.1; chapter 5 para 4.1.

²⁶¹ See Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 230.

²⁶² 2003 1 AC 32.

without redress.²⁶³ Where two defendants acting independently caused harm to the plaintiff, as in the American decision of *Landers v East Texas Salt Water Disposal Company*,²⁶⁴ the joint wrongdoers are held jointly and severally liable for the indivisible loss sustained by the plaintiff. Each defendant's conduct is considered sufficient on its own in causing the plaintiff's loss. The *Restatement Third of Torts*²⁶⁵ recommends that in such instances where each defendant sufficiently causes the plaintiff's harm, that each cause is regarded as a factual cause. The but-for test is not applied, because if it were to be applied²⁶⁶ it would have absolved all the defendants from liability.²⁶⁷ If, on the other hand, the loss is divisible, it is reasonable that the defendant should be held liable only for that portion of the loss that he caused.

In French and American law, with regard to the *DES* cases, the "market share" liability principle may be applied based on the defendant's market share of the defective products.²⁶⁸ However, in the United States of America, some courts adopted this principle, while others rejected it.²⁶⁹ English law, like American law, is divided on the loss of chance principle.²⁷⁰ In South African law the loss of chance principle is recognised in determining future loss.²⁷¹ In French law,²⁷² the loss of chance principle is commonly applied. The principle is applied for example, in cases of failure to provide medical treatment, or failure to inform the patient of risks involved in medical treatment which could have benefited the plaintiff. The loss of chance is expressed as a percentage "of the actual injury suffered by the plaintiff"²⁷³ or an "advantage that was denied as a result of the loss of chance" may be claimed.²⁷⁴ Generally with claims for loss of chance, the defendant fails to act positively in preventing the loss of a reasonable chance. The plaintiff must establish with "reasonable certainty" a causal link between the harm or loss sustained and the defendant's conduct.²⁷⁵

²⁶³ See chapter 4 para 4.1; chapter 5 para 4.1; chapter 6 para 3.

²⁶⁴ 151 Tex 251, 248 SW 2d 731 (1952).

²⁶⁵ (*Liability for Physical and Emotional Harm*) §27 (2010).

²⁶⁶ See chapter 5 para 4.1.

²⁶⁷ See chapter 5 para 4.1

²⁶⁸ See chapter 5 para 4.1; chapter 6 para 3.

²⁶⁹ See chapter 5 para 4.1.

²⁷⁰ See chapter 4 para 4.1; chapter 5 para 4.1.

²⁷¹ See Potgieter, Steynberg and Floyd *Damages* 135.

²⁷² See chapter 6 paras 3.1 and 4.1.

²⁷³ Van Gerven, Lever and Larouche *Tort* 460.

²⁷⁴ Séjean and Knetsch 2014 *European tort law yearbook* 204.

²⁷⁵ See chapter 6 para 3.1.

In dealing with omissions, hypothetical positive reasonable conduct is inserted in place of the omission. American law refers to counter-factual conduct in place of the actual omission.²⁷⁶ Anglo-American law acknowledges that it can at times get complicated, depending on the facts of the case, to try to establish factual causation where there is uncertainty with regard to what happened as a matter of “historical fact” or where there is scientific uncertainty as to the cause. Sometimes positive hypothetical conduct of the claimant, defendant, or third parties is considered.²⁷⁷

The question of legal causation in a strict sense deals with limiting liability, involving legal policy, and principles of fairness, justice and reasonableness in respect of imputing liability for the consequences that occurred.²⁷⁸

In South African law,²⁷⁹ there is no single test for determining legal causation. Thus for example, the “reasonable foreseeability” theory, “adequate cause” theory and the “direct consequences” theory apply as subsidiary tests under the umbrella test of the flexible approach. According to this flexible approach, the question is asked “whether there is a close enough relationship between the wrongdoer’s conduct and its consequence for such consequence to be imputed to the wrongdoer in view of policy considerations based on reasonableness, fairness and justice”.²⁸⁰ Thus the reasonableness of the defendant’s conduct is determined with reference to the proximity or remoteness of the act to its consequence or consequences.²⁸¹ South African law considers policy considerations under legal causation.

Like South African law, French law follows a flexible approach whereby a number of theories and factors, depending on the circumstances, are used in order to determine legal causation. In addition, there is no desire in French law to develop comprehensive theories of legal causation.²⁸² Where required, the adequate cause theory; direct consequences theory; reasonable foreseeability of harm; reasonable preventability of

²⁷⁶ See chapter 5 para 4.1.

²⁷⁷ See chapter 4 para 4.1; chapter 5 para 4.1.

²⁷⁸ See chapter 4 para 4.1.

²⁷⁹ See chapter 3 para 5.2.

²⁸⁰ *S v Mokgethi* 1990 1 SA 32 (A) 40-41. See chapter 3 para 5.2.

²⁸¹ See chapter 3 para 5.2.

²⁸² Van Dam *European tort law* 319. See chapter 6 para 3.

harm; fault in the form of negligence or intention; the efficient cause theory; probability of harm; presumptions; and policy considerations are all factors that may be applied in determining causation.²⁸³ The adequate causation theory, where the “wrongful act” must have resulted in harm that would be expected to occur “in the normal course of things”,²⁸⁴ is applied in cases of strict liability or in instances of negligence.²⁸⁵ Where the direct consequences theory is used, only the direct and certain consequences of the delict may be recovered.²⁸⁶ It is not always easy to differentiate between causes that are certain, uncertain, direct and indirect. The reason for requiring the causation of damage to be certain and direct is a policy reason ensuring that the defendant’s burden is confined within reasonable limits.²⁸⁷

In English law, with respect to the tort of negligence, the criterion applied to establish remoteness or the legal cause (more or less equivalent to the term of “legal causation” used in South African law) is currently the reasonable foreseeability of harm.²⁸⁸ Witting²⁸⁹ points out that since the decision of *Wagon Mound (No. 1)*,²⁹⁰ courts at all levels have followed the principle that “the harm suffered must be of a kind, type, or class that was reasonably foreseeable as a result of the defendant’s negligence”. The courts have been flexible with their interpretation of what kind of injury could have been reasonably foreseeable, depending on the circumstances of the case. At times a liberal approach is applied, while at times a more narrow approach is applied. It is apparent that in the end when the courts decide to use a narrow or liberal approach they consider policy considerations in order to reach a reasonable outcome. The direct consequences theory is generally used in determining legal causation in intentional torts. The harm or loss suffered by the claimant will not be considered a remote consequence if it was a “direct consequence” of the intended tort.²⁹¹ The intention to harm “disposes of any question of remoteness”.²⁹² A defendant who intended to harm

²⁸³ See Spier and Haazen in Spier (ed) *Unification of tort law: causation* 132.

²⁸⁴ The focus is on the cause that led directly to the loss discarding causal facts which played a trivial or minor part in the outcome. See Moréteau and Lafay in Winiger (ed) *Digest of European tort law volume 1: essential cases on natural causation* 26.

²⁸⁵ See chapter 3 paras 5.1-5.2.

²⁸⁶ See chapter 6 para 3

²⁸⁷ Van Dam *European tort law* 321.

²⁸⁸ See chapter 4 para 4.2.

²⁸⁹ *Street on torts* 175.

²⁹⁰ 1961 AC 388.

²⁹¹ See chapter 4 para 4.2.

²⁹² *Quinn v Leathem* 1901 AC 495, 537.

the claimant may therefore not only be liable for the intended direct consequences but also for unintended consequences. It is apparent that in a sense reasonable foreseeable consequences are equated with intended consequences and unforeseeable consequences with unintended consequences. Generally causation is not an issue in the intentional torts.²⁹³ Even though proof of harm is not required in the intentional torts of trespass to the person, some form of harm is assumed. This will be explained further below under the discussion of harm, loss or damage.²⁹⁴

In American law, in order to determine the proximate cause, or scope of liability (more or less equivalent to the term “legal causation” used in South African law), the courts refer to a number of tests. The direct consequences theory, the reasonable foreseeability theory, or the inquiry as to whether the consequences are natural and probable consequences of the defendant’s conduct without any intervening cause are used.²⁹⁵ In terms of the tort of negligence, the harm suffered must be “within the defendant’s scope of liability”.²⁹⁶ It deals with the “policy or justice issue” of “limiting liability to the risks the defendant negligently created”.²⁹⁷ In reference to proximate cause rules it would be unjust and impractical to impose liability on a defendant for harm resulting from his negligent conduct which falls outside the scope of risks he created. Furthermore the defendant cannot be held liable for unknown risks or risks not reasonably known.²⁹⁸ Even though reasonable foreseeability of the general type of harm is the most pervasive test applied in establishing scope of liability in the tort of negligence, there is still some support for finding legal causation for direct harm as opposed to only reasonable foreseeable harm. Whether a cause was direct or indirect may be dispensed with by the courts as all that needs to be determined is whether “the injury that occurred was within the risk created by the defendant”.²⁹⁹ Adjudicators typically instruct juries by stating that a defendant is liable for the “natural and probable consequences” of his conduct or that the proximate cause of the harm occurs where

²⁹³ See chapter 4 para 4.2.

²⁹⁴ See par 2.7 below.

²⁹⁵ See chapter 5 para 4.2.

²⁹⁶ *Restatement Third of Torts (Liability for Physical and Emotional Harm)* § 29 (2010); Dobbs, Hayden and Bublick *Hornbook on torts* 337.

²⁹⁷ Dobbs, Hayden and Bublick *Hornbook on torts* 344.

²⁹⁸ See chapter 5 para 4.2.

²⁹⁹ Dobbs, Hayden and Bublick *Hornbook on torts* 345. See chapter 5 para 4.2.

there is a “natural and continuous sequence, without any efficient intervening cause”.³⁰⁰

In all the jurisdictions discussed, a *novus actus interveniens* may negate legal causation. The *novus actus interveniens* may manifest itself in an act of nature; conduct by a third party; or conduct by the plaintiff. In respect of the plaintiff’s own conduct, liability may be limited or excluded based on his contributory fault.³⁰¹ In all the jurisdictions discussed, reasonable foreseeability of harm is not the decisive test, common sense may be more suitable considering which events are “normal” and “abnormal”. Also, depending on the circumstances of the case, the court will not impute liability based on policy considerations where it is not reasonable, or appropriate to impute liability.³⁰² Thus a new or intervening cause, also referred to as a superseding cause, which occurs after the defendant’s negligent conduct may depending on the circumstances result in excluding liability. An intervening cause breaks the chain of causation and it would be unreasonable to hold the defendant liable for the consequences of a superseding or intervening cause.³⁰³

In all the jurisdictions discussed, in instances of suicide, the chain of causation is not necessarily broken, because the suicide does not necessarily constitute an intervening cause. If the suicide was a foreseeable consequence or, in American law, if the suicide was within the ambit of the risks created by the defendant, then causation may be present.³⁰⁴ Where a person voluntarily acts in a situation of emergency created by the defendant’s wrongdoing or attempts a rescue where such reaction is reasonable or reasonably foreseeable, such intervening act will not usually constitute a *novus actus interveniens*. The defendant may be held liable for harm caused to a rescuer where there is a reasonable rescue attempt.³⁰⁵

³⁰⁰ Dobbs, Hayden and Bublick *Hornbook on torts* 346. See chapter 5 para 4.

³⁰¹ See Dobbs, Hayden and Bublick *Hornbook on torts* 373-375.

³⁰² See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 135; Deakin, Johnston and Markesinis *Markesinis and Deakin’s tort law* 242-243, 245.

³⁰³ See chapter 3 para 5.2; chapter 4 para 4.2; chapter 5 para 4.2; chapter 6 para 3.

³⁰⁴ See for example, *Road Accident Fund v Russell* 2001 2 SA 34 (SCA) in respect of South African law; chapter 4 para 4.2; chapter 5 para 4.2; chapter 6 paras 2.3.3 and 3.

³⁰⁵ See for example, *Miller v Road Accident Fund* 1999 4 All SA 560 (W) in respect of South African law; chapter 4 paras 3.2.2.1, 3.5.2, and 3.3.1; chapter 5 para 4.2; chapter 6 paras 2.3.3 and 3.

The thin-skull rule applies in all the jurisdictions discussed. Thus the defendant is held liable for a greater extent of harm than that suffered by a normal person. The defendant is liable for foreseeable harm as well as unforeseeable harm due to the plaintiff's infirmities.³⁰⁶ From the point of view of the defendant it may seem unreasonable that the defendant is held liable for the full extent of the loss, but on the other hand it is fair and reasonable to compensate the plaintiff who would not have suffered harm or loss had the defendant not caused such harm. All the legal systems that were studied in this thesis seem to prefer a claimant-biased approach to reasonableness in this regard. Naturally where contributory fault on the part of the plaintiff is applicable, his award of compensation may be reduced, although this procedure is not regarded as a part of legal causation in all the studied systems.³⁰⁷

In all the jurisdictions discussed, whichever test is used, at the factual or legal causation stage, it is only reasonable to hold the defendant liable for the factually caused consequences which were not too remote. Van Dam³⁰⁸ is correct in stating that in many instances the courts reach decisions based on policy considerations as to what is fair, just and reasonable, taking into account the circumstances of the case. However, their decisions are provided using the "language the national law provides. For example, the court decides whether the consequences were foreseeable or not, whether they were very unlikely or not so unlikely, whether they were direct or indirect, or whether they were within or outside the prospective scope of the rule".

2.6.1 Multiple uses of "reasonable foreseeability"

What English, South African, American and French law all have in common is the multiple and somewhat controversial roles of foreseeability of harm in a number of elements of liability. It is evident that there are multiple uses of the criterion of reasonable foreseeability of harm in a number of elements dealing with tort liability or delictual liability. In respect of all the jurisdictions discussed, reasonable foreseeability of harm may be used in determining: fault in the form of negligence; legal causation; wrongfulness in South African law; and a duty of care in Anglo-American law.

³⁰⁶ See chapter 3 para 5.2; chapter 4 para 4.2; chapter 5 para 4.2; chapter 6 para 3.

³⁰⁷ See chapter 3 para 5.2; chapter 4 para 4.2; chapter 5 para 4.2; chapter 6 para 3.

³⁰⁸ Van Dam *European tort law* 343.

