Developing the South African law of delict: the creation of a statutory compensation fund for crime victims

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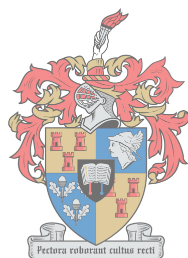

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SUMMARY

The dissertation evaluates the compensatory relief South African law currently provides to victims of crime. To obtain compensation for the harm arising from crime, a victim may institute a common-law delictual claim against the perpetrator of the crime. Because the perpetrator is unlikely to be in a financial position to compensate the victim's harm, crime victims frequently frame actions against the state, not only on the basis of vicarious liability for positive wrongdoing by state employees, but increasingly on the basis of failure by the state or its employees to prevent crime. This dissertation describes the expanding delictual liability of the state for harm caused by crime and concludes that this development of the law of delict is both theoretically and practically undesirable. The dissertation further argues that the existing statutory mechanisms to claim compensation for harm arising from crime is unsatisfactory and provides little assistance to crime victims.

Within this framework the dissertation considers whether there is an alternative method to secure compensation for the hundreds of thousands of South Africans who fall victim to crime each year. The most common solution adopted in foreign jurisdictions is the establishment of a statutory compensation fund for crime victims. The dissertation seeks to establish whether the legislative reform of the South African law of delict through the creation of such a fund is justified and appropriate.

To do so, the dissertation analyses the historical background and policy bases of other significant instances of legislative reform of the South African law of delict. In the process, a general theoretical framework is developed that may provide an outline for statutory reform of the law of delict to provide compensation for specific categories of victims.

The dissertation thereafter examines whether the establishment of a statutory crime victim compensation fund could fit within this proposed theoretical framework. It is concluded that the proposed fund is justifiable and, when compared to the solutions offered by the current developments within the common-law of delict and existing legislation, it seems, in principle, to be a more desirable solution to improve the legal position regarding compensation of crime victims.

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To be successful, the proposed statutory compensation scheme must be theoretically sound and practically workable. The dissertation therefore concludes by focusing on several practical questions and considerations which the South African legislature should take into account, if it were to enact such a scheme.

OPSOMMING

Die verhandeling evalueer die wyse waarop die Suid-Afrikaanse regstelsel tans vergoeding bied aan die slagoffers van misdaad. Om die skade voortspruitend uit misdaad te vergoed, kan ’n slagoffer ’n gemeenregtelike deliktuele eis teen die oortreder instel. Aangesien dit onwaarskynlik is dat die oortreder in 'n finansiële posisie sal wees om die slagoffer se skade te vergoed, stel misdaadslagoffers gereeld eise in teen die staat, nie bloot op die basis van middellike aanspreeklikheid vir positiewe delikte van staatswerknemers nie, maar toenemend op grond van die versuim van die staat of sy werknemers om misdaad te voorkom. Die proefskrif beskryf die uitbreiding van die deliktuele aanspreeklikheid van die staat vir skade veroorsaak deur misdaad en kom tot die gevolgtrekking dat hierdie ontwikkeling van die deliktereg sowel teoreties as prakties onwenslik is. Die verhandeling argumenteer verder dat die bestaande statutêre meganismes om vergoeding te eis vir skade wat uit misdaad ontstaan onbevredigend is en min bystand verleen aan misdaadslagoffers.

Binne hierdie raamwerk word dit oorweeg of daar ’n alternatiewe metode is om vergoeding te verseker vir die honderde duisende Suid-Afrikaners wat elke jaar slagoffers van misdaad is. Die mees algemene oplossing wat in buitelandse jurisdiksies toegepas word, is die vestiging van ’n statutêre vergoedingsfonds vir misdaadslagoffers. Die verhandeling beoog om vas te stel of die wetgewende ontwikkeling van die Suid-Afrikaanse deliktereg deur die skepping van ’n vergoedingsfonds vir misdaadslagoffers geregverdig en gepas is.

Om dit te doen, ontleed die proefskrif die historiese agtergrond en beleidsbasis van ander belangrike voorbeelde van wetgewende hervorming van die Suid-Afrikaanse deliktereg. In die proses word ’n algemene teoretiese raamwerk ontwikkel wat ’n basis kan bied vir statutêre hervorming van die deliktereg om voorsiening te maak vir die vergoeding van spesifieke kategorieë slagoffers.

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Die verhandeling ondersoek dan of die vestiging van ŉ statutêre misdaadslagoffervergoedingsfonds binne hierdie voorgestelde teoretiese raamwerk kan pas. Daar word tot die gevolgtrekking gekom dat die voorgestelde fonds geregverdig kan word en dit wil voorkom asof die vestiging van sodanige fonds, in vergelyking met die oplossings wat gebied word deur die huidige ontwikkeling in die deliktereg en bestaande wetgewing, in beginsel, ŉ meer wenslike oplossing is om die regsposisie met betrekking tot skadevergoeding van misdaadslagoffers te verbeter.

Ten einde suksesvol te wees, moet die voorgestelde statutêre vergoedingskema teoreties gegrond en prakties werkbaar wees. Die proefskrif sluit dus af deur te fokus op verskeie praktiese vrae en oorwegings wat die Suid-Afrikaanse wetgewer in ag behoort te neem as die voorgestelde vergoedingskema vir misdaadslagoffers inderdaad geskep sou word.

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CHAPTER 1: INTRODUCTION

1.1 Setting the scene: a crime epidemic and the need for an appropriate legal response

South Africa is plagued by crime.[1] Violent crime, in particular, has reached epidemic proportions. The most striking crime statistics are unequivocal. South Africa has one of the highest murder rates in the world: 34 per 100 000 members of the population were murdered in 2015/2016,[2] with approximately 51 murders being recorded on average per day in this period.[3] And with around 1 188 assaults committed for every 100 000 members of the population, South Africa is also considered as having one of the highest assault rates worldwide.[4] Contrary to official statistics provided by the South African Police Services ("**SAPS**"), independent research indicates that the number of rapes that occur during the course of one year may be in the order of a half million.[5]

Some perspective on the exceedingly high levels of crime in South Africa can be obtained by comparing crime statistics and motor vehicle accident data: the 18 673 murders that occurred in 2015-2016[6] is much higher than the 13 591 people who died as a result of motor vehicle accidents that took place in 2015,[7] while the 182 933 assaults with the intent to do grievous bodily harm recorded in 2015-2016[8] is almost three times more than the number of people who were seriously injured in motor vehicle accidents in 2015 (62 520).[9]

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[1] See paragraph 4.2.3.1 in chapter 4.
[2] Africa Check "Factsheet: South Africa's 2015/2016 crime statistics" available at <https://africacheck.org/factsheets/factsheet- south-africas-201516-crime-statistics/> (accessed on 2 June 2017).
[3] See paragraph 4.2.3.1 in chapter 4.
[4] See paragraph 4.2.3.1 in chapter 4.
[5] Although the official SAPS crime statistics for 2015-2016 indicates that 42 596 rapes were reported to the police, this statistic has been criticised as ignoring the considerable impact of under-reporting. See Rape Crisis Cape Town Trust "Prevalence" available at <http://rapecrisis.org.za/rape-in-south-africa/#prevalence> (accessed on 28 June 2017); Africa Check "Rape Statistics in South Africa: A Guide" available at <https://africacheck.org/factsheets/guide-rape-statistics-in-south-africa/> (accessed on 28 June 2017); the Independent Police Investigative Directorate *Annual Report 2012/2013* (2013) 15-16; News24 "Rape in South Africa" available at <http://www.news24.com/MyNews24/rape-in-south-africa-20160810> (accessed on 17 July 2017).
[6] SAPS *Annual Crime Report 2015/2016: Addendum to the SAPS Annual Report 2015/2016* (2016) 108.
[7] Road Traffic Management Corporation ("**RTMC**") *The Costs of Crashes in South Africa* (2016) ii.
[8] SAPS *Annual Crime Report 2015/2016* 108.
[9] RTMC *The Costs of Crashes in South Africa* ii.

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It is therefore obvious that the risk of harm arising from violent crime is considerably significant and apparently more real than the risk of harm arising from motor vehicle accidents. For this reason it is unsurprising that a 2015 study found that, along with unemployment, crime ranks as the top concern for South Africans, edging out anxieties about government corruption, health care, infrastructure, quality of schools and education, energy shortages, lack of clean drinking water and pollution.[10] The results of that study is confirmed by a national opinion survey conducted by the Institute for Race Relations, which requested South Africans to identify what they saw as "the two most serious problems not yet resolved since 1994."[11] The top two issues identified were crime and unemployment.[12]

Arguably, there are two general ways in which the law may react to the high levels of crime in South Africa. First, the problem may be approached prospectively by asking: what could be done to prevent crime in future? To answer this question, an analysis of the various reasons for the escalating rate of especially violent crime may be conducted on the basis of which practical, workable solutions could be devised to combat crime and promote safety and security.

For example, to further crime prevention efforts, the National Cabinet adopted the National Development Plan in 2012. It "proposes an integrated approach to resolving the root causes of crime that involves an active citizenry and inter-related responsibilities and co-ordinated service delivery from state and non-state actors."[13] To give effect to this vision, the Civilian Secretariat for Police developed a White Paper on Safety and Security in 2016. It provides, *inter alia*, an overarching plan for crime prevention as well as the legislative and administrative framework required to do so.[14]

Secondly, the law may respond to the crime pandemic by adopting a retrospective approach and enquiring: if crime occurs, what should be done? Within this context, there are broadly speaking two potential reactions to any specific crime.

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[10] Pew Research Center *Health Care, Education Are Top Priorities in Sub-Saharan Africa* (2015) 15, 28-30.
[11] South African Institute for Race Relations *Race Relations in South Africa: Reasons for Hope* (2016) 2.
[12] 2.
[13] Civilian Secretariat for Police ("**CSP**") *White Paper on Safety and Security* (2016) 30-31. See also National Planning Commission *National Development Plan* (2011).
[14] CSP *White Paper on Safety and Security* 7.

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On the one hand, criminal law may respond, which would mean that the state, on behalf of the members of the community, would pursue the perpetrator in an attempt to impose criminal liability:[15] the police would have to apprehend the alleged criminal, investigate the crime and provide the public prosecutor with sufficient evidence so that the matter may be tried.[16] If the prosecution is successful in proving the elements of criminal liability beyond reasonable doubt, the court will sentence the criminal.[17] In the execution of these functions, the criminal justice system strives to fulfil what is arguably its primary function: punishment.[18] In doing so, this branch of the law aims to protect the broader public interest. In *S v Dlamini*,[19] the Supreme Court of Appeal ("**SCA**") summarised this response as follows: "The main purpose and social function of criminal proceedings are to establish the guilt of an accused person in respect of criminal conduct so that he may be punished according to law for that conduct."[20]

On the other hand, the crime victim may seek compensation for the harm he[21] suffered as a result of the crime. This he could do by taking matters into his own hands and instituting a common-law claim against the alleged wrongdoer. Of course, as will be discussed in more detail in paragraphs 1.4 and 1.9.1 below, as well as paragraph 2.3 in chapter 2, the crime victim may also rely on certain existing statutory provisions to seek compensation. However, as will be indicated in chapter 2, these provisions offer limited assistance to crime victims.

It is trite that, to be successful with the common-law claim, the victim would have to prove that, on a balance of probabilities, the harm he suffered was wrongfully and culpably caused by the criminal's conduct. In other words, a second retrospective response to the crime epidemic may be found within the law of delict, i.e. the area of the law that focuses its attention primarily on the compensation of harm.[22]

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[15] See JM Burchell *Principles of Criminal Law* 5 ed (2016) 1-136.
[16] See JJ Joubert, M Basdeo, T Geldenhuys, MG Karels, GP Kemp, JP Swanepoel, SS Terblanche & SE van der Merwe *The Criminal Procedure Handbook* 12 ed (2017).
[17] See Joubert et al *Criminal Procedure*.
[18] Burchell *Principles of Criminal Law* 68-94. See also *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).
[19] 2012 (2) SACR 1 (SCA). See also *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).
[20] Para 55.
[21] References in this dissertation to the male gender applies also the female gender and *vice versa*, where applicable.
[22] For overviews of the function of the law of delict, see JC Macintosh *Negligence in Delict* 1 ed (1926) 1; FP van den Heever *Aquilian Damages in South African Law* (1944) 3; RG McKerron *The Law of Delict: a Treatise on the Principles of Liability for Civil Wrongs in the Law of South Africa* 7 ed (1971);

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This dissertation does not focus on crime prevention. Rather, it adopts a retrospective approach and focuses on questions concerning compensation for the crime victim's harm.