Particularly under the discussion of American³⁰⁹ and South African law,³¹⁰ the criticism and confusion resulting from this criterion has been discussed in detail and will not be repeated here save to point out the manner in which the criterion applies under the different elements.

In South African law, as mentioned above, reasonable foreseeability of harm is one of the factors that may be considered in determining wrongfulness.³¹¹ It is not the main criterion used in determining wrongfulness. It is used in determining the unreasonableness of conduct and is a factor considered which may indicate the presence of a legal duty to prevent harm or loss. Here, the focus is on the infringements of interests and whether or not it was infringed by unreasonable conduct tested against the *boni mores*. An objective *ex post facto* approach is applied based on the facts of the case balancing all the affected interests in light of constitutional provisions.

In Anglo-American law, at the duty of care stage,³¹² the reasonable foreseeability of harm in a general non-specific sense, that is, foreseeable possible harm to a person or class of persons is required.³¹³ Foresight is required, but at this stage the specific conduct of the defendant is not yet conclusively evaluated. The question at this stage is whether an obligation should be imposed on the defendant to act carefully.³¹⁴ Looking at all the combination of elements applied such as whether it is fair, just and reasonable to impose a duty of care, a duty of care overall is determined objectively. Reasonable foreseeability of harm is one of the criteria that may be applied in determining a duty of care. It is not the main criterion and the *Restatement Third of Torts*, as mentioned above, recommends that it does not apply in determining the existence of a duty of care.

In all the jurisdictions that have been discussed, when dealing with fault in the form of negligence (or breach of a duty of care), the defendant should have foreseen some

³⁰⁹ See chapter 5 para 4.2.

³¹⁰ See chapter 3 para 4.4.

³¹¹ See paras 2.4-2.5 above as well as paras 2.9.1, 2.9.3-2.9.4 below.

³¹² See para 2.3 above.

³¹³ See Dobbs Hayden and Bublick *Hornbook on torts* 265.

³¹⁴ See Lunney and Oliphant *Tort* 269-270.

kind of harm to the plaintiff or his property and should have taken steps to prevent harm, if the reasonable person in a similar position would have done so. There is consensus that the criterion here deals specifically with a requisite standard of conduct and an *ex ante* approach is applied. It is reasonably foreseeable harm that is most likely to occur which may justify the need to take precautionary measures. The reasonableness of the conduct of both parties may be considered where contributory fault is applicable. Reasonable foreseeability of harm is one of the main criteria in determining negligence.

In all the jurisdictions discussed, as mentioned above, reasonable foreseeability of harm is one of the tests that may be used to determine legal causation (whether one is referring to the terms “proximate cause”, “remoteness”, or “the scope of liability”). At this stage of the enquiry, the focus is on the consequences after the conduct has been evaluated, after the delict, tort or harm-causing event. The question is whether it is reasonable to hold the defendant liable for the factually caused consequences which were reasonably foreseeable.

2.7 Harm, loss or damage

Functions of tort law or the law of delict generally include: prevention of future harm;³¹⁵ compensation for past and future loss; loss spreading or loss shifting;³¹⁶ deterrence of wrongdoing, also relating to avoiding economically inefficient behaviour; and appeasement or satisfaction for the recognition of an infringement of an interest or right. Other functions of tort law include “punishment and prevention of unjust enrichment”.³¹⁷ However, compensation is generally considered to be the primary aim.³¹⁸ Civil law has a predominantly compensatory function, while the function in criminal law is to punish the offender which takes into account the gravity of the offender’s fault.³¹⁹

³¹⁵ Where injunctions or interdicts may apply.

³¹⁶ For example, in cases of strict liability, where insurance liability applies and where the state provides social benefits or compensation schemes which may be fault based or no-fault based.

³¹⁷ Van Gerven, Lever and Larouche *Tort* 19, 739.

³¹⁸ Van Gerven, Lever and Larouche *Tort* 19.

³¹⁹ Van Gerven, Lever and Larouche *Tort* 20.

In South African³²⁰ and French law,³²¹ the element of harm is explicitly referred to as a requirement of delictual liability, except in instances where an interdict or injunction is sought to prevent harm or the continuation of harm. The same applies to the tort of negligence in English and American law.³²² Firstly, it must be established whether there is harm, based on the proven facts of the case and on a balance of probabilities. Secondly, the inquiry into whether compensation should be awarded for the harm suffered, and finally the extent of the harm, which involves quantification of the damages, must be undertaken.³²³ It is not necessary to prove damage in all torts in Anglo-American law. Some torts, such as the tort of assault and false imprisonment, are actionable *per se* without proof of damage.³²⁴ The “tort itself is regarded as harmful and the plaintiff is always entitled to recover at least “nominal damages”.³²⁵ From a South African viewpoint, even though proof of harm, for example, in the form of patrimonial loss is not required, some form of harm manifesting itself in the infringement of an interest of personality, will be postulated as a requirement. However, in the torts of trespass to the person that have been discussed in this study, the harm suffered must be significant, in that it must not be trivial, to ground liability.³²⁶

The different possible types of damages recoverable in Anglo-American law include: compensatory damages; nominal damages; contemptuous damages; aggravated damages; punitive or exemplary damages; and gain-based or restitutionary damages.³²⁷ Punitive damages are awarded with the aim of deterring further misconduct, this relates to the deterrent function of tort law.³²⁸ Punitive damages are usually awarded where there is some kind of deliberate, intentional or exceptionally reprehensible conduct. American law requires some form of outrageous behaviour. Awarding of punitive damages has been criticised for *inter alia* resembling criminal fines and for being unpredictable and excessive. However, in spite of the criticism, depending on the circumstances of the case, these damages may be awarded. Generally, the punitive award should have some kind of reasonable relationship with

³²⁰ See chapter 3 para 6.1.

³²¹ See chapter 6 para 4.

³²² See chapter 4 para 5; chapter 5 para 5.1.

³²³ See chapter 3 para 6.1.

³²⁴ See chapter 4 para 5; chapter 5 para 2.

³²⁵ Dobbs, Hayden and Bublick *Hornbook on torts* 851.

³²⁶ See chapter 4 para 2; chapter 5 para 2.

³²⁷ See chapter 4 para 5; chapter 5 para 5.1.

³²⁸ Dobbs, Hayden and Bublick *Hornbook on torts* 4.

the harm suffered, or there must be a reasonable proportionality in respect of the potential harm or the actual damages suffered by the plaintiff.³²⁹ Punitive damages are generally not awarded in France but may in the future.³³⁰ In South African law, the influence of the English principles of “*aggravated, punitive, vindictive, penal and exemplary damages* had a considerable influence”, but in modern South African law its application is more relevant under the *actio iniuriarum* with regard to the infringement of personality rights and is more or less irrelevant in respect of patrimonial loss.³³¹ Restitution in Anglo-American law is a remedy whereby the defendant must repay or return any gains “wrongfully obtained by tort”.³³² Nominal damages are usually awarded with regard to the intentional torts in Anglo-American law.³³³ In France nominal damages are referred to as a *franc symbolique*. Nominal damages may also be awarded in South African law.³³⁴

In all the jurisdictions discussed and with regard to the tort of negligence discussed in Anglo-American law, compensatory damages in a monetary form are the main award for damages.³³⁵ Generally, damages for patrimonial or pecuniary loss and compensation for non-patrimonial or non-pecuniary loss may be awarded.³³⁶ In France, identifying the different heads of damages is not crucial as any type of damage is compensable and even compensation in kind is also possible.³³⁷ In France, compensation in kind may entail replacing a damaged item, restoring an item to its original state, retracting a statement made, disclosing information previously unavailable, re-concluding a legal instrument which was defective or correcting incorrect information that was misleading.³³⁸

In all the jurisdictions discussed, the idea is to put the plaintiff in the position he would have been in had the delict or tort not been committed (*restitution in integrum*).³³⁹

³²⁹ See chapter 5 para 5.5.

³³⁰ See chapter 6 para 4.

³³¹ Potgieter, Steynberg and Floyd *Damages* 195-196.

³³² Dobbs, Hayden and Bublick *Hornbook on torts* 4.

³³³ See chapter 4 para 5; chapter 5 para 5.1.

³³⁴ See chapter 4 para 5; chapter 5 para 5.1; chapter 6 para 4; Potgieter, Steynberg and Floyd *Damages* 198-200 with regard to the award of nominal damages in South African law.

³³⁵ See chapter 3 para 6; chapter 4 para 5; chapter 5 para 5; chapter 6 para 4.

³³⁶ See chapter 3 para 6.2-6.3; chapter 4 para 5; chapter 6 para 4.

³³⁷ See chapter 6 para 4.

³³⁸ Viney in Bermann and Picard (eds) *French law* 260.

³³⁹ See chapter 3 para 6.1; chapter 4 para 5; chapter 6 para 4.

Compensation is generally awarded for costs reasonably incurred and for future loss that is reasonably likely to occur. In this sense, tort law has a restorative or reparation function.³⁴⁰ It is accepted that it may not be possible to put the plaintiff in exactly the same position he was before the delict or tort; or for the property to be in the same position prior to the delict or tort. The idea is to come up with an amount which is fair and reasonable *in lieu* of the loss or harm sustained. The question remains whether it is reasonable to compensate the plaintiff for the harm or loss suffered and whether the defendant should pay such compensation. The defendant should however, not be unnecessarily burdened and this encompasses the idea of corrective justice.³⁴¹

In respect of non-patrimonial loss in South African and Anglo-American law, it is difficult to assess, and there is no exact scientific or mathematical calculation adhered to in assessing the awards. The award for pain and suffering is based on the plaintiff's subjective experience. The courts try to attach a monetary value commensurate to the nature, duration and intensity of the physical and mental harm experienced. Factors such as a person's life expectancy, age, gender, social status, lifestyle, degree of consciousness and culture may be considered. Ultimately a fair and reasonable approach is adopted by the courts in assessing non-patrimonial loss.³⁴²

In English law,³⁴³ the courts make reference to specific guidelines³⁴⁴ in order to ensure uniformity when assessing non-pecuniary loss. The guidelines fix a bracket for general damages in respect of many types of injuries but cannot provide a bracket for every combination of injury that may occur in practice. The adjudicator in the end must make an assessment taking all the evidence into account and make an award that is reasonable and fair. With regard to pain and suffering, the purpose is to provide monetary compensation, as a result of physical injuries sustained.³⁴⁵

³⁴⁰ Green and Cardin in Koziol (ed) *Basic questions of tort law* 442.

³⁴¹ See chapter 3 para 6.1; chapter 4 para 5; chapter 5 para 5.1; chapter 6 para 4.1.

³⁴² See chapter 3 para 6.3; chapter 4 para 5.2; chapter 5 para 5.3.

³⁴³ See chapter 4 para 5.2.

³⁴⁴ From the Judicial Studies Board entitled *Guidelines for the Assessment of General Damages in Personal Injury Cases* (now in its 12th edition, last updated in 2013). See Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2042-2043; Steele *Tort* 508.

³⁴⁵ See chapter 3 para 6.1.

In France, compensation for non-pecuniary loss is not readily awarded because the idea behind obtaining money out of one's tears is considered to be perturbing.³⁴⁶ In spite of this view, it is awarded in practice and from the types of injury or harm the plaintiff sustained as referred to below, it is evident that French law is in fact more liberal with the damages that may be awarded than the other jurisdictions. Non-pecuniary loss is claimed for the diminution in a person's well-being which is interpreted widely and includes a claim for: "*prejudice physiologique*", relating to mental and moral harm which includes grief and sorrow; infringement of personality interests or rights; injury consequential to the infringement of one's bodily integrity which includes pain and suffering; personal injury; hurt feelings; bereavement or pain and suffering suffered by persons affected by the injury or death of the primary victim, or due to the death of a beloved animal; "aesthetic damage" (*prejudice esthétique*); loss of amenities or enjoyment; and "sexual injury" (*prejudice sexuel*) which is separate from loss of amenities. A plaintiff who is in a coma, completely unconscious or in a vegetative state may even be entitled to claim non-pecuniary loss. It is perceived that even though a victim is in an unconscious or vegetative state, such person may feel pain and the victim's failure to communicate or move is considered as harm. By excluding compensation for non-pecuniary loss, it would be the same as saying the person was dead, which is regarded as contrary to human dignity. There is a list, called the "*Nomenclature Dintilhac*" which generally refers to the "possible miseries" of the "human condition".³⁴⁷ French courts also make use of tariffs, publications published periodically by the *Jurisclasseur*, and special publications by the *Gazette du Palais*. Even though these publications are commonly referred to, in particular, with regard to personal injuries, they are only to be used as guidelines. The rule of thumb is to take a prior award and adjust it taking into account inflation and circumstances of the plaintiff.³⁴⁸ Thus French law too considers all the circumstances in reaching a fair and reasonable award.

In South African law, with regard to the *actio iniuriarum*, in respect of infringement of personality rights, the courts are at liberty to make a monetary award based on ex

³⁴⁶ See chapter 6 para 4.2.

³⁴⁷ See chapter 6 para 4.2.

³⁴⁸ See chapter 6 para 4.2.

aequo et bono, what is fair and just.³⁴⁹ The customary law principle of *ubuntu* and the remedy *amende honorable* comprising of a retraction of a statement and an apology focus on repair and healing between the parties. The idea is not to penalise the defendant but to promote reparation. However, a monetary award is usually awarded in addition to requiring an apology.³⁵⁰ In France the publication of a judgement may be ordered where the court places emphasis on the reprehensibility of the wrongdoing.³⁵¹

There is a general rule in all the jurisdictions discussed that that loss of income earned illegally cannot be considered in a claim based in delict or tort as it is against public policy. The law of delict or tort law in general cannot condone illegal activity.³⁵² In French law, there is a possibility that in future “disgorgement of illicit benefits” may be awarded.³⁵³ In South African law, when dealing with loss of earning capacity, exceptions apply, for instance where the unlawful activity may have discontinued; where no harm to the public is envisaged; where the legislation could have been challenged; or where the activity was legalised after the breadwinner’s death.³⁵⁴

All the jurisdictions discussed may take into account *inter alia* prior comparable awards, inflation, and interest when making an award.³⁵⁵

In all the jurisdictions discussed, projections of future loss of earnings take into account factors such as the age of the plaintiff, education, life expectancy, job status, etcetera. In respect of loss of future income, generally a fair and reasonable approach is applied and this may be explicit or implicit as in French law.³⁵⁶ In assessing future loss, French courts rarely provide reasons or assumptions with respect to their calculations and a gut-feel approach is preferred. However, the requirement that the loss must be certain and not hypothetical lends to the implicit influence of reasonableness.³⁵⁷ Loss of income in French law is usually based on the plaintiff’s annual income, life expectancy based on statistics, and future loss of income, which is awarded without applying any

³⁴⁹ See chapter 3 para 6.3.

³⁵⁰ See chapter 2 para 1; chapter 3 para 6.3.

³⁵¹ See chapter 6 para 4.

³⁵² See chapter 3 para 6.2; chapter 4 para 5.1; chapter 6 para 4.

³⁵³ See chapter 6 para 4.

³⁵⁴ See chapter 3 para 6.2.

³⁵⁵ See chapter 3 para 6.5; chapter 4 para 5.4; chapter 5 para 5.3, 5.6; chapter 6 para 4.1.

³⁵⁶ See chapter 3 para 6.5; chapter 4 para 5.1; chapter 5 para 5.2; chapter 6 para 4.1.

³⁵⁷ See chapter 6 para 4.1.

contingencies. Compensation is as a rule not awarded for “loss of earning capacity”, only for loss of income. The loss of a chance to earn an income allows the plaintiff to claim for future loss of income, however, such loss must be certain and not hypothetical.³⁵⁸ The courts in South Africa may rely on actuarial evidence as a guide but in general deal with each case based on its own facts, relying on normative concepts such as fairness and reasonableness.³⁵⁹ The courts in the United Kingdom³⁶⁰ were previously reluctant to consider evidence in the form of actuarial calculations in assessing future financial loss, but have recently considered the value of such evidence in a more favourable light, in that it should be used as a starting point to check values.³⁶¹ In English law,³⁶² with regard to future loss of earnings, there is much uncertainty and the courts make use of the multiplier method of calculation. Deductions are then made reducing the award. The court may adopt any of these approaches based on “reasonableness”, “justice” and “public policy”:³⁶³ by making the defendant liable only for actual loss suffered by deducting benefits received from insurance companies, the state, and the employer; not deducting the benefits and making the defendant fully liable; holding the defendant liable for the actual losses sustained by the claimant as well as liable to those who supported the claimant prior to the hearing of the matter.³⁶⁴ In English law,³⁶⁵ loss of life expectancy was abolished by section 1(1)(a) of the Administration of Justice Act³⁶⁶ but claimants may claim for loss of earnings for “lost years”. The claimant would have been able to work but is unable due to his shortened life resulting from the tort.

The collateral source rule applies in South African,³⁶⁷ English³⁶⁸ and American law³⁶⁹ where the courts generally deduct collateral benefits received by the plaintiff as a result of the tort or delict. Voluntary gratuitous (*ex gratia*) payments received from third

³⁵⁸ See chapter 6 para 3.1 and 4.1.

³⁵⁹ See chapter 3 para 6.5.

³⁶⁰ See chapter 4 para 5.1.

³⁶¹ Reference is made to the Ogden Tables (actuarial tables) for use in cases of fatal accidents and personal injury. See Burrows in Jones (gen ed) *Clerk and Lindsell on torts* 2029-2030; Giliker *Tort* 618-619; Steele *Tort* 492-493.

³⁶² See chapter 5 para 5.1.

³⁶³ See *Parry v Cleaver* 1970 AC 1, 13.

³⁶⁴ See chapter 4 para 5.1.

³⁶⁵ See chapter 4 para 5.1.

³⁶⁶ 1982.

³⁶⁷ See chapter 3 para 6.5.

³⁶⁸ See chapter 4 para 5.1.

³⁶⁹ See chapter 5 para 5.6.

parties and insurance payments from policies, where it is considered unjust and unreasonable to penalise the plaintiff for being prudent in taking out insurance, may not be deducted. Employment benefits relating to paid sick leave are deductible. In South African law, medical insurance payments, pension payments and disability benefits generally are considered in reducing the compensation awarded for damages.³⁷⁰ In English law,³⁷¹ contributory pension payments which the claimant is entitled to resulting from the tort are not deductible but other benefits received are deducted, such as any voluntary payments or items received from the defendant and sick pay. The state must not, in terms of policy considerations, subsidise the defendant's liability in tort. Thus section 6 of the Social Security (Recovery of Benefits) Act³⁷² currently provides that certain social security benefits payed out to the claimant for a certain period of time by the state as a result of the injury or accident are recovered in full from the defendant, which is his insurer in most instances. The reason is to recompense the Secretary of the State. There is then no double recovery by the claimant from the state and the defendant, which is also reasonable. In American law,³⁷³ in line with tort law reform, approximately half of the states have either limited or abolished the collateral source rule for certain claims. These claims relate mainly to those against public entities and for medical malpractice claims. Some statutes allow evidence of collateral benefits, while others require the trier to deduct the collateral benefits. The plaintiff whose award has been reduced as a result of deducting collateral benefits, may be entitled to add back into the calculation of the award, the amounts expended on insurance premiums. Some courts have found the statutes unconstitutional, while others have upheld them. Reform legislation in the United States has been aimed at regulating damages by modifying the collateral source rule, capping awards and limiting awards of punitive damages. Over half the states have capped recovery on damages. Some caps apply to particular tort claims such as professional malpractice claims, claims against public entities and claims against suppliers of alcohol. Some statutes impose a cap on all recoverable damages and some on non-pecuniary loss such as for "pain and suffering".³⁷⁴ In French law, the collateral source is not specifically referred to but the principle of "equivalence between

³⁷⁰ See chapter 3 para 6.5.

³⁷¹ See chapter 4 para 5.1

³⁷² 1997.

³⁷³ See chapter 5 para 5.6.

³⁷⁴ See chapter 5 para 6.5.

the harm and compensation” entails that the plaintiff must not be unduly enriched.³⁷⁵ The principle of “equivalence” prevents recovery of compensation exceeding the real value of the damages by combining all benefits, whether private insurance benefits, social security benefits, or “guarantee or indemnification funds” with the damages payable by the defendant. Naturally this does not mean that the defendant pays less and various statutes entitle the insurer, employer and social security “a subrogation claim” against the defendant.³⁷⁶ Benefits that replace a person’s income in terms of an employment contract or social security scheme, may be deducted from the award.

In South African,³⁷⁷ and Anglo-American law³⁷⁸ where the claimant has incurred or will in future incur medical or similar related expenses as a result of the injury sustained, the claimant may recover reasonably incurred costs as well as future costs which are reasonably likely to occur. The plaintiff is not obliged to use public medical service providers in order to comply with the requirement of incurring reasonable medical and similar related costs. French law does not explicitly refer to reasonable costs but the plaintiff is entitled to hospital, medical and related expenses.³⁷⁹ Reasonable transport costs incurred or required in future may be claimed for travelling to and from the hospital or other medical providers. This may, depending on the circumstances, apply to the claimant’s relatives too.³⁸⁰ In the case of disabilities, where a claimant’s car or house needs to be modified, reasonable necessary costs relating to the modification of the car or house can be recovered but is limited by what assistance may be provided by the government “Mobility Scheme” in English law.³⁸¹ In all the jurisdictions discussed, reasonable costs of a carer, reasonable costs of employing someone to do household tasks, garden or handy work around the house, which the plaintiff previously did and is now unable to do, as well as any increased living expenses may be claimed.³⁸² In respect of future medical treatment, the courts will be guided by what

³⁷⁵ Viney in Bermann and Picard (eds) *French law* 261.

³⁷⁶ Galand-Carval in Magnus (ed) *Unification of tort law: damages* 78.

³⁷⁷ See chapter 3 para 6.2.

³⁷⁸ See chapter 4 para 5.1; chapter 5 para 5.2.

³⁷⁹ See chapter 6 para 4.1.

³⁸⁰ See chapter 3 para 6.2 in respect of South African law; chapter 4 para 5.1 in respect of English law.

³⁸¹ See chapter 4 para 5.1.

³⁸² See chapter 3 para 6.2; chapter 4 para 5.1; chapter 5 para 5.2; chapter 6 para 4.1.

treatment in the future is reasonably required. The plaintiff must prove the future required treatment.³⁸³

In all the jurisdictions discussed, loss of support is calculated from the date of death of the breadwinner. A dependant must show “that there was a reasonable prospect that had the deceased not died, the dependant would have obtained some kind of financial benefit from the deceased in the future” and such “dependant would have obtained that benefit by virtue of the fact that he was a dependant of the deceased”.³⁸⁴ Only reasonable funeral expenses may be claimed.³⁸⁵ In the United States of America, there are wrongful death statutes that generally regulate compensation to family members of the deceased as a result of death of the deceased caused by a wrongful or negligent act. The damages for wrongful death are awarded where it is deemed fair and just to do so.³⁸⁶

In all the jurisdictions discussed (except France), generally all past and prospective loss must be claimed once, based on a single cause of action.³⁸⁷ Usually lump sums are awarded, but periodical payments may be ordered. Interim payments may also be awarded as well as provisional damages.³⁸⁸ French law does not make an explicit distinction between past and future loss, but damages are awarded for both types of loss.³⁸⁹ In French law, if there are changes in the plaintiff’s condition, where for example his condition gets worse or the plaintiff proves the “occurrence of a new harm”; further compensation may be awarded after the date of judgment. The *res judicata* rule does not affect the plaintiff claiming compensation when his condition deteriorates.³⁹⁰ If the plaintiff’s condition improves, the defendant cannot generally recover any compensation unless the compensation was paid out periodically with a

³⁸³ See chapter 3 para 6.2; chapter 4 para 5.1.

³⁸⁴ McBride and Bagshaw *Tort* 867. See chapter 3 para 6.2; chapter 4 para 5.1; chapter 6 para 4.1.

³⁸⁵ See chapter 3 para 6.2 in respect of South African law; chapter 4 para 5.1 in respect of English law.

³⁸⁶ See chapter 5 para 5.1.

³⁸⁷ See chapter 3 para 6.5.; See chapter 4 para 5.4; chapter 5 para 5.6; chapter 6 para 4.1.

³⁸⁸ See chapter 4 para 5; chapter 5 para 5.6.

³⁸⁹ See chapter 6 para 4.1.

³⁹⁰ See Cass civ 2 7 July 1993 91-20681 91-21474, Bull civ 1993 II 251 138; Van Gerven, Lever and Larouche *Tort* 844-845; Viney in Bermann and Picard (eds) *French law* 260.

“revision clause”, where the possibility of the plaintiff’s position improving was foreseen.³⁹¹ Again, an approach that favours the claimant is adopted.

In South African law, because of the influence of English law,³⁹² the criterion of the reasonable person is once again referred to with regard to the plaintiff’s need to mitigate his damages where reasonable. A plaintiff must take reasonable steps to mitigate his loss, which is based on the standard of the reasonable person. A failure to take such reasonable steps to prevent further loss will result in the plaintiff not being entitled to compensation for damages that he could have reasonably prevented.³⁹³ In South African law, fairness may be “embodied in the judgement of the reasonable person: will the *reasonable person*, in light of all the relevant circumstances, view the award as fair in accordance with the legal convictions of the community?”³⁹⁴ In English law,³⁹⁵ the use of the reasonable person criterion with regard to the duty to mitigate loss, is used in an objective manner based on what the reasonable person would have done in the claimant’s position. If the plaintiff’s loss could be reduced by him undergoing reasonable medical treatment which could increase his chances of employment then he will be expected to undergo such treatment. If the proposed medical treatment involves a significant risk, then the claimant will not be expected to undergo the treatment in order to mitigate his loss. In American law, the mitigation of loss rule also applies.³⁹⁶ In France, a person need not undergo medical treatment to mitigate his loss, even if such treatment carries minimal risk or where surgical operations are not involved. This principle may be considered reasonable in the sense that the victim is free to exercise a legally valid choice. The plaintiff’s fault however is also considered where applicable.³⁹⁷ Again, such a perception could be regarded as unreasonable only from the defendant’s point of view, while French law takes a decidedly victim or claimant-based point of view. Generally what falls within the ambit of reasonableness will depend on facts and circumstances of each case.

³⁹¹ See chapter 6 para 4.1.

³⁹² See chapter 3 para 6.5; chapter 4 para 5.4.

³⁹³ See chapter 3 para 6.5.

³⁹⁴ Potgieter, Steynberg and Floyd *Damages* 514.

³⁹⁵ See chapter 4 para 5.4.

³⁹⁶ See chapter 5 para 3.5.1.

³⁹⁷ Lafay, Moréteau and Pellerin-Rugliano 2003 *European tort law yearbook* 171-174.

In all the jurisdictions discussed, except France, in respect of damage to property, the reasonable market value of the property is considered or the reasonable costs of repair of such property. Consequential loss associated with the damage to property may be claimed, such as the reasonable costs of hiring a car until such time as the damaged vehicle is replaced.³⁹⁸ In France, a more liberal approach is applied and the retail value of the property is usually awarded. The market value of the property is usually not awarded as it is considered *contra* to the principle of full reparation.³⁹⁹ In France, loss of enjoyment resulting from the damage to property may be claimed if the property was used privately or by the family. Damages may also be awarded for loss of use or “inconveniences”.⁴⁰⁰

In all the jurisdictions discussed, the main aim is to compensate the plaintiff for harm suffered, where deserving due to the defendant’s conduct. The basic idea behind compensation is corrective justice and to restore the balance lost where the plaintiff has suffered harm. The idea of only expecting the defendant to pay for reasonably incurred expenses; or for future loss which is reasonably likely to occur, in South African and Anglo-American law, serves as a limiting factor. In French law where the damage must be certain (whether for past or future loss), serves as a limiting function. Furthermore, it is reasonable that where the plaintiff gains an advantage or windfall, certain amounts he has received must be considered in deducting his claim and that double compensation should not occur. The plaintiff should not, however, be penalised for being prudent in taking out private insurance and where private insurance pay-outs are considered in reducing his claim, at the very least the premiums he has paid should be taken into account. That the defendant should not pay more than required is also reasonable. Where the plaintiff is partially to blame for his harm or loss, his award of damages should be reduced and where his fault is of such a magnitude that it is unfair to make the defendant responsible, then it is reasonable that he should not be entitled to compensation.