1.2 The need for crime victim compensation

It is obvious that a victim of crime may suffer extensive patrimonial and non-patrimonial harm. For instance, it is conceivable that someone who has been raped and assaulted may incur extensive medical costs to repair bodily injuries and continue to incur related financial costs as medical treatment is likely to continue well after the date of injury.[23] Furthermore, the victim may suffer a loss of past income as well as a significant loss of earning capacity.[24] The non-patrimonial harm which may be suffered could include an infringement of physical-mental integrity (i.e. pain and suffering, loss in the amenities of life, disfigurement, emotional shock and a shortened life-expectancy)[25] as well as an infringement of dignity[26] and bodily integrity.[27]

If the victim fails to obtain compensation from the criminal or another source, he will bear the burden of the harm by himself, thereby adding further misery to the already regrettable state of affairs brought about by the crime. This will be especially unfair where a victim is able to prove that his harm was wrongfully and culpably caused by the perpetrator of a heinous crime.

However, if the victim is compensated, it does not only alleviate the financial consequences brought about by crime and provide satisfaction in respect of the non-patrimonial harm, but also provides other benefits. For example, crime victim compensation may be used to reduce "repeat victimization as many sexual violence

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NJ van der Merwe & PJJ Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* 3 ed (1976) 1-3; J Neethling & JM Potgieter *Neethling-Visser-Potgieter Law of Delict* 7 ed (2015) 3-17; JC van der Walt & JR Midgley *Principles of Delict* 4 ed (2016); MM Loubser & JR Midgley (eds) *The Law of Delict in South Africa* 2 ed (2012) 8-11. These authors are in agreement insofar as compensation is regarded as being the primary function of this branch of the law.

[23] JM Potgieter, L Steynberg & TB Floyd *The Law of Damages* 3 ed (2012) 453-462.

[24] 462-477.

[25] 497-512.

[26] 535-536.

[27] 551-552.

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complainants can remove themselves from abusive environments, or increase their security".[28]

In *S v Seedat*,[29] the appellant was convicted of raping the 58-year-old complainant, to whom he had delivered a bedside lamp and groceries. The reasoning of the SCA in this case will be discussed elsewhere,[30] and for present purposes it is sufficient merely to take note of the victim's testimony as it provides a practical illustration of the need for crime victim compensation:[31]

> "Prosecutor: What sentence should be imposed on the accused?
> Complainant: Other than the death penalty, I don't think there is a fair form of punishment. Because what he did to me, is really terrible. And that is why I have decided to take away some of his money […]
> Prosecutor: Tell me, the idea of monetary compensation, since when have you had this idea with regard to this matter? […]
> Complainant: I don't really know when it occurred to me, [but] why should I suffer? He is going to jail tomorrow and the day thereafter he will be released and he will walk away laughing and I will continue to suffer […] I am getting older. My transport is pathetic. Why must I continue to struggle if [I] could benefit from the harm which I have suffered[?]"

Against this background, and with the purpose of introducing the research questions on which this dissertation will focus, a brief overview will now be provided of the South African legal system's current compensatory response to harm arising from crime.

1.3 The compensation of crime victims in the South African legal system: a brief overview

Broadly speaking, crime victims may institute either a common-law delictual claim in pursuit of compensation or turn towards applicable legislation in an attempt to obtain compensation for the harm they suffered. From a delictual point of view, crime victims may institute common-law claims against the perpetrator of a crime if they can prove

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[28] B Greenbaum *Compensation for Victims of Sexual Violence in South Africa: A Human Rights Approach to Remedial Criminal Compensation Provisions* Unpublished Doctorate in Criminal Justice University of Cape Town (2013) 20.
[29] 2017 (1) SACR 141 (SCA).
[30] See paragraph 2.3.1 in chapter 2.
[31] 2017 (1) SACR 141 (SCA) para 25 (own translation).

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the necessary elements of delictual liability, i.e. harm, conduct, causation, wrongfulness and fault.[32]

For obvious reasons, the successful outcome of a common-law delictual claim against the perpetrator depends on his financial position. If he is unable to compensate the victim, it is not worthwhile to follow this route. In this regard, research indicates that victims generally do not institute their common-law claims because the majority of South African perpetrators are likely to be impecunious.[33] This is also the position in various other jurisdictions. Writing about crime victim compensation with a comparative perspective, Miers points out that "[u]ndoubtedly the greatest obstacle to routine compensation is the commonplace fact of the offender's limited means."[34]

The likely indigence of South African criminals presents a significant stumbling block to securing compensation through the institution of common-law delictual remedies against the perpetrator.[35] As a result, those who seek compensation along the delictual path, would have to adopt a different strategy.[36]

1.4 The expansion of state delictual liability for harm arising from crime

The recent past has seen crime victims develop an alternative strategy to secure compensation. In essence, they argue that it is the state, rather than the perpetrator of the crime, that should be held delictually liable for harm arising from crime.[37] More specifically, crime victims have argued that the state (typically the Minister of Safety and Security) should be held vicariously liable in delict on the basis that its employees (normally police officers) culpably and wrongfully caused the victim's harm, either by action or inaction. This strategy is in all likelihood driven by the state's deeper pockets,

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[32] For a summary of the available common-law delictual remedies see Loubser & Midgley (eds) *The Law of Delict* 3-34 and for a discussion of the elements of delictual liability see Loubser & Midgley (eds) *The Law of Delict* 45-160.
[33] South African Law Reform Commission ("**SALRC**") Project 82: *Sentencing (A Compensation Fund for Victims of Crime)* (2004) 74.
[34] D Miers "Offender and state compensation for victims of crime: Two decades of development and change" (2014) 20(1) *International Review of Victimology* 145 150.
[35] See paragraph 3.3.1 in chapter 3 and paragraph 4.2.3.5 in chapter 4.
[36] See paragraph 2.2.1 in chapter 2.
[37] See paragraph 2.2.1 in chapter 2.

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which, compared to the probable impecuniosity of the perpetrator, provide the real opportunity of receiving compensation.[38]

As will be discussed later, this strategy has proven to be remarkably successful.[39] The judicial development relating to the state's delictual liability for harm arising from crime will be evaluated later,[40] but for introductory purposes it may be noted that the expansion of the state's liability has occurred along two discernible paths.

In the first type of case, the crime victim has argued that the state should be held vicariously liable because one or more of its employees was negligent in preventing the crime victim's harm, and that this failure wrongfully caused the victim's harm for the purposes of delictual liability.[41] Because the failure to prevent crime occurred while the employee was acting within the course and scope of his duty, the state, as employer, was held vicariously liable.

The second series of cases deal with plaintiffs who were the victims of crimes committed by police officers (the leading cases deal with the crime of rape), and who argued that the state, as employer, should be held vicariously liable for the harm that was intentionally and wrongfully caused by its employees.[42] In the pioneering decision in this context,[43] the three police-officers who gang-raped the victim were on duty, driving a marked police vehicle and in official uniforms at the time that the rapes were committed. Despite the fact that committing serious crimes like rape is arguably the very antithesis of a police-officer's employment duty, the Constitutional Court ("**CC**") nevertheless held that they were acting within the course and scope of their duty and that their employer could be held vicariously liable.[44] In a subsequent case,[45] the

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[38] See paragraph 2.2.1 in chapter 2. See also A Price *The Influence of Human Rights on State Negligence Liability In England and South Africa* Unpublished PhD thesis University of Cambridge (2012) 137.
[39] See paragraph 2.2.1 in chapter 2.
[40] See paragraphs 2.2.1.1.3 and 2.2.1.2.4 in chapter 2.
[41] See paragraph 2.2.1.1 in chapter 2. See also *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); *Minister of Safety and Security v Carmichele* 2004 (3) SA 305 (SCA); *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA); *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA); *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA).
[42] See paragraph 2.2.1.2.3 in chapter 2. See also *K v Minister of Safety and Security* 2005 (3) SA 179 (SCA); *K v Minister of Safety and Security* 2005 (6) SA 419 (CC); *Minister of Safety and Security v F* 2011 (3) SA 487 (SCA); *F v Minister of Safety and Security* [2011] ZACC 37.
[43] *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).
[44] The reasoning in this case will be evaluated in paragraph 2.2.1.2.4 in chapter 2.
[45] *F v Minister of Safety and Security* [2011] ZACC 37.

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police officer who raped the victim was in plainclothes, driving an unmarked vehicle and on standby-duty at the time, but these factual dissimilarities with the earlier decision turned out to make no practical difference and the CC again held the state vicariously liable.[46]

This judicial development of the common law of delict has led to the considerable expansion of state delictual liability for harm arising from crime.[47] The extension of liability of the Minister of Police (formerly known as the Minister of Safety and Security) is reflected in a report which sets out the scope and impact of civil claims against the SAPS. The report states that, in recent years, the SAPS have "reported a substantial annual increase in civil claims filed for damages as a result of actions or omissions by its officials, and an even larger increase in claims that are pending. The 2014/2015 SAPS annual report showed that pending claims stood at over R26 billion, which is equivalent to over a third of the SAPS budget."[48] It also asserts that between 2007/08 and 2014/15, "claims made annually against the SAPS increased by 533% if considering the original rand value, or 313% if adjusted to the same rand value".[49] Lastly, the report records that, in a parliamentary reply, the Minister of Police indicated that "just under R570 million had been spent by the SAPS on legal costs relating to civil claims between 2011/12 and 2013/14."[50]

Although much may be said about the theoretical implications of the judicial expansion of state delictual liability,[51] it also presents a practical and financial dilemma which presently requires emphasis: when the state employer is held vicariously liable for the culpable wrongdoing of an employee and is ordered to pay the crime victim's damages, it is the taxpayer who ultimately has to bear the cost. However, if taxpayer

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[46] The reasoning in this case will be evaluated in paragraph 2.2.1.2.4 in chapter 2.

[47] J Neethling "Die Hoogste Hof van Appèl Bevestig die Uitdyende Verantwoordelikheid van die Staat om die Reg op die Fisies-Psigiese Integriteit in die Lig van die Grondwet te Beskerm" (2003) 4 *TSAR* 783 788-790; C Okpaluba & P Osode *Government Liability: South Africa and the Commonwealth* (2012) 16-18, 124-127; J Neethling "State (public authority) liability *ex delicto* (1)" (2012) 75 *THRHR* 622 622-624; Loubser & Midgley (eds) *The Law of Delict* 264-269; Price *The Influence of Human Rights* 111-139; J Neethling "South Africa" in K Oliphant (ed) *The Liability of Public Authorities in Comparative Perspective* (2016) 421-463.

[48] G Dereymaeker "Making sense of the numbers: civil claims against the SAPS" (2015) *SA Crime Quarterly* (54) 29 29. See also L Prince "R14,6 mjd. se siviele eise teen polisie in boekjaar" (20 April 2017) available at <http://www.netwerk24.com/Nuus/Politiek/r146-mjd-se-siviele-eise-teen-polisie-in-boekjaar-20170420> (accessed on 20 April 2017).

[49] Dereymaeker (2015) *SA Crime Quarterly* 31.

[50] 34.

[51] See paragraphs 2.2.1.1 and 2.2.1.2.3 in chapter 2 for a critical evaluation of the theoretical implications of this development.

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money is used to pay compensation, then less money is available for performing the state's ordinary tasks, i.e. in the case of the police, preventing crime and promoting safety and security.[52] Of course, this decreased ability to prevent crime only serves further to increase the likelihood of a higher crime rate and the accompanying litigation that may be instituted against the state on the basis that they failed to prevent crime. This means that the South African law of delict appears to be caught in a vicious cycle of ever-expanding state delictual liability for harm arising from crime.

The common-law delictual claim is not the crime victim's only option for compensation. The Criminal Procedure Act 51 of 1977 provides crime victims with a degree of procedural assistance in claiming compensation from the actual perpetrator. Section 297(1)(a)(i) of the Act allows a court to postpone the sentencing of a convicted person for up to five years on certain conditions, including making payment of compensation.[53] In turn, section 300 of the Act allows a court, when convicting a person of an offence which has caused damage to, or loss of, property (including money) belonging to another, to award the victim of the crime compensation for the damage or loss of his property.

However, as discussed later, the potential application of the Act appears to be severely limited in practice.[54] In addition, research has indicated that sentences of this kind is very scarce "and the main reason for this is the lack of means of offenders."[55]

Furthermore, the Prevention of Organised Crime Act 121 of 1998 ("**POCA**") seeks to introduce measures to combat organised crime activities and provides for the recovery of the proceeds of unlawful activities (through confiscation orders) and the civil forfeiture of criminal assets that have been used to commit an offence (through forfeiture orders).[56] Chapter 7 of the POCA establishes the Criminal Assets Recovery Account ("**CARA**") as a separate account in the National Revenue Fund.[57] The CARA

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[52] See also P Atiyah *The Damages Lottery* (1996) 80-81.
[53] See paragraph 2.3.1 in chapter 2.
[54] See paragraph 2.3.2 in chapter 2.
[55] JC von Bonde *Redress for Victims of Crime in South Africa: A comparison with Selected Commonwealth Jurisdictions* Unpublished LLD thesis Nelson Mandela Metropolitan University (2007) 88. See also RE Scott "Compensation for Victims of Violent Crimes: An Analysis" (1967) 8(2) *William & Mary Law Review* 277 278; B Cameron "Compensation for Victims of Crime, The New Zealand Experiment" (1963) 12 *Journal of Public Law* 368; M Fry "Justice for Victims" (1959) 8 *Journal of Public Law* 191 192; J Goodey *Compensating Victims of Violent Crime in the European Union* (2003) 11.
[56] A Kruger *Organised Crime and Proceeds of Crime Law in South Africa* 2 ed (2013) 75-151.
[57] Section 63 of the POCA.

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is funded by money derived from the fulfilment of confiscation and forfeiture orders as well as other sources.[58]

Although crime victims have received payments made possible as an indirect result of especially forfeiture orders that have been issued under the POCA, the Act does not provide an adequate solution to the broad issue of crime victim compensation. This may be seen as a consequence of the fact that the Act is primarily concerned with combating and deterring organised crime as opposed to offering a legislative solution to the general problem of victim compensation. Also, payments made from proceeds of unlawful activities are limited to those who suffer harm from the criminal activities which form the focus of the POCA. This ultimately means that payments are made to relatively few victims of organised crimes while the significant number of violent crime victims remain without compensatory relief.

1.5 Investigating alternative methods to secure crime victim compensation

If it is assumed, for the moment, that the current legal position relating to crime victim compensation is indeed unsatisfactory, the fundamental question arises whether an alternative method exists to ensure the compensation of crime victims.

From a comparative legal perspective, the most popular alternative solution which has been adopted by a wide range of jurisdictions is the establishment of a statutory compensation fund for crime victims.[59] This solution amounts to the legislative development of the law of delict/tort law in terms of which the compensation scheme,

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[58] See section 64 of the POCA: the CARA may also be funded by the balance of all moneys derived from the execution of foreign confiscation orders as defined in the International Co-Operation in Criminal Matters Act 75 of 1996; any property or moneys appropriated by Parliament, or paid into, or allocated to, the account in terms of any other Act; domestic and foreign grants; any property or amount of money received or acquired from any source; and all property or moneys transferred to the Account in terms of this Act.

[59] The European jurisdictions that have created a crime victim compensation fund include Austria, Belgium, Bulgaria, the Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxemburg, Malta, the Netherlands, Poland, Portugal, Romania, Slovenia, Slovakia, Spain, the United Kingdom and Sweden. See D Greer (ed) *Compensating Crime Victims: a European Survey* (1996). Several Australian, American and Canadian territories have also adopted similar funds: see D McGillis & P Smith *Compensating Victims of Crime: An Analysis of American Programs* (1983); National Center for Victims of Crime *Repairing the Harm* (2004); Canadian Resource Center for Victims of Crime “Financial Assistance” available at <https://crcvc.ca/for-victims/financial-assistance/> (accessed on 28 June 2017).

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generally funded through tax-payer money, takes over the primary responsibility of compensating crime victims.

South Africa has not enacted a crime victim compensation scheme. Arguably, this is not because the legislature is, in principle, opposed to intervening in the law of delict by establishing a compensatory regime for a special purpose. On the contrary, this was done for the compensation of victims of motor vehicle accidents, occupational injuries and diseases and defective consumer products and resulted in the enactment of the following statutes: the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ("**COIDA**"), the Road Accident Fund Act 56 of 1996 ("**RAF Act**"), as amended by the Road Accident Fund Amendment Act 15 of 2005 ("**RAFA Act**"), and the Consumer Protection Act 68 of 2008 ("**CPA**").

Clearly, the existence of several foreign crime victim compensation schemes and the fact that the South African legislature has illustrated its willingness to develop the law relating to the compensation of other categories of victims in the past does not by itself provide convincing evidence to suggest that a crime victim compensation fund would also be a workable and desirable solution in the South African context.

Indeed, intervention of this kind could amount to a profound legislative reform of the law of delict and it would therefore require justification. Unsurprisingly, scholars have therefore raised their concern regarding the lack of a justifiable basis for this kind of statutory development: "the idea of selecting this group of injured and disabled people for special treatment is not easily defensible".[60] Academics have consequently emphasised a "fundamental problem"[61] that confronts reformers of the law of delict/tort law in this context, which is that "it is difficult to find a satisfactory rationale for singling out violent-crime victims from other groups of unfortunates for special treatment by the state."[62]

Therefore, assuming that the current South African legal position relating to crime victim compensation is indeed unsatisfactory, it would require further consideration as

[60] P Cane *Atiyah's Accidents, Compensation and the Law* 8 ed (2013) 303-308.
[61] SALRC *A Compensation Fund for Victims of Crime* 182-183. See also Scott (1967) *William & Mary Law Review* 281; Cane *Atiyah's Accidents* 303-308.
[62] SALRC *A Compensation Fund for Victims of Crime* 182. See also Scott (1967) *William & Mary Law Review* 281; Cane *Atiyah's Accidents* (2013) 303-308.

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to whether it could be justifiable to develop the South African law of delict through statutory intervention by enacting a scheme that is aimed at providing compensation to a specific category of victims, i.e. those who suffer harm as a result of crime.

1.6 Research questions

Three central research questions have been identified for further investigation.

1. What is the nature of the current statutory and common-law compensatory regimes and does the South African law provide a satisfactory solution to the issue of crime victim compensation?

2. Assuming that crime victim compensation under South African law is unsatisfactory, could the statutory development of the law of delict through the enactment of a crime victim compensation scheme for a specific category of victims (i.e. those who suffer harm as a result of crime) be justified?

3. If the statutory development of the law of delict through the enactment of a crime victim compensation fund is justifiable, and the legislature elects to enact such a scheme, how would such a fund work in practice and what considerations would the legislature have to take into account in this context?

It may be noted that the title of this dissertation – “Developing the South African law of delict: the creation of a statutory compensation fund for crime victims” – is based on the research questions identified for investigation. It may be said that the creation of a statutory compensation scheme is not about *developing* the law of delict, but rather *supplementing* the law of delict. However, the approach adopted in this dissertation is that the law of delict includes both the common law as well as certain statutes that impact on delictual principles and are aimed at compensating harm. From this perspective, the creation of a new statute would therefore amount to the development of the South African law of delict.

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1.7 Relevance of the research questions

The relevance of the first research question probably speaks for itself. Considering the high levels of violent crime and the substantial number of crime victims who clearly would require compensation for the harm that they have suffered, it is obviously important to evaluate the available remedies currently available in the South African legal system. For as long as South Africa continues to struggle with a high crime rate, crime victim compensation will remain an important issue that demands attention.

It is argued that the second research question is both practically and theoretically important. To comprehend its relevance, regard may be had to the fact that this is not the first research project to emphasise the need to provide adequate crime victim compensation in a swift and cost-effective manner. It was the subject of an extensive 2004 SALRC report which noted that, within the field of safety and security, the victim-centred approach to dealing with the impact of crime required emphasis being placed on "the need to restore victims to a position comparable to that which they occupied prior to their victimisation"[63] ("**SALRC Report**").[64] Ultimately, this involved considering the possibility of compensating crime victims which, in turn, involved an examination of the proposal "to establish a Victim Compensation Scheme in SA, through which the state would offer financial compensation to victims or their dependants for the harm done by offenders."[65]

Taking into account some of the arguments that may be raised for and against the establishment of a statutory compensation fund for crime victims, the SALRC ultimately concluded that, although "there seemed to be substantial support for the creation of a compensation fund"[66] the establishment of the fund was not a viable option.[67] This conclusion was reached primarily on the basis that a fund could not be afforded in the financial climate of the time and because certain prerequisites required for the effective and efficient administration of a crime victim compensation fund were absent at the time.[68]

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[63] SALRC *A Compensation Fund for Victims of Crime* 10.
[64] This dissertation is distinguished from the SALRC Report in paragraph 1.8 below.
[65] SALRC *A Compensation Fund for Victims of Crime* 10.
[66] 321.
[67] 111-118, 321-326. See also paragraph 4.3 in chapter 4.
[68] 111-118. See also paragraph 4.3 in chapter 4

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Despite the SALRC's financially-motivated opposition to the creation of a fund, it nevertheless noted that "the establishment of a compensation fund should not be abandoned but developed over time as a long term project within the broader objective of improved services for victims of crime"[69] and that "developing a motivation for the establishment of a [statutory compensation fund] in SA remains incomplete, and must be completed if legislation is to be drafted, since no law should be passed without its objectives being clearly defined and costed."[70]

The SALRC's rejection of the proposal to establish a statutory crime victim compensation scheme leaves scope for a further detailed study concerning the topic. In fact, as the commission itself indicated, what seems to be absent is a proper motivation – or justification – for the potential statutory reform of the law relating to crime victim compensation.

Hence, it is argued that the research question concerning the justification of a crime victim compensation fund assumes significant theoretical and practical relevance. It is important because it attempts to fill the gap in the SALRC Report insofar as a justification for a potential fund is concerned. In the process several other relevant issues that have theoretical and practical importance will be canvassed, including the following: the role and function of the South African law of delict in general; the relationship between the common law of delict and a statutory compensation scheme that could potentially be enacted; the current judicial development of state delictual liability (the nature of the state's liability as well as the judicial development of established common-law delictual principles); and providing a general theoretical framework which may be used for the purpose of future statutory reform of the South African law of delict.

The third research question involves matters that are of obvious practical importance. As indicated above, the dissertation will consider how the proposed fund would actually work as well as various related practical considerations which the legislature should consider if it were to enact a statutory compensation fund for crime victims. It is suggested that an examination of these issues may have considerable practical value as a point of departure for any legislative committee tasked with the

[69] SALRC *A Compensation Fund for Victims of Crime* 322. See also paragraph 4.3 in chapter 4.
[70] 318-319.

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responsibility of proposing a crime victim compensation scheme. The further investigation of such a scheme may also benefit from the evaluation of existing foreign compensation schemes undertaken in this dissertation.

1.8 Differences between this dissertation and earlier research on the establishment of a statutory compensation fund for crime victims in South Africa

The questions above have to some extent been considered in earlier studies. The SALRC examined the feasibility of a crime victim compensation fund and published the SALRC Report in 2004. Subsequently, JC von Bonde investigated the matter in a doctoral dissertation.[71] However, these studies left a number of important issues open for further analysis.

First, in its report, the SALRC provided a synopsis of the crime victim compensation regime under South African law as well as a comparative overview of the legal position of crime victims in the United States of America and the United Kingdom ("**UK**"). Similarly, Von Bonde's dissertation also describes the legal position of the crime victim in South Africa, the UK, India and New Zealand. Although this dissertation will also investigate the position of crime victims within the South African compensatory framework, it will cover a variety of issues which the SALRC Report and Von Bonde's dissertation left untouched.

Most importantly, this dissertation sets out a critical evaluation of recent judicial developments within the common law of delict which have taken place since those two studies have been finalised. This includes a description and critical evaluation of the recent judicial expansion of the state's delictual liability for harm arising from crime. This development arguably became much more significant when the CC handed down its decision in *K v Minister of Safety and Security*[72] in 2005, one year after the SALRC Report was completed. The dissertation will also critically evaluate the development of the common-law doctrine of vicarious liability by the CC in *F v Minister of Safety*

[71] Von Bonde *Redress for Victims of Crime in South Africa* 148.
[72] 2005 (6) SA 419 (CC).

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and Security,[73] which was handed down in 2012, five years after the completion of Von Bonde's work.[74] In addition, this research project will also examine the evidentiary obstacles related to proving fault (especially negligence), which confronts those crime victims who elect to institute a delictual claim – another issue left unexamined by earlier research.

The SARLC Report provided a summary of the merits of a statutory compensation scheme for crime victims in South Africa wherein it briefly considers potential arguments for and against the establishment of a scheme. However, as the quoted extract above indicates, the commission does not attempt to provide a justification for this potential statutory development. Von Bonde's dissertation does not consider the merits of a statutory compensation scheme in any detail and also does not provide a justification for legislative development in this context. This dissertation will attempt to fill this gap by proposing a theoretical framework for statutory reform of the law relating to crime victim compensation.