³⁹⁸ See chapter 3 para 6.4; chapter 4 para 5.3; chapter 5 para 5.4; chapter 6 para 4.1.

³⁹⁹ See chapter 6 para 4.1.

⁴⁰⁰ See chapter 6 para 4.1.

2.8 Strict liability

The influence of reasonableness on strict liability in all the jurisdictions discussed is apparent, whether stemming from common law, specific legislation or the provisions of the CC in France. The risk and profit theory are the main theories advanced for strict liability. In light of the fact that the risks were created in the pursuit of some profit or advantage, it is considered reasonable and fair that the risk creator should be held strictly liable for the harm caused.⁴⁰¹ In France, strict liability is more the rule than the exception, compared to South African and Anglo-American law where liability is predominantly fault-based.

In France, strict liability applies for the so-called act of a private thing,⁴⁰² of which a person is the custodian in terms of Article 1384(1) of the CC.⁴⁰³ A minor or mentally impaired person can also be the custodian of a thing. It is also possible that a number of persons may be custodians of a thing at the same time. The rule that the defendant must be the custodian of the thing at the time of the delict is a reasonable rule. It would be unfair and unreasonable if, for example, an owner is liable for damages caused by his motor vehicle in an accident, where such motor vehicle was not being used, directed or controlled by him. A “thing” is interpreted widely to include animate and inanimate objects. Physical contact between the thing and a person is not required. Where there is no contact, it must be proven that the thing was defective or “behaved” abnormally, or was put in the wrong place.⁴⁰⁴ The plaintiff must also prove that the thing caused harm. The custodian of the thing may escape liability or liability may be limited by proving that an external or extraneous cause (*cause étrangère*) was the unforeseeable, unavoidable, external cause of the damage.⁴⁰⁵ Thus even though a custodian may be held strictly liable for the act of the thing, liability is kept within reasonable limits where an external or extraneous cause may limit or exclude such liability.

⁴⁰¹ See chapter 3 para 1; chapter 4 para 1; chapter 5 para 1; chapter 6 para 1.

⁴⁰² In other words not an object owned by the state.

⁴⁰³ See chapter 6 para 5.1.

⁴⁰⁴ See chapter 6 para 5.1.

⁴⁰⁵ See chapter 6 para 5.1.

Article 1384 of the CC is interpreted as providing for *inter alia* strict liability of parents for the acts of their minor children still living with them; and employers for the act of their employees.⁴⁰⁶ An employer is in principle held vicariously liable for the acts of his employee, which is reasonable where the employer has effective control over his employee and the activities are interpreted as being undertaken during the course and scope of employment. Thus the risk and profit theory may also be advanced, where the influence of reasonableness is implicit. In respect of strict liability of the parents for the acts of their minor children, it must be established that the child directly caused the harm or loss. The only defences a parent can rely on are contributory negligence on the part of the plaintiff and the presence of some external cause to the damage.⁴⁰⁷ Once again the damages are kept within reasonable limits where the unreasonable conduct of the plaintiff is taken into account and where there was an external cause to the harm sustained. The parents who have children living with them, have the power and control over raising their children, therefore in light of this it may be considered reasonable to hold the parents strictly liable. Parents take out insurance for such potential liability which ameliorates this strict liability rule. Furthermore, even though this strict liability rule may seem harsh it may be understood as reasonable in France which follows a pro-victim approach.

2.9 Omissions, wrongful conception, wrongful birth and wrongful life claims, emotional harm or psychiatric injury, pure economic loss

Each legal system has grappled with liability for omissions, pure economic loss, psychiatric injury or emotional harm,⁴⁰⁸ wrongful conception, wrongful birth and wrongful life claims. In all these areas of liability, policy considerations play a role in allowing or excluding claims. These claims have been discussed in more detail under the discussion of each jurisdiction in this thesis and the main similarities and differences will be referred to briefly with regard to the influence of reasonableness.

⁴⁰⁶ See chapter 6 para 5.2.

⁴⁰⁷ See chapter 6 para 5.2.

⁴⁰⁸ Van Dam *European tort law* 139.

2.9.1 Omissions

In South African law,⁴⁰⁹ in respect of wrongfulness in cases of omissions, the question is whether according to the *boni mores*, there was a legal duty upon the defendant to prevent harm to the plaintiff. There are certain factors that have over time been identified as indicators leading to the establishment of whether there was legal duty to act positively. These factors are similar to the factors considered in English⁴¹⁰ and American law⁴¹¹ in determining whether a duty of care exists in cases of omission. The factors include prior conduct; a particular office that has been assumed; control over a dangerous object or person; rules of law; foreseeability of harm; a special relationship between the parties; social and economic concerns; contractual undertaking for the safety of a third party; and creation of an impression that the interests of a third party will be protected.⁴¹²

In South African law, if a legal duty to prevent harm exists and the defendant fails to prevent the harm ensuing, his omission maybe regarded as unreasonable, *contra bonos mores* and wrongful, according to the traditional approach. Also, providing all the other elements are present, according to the recent approach to determining wrongfulness, it may be reasonable to hold the defendant liable for the harm sustained according to public policy. His failure to act positively is unreasonable and therefore it is reasonable to impose liability.⁴¹³ Even though it is apparent that similar factors are considered in determining negligence and the existence of a legal duty to prevent harm; in respect of wrongfulness, conduct is tested objectively *ex post facto* while in terms of negligence an *ex ante* approach is applied, which is objective insofar as the defendant's conduct is measured against the reasonable person standard, but subjective insofar as the reasonable person is placed in the particular circumstances of the defendant. In South African law,⁴¹⁴ liability for the omissions of the state, in particular the Minister of Police was discussed extensively and it was highlighted that constitutional provisions play a significant role in South African law in holding the state

⁴⁰⁹ See chapter 3 para 3.1.11.

⁴¹⁰ See chapter 4 para 3.3.1.

⁴¹¹ See chapter 5 Para 3.4.1.

⁴¹² See chapter 3 para 3.1.11.

⁴¹³ See chapter 3 para 3.1.11.

⁴¹⁴ See chapter 3 para 3.1.11.

liable when compared to the approach in English law. It will not be repeated here, save to point out that English law follows the policy of the state being generally immune from liability for its omissions.⁴¹⁵

In English law,⁴¹⁶ emergency or any other services offering aid or rescue services, such as the police, fire brigades and coast guards, are under no legal obligation to come to the aid of a member of the public. There is no obligation on a person to give a warning either. Some of the policy considerations include that it is not in the general public interest to pay compensation to a minority of the public; liability against public authorities should be excluded because they need the freedom to operate without being too cautious in their practices; and claims against the various public entities could lead to the undermining of the framework of public protection offered by certain legislation.⁴¹⁷ A public authority may however be held liable for making the situation worse when it intervenes in a situation. The effect of this is that emergency services will not be held liable for failing to respond to a call for assistance, but if the emergency service responds, there is an “assumption of responsibility” and they may be held liable.⁴¹⁸ In the 2008 Consultation Paper *Administrative Redress: Public Bodies and the Citizen*, the Law Commission proposed that, under certain circumstances, a public entity should be held liable for harm or loss caused by positive conduct; or failing to prevent harm or loss where the authority acts unlawfully; or is at fault. The paper was widely criticised in the United Kingdom and there is no indication as to whether the proposals will be implemented. Recently, though, there has been a departure from the approach of the state being immune from liability and this is evident with the decisions of *D v East Berkshire NHS Trust*⁴¹⁹ and *Phelps v Hillingdon London Borough Council*,⁴²⁰ where the courts interpreted the factors of a special relationship between the parties or assumption of responsibility more widely. It may be presumed that English law will in future more readily recognise claims in the tort of negligence in respect of omissions. Policy considerations will have to be in favour of concluding that it is fair, just and reasonable to impose a duty of care. The decisions of the European

⁴¹⁵ See chapter 4 para 3.3.1.

⁴¹⁶ See chapter 4 para 3.3.1.

⁴¹⁷ See chapter 4 para 3.3.1.

⁴¹⁸ See chapter 4 para 3.3.1.

⁴¹⁹ 2005 2 AC 373.

⁴²⁰ 2001 2 AC 619.

Court of Human Rights no doubt have also influenced the English courts towards recognising liability of the state, particularly in cases of omissions. However, with the effect of Brexit and the possibility of the government of the United Kingdom repealing and replacing the Human Rights Act, it is uncertain if English law will further develop tort liability of the state or if state immunity from liability will be perpetuated and strengthened.⁴²¹

In American law,⁴²² there is no general duty to act in cases of pure omissions. There are exceptions to the general rule whereby a duty of “reasonable assistance” to the plaintiff may be required. These exceptions follow the same factors considered in English and South African law in acknowledging an obligation to act positively in order to prevent harm to the plaintiff, including where the defendant commences with offering assistance. However, the duty to act positively in American law has grown due to public sentiment and social policy.⁴²³ Generally with liability for nonfeasance (omissions), there must be a relationship between the plaintiff and defendant of such a nature that social policy justifies the imposition of a duty to act. A few states have statutes providing that a failure to assist or rescue a person in peril may lead to a criminal sanction.⁴²⁴ Thus “reasonable assistance” is required generally when the defendant is able to assist without any danger to himself or others and when he knows that another has been exposed to grave harm or risk of harm. The notion of “reasonable assistance” takes into account the rescuer’s efforts to render aid.⁴²⁵ American law takes a different approach from English law when it comes to liability of the state. In 1947, the Federal Tort Claims Act became applicable, in effect generally abolishing government immunity from tort liability. Thus the government may be held liable under the relevant state law in instances where a private person would also have been liable.⁴²⁶ If, for example, the police respond to a 911 emergency call but the police vehicle goes to the wrong address, the police may be held liable as a duty of reasonable care was undertaken. Thus reasonable rescue measures should have

⁴²¹ See chapter 4 para 3.3.1.

⁴²² See chapter 5 para 3.4.1.

⁴²³ See chapter 5 para 3.4.1.

⁴²⁴ See chapter 5 para 3.4.1.

⁴²⁵ Dobbs, Hayden and Bublick *Hornbook on torts* 616 fn 20.

⁴²⁶ 28 US CA §2674. See in general Dobbs, Hayden and Bublick *Hornbook on torts* 549-589; Keeton *et al Prosser and Keeton on torts* 1032-1056 with regard to the limitations applicable to government immunity.

been undertaken. This may be compared with the facts of the English decision⁴²⁷ of *Michael v Chief Constable of South Wales Police*,⁴²⁸ where a woman who feared for her life contacted the police requesting assistance. The police, as a result of miscommunication between the different police departments, did not attend to her call for help immediately and by the time they did arrive at her house, she had already been stabbed to death. The Supreme Court following the decision in *Hill v Chief Constable of West Yorkshire*⁴²⁹ found that no duty of care was owed to the woman.

In French law a relationship with a place, object, the plaintiff or the defendant may be an indication of a duty to act positively. Strict liability rules apply to omissions as well as in respect of damage caused by the “acts of things” or acts of others one is responsible for.⁴³⁰ Where there is a relationship between the plaintiff and the defendant, for example the relationship between a school and its pupil, or employer and employee, there is a strong indication of a duty to act positively.⁴³¹ In respect of omissions, a failure to act positively may be regarded as: violating the general obligation of prudence and diligence; or violating an unwritten legal duty to act positively which may be deemed as socially unacceptable conduct according to Articles 1382 and 1382 of the CC. It is submitted that these general obligations and unwritten legal duties to act positively in French law echo the *boni mores* in South African law. In France, in terms of Article 223-6 of the Penal Code (*Code pénal*), a bystander may be held criminally liable if he does not assist a person in peril and where he is in a position to do so without risking harm to himself or others.⁴³² A criminal offence is however regarded as a civil *faute* in terms of Article 1382 of the CC. Therefore, by violating Article 223-6 of the French Penal code, Article 1382 of the CC provides for civil liability for damage caused.⁴³³ The *Cour de Cassation*⁴³⁴ has however held that a bystander will be held liable only if the bystander intentionally refused to help when he was in a position to do so. Naturally, if he was not aware of the situation

⁴²⁷ See chapter 4 para 3.3.1.

⁴²⁸ 2015 UKSC 2.

⁴²⁹ 1989 1 AC 53.

⁴³⁰ See Van Dam *European tort law* 249-250.

⁴³¹ See Van Dam *European tort law* 250.

⁴³² Van Dam *European tort law* 521.

⁴³³ See Cass crim 16 March 1972 71-92418; Van Dam *European tort law* 522.

⁴³⁴ See Cass civ 2 18 January 1963, JCP 1963 II 13316 note Blaevoët; Cass civ 2 18 October 1962, Bull civ 1962 II 288 201; Cass civ 2 22 May 1968 note 102; Cass civ 2 9 November 1971, D 1972 75; Van Dam *European tort law* 521 fn 2.

requiring action or if he was unable to assist, he will not be held liable. A subjective test is applied to the bystander, taking into account his “personal knowledge and abilities”.⁴³⁵

In France, “complete immunity of a public official from liability is unconstitutional”.⁴³⁶ However, the liability of public entities is regulated mainly by administrative law and administrative courts. The administrative courts play a significant role in protecting fundamental rights of citizens when such rights are violated by public entities.⁴³⁷ Liability of public entities may be fault-based or applied where there is a breach of a statutory rule based on the principle of “equality”, entitling a plaintiff to compensation. In respect of administrative law, strict liability is also based on “equality before public burdens” in terms of Article 13 of the Declaration.⁴³⁸ The notion behind the principle of “equality” is that public burdens must be shared equally amongst all the citizens and when a citizen bears more than his share of the burden, that is, if a plaintiff has sustained “abnormal damage” or “disproportionate damage”, it is reasonable that he should be compensated for such abnormal damage sustained. The principle of “equality” expresses the community’s thoughts and “solidarity”.

In all the jurisdictions that have been discussed, it is apparent that there is no general duty to act. Liability for the failure to act stems from morals and when the community believes that a person should have acted under the circumstances, that is, when a moral duty is translated into a legal duty. The defendant is not expected to put himself in danger or take unreasonable risks. In respect of fault-based liability, the liability stems from an unreasonable failure to act positively in preventing the harm in the circumstances. Due to this unreasonable conduct, it may, depending on the circumstances of the case, be reasonable to hold the defendant liable for the harm suffered by the plaintiff. Where there is contributory fault on the part of the plaintiff, then it is reasonable that his damages should be reduced. In cases of strict liability, it may be reasonable to compensate the plaintiff where he is exposed to abnormal risk

⁴³⁵ See chapter 6 para 2.3.3.

⁴³⁶ Constitution of 28 July 1989 (*Commission des opérations de bourse*). See Van Dam *European tort law* 532 fn 5.

⁴³⁷ See chapter 6 para 6.

⁴³⁸ Of the Rights of Man and the Citizen of 1789. See chapter 6 para 6.

or where he sustains an abnormal damage which he should not be burdened with. Thus reasonableness plays an influential role in all jurisdictions in cases of omissions.

2.9.2 Wrongful conception, wrongful birth and wrongful life claims

Wrongful conception claims usually stem from failed sterilisation procedures, or where the sterilisation procedure was not performed at all, resulting in an unwanted pregnancy. The child is born without any disabilities.⁴³⁹ In South African law, child-raising expenses may be allowed where the parent's financial reasons for not wanting another child are considered, but need not be based on socio-economic reasons. Other reasons, such as a couple deciding not to have more children, are acceptable.⁴⁴⁰ In English law, a duty of care may be recognised, but the mother is usually only entitled to damage resulting from the pregnancy. That is, damages may be awarded for pain and suffering experienced during labour; maternity wear; hospital and medical expenses; and economic loss resulting from taking time off work; etcetera. The parents will generally not be entitled to damages for raising the child as it is considered morally offensive to make the defendant liable for the upbringing of the child. It is also considered fair, just and reasonable to take into account the benefit and joy of bringing up a child.⁴⁴¹ In American law, most courts do not allow compensation related to the cost of raising a healthy child. Some courts have allowed juries to award child-raising costs where the parents wanted to avoid having children for financial or economic reasons. Damages relating to *inter alia*: medical costs incurred during pregnancy and delivery of the child; lost wages from taking time off from work due to pregnancy and delivery of the baby; and for emotional distress from having an unplanned child, have been allowed. Some courts do allow damages for the upbringing of the child, but the damages are reduced taking into account the benefit of parenthood rule.⁴⁴² In France, in cases of wrongful conception claims, courts award damages relating to the pregnancy and birth, but not for the upbringing of the child.⁴⁴³

⁴³⁹ See chapter 3 para 7.

⁴⁴⁰ See chapter 3 para 7.

⁴⁴¹ See chapter 4 para 3.2.2.1.

⁴⁴² See chapter 5 para 3.4.3.

⁴⁴³ See chapter 6 para 7.

There seems to be consensus that as a result of the unreasonable conduct of the medical practitioner or staff, the parents are entitled to damages related to the pregnancy and birth of the child. South African law allows costs for raising the child, holding the defendant responsible for unreasonable conduct resulting in the unwanted burden of child-raising with its concomitant costs. English and French law, relying on policy considerations, deny the costs of child-raising. In English law it is considered morally offensive, unfair, unjust and unreasonable to allow the defendant to pay for the child-raising costs. American law seems to offer an approach which may be considered a balanced approach between two extremes, whereby in some states the costs of child-raising are allowed but reduced by the benefit of parenthood rule.⁴⁴⁴

Wrongful birth claims stem from instances where a congenital condition is not detected during pregnancy, resulting in the birth of a child with a disability. As a result of the failure to detect and inform the parents of the condition, the parents are denied the right to choose to terminate the pregnancy. If they had been informed of the possibility or existence of the disability, they would have had the option to terminate the pregnancy and, thus, the right to autonomy is infringed. In both wrongful conception and birth claims, the claim is usually instituted by the parents of the child against medical practitioners or medical institutions.⁴⁴⁵ In South African law, claims for damages consisting of costs for the child's maintenance, special schooling needs, as well as future hospital and medical costs, are allowed.⁴⁴⁶ In English law, the parents may be entitled to compensation, not for the normal costs of upbringing, but for the additional cost associated with bringing up a child with such disability. The birth of a child born with disabilities is regarded as a foreseeable consequence of the medical practitioner's negligence.⁴⁴⁷ In the United States of America, some states have denied wrongful life claims or have anti-abortion legislation in place. Other states allow recovery for wrongful birth claims, but are tempered by the benefit of parenthood rule.⁴⁴⁸ In France, in cases of wrongful birth claims, the parents are entitled to claim for "financial and moral losses" which include non-pecuniary loss. The parents are usually entitled to claim medical and related expenses as well as non-material damage

⁴⁴⁴ See chapter 3 para 7; chapter 4 para 3.2.2.1; chapter 5 para 3.4.3; chapter 6 para 7.

⁴⁴⁵ See chapter 3 para 7.

⁴⁴⁶ See chapter 3 para 7.

⁴⁴⁷ See chapter 4 para 3.2.2.1.

⁴⁴⁸ See chapter 5 para 3.4.3.

for the adverse effect on the quality of their life due to the disability suffered by the child.⁴⁴⁹

It seems that in wrongful birth claims, the negligent and unreasonable conduct of the medical practitioner or staff justifies the need for the parents to be compensated for, at the very least, medical-related expenses as well as the additional costs of bringing up the child with special needs.

Wrongful life claims are instituted by a child living with a disability or disabilities, based on the failure of the medical practitioner or employees of medical institutions to detect a congenital disability.⁴⁵⁰ In South African law, such a claim has recently been recognised in *H v Fetal Assessment Centre*.⁴⁵¹ The Constitutional Court held that the loss suffered entails the costs of raising a child with a disability. Wrongfulness lies in the breach of a legal duty not to cause loss to the child and not to infringe the child's constitutional rights. In using the test similar to the three-fold test in establishing a duty of care (in English law), when establishing wrongfulness (in South African law), the court with reference to the policy consideration of indeterminate liability, stated that the liability is determinate in that either the child or the parents may claim for the loss and that it was not unreasonable to impose liability.⁴⁵² However, the Constitutional Court acknowledged that policy considerations may still negate legal causation, but that it was for the High Court to determine, including whether all the elements of a delict are present.⁴⁵³ In English law, a wrongful life claim is not allowed as it is considered against public policy in so far as it is regarded as violating the sanctity of human life. Furthermore, in accordance with the Congenital Disabilities (Civil Liability) Act,⁴⁵⁴ a child born after the passing of this Act cannot institute an action based on the "loss of a chance to die".⁴⁵⁵ Even though the recent approach to determining wrongfulness and the third element of the three-fold test in determining a duty of care are similar based on policy and whether it is reasonable to impose a duty of care or

⁴⁴⁹ See chapter 6 para 7.

⁴⁵⁰ See chapter 3 para 7.

⁴⁵¹ 2015 2 SA 193 (CC).

⁴⁵² *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) 217.

⁴⁵³ *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) 218.

⁴⁵⁴ 1976.

⁴⁵⁵ See Jones in Jones (gen ed) *Clerk and Lindsell on torts* 462.

liability, two different outcomes are reached. In South African law, the claim is justified in protecting the child's constitutional rights under section 28(2) of the Constitution.⁴⁵⁶

In American law, most courts do not allow the claim due to policy considerations, in that life is preferred to no life, and life cannot be viewed as an injury. In instances where claims are allowed, usually only special damages relating to medical expenses are awarded.⁴⁵⁷ In France, the child was initially entitled to claim based on the infringement of a child's right to bodily health and integrity. From 2002, wrongful life claims in France are regulated by legislation.⁴⁵⁸ Compensation is awarded to the parents for the handicap or disabilities and not to the child, as this would mean acknowledging the right of the child not to be born.⁴⁵⁹ This legislation curtails medical malpractice claims and Moréteau⁴⁶⁰ points out that in choosing national solidarity over liability of the individual, France gives a clear message that "no life is ever wrongful".

It seems that with the wrongful life claims, the court and legislature struggle with acknowledging that life can ever be wrongful, or that non-existence is better than existence. Policy considerations and morality play a role in not accepting the child bringing a claim for his wrongful life. South African law allowed claims though based on the unreasonable infringement of the child's rights. Thus the influence of reasonableness on wrongful conception, wrongful birth and wrongful life claims is apparent.

2.9.3 Emotional harm or psychiatric injury

In South African law, the psychiatric injury or emotional harm sustained must not be trivial but "reasonably serious".⁴⁶¹ Evidence must be produced to prove the psychiatric injury. Claims for primary and secondary psychiatric injury, stemming from either intentional or negligent conduct on the part of the wrongdoer are allowed.⁴⁶² As a result

⁴⁵⁶ Of the Republic of South Africa, 1996.

⁴⁵⁷ See chapter 5 para 3.4.3.

⁴⁵⁸ Law No 2002-303 of 4 March 2002.

⁴⁵⁹ See Van Dam *European tort law* 201-202 fn 145 who points out that most European countries do not entertain wrongful life claims brought by the child except in Spain and Netherlands.

⁴⁶⁰ 2006 *European tort law yearbook* 200-201.

⁴⁶¹ Neethling and Potgieter *Delict* 287.

⁴⁶² See chapter 3 para 8.

of the influence of English law on South African law, the courts place emphasis on the criterion of “reasonable foreseeability of harm” which is relevant to determining wrongfulness, negligence and legal causation. Wrongfulness lies in the infringement of physical-mental integrity. In respect of negligence, the conduct may be considered unreasonable and in respect of intention, there must be consciousness of the unreasonableness of the conduct. In respect of negligence and the reasonable foreseeability of the probability of harm requiring the defendant to take preventative measures, the foreseeability of harm is easier to prove in cases of primary emotional shock. In respect of legal causation, what must be established is whether there is a close enough relationship between the defendant’s conduct and the psychiatric injury sustained in order for the defendant to be held liable for the psychiatric injury in view of policy considerations based on reasonableness, fairness and justice. If the psychiatric injury to the secondary victim is considered too remote, then it is unreasonable to hold the defendant delictually liable for the psychiatric harm sustained. Secondary emotional shock claims are limited by the requirement of a strong emotional bond or close relationship between the secondary victim and the primary victim. Furthermore, the flexible approach to determining legal causation may be easily applied in limiting claims by secondary victims.⁴⁶³

In English law, negligently inflicted psychiatric injury caused by the defendant’s unreasonable conduct is compensable. Some form of recognisable psychiatric injury is required. Mere mental distress, grief, fear or other emotions are not sufficient to ground liability.⁴⁶⁴ A duty of care towards primary victims who suffer negligently inflicted psychiatric injury is more easily acknowledged than in respect of secondary victims. In *Page v Smith*⁴⁶⁵ liability for psychiatric injury of primary victims with inherent susceptibilities was recognised. Thus *general harm* must be reasonably foreseeable in respect of a primary victim, but *psychiatric injury* must be reasonably foreseeable in respect of a secondary victim. Furthermore, a claim for psychiatric injury by a primary victim depends on what was reasonably foreseeable by the defendant *ex ante*, but *ex post facto* in respect of a claim for psychiatric injury by a secondary victim.⁴⁶⁶ A

⁴⁶³ See chapter 3 para 8.

⁴⁶⁴ See chapter 4 para 3.3.2.

⁴⁶⁵ 1996 AC 155.

⁴⁶⁶ See chapter 4 para 3.3.2.

secondary victim will have to meet the following requirements in order to succeed in a claim for pure psychiatric injury: the claimant must fall within the class of persons whose claim should be recognised; proximity must be present with regard to the event in time and space, as well as proximity of the relationship between the primary and secondary victim; the psychiatric injury must be induced by some form of shock; and there must be foreseeability of psychiatric injury to the claimant of normal fortitude.⁴⁶⁷ The different approaches applied to primary and secondary victims have been criticised.⁴⁶⁸ Nevertheless, it is evident that the rules of proximity in English law play an important role in limiting claims of secondary victims.

In American law, the policy concerns for being cautious in awarding damages for stand-alone emotional harm include the danger of a flood of litigation; the difficulty of proving and quantifying damages for such harm; how much emotional harm a person sustains is subjective; an award for emotional harm may not result in a person no longer suffering such harm; and at times it may not be possible to see a reasonable limit to claims for emotional harm.⁴⁶⁹ In respect of emotional harm caused intentionally to a primary victim, there must be proof of severe emotional harm, which either a reasonable person should not be expected to tolerate, or the plaintiff must provide proof of the emotional harm sustained. Intention is required and recklessness or a wilful attitude is sufficient. There must be “extreme” or “outrageous” conduct on the part of the defendant, which is clearly beyond human decency and social norms.⁴⁷⁰ The *Restatement Third of Torts*⁴⁷¹ limits claims of secondary victims who suffer intentional emotional harm, to close family members. Furthermore, the mental harm must have been reasonably foreseen or anticipated.⁴⁷²

In the case of primary victims suffering emotional harm inflicted negligently, the primary victim must have been in some kind of imminent danger or the harm must occur “within the confines of particular undertakings or special relationships”.⁴⁷³ The

⁴⁶⁷ See chapter 4 para 3.3.2.2.

⁴⁶⁸ See chapter 4 para 3.3.2.2.

⁴⁶⁹ See chapter 5 para 3.4.4.

⁴⁷⁰ See chapter 5 para 3.4.4.

⁴⁷¹ (*Liability for Physical and Emotional Harm*) § 46 cmt m (2012). See also *Restatement Second of Torts* § 46(2) (1965).

⁴⁷² See chapter 5 para 3.4.4.