Although the SALRC Report includes a draft bill that could provide the legislature with practical assistance if it were to enact a crime victim compensation scheme, the report does not pay regard to specific practical questions and considerations which will require the legislature's attention, if it were indeed to enact the proposed fund. Von Bonde's work also did not examine any potential practical questions which may be of relevance to a legislature. This dissertation will consider several considerations and do so after having evaluated the approaches adopted by foreign legislatures so as to ensure the most workable solution within the South African context.

The approach in this dissertation is also different from that of the SALRC Report and Von Bonde's research in the following respects. As part of the SALRC Report, the commission pays much attention to the question of developing a restorative justice approach in the South African criminal justice system as well as other issues related to victim-empowerment. This is also true of the dissertation written by Von Bonde, although to a lesser extent. Von Bonde's research considers the legal position of crime

[73] 2012 (1) SA 536 (CC).
[74] See further paragraph 2.2.1.2.4 in chapter 2.

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victims in India and New Zealand in detail. None of these matters will be considered in this dissertation.

Von Bonde ultimately makes the following recommendation:[75]

> "[T]he consolidation of the Road Accident Fund and the Compensation Fund operating in terms of the Compensation for Occupational Injuries and Diseases Act. These two bodies should be amalgamated to create a unified Compensation Scheme to compensate victims of crime, as well as victims of traffic and industrial injuries. General qualifying criteria for claimants would be drafted, with specific criteria applying in cases of traffic, industrial and crime related injuries, respectively."

Referring to Canada and Australia as providing an example of the way forward for the South African legislature in relation to crime victim compensation,[76] the SALRC formulated its ultimate proposal as follows:[77]

> "[T]he Commission was of the view that […] legislation should, as a minimum, provide for: (a) the creation of a permanent structure, like an office for Victims of Crime within government structures, to take care of the needs of victims on a permanent basis; (b) the creation of a permanent body or institution (like an Advisory Council) to advise government on policy issues and legislative amendments to meet the needs of victims of crime; (c) the introduction of legislative […] principles to guide the treatment of victims of crime; and (d) the creation of a dedicated fund to facilitate and develop the establishment of victim services. The above principles are supported by all commentators to the Commission's discussion documents."

As will become clearer through the course of the dissertation, this dissertation will consider issues and material not investigated in the earlier research referred to and will propose a different system for the compensation of crime victims.

1.9 Structure of this dissertation

1.9.1 Chapter 2: A description and evaluation of the current South African legal position regarding the compensation of harm suffered by crime victims

This chapter will focus on the first research question, examining and evaluating the ways in which the South African legal system currently provides compensation for crime victims.

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[75] Von Bonde *Redress for Victims of Crime in South Africa* iv.
[76] SALRC *A Compensation Fund for Victims of Crime* 334-335.
[77] 334. The commission pointed out that the Probation Services Act 11 of 1986 provided a legislative basis for establishing victim-centred programmes aimed at the compensation of crime victims.

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First, crime victims may seek compensation by means of a common-law claim in delict. The theoretical and practical problems arising from the judicial expansion of the delictual liability of the state are examined. The evidentiary burdens facing crime victims who institute common-law delictual claims are highlighted. Then follows an analysis of the existing statutory provisions allowing crime victims to claim compensation for harm caused by crime, in particular the provisions contained in the Criminal Procedure Act.

The chapter concludes that an alternative form of crime victim compensation should be considered. The most common solution adopted in foreign jurisdictions is the enactment of a statutory crime victim compensation scheme. In South Africa this would entail a large-scale legislative reform of the law of delict and funding from tax revenue. The crucial question is whether this statutory development is justifiable.

1.9.2 Chapter 3: Legal and public policy considerations that justify legislative development of the law of delict

Chapters 3 and 4 deal with the second research question: is it justifiable to establish a statutory crime victim compensation scheme?

Chapter 3 will propose a general theoretical framework that provides an outline for future statutory reform of the law of delict insofar as victim compensation is concerned. This chapter examines legal and public policy considerations which in the past have formed the basis for statutory reform of specific areas of the law of delict. To do so, the focus will shift to analysing the background to, and policy bases of, the three major statutes that have developed the law relating to the compensation of specific categories of victims in the past: the RAF Act, the COIDA and the CPA.

As will be illustrated in chapter 3, these statutes share common policy considerations that have been used to justify earlier legislative reform of the law of delict. They were enacted to alleviate the victims' exposure to the substantial risk of harm arising from motor vehicle accidents, occupational injuries and diseases and defective manufactured products as well as the accompanying risk of receiving no compensation if the relevant risk of harm materialises. They also aim to promote the

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constitutional right to social security. A further common aim is to ease the significant evidentiary burden that relates to proving the common-law delictual requirement of fault (specifically negligence).

Further general considerations underlying the enactment of these statutes include the high costs involved when instituting a common-law delictual claim as well as the likely under-compensation which may occur when doing so, the advantages of statutory as opposed to judicial reform, and the need to avoid arbitrary outcomes that may be the product of claiming compensation by delictual action.

1.9.3 Chapter 4: Justifying the legislative development of the law of delict by establishing a statutory compensation fund for crime victims

This chapter examines whether the establishment of a statutory crime victim compensation fund could fit within the proposed theoretical framework outlined in chapter 3.

Therefore, chapter 4 will establish the extent of the risk of falling victim to crime (as well as the accompanying risk of receiving no compensation where risk materialises). Also, it will examine whether the enactment of the proposed scheme could further the constitutional right to social security. Furthermore, it will be considered whether crime victims, like victims of motor vehicle accidents, occupational injuries and diseases and defective manufactured products are confronted with an evidentiary obstacle in claiming compensation if they institute common-law delictual claims.

The chapter will also examine whether the general dissatisfaction with the high transaction costs and levels of under-compensation attributed to the civil procedural system, the advantages of statutory as opposed to judicial reform and the need to avoid arbitrary outcomes can justify the proposed scheme.

Lastly, it will be enquired whether considerations that thus far have counted against the introduction of the fund, namely problems with affordability and administration, as well as the potential erosion of the deterrence function of the law of delict, present conclusive arguments against its implementation.

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Chapter 4 concludes that, when compared to the solutions offered by the current developments within the common-law of delict and existing legislation, a statutory compensation fund seems, in principle, to be a more desirable solution to improve the legal position of crime victims insofar as their compensation is concerned.

1.9.4 Chapter 5: Practical considerations that are relevant when developing a statutory compensation fund for crime victims

The success of any proposal to enact a statutory compensation scheme would depend on how well it would work in practice. Chapter 5 will focus on several practical considerations which the South African legislature should take into account if it were indeed to enact such a scheme.

Some of these practical questions include the following. Who should be eligible to claim compensation from the proposed fund? If a person satisfies the eligibility criteria, what type of harm should be compensated? Should the potential availability of a claim against a statutory compensation fund involve the abolition of the crime victim's common-law claim against the actual perpetrator of the crime? Should the victim's claim against the compensation fund be limited? Should the compensation fund be no-fault based? Should benefits received under a statutory compensation fund be deducted from compensation received under a residual common-law claim of delict (if it were to remain)?

1.9.5 Chapter 6: Conclusions

The final chapter of this dissertation will provide a summary of the main arguments set out in the dissertation. It will also include comments relating to the relationship between the common law of delict and statute as well as the function of the South African law of delict, which are themes that will be referred to during the course of the dissertation. This is done with the view of making a meaningful contribution towards the development of the South African law of delict in general and, specifically, in furtherance of future research projects that focus on the potential statutory

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development of the law of delict, a hitherto relatively under-researched area within the South African legal landscape. These comments pertain to the issues considered, and proposals presented, throughout the dissertation.

In conclusion, as the structure of the dissertation indicates, the current compensatory regime relating to crime victims will first be investigated. After concluding that it is undesirable from a theoretical and practical perspective, it will be suggested that it may be worthwhile to consider alternative methods to compensate crime victims. In this context, the strategy adopted in most other jurisdictions is the establishment of a statutory compensation scheme for crime victims. This would potentially amount to the statutory development of the law of delict, which requires an investigation into the justifiability of such a development. Only once it has been concluded that such a development may, in principle, be justifiable, will attention be given to more practical and specific questions, e.g. who may be eligible for compensation. Therefore, up to the point at which it is specifically considered, the term "victim of crime" or "crime victim" will bear its ordinary, general meaning.

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CHAPTER 2: A DESCRIPTION AND EVALUATION OF THE CURRENT SOUTH AFRICAN LEGAL POSITION REGARDING THE COMPENSATION OF HARM SUFFERED BY CRIME VICTIMS

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CHAPTER 2: A DESCRIPTION AND EVALUATION OF THE CURRENT SOUTH AFRICAN LEGAL POSITION REGARDING THE COMPENSATION OF HARM SUFFERED BY CRIME VICTIMS

2.1 Introduction

This chapter, specifically, focuses on the following question: is the current South African legal position regarding the compensation of crime victims satisfactory? If it is, then it is the end of the matter. If not, a further investigation into alternative solutions for satisfactory crime victim compensation may be warranted.

This chapter will commence by examining the way in which the South African legal system currently compensates crime victims. To do so, attention will first be paid to the common law of delict as the branch of the law that takes on the compensation of harm as its primary function.[1] Thereafter, the focus will turn towards an analysis of the existing statutory mechanisms that may provide the crime victim with a remedy in respect of his harm. In particular, the provisions of the Criminal Procedure Act 51 of 1977 will be examined. Attention will also be given to the impact that the Prevention of Organised Crime Act 121 of 1998 ("**POCA**") may have in the context of crime victim compensation.

Regarding the structure of this chapter, it may be considered whether it would be more appropriate to start with an analysis of the existing statutory provisions that has a limited impact on crime victim compensation and then examine the way in which the common law of delict provides crime victims with relief. However, this chapter deals with the current compensatory regime for crime victims in South Africa and, as will become clear throughout the course of this chapter, the most notable and important development in this context has been the recent expansion of the state's delictual liability for harm arising from crime. Indeed, the practical and theoretical concerns

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[1] For overviews of the function of the law of delict, see JC Macintosh *Negligence in Delict* 1 ed (1926) 1; FP van den Heever *Aquilian Damages in South African Law* (1944) 3; RG McKerron *The Law of Delict: a Treatise on the Principles of Liability for Civil Wrongs in the Law of South Africa* 7 ed (1971); NJ van der Merwe & PJJ Olivier *Die Onregmatige Daad in die Suid-Afrikaanse reg* 3 ed (1976) 1-3; J Neethling & JM Potgieter *Neethling-Visser-Potgieter Law of Delict* 7 ed (2015) 3-17; JC van der Walt & JR Midgley *Principles of Delict* 4 ed (2016); MM Loubser & JR Midgley (eds) *The Law of Delict in South Africa* 2 ed (2012) 8-11. These authors are in agreement insofar as compensation is regarded as being the primary function of this branch of the law.

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related to this development of the common law of delict partly prompted this research project. The chapter therefore investigates this development first and only focuses on existing statutory provisions, which plays a much less significant role in the context of crime victim compensation, thereafter.

For the sake of clarity, it is further emphasised that the aim of this chapter is not to determine whether a specific type of crime is adequately compensated under the law of delict. Rather, the focus is on describing and evaluating the compensatory regime in South Africa as it relates to crime victims. To do so, the position under the common law is first described. In this context, the chapter focuses on cases which, arguably, have contributed most to the expansion of state delictual liability for harm arising from crime. Those cases involved the crimes of rape and assault. Therefore, the focus on those crimes are incidental to the main aim of the chapter. The dissertation is structured in a way that brings the specific question of eligibility (the meaning of the term "victim of crime") into play in chapter 5 (see paragraph 5.2), only after it has been determined that, in principle, the establishment of a statutory compensation scheme may be justifiable.

2.2 Seeking compensation for harm arising from crime through the common law of delict

The common law of delict may be described as being "primarily concerned with the circumstances in which a person can claim compensation for harm that has been suffered."[2] It is trite that, in order to be successful with a delictual claim, a plaintiff must prove on a balance of probabilities that his harm was culpably and wrongfully caused by another person's conduct. Someone who has fallen victim to crime and who is interested in obtaining damages in respect of the harm suffered, will thus be required to prove those elements of liability in a civil court.