⁴⁷³ Dobbs, Hayden and Bublick *Hornbook on torts* 714.

plaintiff must have suffered severe emotional harm that a normal person would sustain or that a reasonable person would foresee. Alternatively, medical evidence may be provided proving the emotional harm. In respect of secondary victims, claims for negligently inflicted secondary emotional harm are more likely to succeed where: the victim was a bystander who witnesses injury or threat of harm to a close relative; the victim was in the zone of danger where the victim fears for his own safety; or the emotional harm was foreseeable. A close enough relationship may at times be interpreted widely, not limiting the relationship to blood or marriage.⁴⁷⁴

In France,⁴⁷⁵ in contrast all kinds of mental harm are in principle compensable and the mental harm need not result in some form of recognised medical psychological or psychiatric injury. The mental harm must result in some damage in terms of Articles 1382 and 1384 of the *CC* and any “negative impact on someone’s feelings can amount to mental harm”.⁴⁷⁶ Thus grief is in principle compensable and damages have even been awarded for emotional distress as a result of losing one’s pet.⁴⁷⁷ All that is required is a *faute* relating to the defendant’s unreasonable conduct which must have caused immediate, direct and certain mental harm. The courts assess the subjective mental harm of the plaintiff in each case and an objective approach is not applied. The element of causation plays a role in limiting claims where the damage must be certain and direct. If the secondary victim is family or related to the primary victim, there is a presumption of a “link of affection” between them. However, the secondary victim need not be a relative and what must be proven is a “material or sentimental link” with the primary victim. In respect of unmarried couples, the relationship between them must have been stable and continuous. Generally there must be some kind of personal relationship between the primary and secondary victim.⁴⁷⁸

It is evident that reasonable foreseeability of harm plays a major role in determining liability and limiting liability for psychiatric injury or emotional harm in South African and Anglo-American law. Furthermore, American law in applying an objective approach makes use of the criterion of the reasonable person, for example, in

⁴⁷⁴ See chapter 5 para 3.4.4.

⁴⁷⁵ See chapter 6 para 8.

⁴⁷⁶ Van Dam *European tort law* 175.

⁴⁷⁷ See chapter 6 para 8.

⁴⁷⁸ See chapter 6 para 8.

questioning whether a reasonable person would have suffered emotional harm under similar circumstances. Dobbs, Hayden and Bublick⁴⁷⁹ correctly submit that the “rules are not about foreseeability but about pragmatic limits on liability, which are endemic to this area”. This is evident particularly where policy considerations are applied. In all the jurisdictions discussed, a successful claim for psychiatric injury or emotional harm depends on whether there was an unreasonable infringement of the interests in bodily integrity, unreasonable conduct in causing the emotional harm and whether it is reasonable to hold the defendant liable for the emotional caused. Policy considerations play a prevalent role in limiting liability. Thus it is reasonable to compensate the plaintiff for emotional harm or psychiatric injury that was not too remote.

2.9.4 Pure economic loss

In South African and Anglo-American law, pure economic loss is generally described as patrimonial loss which does *not* stem from physical harm to the plaintiff’s property or person. It does not relate to consequential loss which is financial loss resulting directly from personal injury or damage to property.⁴⁸⁰ Conduct must be present, whether explicitly mentioned as a requirement or not, and the pure economic loss may be caused by intentional or negligent conduct. English law has influenced South African and American law with regard to claims for pure economic loss.⁴⁸¹ In the above-mentioned jurisdictions, the courts are reluctant to award damages for pure economic loss for a number of policy reasons. Depending on the circumstances of the case, the courts justify their reasons for either acknowledging or excluding a claim by referring to policy considerations.

In South African law,⁴⁸² wrongfulness may lie in the infringement of a right, such as with an interference with a contractual relationship, or breach of a legal duty to prevent pure economic loss. In applying the *boni mores* or reasonableness criterion in order to determine whether there is a legal duty to prevent pure economic loss, the following

⁴⁷⁹ *Hornbook on torts* 714.

⁴⁸⁰ See chapter 3 para 9; chapter 4 para 3.3.4; chapter 5 para 3.4.5.

⁴⁸¹ See chapter 3 para 9; chapter 4 para 3.3.4; chapter 5 para 3.4.5.

⁴⁸² See chapter 3 para 9.

factors have *inter alia* been considered: reasonable foreseeability of harm; practical measures that could have been taken to avert the loss; where the defendant as a professional possessing certain knowledge and competence has a duty not to cause economic loss; the degree of the risk of economic loss that may be suffered by the plaintiff; the extent of the loss, if it is indeterminate it may be unlikely that the defendant had a legal duty to prevent the economic loss; where a statutory provision may indicate whether there is a legal duty on a person to prevent economic loss; whether there is a special relationship between the parties; and whether there was fraud or dishonesty on the part of the defendant.⁴⁸³ It is apparent that the factors in determining negligence are also considered in determining whether there was a legal duty to prevent economic loss. In addition, the following policy considerations have been considered in order to justify *not imposing liability for pure economic loss*: the concern of indeterminate liability; the opening of the floodgates to a high influx of claims; where the parties could have protected themselves from loss by other means; the plaintiff's vulnerability to risk of pure economic loss; the law of delict should not undermine and interfere with contractual relations where the law of contract may be applied; and liability on the defendant would be refused if such imposition is deemed an additional burden which would hamper his activities.⁴⁸⁴ The policy considerations referred to may apply in negating the element of wrongfulness and legal causation. The recent approach to determining wrongfulness and the flexible approach to determining legal causation, which are similar to the third element of the English three-fold test in determining a duty of care, apply in allowing or excluding a claim for pure economic loss. The question of wrongfulness depends on whether there was a legal duty to act reasonably to prevent the pure economic loss, according to the *boni mores*, judged *ex post facto*. According to the recent approach to determining wrongfulness, it depends on whether public policy dictates that it is reasonable to impose liability on the defendant for the pure economic loss. In determining legal causation, the question is whether it is fair, just and reasonable that the defendant should be held delictually liable for the pure economic loss factually caused by his conduct. If the pure economic loss is for example, indeterminate, then the consequences may be considered too remote and legal causation may be absent. In respect of negligence, it would depend on whether

⁴⁸³ See chapter 3 para 9.

⁴⁸⁴ See chapter 3 para 9.

the defendant's conduct was unreasonable, when judged according to the standard of the reasonable person *ex ante*. If there is contributory fault on the part of plaintiff, then liability may be limited or excluded. In respect of intention, what must be determined is whether the defendant directed his will towards causing the pure economic loss and whether he was conscious of the wrongfulness or unreasonableness of his conduct.⁴⁸⁵

In English law,⁴⁸⁶ the policy reasons for not acknowledging a duty of care in instances of pure economic loss in the tort of negligence are similar to the policy reasons considered in South African law. English law, in addition to the policy reasons referred to in South African law, refers to: disproportionate liability on the part of the defendant and that the loss is difficult to ascertain and prove. The *Hedley Byrne* principle⁴⁸⁷ is applied to negligent misstatements. A special relationship between the parties is required where the defendant assumes responsibility and there must be reasonable reliance on the statement, by the claimant. The *extended Hedley Byrne* principle⁴⁸⁸ extends the principle to instances where services are rendered. For example, using this principle, a doctor or dentist is expected to treat his patient with the care and skill that a reasonably competent doctor or dentist would exercise. In turn, the patient relies on the doctor to exercise care and skill in treating him.⁴⁸⁹

In American law,⁴⁹⁰ the *economic loss rule* is applied and this rule means that in general, a person does not owe a duty of reasonable care to prevent economic loss to another. There are exceptions, for example, where there is intentional or negligent misstatements causing pure economic loss and where the plaintiff relies on the statement made. The plaintiff relies on the inaccurate or incorrect information and is led to reasonably expect reasonable care of his interests. There must be justified, reasonable reliance on the statements made. That is, would the reasonable person attach significance to the statement made? The statement must be materially factual and not, for example, a mere opinion on future uncertain projections or statements

⁴⁸⁵ See chapter 3 para 9.

⁴⁸⁶ See chapter 4 para 3.3.4.

⁴⁸⁷ Stemming from the decision of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* 1964 AC 465. See chapter 4 para 3.3.3.

⁴⁸⁸ See chapter 4 para 3.3.3.

⁴⁸⁹ See chapter 4 par 3.3.4.

⁴⁹⁰ See chapter 5 para 3.4.5.

about a product that amounts to “puffing” or “exaggeration”.⁴⁹¹ The *stranger rule* also applies, which is similar to the idea of proximity applied in English law, where no duty of reasonable care is owed to the third parties, which are considered to be *strangers*, who suffer pure economic loss. The reasons mentioned above as being applicable in English and South African law for denying liability for economic loss, are also applied in American law.⁴⁹² In addition, American law refers to the principle that it is unfair and unjust to compensate the plaintiff for the economic loss suffered. Thus the plaintiff should assess his risk, which includes economic loss he may sustain, and should either insure against such loss or contract with another for protection. Some courts bar economic loss claims when the parties are considered to be “sophisticated business entities” or where the plaintiff is the “sophisticated party”. If however, the plaintiff is lacking bargaining power, he may be entitled to an economic loss claim in tort and need not be limited to a claim in contract. Intentionally inducing breach of a contract and interference with the plaintiff’s contract or economic interests may result in pure economic loss. Usually as a result of the defendant’s conduct, a third party breaches the contract with the plaintiff or causes economic loss in the form of a reasonably likely gain or profit.⁴⁹³

In French law,⁴⁹⁴ the idea of “pure economic loss” is generally unfamiliar and does not exist as an independent jurisprudential topic. However, where there is an infringement of legitimate economic interests, then the economic loss may in principle be recovered. The damage, however, must be personal, certain and direct. Liability for pure economic loss is controlled by all three elements of *faute* (encompassing an effective combination of wrongfulness and fault) causation, and damage. The idea of an indeterminate number of plaintiffs is resolved with the element of causation and the floodgates argument is not encountered in French legal doctrine.⁴⁹⁵ In respect of *faute*, the reasonable person test may be replaced with the question of whether one has complied with the principles of loyalty, honesty, and good faith. This would apply where compensation for pure economic loss is awarded in cases of non-performance of a

⁴⁹¹ See chapter 5 para 3.4.5.

⁴⁹² See chapter 5 para 3.4.5.

⁴⁹³ See chapter 5 para 3.4.5.

⁴⁹⁴ See chapter 6 para 9.

⁴⁹⁵ See chapter 6 para 9.

contractual obligation.⁴⁹⁶ Furthermore, the plaintiff would have to prove that the loss was reasonably unavoidable. If, for instance, they could have contracted with another supplier, then the loss is not unavoidable. If the damage is indirect, hypothetical or uncertain, damages are not awarded. It is unfair and unreasonable to compensate the plaintiff under the circumstances, as the loss is too remote. In respect of lost opportunities relevant to pure economic loss, the courts may either find that the damage is not the direct consequence of the defendant's conduct, or the cause of a reasonable loss of chance, or that the plaintiff voluntarily assumed the risk of harm which would exclude liability. The element of causation is essentially used to control unreasonable or excessive claims.⁴⁹⁷

In all the jurisdictions discussed with regard to pure economic loss, it is evident that there is a need to control pure economic loss claims within reasonable limits. South African and Anglo-American law specifically rely on policy considerations within some different elements of liability to either allow or exclude a claim, while French law mainly makes use of the elements of delictual liability in allowing or excluding claims for pure economic loss.

3. Recommendations for the South African law of delict

The reason for embarking on this study⁴⁹⁸ was a dissatisfaction with the recent approach of the courts to determining wrongfulness;⁴⁹⁹ the *ex ante* approach sometimes applied by the courts to grounds of justification, which negates the element of wrongfulness where wrongfulness should be determined objectively and *ex post facto*;⁵⁰⁰ the courts' view that reasonableness in respect of wrongfulness does not have anything to do with the reasonableness of the conduct of the defendant;⁵⁰¹ the equation of breach of a legal duty to prevent harm in South African law, which is the

⁴⁹⁶ Van Dam *European tort law* 210.

⁴⁹⁷ See chapter 6 para 9.

⁴⁹⁸ The reasons for embarking on this study were not provided in detail in chapter 1 because it was necessary first to discuss South African law and English law in depth in order to effectively point out the confusion and uncertainty found in South African law.

⁴⁹⁹ See chapter 3 para 3.2.

⁵⁰⁰ See chapter 3 para 3.4. Fagan supports the *ex ante* approach – see Fagan 2005 *SALJ* 93; Fagan 2007 *SALJ* 292; chapter 3 para 3.3.2.

⁵⁰¹ Brand JA stated this in *Le Roux v Dey* 2011 3 SA 274 (CC) 315 whereafter it was repeated in numerous judgments. See chapter 3 para 3.3.3.

test for determining wrongfulness in cases of omissions, with the duty of care in the tort of negligence found in Anglo-American law;⁵⁰² the conflation of wrongfulness, fault and legal causation, in using the criteria of reasonable foreseeability and reasonable preventability of harm without appreciating the distinctive functions of each element;⁵⁰³ and the courts almost dispensing with the requirement of consciousness of wrongfulness as the second element of intention.⁵⁰⁴ At the centre of all this dissatisfaction was the realisation that the concept of reasonableness played a role. There is nothing wrong with the concept of reasonableness itself, because it is often associated with fairness and justice, whether express or implied in law. These concepts are necessary in law even though their application is criticised by some for being ambiguous. The real problem lies, it is submitted, in the manner in which reasonableness is sometimes used by the adjudicators.⁵⁰⁵ The distinctive functions of the various elements of delictual liability are not clearly kept in mind, and that brings about the conflation of the elements and the uncertainty in South African law. It should be noted, however, that justice has always been served, and fair results have more or less consistently been attained in case law, even though the elements are conflated at times. It is desirable in law that there should be uniformity, clarity and certainty. Where there is confusion and uncertainty, the adjudicators have the power to remedy this by bringing back the certainty and clarity. This is especially the case since the South African law of procedure follows the precedent system.⁵⁰⁶

It is evident from the study of South African and Anglo-American law, that American law is based on English law to a large extent and that South African law has been significantly influenced by English law. That being said, there are areas in American law where there is a notable divergence from English law, particularly in respect of the duty of care concept, liability of the state and liability for omissions. To my mind, the reason for the divergence in omissions and liability of the state is because American common law acknowledges the protection of rights, which is enforced by constitutional

⁵⁰² See chapter 3 para 4.4; Fagan 2000 *Acta Juridica* 65; Fagan's views discussed in chapter 3 paras 3.3.2 and 4.4

⁵⁰³ See chapter 3 para 4.4.

⁵⁰⁴ See *Le Roux v Dey* 2010 4 SA 210 (SCA) 224; chapter 3 par 4.2. Fagan also supports the dispensing of the requirement of the second element of intention (see Fagan 2005 *SALJ* 117).