It might be thought that, considering the high frequency of crime and the accompanying high risk of falling victim to harm arising from crime,[3] victims will regularly turn towards the common law of delict to compensate their harm. However,

[2] Loubser & Midgley (eds) *The Law of Delict* 4.
[3] See paragraph 4.2.3.1 in chapter 4.

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an overview of the South African law reports provide remarkably few examples of instances where a crime victim instituted a delictual claim against the purported criminal to repair the harm he suffered.[4]

Of course, this does not mean that there are no cases in which crime victims elect to institute a common-law delictual claim to compensate their harm. Indeed, there are several cases where victims of crime have elected to do so, all of which appear to share a single feature: in almost all of the cases that deal with crime victim compensation, the victim institutes his claim not against the criminal, but rather against the state (typically the Minister of Safety and Security). This choice ultimately appears to be based on the probable financial impecuniosity of the criminal in comparison with the substantially deeper pockets of the state.[5]

In this chapter the arguments made by the victim to hold the state delictually liable, the court's reasoning in those cases and the nature of the state's delictual liability will be discussed in further detail. For present purposes it is sufficient to note that, where crime victims elect to institute delictual proceedings to obtain compensation, they mostly seek to hold the state vicariously liable. This has led to the expansion of state delictual liability for harm arising from crime,[6] which will be described and evaluated in the following section.

2.2.1 The expansion of state delictual liability for harm arising from crime

This part of the chapter concerns the recent expansion of the state's delictual liability for harm arising from crime. Essentially, this development has occurred in two ways, which will also provide the broad outline for the discussion that follows in this section. On the one hand, crime victims have successfully argued that the state may be held vicariously liable where its employees have negligently and wrongfully failed to prevent

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[4] For example, in the following cases the victim instituted the *condictio furtiva* for theft of his property: *Chetty v Italtile Ceramics Ltd* 2013 (3) SA 374 (SCA); *Crots v Pretorius* 2010 (6) SA 512 (SCA); *First National Bank of Southern Africa Ltd v East Coast Design CC* 2000 (4) SA 137 (D); *Clifford v Farinha* 1988 (4) SA 315 (W). In the following cases the victim instituted a claim arising from violent crime: *N v T* 1994 (1) SA 862 (C); *Mabaso v Felix* 1981 (3) SA 865 (A); *Schoultz v Potgieter* 1972 (3) SA 371 (E); *Manuel v Holland* 1972 (4) SA 454 (R); *Wessels v Pretorius, NO* 1974 (3) SA 299 (NC); *Mbatha v Van Staden* 1982 (2) SA 260 (N); *Groenewald v Groenewald* 1998 (2) SA 1106 (SCA).

[5] South African Law Reform Commission ("**SALRC**") Project 82: *Sentencing (A Compensation Fund for Victims of Crime)* (2004) 191, 315. See further paragraphs 4.2.3.1 and 4.2.3.5 in chapter 4.

[6] See Loubser & Midgley (eds) *The Law of Delict* 264-269.

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the crime that has caused the victim's harm.[7] On the other hand, and arguably more significantly, courts have also held the state vicariously liable where the harm caused to crime victims occurred as a result of intentionally-committed crimes occasioned by its employees.[8]

Attention will first be given to the expansion of the state's delictual liability for the wrongful and negligent failure of its employees to prevent crime, which will be described and evaluated in the next section.

2.2.1.1 Expansion of the state's delictual liability for the wrongful and negligent failure of state employees to prevent crime

2.2.1.1.1 The background to, and the role of the Constitution in, the state's expanded delictual liability for the wrongful and negligent failure of state employees to prevent crime

The expansion of the state's delictual liability in cases where their employees negligently and wrongfully failed to prevent crime may be regarded as the result of the considerable influence which the Constitution of the Republic of South Africa Act, 1996 (the "**Constitution**") has had when assessing the wrongfulness of a state employee's[9] negligent failure to prevent crime. In particular, it may be said that the constitutional rights to safety and security of the person,[10] life[11] and human dignity[12] as well as the constitutional norm relating to government accountability[13] have opened the pathway to greater state liability.

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[7] See *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); *Minister of Safety and Security v Carmichele* 2004 (3) SA 305 (SCA); *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA); *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA); *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA); paragraph 2.2.1.1 below.

[8] *K v Minister of Safety and Security* 2005 (3) SA 179 (SCA)*; K v Minister of Safety and Security* 2005 (6) SA 419 (CC)*; Minister of Safety and Security v F* 2011 (3) SA 487 (SCA); *F v Minister of Safety and Security* [2011] ZACC 37; paragraph 2.2.1.2 below.

[9] In most cases which courts have dealt with, the employees were police officers, but it may also include a reference to other employees, such as public prosecutors.

[10] Section 12 of the Constitution.

[11] Section 11 of the Constitution.

[12] Section 10 of the Constitution.

[13] Section 41(1) of the Constitution.

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Properly depicting the influence of the Constitution in this context requires a brief description of *Carmichele v Minister of Safety and Security*[14] ("***Carmichele CC***"), which provided the *impetus* for the constitutional development of the law of delict.

In this case, the applicant was assaulted by one Coetzee. Prior to the assault, Coetzee had been convicted on charges of housebreaking and indecent assault. In addition to having been found guilty of these crimes, he was accused of rape and had appeared earlier before the magistrate's court on this charge. Even though members of the public provided the investigative police officer with information that Coetzee posed a significant threat to their safety and security, he advised the public prosecutor that there was no reason to deny Coetzee bail and recommended that he be released on warning. When Coetzee subsequently appeared before a magistrate on the rape charge, the prosecutor therefore did not place before the magistrate any information concerning Coetzee's previous conviction, nor did he oppose Coetzee's release on his own recognisance.

Following his release, a concerned member of the community approached the police and requested Coetzee's detention pending his trial. The police officer in question referred that person to the public prosecutor who, in turn, advised that nothing could be done unless Coetzee committed another offence.

Shortly thereafter, Coetzee was re-arrested, but after pleading not guilty on the charge of rape, he was re-released by the magistrate, pending a decision by the Attorney-General on whether the case should be tried in the High Court or the Regional Court. The Attorney-General, who had been in possession of documents which reflected the seriousness of the rape and the extent of Coetzee's sexual deviation, had not instructed the public prosecutor to oppose bail, with the result that this re-release was therefore unopposed.

The applicant was assaulted following Coetzee's unopposed re-release whereafter she instituted a delictual claim against the Ministers of Safety and Security and of Justice, arguing that the members of the police and the public prosecutors had owed her a legal duty to prevent Coetzee from being released on bail, and that their negligent failure to comply with this duty allowed him to cause her harm. The High Court rejected

[14] 2001 (4) SA 938 (CC).

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the argument and ordered absolution from the instance on the ground that the failure did not amount to wrongfulness.[15] The appeal to the Supreme Court of Appeal ("**SCA**") was dismissed, and the applicant subsequently appealed to the Constitutional Court ("**CC**").

The CC opined that the High Court and the SCA had overlooked the demands of the Constitution, especially the Bill of Rights, and that the law of delict had to be developed beyond existing precedent. At the time, wrongfulness and the concomitant enquiry into the existence of a legal duty, fell to be determined with reference to the criterion as developed in the pioneering decision *Minister van Polisie v Ewels*[16] ("***Ewels***"), i.e. the *boni mores* or legal convictions of the community. Applying this common-law criterion and following established precedent, the SCA had denied the existence of a legal duty on the part of the police and the state prosecutors:[17]

> "[I]t cannot be said […] that it was unreasonable for the prosecutor not to have opposed the release of Coetzee on his own recognisance. For this reason the prosecutor did not owe the appellant a legal duty either to oppose bail or to ensure his subsequent rearrest. […] There is another reason why the circumstances of the present case are not capable of establishing the legal duty contended for. This is that there was no special relationship shown to exist between the prosecutors at Knysna and the appellant. That there must be some relationship between the person who owes the legal duty and the person to whom the duty is owed, the breach of which would expose the latter to a particular risk of harm in consequence of an omission, which risk is different in its incidence from the general risk of harm to all members of the public, is well established in English law and is also in accordance with our law."

In response, the CC remarked that "the obligation of Courts to develop the common law, in the context of the s 39(2) objectives, is not purely discretionary", [and that] the Courts are under a general obligation to develop"[18] the common law so that it gave effect to the section 39(2) objectives.[19] The CC therefore referred the case back to the High Court which, in its second judgment in the matter, allowed the plaintiff's claim. On appeal to the SCA, the matter finally came to conclusion when the Ministers' appeal was dismissed (this judgment is discussed in detail below).[20]

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[15] 2001 (4) SA 938 (CC) paras 27-32.
[16] 1975 (3) SA 590 (A).
[17] *Carmichele v Minister of Safety and Security* 2001 (1) SA 489 (SCA) paras 19-20.
[18] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 39.
[19] Section 39(2) of the Constitution states: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."
[20] *Minister of Safety and Security v Carmichele* 2004 (3) SA 305 (SCA).

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Although criticised by some,[21] the judgment in *Carmichele CC* was described as "seminal"[22] for the purposes of the law of delict and hailed as constituting a positive development of the common law, especially insofar as it ensured fuller protection of the right to bodily integrity and security of the person,[23] and because it provided "much-needed guidance and direction on the interplay between the Constitution and the common law."[24] Another reason for its positive reception may be the cautionary approach taken in respect of the Constitution's future role in relation to private law, one that is mindful of the fact that the major engine for law reform should be the legislature and not the judiciary[25] and which "could reform the law of delict without having to deform it."[26]

In summary, *Carmichele CC* "gave the green light to the courts"[27] to revisit the basis upon which state liability cases should be determined. As will be indicated in the next section, it allowed courts to take into account several constitutional rights when considering whether a state employee's negligent failure to prevent crime should be regarded as wrongful and in the process paved the way for a widened state delictual liability.[28]

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[21] See A Fagan "Reconsidering Carmichele" (2008) 124 *SALJ* 659 659-666.
[22] *Dendy v University of the Witwatersrand and Others* 2005 (5) SA 357 (W). See also J Neethling "Die *Carmichele*-sage kom tot 'n gelukkige einde" (2005) 2 *TSAR* 402 402.
[23] J Neethling "Die Hoogste Hof van Appèl Bevestig die Uitdyende Verantwoordelikheid van die Staat om die Reg op die Fisies-Psigiese Integriteit in die Lig van die Grondwet te Beskerm" (2003) 4 *TSAR* 783 788-790; J Neethling "Delictual Protection of the Right to Bodily Integrity and Security of the Person Against Omissions by the State" (2005) 122 *SALJ* 572 572-574; JR Midgley & B Leinius "The impact of the constitution on the law of delict: *Carmichele v Minister of Safety and Security*" (2002) 119 *SALJ* 17 27.
[24] Midgley & Leinius (2002) *SALJ* 27.
[25] H MacQueen "Delict, contract and the Bill of Rights: a perspective from the United Kingdom" (2004) 121 *SALJ* 359 359-370.
[26] F du Bois "State Liability in South Africa: A Constitutional Remix" (2010) 25 *Tulane European and Civil Law Forum* 139.
[27] C Okpaluba & P Osode *Government Liability: South Africa and the Commonwealth* (2012) 124.
[28] Okpaluba and Osode *Government Liability* 16-18; 124-127; Neethling (2005) *SALJ* 572-574; Neethling "State (public authority) liability *ex delicto* (1)" (2012) 75 *THRHR* 622 622-624.

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2.2.1.1.2 A description of the expansion of the state's delictual liability for the wrongful and negligent failure of state employees to prevent crime

Following the judgment in *Carmichele CC*, but prior to handing down the final judgment in the matter, the SCA was presented with an opportunity to illustrate the impact of the Constitution on the law of delict according to the recommendation in *Carmichele CC.*

In *Minister of Safety and Security v Van Duivenboden*[29] ("***Van Duivenboden***"), the plaintiff brought a claim in delict against the Minister of Safety and Security after he had been shot by his neighbour. It was common cause that, prior to the incident, police officers had information that the perpetrator, when drunk, habitually threatened to use his firearms against himself and others.[30] Nonetheless, they had failed to take any steps to initiate an enquiry in terms of the Arms and Ammunition Act 75 of 1969 (which empowered the Commissioner of Police to declare someone unfit to possess a firearm and to seize it). The pertinent question for the SCA's consideration was whether the negligent failure of the police officers to disarm the perpetrator of the crime was wrongful.