⁵⁰⁵ See Mullender *Modern LR* 688 with regard to the concept of reasonableness. See chapter 2 para 4.

⁵⁰⁶ See para 1 above.

provisions. Furthermore, the divergence in the duty of care concept is evident due to the acknowledgement of the protection of interests or rights, where the idea of a requisite relationship between the parties or proximity is considered to be artificial and a duty of reasonable care may be owed to anyone. American law needs to clarify the role of foreseeability of harm, or else the roles of the jury and the adjudicator may be blurred.⁵⁰⁷

South African law is referred to as a hybrid system, because, in addition to its English law influences, it is also primarily based on Roman-Dutch law. Furthermore, it follows a generalising approach and the Constitution has a significant influence on the common law.⁵⁰⁸ This is evident with the constant references of the courts to the protection of constitutional rights and the reference to the Constitution in recent delict judgments.⁵⁰⁹

Turning back to the dissatisfaction mentioned above, a study of English, South African and French law provided new insights. It is now clear that many of the problems relating to the South African law of delict can be traced to the adoption of principles from English law. It is understandable that the approaches followed in English law work well within their own tort law system. English law has specific torts, there is the tort of negligence which deals with negligent conduct, there are specific intentional torts which deal with intentional conduct and there are a number of remedies and types of damages available in English law.⁵¹⁰ Together, as a system, they work in harmony. With this understanding, recommendations for South African law can now be made.

To begin with, since South African law follows a generalising approach, all the elements of delictual liability, namely: conduct, wrongfulness, fault, causation and harm must in principle be present to ground liability. Fault is, however, not a requirement in cases of strict liability. All the elements of a delict should remain conceptually separate, with their own tests and requirements and each element should be determined separately.⁵¹¹ This must apply particularly to wrongfulness and fault

⁵⁰⁷ See para 2.3 above.

⁵⁰⁸ See para 1 above.

⁵⁰⁹ This is evident throughout chapter 3 where quotations of the Constitutional Court are supplied.

⁵¹⁰ See para 2.3-2.7 above with regard to English law.

⁵¹¹ See chapter 3 para 1.

and as far as possible the boundaries between them should not be blurred by indiscriminately following Anglo-American tort law, where there is no clear-cut conceptual difference between these elements.

The recent approach to determining wrongfulness, which is the same as the last element of the three-fold test applied in determining a duty of care in English law, was an unnecessary approach adopted in South African law. The traditional approach to determining wrongfulness in South African law was more than sufficient to deal with even novel and problematic cases.⁵¹² Nevertheless, the traditional approach to determining wrongfulness, as referred to in this thesis, is still followed in the South African law of delict next to the recent approach to determining wrongfulness, which is now a part of our law. The two approaches are sometimes combined, with the recent approach applying as a final conclusion as to whether the defendant acted wrongfully. It is submitted that the recent approach for the sake of clarity could be restated as “*is it reasonable to impute wrongfulness on the defendant based on policy considerations*”? In this manner the tests for wrongfulness and legal causation in South African law, where reference is commonly made to imputation of liability, are distinguished. Furthermore, not all the other elements of a delict need to be established before determining wrongfulness, if the test is phrased in such a manner.

In respect of a legal duty to prevent harm or loss, it applies in South African law as one of the two main tests for determining wrongfulness according to the traditional approach, and should not be equated with the duty of care concept, which applies to wrongfulness and negligence without conceptually differentiating between them in Anglo-American law.⁵¹³ The grounds of justification should remain defences that exclude wrongfulness. The South African courts should clearly recognise the defences discussed under South African law, namely: consent; private defence or self-defence; necessity; statutory authority; official capacity; and official command, as grounds of justification negating wrongfulness. By doing this, the courts must ensure that when a defence is recognised as a ground of justification, thus excluding wrongfulness, an objective *ex post facto* approach is applied.⁵¹⁴ Whether a belief is reasonable or not

⁵¹² See chapter 3 paras 3.1-3.2.

⁵¹³ See chapter 3 para 4.4.

⁵¹⁴ See chapter 3 para 3.4.

and whether it should exclude liability should be determined under the element of fault where an *ex ante* approach is applied. Anglo-American law does not make the distinction between wrongfulness and negligence and does not have a need to make a distinction. For example, there is no need to make a distinction between putative and actual defence.⁵¹⁵ In American law, there is a distinction between private and public necessity. South African law developed in a manner whereby necessity as a defence, whether private or public necessity from an American perspective, may exclude liability and it is not a partial defence.⁵¹⁶ If private necessity were to be made a partial defence, whereby the innocent plaintiff must be compensated for his loss, then there would be a need for the defendant to insure against such potential loss. The defence of discipline may soon not be recognised as a defence in South African law as the High Court in South Africa has recently ruled that physical reasonable force used in disciplining a child is unconstitutional and may be considered as an “assault”.⁵¹⁷ We have yet to see the Constitutional Court’s ruling on this and whether it will affect the defence of discipline in the South African law of delict. Furthermore, the courts have not yet pronounced whether provocation applies as a ground excluding wrongfulness or as a ground limiting or excluding fault.⁵¹⁸ If provocation is to be applied as a mitigating factor, it would make sense if it was a defence applied to fault and if provocation is applied as a complete defence, as is the defence of consent etcetera, then it would make sense that it applies as a ground excluding wrongfulness. Again, because Anglo-American law does not make the conceptual distinction between wrongfulness and fault, there is no need to decide whether provocation applies as a complete or partial defence. Contributory fault is recognised as a defence applying to the elements of negligence and intention and the courts do apply an *ex ante* approach.⁵¹⁹

It is clearly evident that reasonableness of conduct is considered under both the elements of wrongfulness and fault. The courts’ statement that wrongfulness has nothing to do with the reasonableness of the defendant’s conduct is clearly wrong. As shown under the discussion of South African law, reasonableness plays an explicit

⁵¹⁵ See para 2.5 above.

⁵¹⁶ See para 2.5 above.

⁵¹⁷ *YG v S* 2017 ZAGPJHC 290 (19 October 2017) in a criminal context.

⁵¹⁸ See chapter 3 para 3.4.4.

⁵¹⁹ See chapter 3 para 4.2-4.3.

role in determining wrongfulness according to the traditional and recent approach and actually plays a role in determining all the elements of delictual liability. The difference is that when dealing with reasonableness of conduct under wrongfulness, the test focuses on the unreasonable infringement of interests even if formulated as breach of a legal duty, and tested against the *boni mores*; while when dealing with intention and negligence, the focus is on the blameworthiness of the defendant for his conduct and hence whether the conduct is unreasonable from that angle.⁵²⁰ In respect of negligence, the conduct is tested against the standard of the hypothetical reasonable person.⁵²¹ In respect of intention, consciousness of wrongfulness or unreasonableness of conduct as the second element of intention is required.⁵²² Wrongfulness follows an *ex post facto* approach; while an *ex ante* approach is followed in dealing with fault. Wrongfulness should be determined before fault, which is far better when compared to the recent approach to wrongfulness, which requires all the other elements to be present before determining wrongfulness. Since the second element of intent lies in the consciousness of wrongfulness, wrongfulness should be determined before fault. Furthermore, there is nothing wrong in logically determining wrongfulness before fault.⁵²³

In respect of the role of foreseeability of harm, it should preferably be left to determining negligence. However, like the recent approach to determining wrongfulness, it is part of our law that is also applied at times in determining wrongfulness and often when determining legal causation. At the very least, its role should be clarified taking into account the distinctive function of each element. As stated above,⁵²⁴ reasonable foreseeability of harm is one of the factors that may be considered in determining wrongfulness.⁵²⁵ It is a factor which may indicate the presence of a legal duty to prevent harm or loss. Ultimately, in breaching a legal duty to prevent harm or loss, the focus is on interests or rights and whether or not harm or loss affecting those interests or rights flowed from unreasonable conduct tested against the *boni mores*. An objective *ex post facto* approach is applied based on the

⁵²⁰ See paras 2.4-2.5 above.

⁵²¹ See chapter 3 para 4.3.

⁵²² See chapter 3 para 4.2.

⁵²³ See chapter 3 para 3.

⁵²⁴ See para 2.6 above.

⁵²⁵ See above paras 2.4-2.5; para 2.9.1 with regard to omissions; para 2.9.3 with regard to emotional harm or psychiatric injury; para 2.9.4 with regard to pure economic loss.

facts of the case, balancing all the affected interests in light of constitutional provisions. For example, in respect of omissions, where reasonable foreseeability of harm is used, the question could be framed in such a manner – was harm to the plaintiff reasonably foreseeable requiring the defendant to act positively in protecting the plaintiff's interests or rights? Or in terms of economic loss, the question could be framed in such a manner – was economic loss to the plaintiff reasonably foreseeable requiring the defendant to protect the plaintiff's economic interests? In reaching a decision on whether the plaintiff's interests were infringed unreasonably, all interests must be weighed taking into consideration constitutional values, the *boni mores* and the surrounding circumstances. In respect of negligence, the defendant should have foreseen the probability of some kind of harm to the plaintiff requiring the defendant to take steps to prevent harm, if the reasonable person in a similar position would have done so. Reasonable foreseeability of harm here deals specifically with blameworthiness of conduct and an *ex ante* approach is applied. In respect of legal causation, reasonable foreseeability of harm is one of the subsidiary tests applied to determine legal causation. If reasonable foreseeability is used as the test in determining legal causation, the question is whether the defendant should be held liable for the factually caused consequences that were reasonably foreseeable.⁵²⁶

Under the discussion of American law,⁵²⁷ it is evident that in requiring single intent, it will affect children and mentally impaired persons. Accountability in South African law is a pre-requisite for fault and is firmly entrenched in our law.⁵²⁸ South African law developed in a manner whereby the mentally impaired persons and children, depending on their age, may not be held accountable or at fault. Koziol⁵²⁹ points out that children pose a special risk and mentally impaired persons require special protection. He proposes that the loss stemming from their conduct may be distributed amongst everyone by covering such liability in the form of "social liability insurance". Naturally, the legislature would have to intervene in developing such social liability insurance as it is unlikely that everyone in South Africa would insure against such liability voluntarily. France has dispensed with the element of discernment in delictual

⁵²⁶ See para 2.6 above.

⁵²⁷ See paras 2.2 and 2.5.2 above.

⁵²⁸ See chapter 3 para 4.1.

⁵²⁹ In Koziol (ed) *Basic questions of tort law* 793. See para 2.2 above with regard to Koziol's views.

liability but has addressed this by applying strict liability rules. Furthermore, most parents are insured against liability for the delictual conduct of the children they have control over, at a minimal cost. To reiterate, there is no separate delict of intention and separate intentional delictual torts in South Africa, therefore before the second element of intent or the requirement of accountability is dispensed with, there is a need to thoroughly investigate how it will affect delictual liability and particularly *inter alia* children and their parents, mentally impaired persons, and liability for the infringement of personality rights.

The French and Anglo-American approaches to determining causation,⁵³⁰ where there are successive causes or where the plaintiff such as in the case of *Fairchild*⁵³¹ cannot prove which wrongdoer caused the harm, offer commendable answers to some of the most difficult legal questions arising in the field of delict or tort. Reversing the burden of proof and requesting the defendants to prove that they did not cause the harm is a reasonable approach in a claimant-centred system. It is not suggested that policy considerations should form a major part of the test for factual causation in South African law, but merely that the burden of proof be reversed to the aggregate of the defendant's conduct. The American approach of applying the but-for test to the aggregate of the defendants' conduct is sound. Where the harm is divisible, the but-for test may be applied to the aggregate conduct of the wrongdoers and they may be held liable for their share of the divisible loss. It was mentioned above that where there is a delictual and a non-delictual cause of the plaintiff's harm, the dominant or significant cause must be determined. If the delictual cause is the dominant or significant cause, it may be considered the "material cause" or contribution to the harm, thereby entitling the plaintiff to recover compensation. The but-for test can be applied to the combined delictual and natural cause where the delictual cause is the material cause.

⁵³⁰ See para 2.6 above.

⁵³¹ *Fairchild v Glenhaven Funeral Services* 2003 1 AC 32.

4. Closing thoughts

In all the jurisdictions discussed in this thesis and with reference specifically to the fields covered by the torts of negligence and trespass to the person, the influence of reasonableness is apparent, whether explicitly or implicitly. There must be conduct whether in the form of an omission or commission; otherwise it is unreasonable to hold the defendant liable. In respect of delictual liability, the tort of negligence and the torts of trespass to a person, interests or rights are protected whether express or implied. The influence of reasonableness is apparent in the protection of the plaintiff's interests, promotion of the defendant's interests and the interests of the community, which are weighed. The reasonableness of conduct in terms of fault is apparent where the blameworthiness of conduct is considered. In respect of the standard of the reasonable person in determining negligence, the influence of reasonableness is explicit and the standard may be lowered or raised taking into account subjective factors relevant to the particular person and circumstances of the case. Where there is contributory fault on the part of the plaintiff, it is reasonable to reduce the plaintiff's award or deny his claim because of his unreasonable conduct. A defence which goes to the heart of any element will, if upheld, promote the reasonableness of not imposing liability as a result of an absent element. It is reasonable to hold the defendant liable only if he factually caused the consequences. It is only reasonable to hold the defendant liable for the factually caused consequences if such consequences are not too remote, in an enquiry that is termed legal causation in some legal systems. It is only reasonable to hold the defendant liable if he caused harm, loss or damage. In addition, the harm must not be trivial but reasonably serious in order to ground liability.

As shown above there is much common ground in determining liability in delict or tort law, because of the influence of reasonableness. Reasonableness, the community's views, morals, policy considerations, equality, fairness and justice are all linked in providing value judgments, whether directly or indirectly, in all jurisdictions.