In his determination of the wrongfulness of the police officers' omission, Nugent JA reiterated the common-law rule that the negligent failure to act positively in preventing harm was not *prima facie* wrongful.[31] He stated that it therefore had to be determined whether the police officers owed the plaintiff a legal duty to prevent his harm.[32] To answer that question, Nugent JA restated the common-law criterion as developed in *Ewels*.[33] The court held that, in the context of wrongfulness for an omission, "the question to be determined is one of legal policy"[34] and that, in "applying the test that was formulated in [*Ewels*] the 'convictions of the community' must necessarily now be informed by the norms and values of our society as they have been embodied in the 1996 Constitution."[35] In this way, public and legal policy became the gateway for the

[29] 2002 (6) SA 431 (SCA).
[30] Paras 4-11.
[31] Paras 12-13.
[32] Para 12.
[33] Paras 12-13.
[34] Para 16.
[35] Para 17.

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introduction of constitutional rights in the application of the common-law rules of the law of delict.[36]

Nugent JA noted several policy considerations that might weigh against the imposition of delictual liability where police officers negligently fail to prevent crime. These arguments included the public policy consideration, rooted in a *laissez faire* concept of liberty, which suggested that it might be an unreasonable infringement upon someone's personal autonomy to expect him to take positive steps in order to avert harm to others.[37] Similarly, the principle of equality might be infringed upon by imposing liability on one person where others might equally be faulted for their failure in preventing the relevant harm.[38] On a broader level, a public policy consideration that might inhibit the imposition of liability on the state and its functionaries is the apparent utility of allowing them the freedom to provide public services without the chilling effect of the threat of litigation if they negligently failed to prevent harm.[39]

However, these concerns were outweighed by the following considerations. First, the court emphasised the obligation imposed on the state in terms of section 7 of the Constitution not only to respect but also to "protect, promote and fulfil the rights in the Bill of Rights".[40] Secondly, section 2 of the Constitution demanded that these duties imposed by the Constitution on the state must be fulfilled.[41] The relevant constitutional rights which the majority had in mind included the respective rights to safety and security of the person, life and human dignity.[42] Thirdly, Nugent JA emphasised that section 41(1) of the Constitution expressly required government that is not only effective, transparent and coherent, but also accountable.[43] Ultimately, considerable weight was attached to the constitutional norm of accountability. In fact, its application convinced the majority of the court to impose delictual liability on the police officers and to hold their employer, the state, vicariously liable:[44]

> "Where the conduct of the State, as represented by the persons who perform functions on its behalf, is in conflict with its constitutional duty to protect rights in the Bill of Rights, in my view,

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[36] FDJ Brand "Influence of the Constitution on the Law of Delict" (2014) *Advocate* 42 43.
[37] 2002 (6) SA 431 (SCA) paras 16-18.
[38] Para 19.
[39] Paras 19-20.
[40] Para 20.
[41] Para 20.
[42] Para 20.
[43] Para 21.
[44] *Minister of Safety and Security v Van Duivenboden* 2002 (2) SA 431 (SCA) paras 21-22.

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> the norm of accountability must necessarily assume an important role in determining whether a legal duty ought to be recognised in any particular case […] Where there is a potential threat of the kind that is now in issue the constitutionally protected rights to human dignity, to life and to security of the person are all placed in peril and the State, represented by its officials, has a constitutional duty to protect them. It might be that in some cases the need for effective government, or some other constitutional norm or consideration of public policy, will outweigh accountability in the process of balancing the various interests that are to be taken into account in determining whether an action should be allowed […] but I can see none that do so in the present circumstances."

The judgment in *Van Duivenboden* indicates that the norm of accountability could have a significant impact on a court's reasoning where there appears to be no way of holding the state accountable, other than for a delictual claim for damages.[45]

The SCA ultimately found that the relevant police officers' failure to act was indeed wrongful.[46] Having also determined that their wrongful failure was negligent[47] and caused the victim's harm,[48] the court held that "the negligent conduct of police officers in [the] circumstances [of the case] is thus actionable and [that] the State [should be held] vicariously liable for the consequences of any such negligence."[49]

Shortly after the SCA handed down its judgment in *Van Duivenboden*, its reasoning was confirmed and applied in *Van Eeden v Minister of Safety and Security*[50] ("***Van Eeden***"), *Minister of Safety and Security v Hamilton*[51] ("***Hamilton***") and *Minister of Safety and Security v Carmichele*[52] ("***Carmichele SCA***").

In *Van Eeden* the appellant had been assaulted, raped and robbed by a dangerous criminal and serial rapist who had escaped from police custody after the failure on the part of the police to ensure that the criminal's cell door was properly locked. The respondent had conceded vicarious liability, negligence and causation and the only issue remaining for decision was whether the police officers' failure was also wrongful for the purposes of delictual liability.[53]

In establishing wrongfulness, Vivier ADP applied the approach adopted in *Van Duivenboden*, referring expressly to the state's constitutional duties identified in that

[45] See A Price "State Liability and Accountability" (2015) *Acta Juridica* 313-335.
[46] Para 22.
[47] Para 23.
[48] Paras 24-30.
[49] Para 22.
[50] 2003 (1) SA 389 (SCA).
[51] 2004 (2) SA 216 (SCA).
[52] 2004 (3) SA 305 (SCA).
[53] Para 4.

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judgment.[54] He added that the state is obliged under international law to "protect women against violent crime and against the gender discrimination inherent in violence against women".[55] This obligation was imposed on the state by virtue of section 39(1)(b) of the Constitution, read with the preamble to the Universal Declaration of Human Rights, article 4(d) of the Declaration on the Elimination of Violence against Women and article 2 of the Convention on the Elimination of All Forms of Discrimination against Women.[56] Furthermore, the court emphasised section 205(3) of the Constitution, which states that the "objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law" as well as the South African Police Service Act 68 of 1995, in which the police's functions to maintain law and order and prevent crime is set out.[57]

The court further emphasised the need to hold the state accountable and was of the view that a finding of wrongfulness would not "disrupt the efficient functioning of the police"[58] or "require additional resources."[59] Apart from the state's constitutional imperatives Vivier ADP also pointed out the fact that the police had control over someone "who was known to be a dangerous criminal and who was likely to commit further sexual offences against women should he escape; and the fact that measures to prevent his escape could reasonably and practically have been taken by the police."[60]

Therefore, taking into account that the "police accordingly acted wrongfully and in view of the admission of negligence, vicarious liability and causation",[61] the court held the state vicariously liable for the plaintiff's harm which arose from a crime committed by a third party, but which was caused, in law, by the negligent, wrongful failure of police officers to comply with their legal duties.

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[54] Paras 12-22.
[55] Para 15.
[56] Para 15.
[57] Para 16.
[58] Para 21.
[59] Para 21.
[60] Para 24.
[61] Para 24.

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In *Hamilton* the respondent had suffered serious bodily injuries after being shot by one McArdell, who was issued a license to possess a revolver after a successful application lodged with the Stellenbosch Police Station in terms of section 3(1) of the Arms and Ammunition Act. From the facts it appeared that McArdell had a history of psychological and emotional disturbance and was receiving counselling from several mental health professionals. She had also abused alcohol and certain psychiatric medications were prescribed for her by various psychiatrists. The respondent instituted a delictual claim against the Minister of Safety and Security, arguing that the relevant police officers[62] working in the Stellenbosch Police Station owed him a legal duty to take proper measures to screen an application for a firearm licence by making such enquiries as were reasonable in the circumstances and to corroborate the accuracy of the information furnished to them by the applicant in relation to her physical, temperamental and psychological fitness to possess a firearm.

Van Heerden AJA held that there was indeed a legal duty on the police officers, emphasising that the "sources of this legal duty […] are both the common law and the statutory provisions".[63] Although the court chose not to rely directly on constitutional rights in identifying the source of the state employee's legal duties, it did follow the reasoning in *Van Duivenboden* insofar as it considered legal and public policy considerations relevant to the determination of wrongfulness.

The court stated that the public interest would be best served by allowing a delictual claim against the state.[64] It also noted "the undoubted public importance of the effective control of firearms."[65] In addition, the court was convinced that there was no possibility that imposing delictual liability upon the state would open the floodgates of litigation or that it would result in the "chilling effect of potential limitless liability on the efficient and proper performance by the police of their primary functions".[66] Because there appeared to be no effective way to hold the state accountable other than by allowing an action for delictual damages, the court held the Minister of Safety and Security vicariously liable for the plaintiff's harm, which arose from a crime, but was

[62] 2004 (2) SA 216 (SCA) paras 27-29: reference is pertinently made to two police officers (Warrant Officer Loubser and Lieutenant Groenewald) who were required to comment and make a recommendation in respect of the application.
[63] Para 36.
[64] Paras 35-36.
[65] Para 36.
[66] Para 35.

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found to be caused in law by the negligent, wrongful failure of police officers to comply with their legal duties.

Lastly, in *Carmichele SCA*, Harms JA, in respect of the element of wrongfulness, held that although it was trite that the police officers and public prosecutors owed the victim a legal duty under public law to oppose bail,[67] the court had to establish whether the breach of such a public legal duty by the respective state employees could be transposed to a private legal duty.[68] To answer this question, the court relied heavily on the reasoning in *Van Duivenboden* and, again, emphasised the need to hold the state accountable: "Did the State owe a duty to the plaintiff? The answer lies in the recognition of the general norm of accountability: the State is liable for the failure to perform the duties imposed upon it by the Constitution unless it can be shown that there is compelling reason to deviate from that norm."[69] Ultimately, based on the reasoning in *Van Duivenboden* and *Van Eeden*, Harms JA held the state vicariously liable for the plaintiff's harm caused by the negligent and wrongful failure of state employees to prevent the crime.

In summary, the reasoning in *Van Duivenboden*, as applied in subsequent cases, led to the expansion of the state's delictual liability for harm in situations where its employees negligently and wrongfully failed to prevent crime.[70] The following section will evaluate some of the aspects of this development that have received critical attention from scholars, including the nature of the state's delictual liability as well as the consequences of the SCA's reasoning in *Van Duivenboden*.

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[67] 2004 (3) SA 305 (SCA) para 36.
[68] Para 37.
[69] Para 43.
[70] Recent cases that have followed the reasoning in these cases include *PE v Ikwezi Municipality* 2016 (5) SA 114 (ECG); *Minister of Safety and Security v Booysen* (35/2016) [2016] ZASCA 201; *Terblanche v Minister of Safety and Security* 2016 (2) SA 109 (SCA); *Minister of Defence v Von Benecke* 2013 (2) SA 361 (SCA); *Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security* 2012 (2) SA 137 (SCA); *Minister of Safety and Security v Venter* 2011 (2) SACR 67 (SCA); *Ntombenkosi Hlomza v Minister of Safety and Security* 2011 JDR 0030 (ECM); *Minister of Safety and Security v Madyibi* 2010 (2) SA 356 (SCA).

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2.2.1.1.3 An evaluation of the state's expanded delictual liability for harm due to the negligent and wrongful failure of state employees to prevent crime

a. Introduction

In this section attention will be given to aspects of the *Van Duivenboden* series of cases that have received critical commentary from scholars. The first issue to be considered is whether the nature of the state's delictual liability was indeed vicarious.[71] This issue receives attention because some scholars have argued that these cases are "in truth imposing direct liability"[72] on the state. To examine this contention, the differences between vicarious and direct liability as well as the common-law requirements for vicarious liability are briefly restated.

b. The distinction between direct and vicarious liability

If through A's conduct he wrongfully and culpably causes B harm, then A has committed a delict in respect of which he is directly, or personally, liable towards B. In other words, liability is imposed directly upon A because it was he who wrongfully and culpably caused B's harm. It may therefore be said that the driving force behind the imposition of direct liability is the notion of personal responsibility.[73] If B's harm was not wrongfully caused by A's culpable conduct, then it would be unfair to oblige him to compensate B. When considering imposing direct liability on a primary wrongdoer, a court will have regard to the nature of his conduct and will provide him with the opportunity to avoid liability by providing justifiable reasons for his conduct.

However, if A commits a delict against B, but C is required to compensate B for his harm, then C is held vicariously liable. Vicarious liability may be described as an instance of strict liability in delict, where one person is held liable for the harm wrongfully and culpably caused by another person.[74] As an example of strict liability, it is therefore an exception to the fault-based rule of personal responsibility that may

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[71] See Du Bois (2010) *Tulane European and Civil Law Forum* 174-175; Fagan (2008) *SALJ* 668-669; S Wagener "*K v Minister of Safety and Security* and the increasingly blurred line between personal and vicarious liability" (2008) 125 *SALJ* 673 675; L Boonzaier "State Liability in South Africa: A More Direct Approach" (2013) 130 *SALJ* 330 330-368.
[72] Boonzaier (2013) *SALJ* 342.
[73] P Giliker *Vicarious Liability in Tort – A Comparative Perspective* (2010) 16-18.
[74] *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para 24; Loubser & Midgley (eds) *The Law of Delict* 383-392; Neethling & Potgieter *Law of Delict* 379-402.

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be said to ground delictual liability in general.[75] The imposition of vicarious liability on such a party may be justified on the basis of a variety of policy-based reasons which will be discussed in paragraph 2.2.1.2.5 below.[76]

When considering the potential vicarious liability of a defendant, a court will not pay attention to his culpability and he will not be afforded the opportunity of advancing his reasonable conduct as a justificatory defence to evade liability. Lastly, as indicated in further detail below, to hold the defendant vicariously liable, it must nevertheless be proven that the primary wrongdoer committed a delict.

c. The common-law requirements for vicarious liability

Vicarious liability may be attributed to a defendant on the basis of a legal relationship that exists at the time of the wrongdoing between himself and the primary wrongdoer.[77] The common-law doctrine of vicarious liability is complex and has been a controversial topic within South African law.[78] Its requirements, scope and application have been widely debated, especially in the post-Constitutional era.[79] Although the application of these requirements in recent case law will only be discussed in detail in paragraph 2.2.1.2.3 below, they are briefly summarised here to give a proper background against which to respond to the question whether the recent judicial expansion of state delictual liability involves direct or vicarious liability.

First, a plaintiff is required to prove a relationship between the wrongdoer and another person, which warrants the imposition of liability.[80] Second, it must be proven that the wrongdoer committed a delict.[81] Lastly, the delict must have occurred in the course and scope of performing the defendant's instructions and it must be for the defendant's

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[75] Loubser & Midgley (eds) *The Law of Delict* 5; P Cane *The Anatomy of Tort Law* (1997) 51-52.

[76] See also *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) paras 21-22; J Neyers "A Theory of Vicarious Liability" (2005) 43 *Alberta Law Review* 1 1-15.

[77] S Wagener *An Assessment of the Normative Bases for the Doctrine of Vicarious Liability in South African Law, and the Implications for its Application* Unpublished PhD thesis University of Cape Town (2011); Giliker *Vicarious Liability* 6-7.

[78] See H Wicke *Vicarious Liability in Modern South African Law* Unpublished LLM thesis University of Stellenbosch (1997); Wagener *Vicarious Liability*.

[79] Wagener *Vicarious Liability*. See also A Fagan "The Confusions of K" (2009) 126 *SALJ* 158; Wagener (2008) *SALJ* 673; JA Linscott "A critical analysis of the majority judgment in *F v Minister of Safety and Security* 2012 (1) SA 536 (CC)" (2014) 17(6) *Potchefstroom Electronic Law Journal* 2916-2949.

[80] Loubser & Midgley (eds) *The Law of Delict* 30; Neethling & Potgieter *Law of Delict* 389.

[81] Loubser & Midgley (eds) *The Law of Delict* 30; Neethling & Potgieter *Law of Delict* 389.

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benefit, or fall within the risk created by the defendant when establishing the relationship with the wrongdoer.[82] Although the common law recognises various relationships akin to employment as potentially giving rise to vicarious liability,[83] it is the employer-employee relationship that is most likely to give rise to the delictual liability of the state for harm arising from crime.[84]

Plaintiffs who wish to hold the state vicariously liable for their harm are therefore required to prove that (a) an employment relationship existed between the primary wrongdoer and the state, (b) the employee committed a delict and (c) that the delict was committed during the course and within the scope of employment.[85] The failure to meet any of these requirements absolves the state from liability.

d. The nature of the state's delictual liability in *Van Duivenboden*, *Van Eeden*, *Hamilton* and *Carmichele*

This section contains a critical engagement with the views of academics regarding the nature of the state's delictual liability for harm arising from crime. This has been done because these views, and the questions that they have prompted, have formed a substantial part of the academic debate in the context of the state's expanding delictual liability for harm arising from crime and therefore merits analysis. Furthermore, it is pointed out that the established scholarship does not provide a satisfying solution to the problem of expanding state delictual liability on a practical level. Accordingly, it may be said that there is a link between the nature of the state's delictual liability arising from crime and the creation of a statutory crime victim compensation scheme.

Although it is not the sole foundation of state liability,[86] section 1 of the State Liability Act 20 of 1957 provides that the state is liable for "any wrong committed by any servant

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[82] Loubser & Midgley (eds) *The Law of Delict* 30; Neethling & Potgieter *Law of Delict* 389.
[83] The relationships recognised under South African law include employer and employee, principal and agent, and motorcar owner and motorcar driver. See Neethling & Potgieter 389-400; Van der Walt & Midgley *Principles of Delict* para 19; D Visser "Delict" in Francois du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007) 1224–1227; H Wicke "Vicarious liability for agents and the distinction between employees, agents and independent contractors" (1998) 61 *THRHR* 609 610–611.
[84] Wicke *Vicarious Liability* 209-232.
[85] *K v Minister of Safety and Security* 2005 (3) SA 179 (SCA); *K v Minister of Safety and Security* 2005 (6) SA 419 (CC); *Minister of Safety and Security v F* 2011 (3) SA 487 (SCA); *F v Minister of Safety and Security* 2012 (1) SA 536 (CC).
[86] For example, see section 60(1) of the South African Schools Act 84 of 1996.

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of the state acting in his capacity and within the scope of his authority as such a servant". The orthodox interpretation of this section is that the state may only be held vicariously liable for the delicts of its employees and that, on the wording of the Act, there is no room for direct liability of the state.[87]

However, a different interpretation of the wording of the Act is conceivable, i.e. one that would allow for imposing direct liability on the state.[88] Because the state as a juristic person can conduct itself only through its organs and employees (or "servants", in the language of the Act), it may be argued that it could be held directly liable if it is proved that the state organ or employee acted within the formal scope of its authority or when it acted in its official capacity as state organ or employee.

Recently, scholars have reconsidered the nature of the state's delictual liability in *Van Duivenboden* as well as the line of cases that followed in its wake. An overview of this debate, and a critical evaluation thereof, is set out below.

Du Bois has described the decision in *Van Duivenboden* as follows:[89]

> "A subtle but vital shift takes place here, in which state liability is no longer viewed in terms of the traditional vicarious liability paradigm of the common law model, but rather, á la civilian systems, as a form of direct liability arising from an organizational failure or *faute de service*. It is this implicit and unwitting paradigm shift that explains the very broad contours of liability envisaged in this decision and the departure from the common law tradition, where liability principles do not mark out the state as bearer of special responsibilities."

This paradigm shift has been explained by reference to the emphasis which Nugent JA placed on the duties of the state as employer as opposed to the duties of the individual state employees and the expressed desire to give effect to the norm of state accountability.[90] This emphasis, it is argued, appears out of place in the context of determining vicarious liability where the pertinent question is whether the employee had acted wrongfully and culpably in causing the victim's harm, and not whether the employer itself had so acted. Wagener summarises the argument as follows:[91]

> "A breach of an employer's duties […] can only affect its personal liability. The breach of its duty cannot make any difference to its vicarious liability, which is concerned with the duties of

[87] J Neethling "Liability of the state for rape by a policeman: The saga takes a new direction" (2011) *Obiter* 437; J Neethling & JM Potgieter "Deliktuele staatsaanspreeklikheid weens polisieverkragting" 2012 (9) *Litnet Akademies* 73 77.

[88] WE Scott *Middellike Aanspreeklikheid in die Suid-Afrikaanse Reg* (1983) 200-201. See also Froneman J's minority judgment in *F v Minister of Safety and Security* 2012 (1) SA 536 (CC).

[89] Du Bois (2010) *Tulane European and Civil Law Forum* 174-175 (references omitted).

[90] Du Bois (2010) *Tulane European and Civil Law Forum* 174-175; Wagener (2008) *SALJ* 675.

[91] Wagener (2008) *SALJ* 675.

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> the tortfeasant employee; that is, her delictual duties and employment duties. Her delictual duties define whether she acted wrongfully, a finding of which being a necessary condition for her liability (and her liability being a necessary condition for her employer's vicarious liability)."

This argument has received limited judicial support. In an *obiter* comment in a subsequent case, *Minister of Safety and Security v F*[92] ("***F (SCA)***"), Nugent JA seemed to agree with Du Bois and Wagener and remarked that his judgment in *Van Duivenboden,* as well as the judgments in *Van Eeden, Hamilton* and *Carmichele (SCA)* "purport to be founded upon vicarious liability but might better be said to have been founded upon direct liability of the State, acting through the instrument of its employees."[93]

The argument was further endorsed in Froneman J's minority judgment in *F v Minister of Safety and Security*[94] ("***F (CC)***"), which dealt not with the state's liability for the negligent, wrongful failure of its employees to prevent crime, but with its liability for the intentionally-committed crimes of its employees.[95] Froneman J was of the view that it was time to "recognise that State delictual liability in circumstances where the State has a general constitutional and statutory duty to protect people from crime is usually 'direct', and not 'vicarious' in the sense traditionally understood by that term."[96] This was because the state invariably acted *via* its organs, i.e. state officials, when performing public duties.

In other words, because the state is a juristic person that fulfils its public duties through its various organs and employees, the execution of these public duties may be attributed to the state and the state may therefore be held responsible for any such acts which attract delictual liability. Froneman J thus suggested that the question whether the state should be delictually liable in both the *Van Duivenboden* type of cases as well as cases resembling the facts of *F (CC)* should "no longer be dealt with as an aspect of vicarious liability but rather as part of the normal direct enquiry into whether the elements of our law of delict are present when instruments of the State act."[97]

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[92] 2011 (3) SA 487 (SCA). See paragraph 2.2.1.2.3 (c) below.
[93] 2011 (3) SA 487 (SCA) para 34.
[94] 2012 (1) SA 536 (CC). See paragraph 2.2.1.2.3. (d) below.
[95] See paragraph 2.2.1.2 below.
[96] 2012 (1) SA 536 (CC) para 89.
[97] Para 89.

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Neethling and Potgieter summarise the argument in favour of direct state liability as follows:[98] the state is a juristic person that can only act through its organs as instruments and the officials who form a part of those organs. The police service functions as a state organ and its members are subjected to specific constitutional and statutory duties. Conduct of the police service and various police officers is conduct for which the state is held liable because it constitutes the state's conduct. This means that because the conduct of the police service or its officers constitutes the state's conduct, the latter may be held directly liable.

These scholars reject the argument that the *Van Duivenboden* series of cases may be said to have imposed direct state liability.[99] Referring to the remarks made by Nugent JA and Froneman J, they correctly emphasise the failure of both judges to explain the difference between establishing whether the conduct of state employees qualify as the conduct of state organs for the purposes of direct state liability and determining whether a state employee conducted himself within the course and scope of his employment for the purposes of vicarious liability.[100] In light of this shortcoming, they appropriately contend that the shift to direct state liability can only lead to confusion and create legal uncertainty in an area where clarity existed beforehand.[101] According to them, it was clear that, in *Van Duivenboden, Van Eeden, Hamilton* and *Carmichele SCA*, it was the employees who, while acting in course and scope of their employment, negligently breached their duty to prevent crime and that the state was thus correctly held vicariously liable.[102]

They also contend that certainty and precedent has been established in the series of cases dealing with the negligent wrongdoing of police employees and that, in these cases, courts have "consistently maintained"[103] that the state should be held vicariously liable for the negligent wrongdoing of police officials. They conclude that,

[98] Neethling & Potgieter *Litnet Akademies* (2012) 78. See also Verloren van Themaat *Staatsreg* (1968) 468; D'Oliviera *State liability for the wrongful exercise of discretionary powers* Unpublished LLD dissertation. University of South Africa (1976) 477-488.
[99] See Neethling & Potgieter (2012) *Litnet Akademies* 77-82.
[100] Neethling & Potgieter (2012) *Litnet Akademies* 77-82; Scott (2011) *TSAR* 777-784; Neethling (2012) *THRHR* 627-631; Scott *Middellike Aanspreeklikheid* 200-201.
[101] Neethling & Potgieter (2012) *Litnet* 79. See also Neethling (2011) *Obiter* 436-437.
[102] Neethling (2011) *Obiter* 436-437.
[103] 436-437.