An outcome with regard to liability in tort law or the law of delict must be reasonable when looked at holistically. For example, in the case of *Fairchild*,⁵³² there may be some

⁵³² *Fairchild v Glenhaven Funeral Services* 2003 1 AC 32.

injustice towards the defendants if only their point of view is considered, but the court may decide that this is outweighed by the justice of allowing redress to the victims. Thus, in the end, the outcome can be characterised as reasonable. The same should apply to policy or policy considerations. For example, in the case of allowing a claim for pure economic loss, a policy decision may seem unreasonable to the defendant, but may be outweighed by the justice of allowing redress to the plaintiff. Policy should holistically be reasonable and justified, if not it should be changed and law reform is in principle needed. In principle, looked at holistically while weighing the interests that are promoted and those that are adversely affected; policy itself should be reasonable. What is regarded as reasonable may change with the times as well as changing social, moral and other realities. Ideas of reasonableness vary and this cannot be avoided. Any legal system must at least grapple with reasonableness issues and should not perpetuate rules that are palpably unreasonable. An implication would be that one could personally regard a particular rule in a particular system to be unreasonable, but this does not necessarily mean that the legal system does not employ reasonableness standards – it could simply mean that reasonableness has, in a specific instance, been given a content that may be counterintuitive or even repugnant to a lawyer steeped in the tradition of another legal system. Van Dam⁵³³ correctly states that reasonableness, fairness and justice differ from adjudicator to adjudicator and from country to country and so, one could add, also from legal system to legal system.

Fletcher⁵³⁴ states that the “life of law is not simple logic, for all too often there are multiple logics, multiple paradigms, at work in legal disputes”. Fletcher⁵³⁵ submits that “the standard of reasonableness invites consideration of diverse normative criteria in resolving the dispute. It does not, however, necessarily point to a single right answer. If there are several reasonable solutions to a particular dispute, then there is no way to decide between them but by judicial exercise of choice or discretion”.

Reasonableness is a standard, or a sort of *Grundnorm* of several standards, by which to judge whether the particular elements of a delict are present to ground liability; overall whether it is reasonable that a tort or delict is held to be present; whether

⁵³³ *European tort law* 144.

⁵³⁴ 1993 *Harv L Rev* 1678.

⁵³⁵ 1985 *Harv L Rev* 981.

compensation should be awarded; and what is a fair and reasonable award in quantifying damages. The entire law of delict or tort is steeped in a deep tradition of reasonableness - sometimes explicit and immediately apparent, sometimes implicit, but at work at an almost subconscious but very fundamental level. No doubt the inherent adaptability of delict or tort law when faced with novel challenges, and the comparative ease with which the South African law of delict has taken the adoption of constitutional values based on equality and freedom in its stride, are in no small measure due to the pervasive influence of reasonableness.

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Opsomming

Redelikheid as 'n konsep wat gebruik word om deliktuele aanspreeklikheid of aanspreeklikheid in delitereg te bepaal, word hetsy verwelkom of deur sommiges as frustrerend beskou. Dit is 'n normatiewe konsep, wat onlosmaaklik verbind is aan die konsepte van regverdigheid, geregtigheid, billikheid, openbare beleid en die waardes van die gemeenskap. Hierdie konsepte help om waarde-oordele te verskaf ten einde aanspreeklikheid te bepaal.

Dit blyk duidelik uit hierdie studie dat die invloed van redelikheid oorwegend implisiet in die Franse deliktereg is, maar meer eksplisiet in die Suid-Afrikaanse deliktereg en die Anglo-Amerikaanse deliktereg. Die invloed daarvan wissel ten aansien van elke element van onregmatige of deliktuele aanspreeklikheid. Ten einde 'n persoon vir 'n delik of onregmatige daad aanspreeklik te kan hou, is dit net redelik dat al die elemente van 'n delik of onregmatige daad teenwoordig moet wees. 'n Gemeenskaplike element van al die jurisdiksies wat in hierdie tesis bestudeer word, is die idee om 'n balans te verkry tussen die bevordering van die verweerder se belange, die benadeling van die klaer se belange en die belange van die samelewing. Waar aanspreeklikheid op fout gegrond is, word die redelikheid van gedrag bevraagteken. Watter toets of teorie ook al gebruik word met betrekking tot oorsaaklikheid, moet daar uiteindelik bepaal word of dit op grond van die feite van die saak redelik is om aanspreeklikheid aan die verweerder vir die feitelik veroorsaakte gevolge toe te reken. Ongeag of verlies of skade vereis word, veronderstel word of nie vereis word nie, word die vraag oor die toepaslike remedie of vergoeding wat onder die omstandighede redelik is, bevraagteken.

In die Suid-Afrikaanse of Anglo-Amerikaanse reg veroorsaak die meervoudige gebruike van die standaard van die redelike persoon; redelike voorsienbaarheid van skade; redelike voorkombaarheid van skade; die vraag of dit redelik is om 'n element van aanspreeklikheid op te lê en of dit redelik is om aanspreeklikheid toe te skryf, dikwels verwarring en onsekerheid. Soms kan die rol van hierdie kriteria met betrekking tot 'n spesifieke element geldig en versterk wees; ander kere kan hul rol weer verswak en omstrede wees. Daar is egter niks verkeerd met die konsep van redelikheid self nie; trouens, dit is 'n nodige en nuttige konsep in die reg. Dit is

eerder die manier waarop dit vertolk en in die bepaling van aanspreeklikheid toegepas word, wat problematies is.

Kakaretšo

Bokgoni bja go dira dikakanyo tše di swanetšego bjalo ka kgopolo ye e šomišwago go laetša go rweša motho boikarabelo ka lebaka la go roba molao goba go rweša boikarabelo go molato wa ditiro tše di fošagetšego, bo amogelwa goba go bonwa ke ba bangwe bjalo ka kgopolo ye e gakantšhago. Ke kgopolo ya melawana ya boitshwaro ye e ka se arogantšhwego le dikgopolo tša botse, toka, tekatekano, melaotshepetšo ya setšhaba le ditumelo ka ga boitshwaro bjo bobotse le dilo tše di lego bohlokwa setšhabeng. Dikgopolo tše di thuša go dira dikahlolo tše bohlokwa ge go laetšwa go rweša boikarabelo go ditiro tše fošagetšego.

Go molaleng go tšwa thutong ye gore khuetšo ya bokgoni bja go dira dikakanyo tše di swanetšego ga e hlalošwe thwi molaong wa Fora wa ditiro tše di fošagetšego, eupša e hlalošwa gabotse go molao wa Afrika Borwa wa ditiro tše di fošagetšego le molao wa ditiro tše di fošagetšego wa Maisemane le Maamerika. Khuetšo ya bjona e fapana go ya ka elemente ye nngwe le ye nngwe ya ditiro tše di fošagetšego goba go rweša boikarabelo ka lebaka la go roba molao. Gore motho a rwešwe boikarabelo ka lebaka la go robamolao goba ditiro tše di fošagetšego, go swanetše gore go be le dielemente ka moka tša go roba molao goba tša ditiro tše di fošagetšego. Seo se lego gona dipeakanyong tša dikgorotsheko tša molao tše di ithutilwego go thesisi ye ke kgopolo ya go tliša tekatekano gare ga dikgahlego tša molatofatšwa tše di godišitšwego, dikgahlego tša mosekiši tše di amegilwego gampe le dikgahlego tša setšhaba. Fao go rwešwa boikarabelo go theilwego go phošo, tiro ye e swanetšego ya boitshwaro e swanelwa go lekodišišwa. Mabapi le mokgwa wa go tswalanya ditiro le ditlamorago tše di hlotšwego, teko goba teori efe goba efe ye e šomišwago, seo se swanetšego go laetšwa mafelelong ke ge e ba go ya ka dinnete tša molato, go a kwagala go rweša mosekišwa boikarabelo go ditlamorago tše di tše di bakilwego ke ditiro tša gagwe. Ge e ba tobo goba kgobalo e ya nyakega, e naganelwa goba e sa nyakege, ntlha ya tharollo goba tefelo ya maleba ye e kwagalago le ge go ka ba bjang e swanelwa go lekodišišwa .

Go molao wa Afrika Borwa le wa Maisemane le Maamerika, ditirišo tše ntši tša boemo bja motho wa go ba le tlhaologanyo; ponelopele ye e kwagalago ya kgobalo; thibelo ye e kwagalago ya kgobalo; e ka ba e e le mo go kwagalago go tliša elemente ya go rweša boikarabelo; goba e le mo go kwagalago go rweša boikarabelo, gantši go hlola

kgakanego le go se kgonthišišege. Ka dinako tše dingwe, tema ye e kgathwago ke dilekanyo tše mabapi le elemete ye e itšego e ka ba ya kgonthe gape ye o hlalošitšwego ka botlalo; mola ka dinako tše dingwe, tema ye e di kgathago e fokotšwa le go ka tsoša dingangišano. Le ge go le bjalo, ga go na se se fošagetšego ka kgopolo ya bokgoni bja go dira dikakanyo tše di swanetšego ka boyona; ka kgonthe ke kgopolo ye e hlokegago gape ye bohlokwa molaong. Mogongwe, ke ka tsela ye e hlathollwago le go dirišwa ka gona go laetša go rweša boikarabelo go go gakantšhago.

Isifinyezo (isamari)

Ukulandela inqubo nombandela wokwenzeka kwento ngomqondo ohluzekile nezizathu ezizwakayo, (reasonableness) njengomqondo osetshenziswa ekunqumeni ukuthi ngabe umuntu wenze okungalungile nokubangela ukulahlekelwa noma ukulinyalelwa komunye umuntu owenza lowo muntu abe necala emahlombe akhe ngokulahlekelwa nokulinyalelwa kwalowo muntu (delictual liability) ngokulandela inqubo yomthetho kumacala ezokulahlekelwa noma ukulinyalelwa, umthetho obizwa nge-tort law, le nqubo yalo mthetho ivamise ukuthi yamukelwe noma ithathwe ngabanye njengeyisiphazamiso nesihibe. Inqubo nombandela osetshenziswayo ukuhlola nokunquma ukuthi ngabe into noma isenzo ngesilungile noma esingalungile noma ukuthi ngabe lesenzo kuyinto okumele yenziwe enhle noma embi (normative concept), kanti lokhu kuxhumene nomqondo wokulungile, okunobulungisa, okubonelela ngokulinganayo nhlangothi zonke, kanye nomgomo kawonke-wonke kanye nezinto ezingamagugu nezilungile kumphakathi. Le miqondo nemibandela isiza ekwenzeni izinqumo ngokulungile nokungalungaka kanye nokunquma ukuthi ngabe umuntu unomthwalo wecala emahlombe akhe noma akunjalo.

Kuyacaca kulesi sifundo ukuthi umthelela wokwenza into ngomqondo ohluzekile nonezizathu ezizwakalayo, kuyinto equkethwe kumthetho wesiFulentshi ngokucacile nokungekho obala njengomqondo osetshenziswa kakhulu ekunqumeni ukuthi ngabe umuntu wenze isenzo esilungile noma esingalungile nesibangele ukulahlekelwa noma ukulinyalelwa komunye umuntu okwenza lowo muntu abe necala emahlombe akhe ngokulahlekelwa nokulinyalelwa kwalowo muntu, kanti le nqubo yalo mthetho icace nokuba sobala kumthetho waseNingizimu Afrika kanye nomthetho wamaNgisi namaMelika (Anglo-American tort law) kumthetho obhekene nezenzo ngokulahlekelwa noma ukulinyelelwa. Kodwa umthelela walo mthetho wehlukahlukene maqondana nomkhakha nomkhakha kwezokubekwa icala ngesenzo sokulahlekelwa noma ukulinyalelwa komunye umuntu. Ukuze umuntu atholakale enecala emahlombe akhe ngokulahlekelwa noma ukulinyalelwa komunye umuntu, kuyinto enomqondo ohluzekile wesizathu esizwakalayo ukuthi yonke imikhakha yokulahlekelwa nokulinyalelwa ibe khona. Okuvamise ukubakhona kosomagunya abanquma ngezomthetho, okucwaningwe ngawo kule *thesis*, ukuthi kumele kube nenqubo ebhalansile ebonelela nhlangothi zombili ngokwezidingo

zommangalelwa nommangali othikamezekile kanye nezidingo zesizwe sonkana. Lapho khona ukubeka icala emahlombe omuntu, kubekwe ngokulandela lowo owenze iphutha noma ukungalungile, kuba nenkinga ukusebenzisa ukuthatha isinqumo ngesenzo ngokulandela umbono wokwenza into ngomqondo ohluzekile nonesizathu esizwakalayo. Kodwa ukulandela okwenzeke ngembangela, noma yiluphi uhlobo lohlobo noma ithiyori esetshenziswayo, okumele ekugcineni kunqunywe ngakho, ukuthi ngabe ngokulandela amaqiniso ecala, ngabe kunesizathu esizwakalayo yini ukubeka noma ukwabela icala kummangalelwa ngemiphumela eyenzeke ngembangela ethize. Ngishonoma ngabe ukulahlekelwa noma ukulinyalelwa kuyadingeka, kuthathwa njengokwenzekile noma akudingekile, umbuzo osemqoka ukuthi ngabe kuzoba yini ikhambi lokulungisa ukulahlekelwa noma ukulinyalelwa noma isinxephezelo, lokhu kwenziwe ngokulandela umqondo wesizathu esihluzekile nesizwakalayo, ngaphansi kwalezo zimo ezikhona.

Kumthetho waseNingizimu Afrika kanye nowamaNgisi kanye namaMelika, ukusetshenziswa kwezinga nombandela womuntu onesizathu somqondo ohluzekile nesizwakalayo; ukuthi ngabe lowo muntu obengakwazi yini ukubona ngaphambilini ukuthi kungahle kube nokulinyalelwa; ukuthi ngabe bekungukulinyalelwa obebungavimbeleka, nokuthi ngabe yinto enomqondo ohluzekile yini nozwakalayo ukubeka icala; konke lokhu, kuvame ukubangela ukudideka nokungabi nasiqiniseko. Kwezinye izikhathi, indima yale mibandela maqondana nengxenye ethize yodaba, kungenzeka kufanele kanti futhi kugqanyiswe; kanti kwezinye izikhathi, indima yale mibandela nemiqondo indima yayo kungenzeka iphansi noma ibangela isixakaxaka nempikiswano. Kodwa, akukho okonakele ngokulandela udaba nombandela womqondo ohluzekile nonesizathu esizwakalayo, kanti futhi kufanele nakhona kuwumqondo osizayo kwezomthetho. Inkinga ukuthi ngabe le mibandela itolikwa nokusetshenziswa kanjani ekunqumeni ukuthi ngabe umuntu unecala noma akanalo, yilokhu-ke okubanga inkinga.