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in these cases, the vicarious liability approach "has delivered satisfactory results"[104] and that it "is questionable whether a radical deviation from this approach is justified."[105]

Nevertheless, Neethling and Potgieter appear to accept the argument that the state may be held directly liable where its employees *intentionally* deviate from their employment duties (the category of cases examined in paragraph 2.2.1.2 below).[106] Such an exception centres on Froneman J's argument that factors that have typically been used to determine whether an employee's intentional crime may be regarded as a delict committed during the course and scope of employment are "at odds in determining the secondary, vicarious State liability",[107] but can "legitimately be assessed in determining the primary wrongfulness of the conduct of the State, through its officials, in a delictual action based on direct liability".[108] Neethling and Potgieter therefore contend that direct state liability, with an enquiry into the wrongfulness of the state's direct liability, potentially provides a more acceptable basis for the state's liability when compared to vicarious liability.[109]

Notwithstanding this possibility, the CC has clearly opted for vicarious liability as the preferred paradigm for state liability in the context of the negligent, wrongful failure of their employees to prevent harm as well as in cases where their employees intentionally commit crimes. Courts evidently regard the nature of the state's liability as vicarious and therefore continue to apply vicarious liability requirements to determine the state's delictual liability in both contexts.[110] Support for Froneman J's argument therefore seems to have academic interest only and it appears likely that vicarious liability will continue to form the basis of the state's liability in future cases.[111]

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[104] Neethling & Potgieter (2012) *Litnet Akademies* 74. See also J Scott "Die Hoogste Hof van Appèl Smoor Heilsame Regsontwikkeling" (2011) 4 *TSAR* 773 777-784; Neethling (2012) *THRHR* 627-631.
[105] Neethling & Potgieter (2012) *Litnet Akademies* 74.
[106] Neethling & Potgieter (2012) *Litnet Akademies* 82-83. See also Scott (2011) *TSAR* 777-784; Neethling (2012) *THRHR* 627-631.
[107] 2012 (1) SA 536 (CC) para 116.
[108] Para 116.
[109] Neethling & Potgieter (2012) *Litnet Akademies* 82; *F v Minister of Safety and Security* 2012 (1) SA 536 (CC) paras 112-113.
[110] See also paragraph 2.2.1.2 below.
[111] See also *PE v Ikwezi Municipality* 2016 (5) SA 114 (ECG); *Minister of Safety and Security v Booysen* (35/2016) [2016] ZASCA 201; *Terblanche v Minister of Safety and Security* 2016 (2) SA 109 (SCA); *Minister of Defence v Von Benecke* 2013 (2) SA 361 (SCA); *Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security* 2012 (2) SA 137 (SCA); *Minister of Safety and Security v Venter*

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At any rate, the debate concerning the preferred paradigm for state liability will not provide a practical contribution towards solving the problem of the continued expansion of state delictual liability for harm arising from crime. Essentially, the theoretical nature of the state's liability does not change the fact that, in cases like those discussed above, it is the state that is held liable for harm actually committed by criminals rather than the criminals themselves. Indeed, it fails to pay attention to the question whether the expanded state delictual liability provides a satisfactory solution to the issue of crime victim compensation. Therefore, the reasons for Froneman J's preference for direct state liability will not be analysed in further detail in this dissertation.

Lastly, attention may be given to the argument by Boonzaier, who regards the argument that the nature of the state's liability in the *Van Duivenboden* cases is vicarious as "startling", "unconvincing" and as taking "no account of the grave problems" posed by the reasoning in these cases.[112]

Agreeing with the argument that these cases are "in truth imposing direct liability",[113] Boonzaier argues that the only duties identified by the court in *Van Duivenboden* were the state's constitutionally-imposed duties, and because the imposition of vicarious liability upon the state necessitates the recognition of a legal duty on the police officers in question, the state's liability cannot be regarded as vicarious in nature.[114] In order to reach a vicarious liability outcome in these cases, one would have to "manufactur[e] a legal duty resting on the police officers".[115]

He goes further, arguing that there was no legal duty[116] resting on the police officers in *Van Duivenboden* and "[w]here there is no duty grounded on recognised principles of private law, and as such there is no delict which can be imputed to the state, one may not manufacture one simply to generate the right outcome on vicarious

2011 (2) SACR 67 (SCA); *Ntombenkosi Hlomza v Minister of Safety and Security* 2011 JDR 0030 (ECM); *Minister of Safety and Security v Madyibi* 2010 (2) SA 356 (SCA)

[112] Boonzaier (2013) *SALJ* 354. See also Neethling (2011) *Obiter* 437.

[113] Boonzaier (2013) *SALJ* 342.

[114] 340.

[115] 340.

[116] 341: With regard to the situation in which a policeman fails to deprive "known threats of their weapons", Boonzaier argues that "the official's duties should be grounded on the common-law duty to take reasonable care in the exercise of one's profession" and then notes that "[in] South African law no general such duty has yet been recognised."

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liability."[117] Correspondingly, the SCA's decision to impose vicarious liability on the state in *Hamilton* is rejected on the basis that Van Heerden AJA apparently "convert[ed] a duty which in truth rested on the state generally (that is, the duty to prevent dangerous people receiving firearm licences) into a duty resting on the relevant individual officers."[118]

Continuing this line of criticism on the characterisation of the state's liability as vicarious, Boonzaier rejects the court's reasoning in *Van Eeden* as "even more incongruous"[119] since, in this case, the court apparently failed to identify the individual employee responsible for having committed the delict. Instead, the "court refers in general terms to the wrongdoing of 'the police' [with the] result that vicarious liability is imposed following almost exclusive discussion of the state's duties and no mention whatsoever of any individual tortfeasant employee."[120] Similarly, the decision in *Van Duivenboden* is faulted on the basis that the omission on the part of the police "was never ascribed to any police officer"[121] and that it was the "negligence of 'the police' generally which was ultimately found to have caused the harm to the plaintiff."[122]

Boonzaier's outright rejection of the decision to regard the state's delictual liability as vicarious in nature is not well founded. Although the court in *Van Duivenboden* does not expressly ascribe the failure on the part of the police to a specific police officer, considerable time is spent in describing the nature of various specific police officers' conduct.[123] The court set out the relevant provisions of the Arms and Ammunition Act which allowed for the deprivation of firearms, and noted that "various police officers were in possession of information that reflected upon Brooks's fitness to be in possession of firearms."[124] The court also referred to the circumstances under which superintendent Hefer and several members of the Internal Stability Unit came to have knowledge of Brooks' threats to kill himself and members of his family.[125]

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[117] 341.
[118] 345.
[119] 342.
[120] 342.
[121] 342.
[122] 342.
[123] 2002 (6) SA 431 (SCA) paras 12-20.
[124] Para 4.
[125] The court takes note of the fact that Hefer spoke to Brooks' wife, who told him that Brooks should not be in possession of firearms. Hefer had explained the statutory procedure for Brooks' disarmament and offered to take a statement from Brooks' wife.

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Furthermore, the court considered the conversations that occurred between one of the deceased and sergeant Goldie, responsible for the administration of matters relating to firearms at the Milnerton Police Station, who, after being informed of Brooks' drinking problems and propensity for violence, advised the deceased of certain available measures to be taken.[126] Finally, Brooks' deceased wife also approached sergeant Roos at the Bothasig Police Station, who referred her to warrant officer Jenkins, who was in command of the police station and advised her to lay a charge against Brooks so as to allow the police to act against the latter.[127] All of this suggests that the court did take into account the conduct of the police officers involved as well as their respective legal duties.

Similarly, in *Van Eeden* the court did not point out specific police officers by name. Nonetheless, taking into consideration the fact that vicarious liability had been conceded by the state, it would be reasonable to infer that, when the court considered whether "members of the South African Police Service owed [the plaintiff] a legal duty",[128] it had in mind those officers who were, at the time, responsible for securing the relevant criminal's cell door.

Furthermore, Boonzaier's argument that the SCA "manufactured" a legal duty which did not exist and similarly "converted" a legal duty of the state into a legal duty resting on specific employees in *Hamilton* should be rejected on the basis of prior decisions of the same court in which it held that, as expressed in *Van Duivenboden*, "it was the law that assault is unlawful, that the police are under a positive duty in law to protect citizens from assault when in a position to do so and that, if they negligently fail to do so, the State will be liable in damages."[129]

In conclusion, the following remarks may be made in response to the academic debate. Du Bois, Wagener, Boonzaier, Nugent JA in *F (SCA)* and to some extent Froneman J in *F (CC)* hold that a possible interpretation of the expansion of the state's

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[126] Goldie asked her whether her husband had firearms and, when she replied in the affirmative, advised that if she felt threatened she should make a sworn statement and an enquiry would be held in terms of section 11 of the Arms and Ammunitions Act.

[127] Jenkins told her that she would need to prefer a charge against Brooks and that unless she did so the hands of the police were tied. Dawn told Jenkins that she was unwilling to prefer charges because to do so would jeopardise her marriage and there the matter was left.

[128] 2003 (1) SA 389 (SCA) 394.

[129] 2002 (6) SA 431 (SCA) para 33. See also *Minister van Polisie v Ewels* 1975 (3) SA 590 (A).

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delictual liability for the wrongful and negligent causation of harm arising from crime is that, despite the court's references to vicarious liability, its reasoning was nevertheless confused. These scholars take this position because the judgments of the SCA in the *Van Duivenboden* series of cases focused on the legal duties of the state as employer as opposed to the employee's duties. For the reasons set out below, their argument is not persuasive.

It may be conceded that none of the abovementioned cases expressly applied the requirements of vicarious liability to the facts. Emphasis was placed on the legal duties of the employer and the necessity of holding the employer accountable. However, it does not necessarily follow that the court sought to hold the state directly liable. Indeed, it ought to be remembered that these cases focused on only one of the three requirements for vicariously liable, namely whether the state employees had committed a delict. More specifically, the central question was whether the respective employees' negligent failure to prevent harm could be regarded as wrongful. The other two requirements – the existence of an employer-employee relationship and determining whether the employee's delict had occurred in the course and scope of their employment – was not in issue and therefore required no attention. If they did, it would perhaps have been more apparent that the court dealt with vicarious liability, which would have placed an end to any question regarding the nature of the state's liability then and there.

It was in the context of determining wrongfulness that the court took into account various legal and public policy considerations, constitutional rights and norms. The focus on the nature of the state's legal duties was a relevant consideration within this framework, because, at the very least, it also shaped and informed the duties of its employees and thus the wrongfulness of their respective failures to execute their duties to prevent crime. The reference by the SCA to the state's legal duties is not convincing evidence that the court sought to hold the state directly liable, but may be regarded as a relevant consideration in the determination of wrongfulness and ultimately whether a delict had been committed – one of the three requirements for vicarious liability.

It is contended that this interpretation of these cases, and therefore also the nature of the state's delictual liability in cases dealing with the negligent, wrongful failure of state

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employees to prevent crime, is aligned with the actual statements recorded in the various judgments. For instance, in *Van Duivenboden,* Nugent JA concluded his reasoning on the question of wrongfulness as follows: the "negligent conduct of police officers in [the] circumstances [of the case was] thus actionable and the State [should therefore be held] *vicariously* liable for the consequences of any such negligence".[130] In *Van Eeden* the court was not requested to consider the nature of the state's delictual liability because the Minister of Safety and Security conceded vicarious liability. Accordingly, Vivier ADP did not deal with any of the requirements for vicarious liability. Likewise, in *Carmichele SCA*, Harms JA paid no attention to the requirements for vicarious liability and quoted extensively from Nugent JA's judgment in *Van Duivenboden* to confirm the existence of legal duties on the part of the state employer. This was done in an attempt to determine wrongfulness. Harms JA concluded that the "*vicarious liability* of the Ministers is not in issue."[131]

In conclusion, this dissertation supports the argument made by Neethling and Potgieter, namely that the nature of the state's delictual liability in the *Van Duivenboden* series of cases is, and continues to be, vicarious. Whereas it might be possible to hold the state directly liable in the line of cases dealing with the intentionally-committed crimes of state employees, the courts do not appear likely to entertain this notion. At any rate, as mentioned above, the debate is of an academic nature and it has failed to address the pertinent issue, which is that, whether direct or vicarious, the state's liability for harm arising from crime – actually committed by third parties – have expanded considerably and continue to do so. From a crime victim compensation perspective, the focus should therefore be on the following question: is this a satisfactory situation or should it be rethought with a view to investigating an alternative solution? Before concentrating specifically on answering this question,[132] this section of the chapter (focusing on the expansion of state delictual liability for the negligent, wrongful failure of state employees to prevent crime) will be concluded with an evaluation of the criticism of the SCA's reasoning in *Van Duivenboden*.

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[130] 2002 (2) SA 431 (SCA) para 22 (own emphasis).
[131] 2004 (3) SA 305 (SCA) footnote 14 (own emphasis).
[132] This question receives specific attention in paragraphs 2.2.1.1.4 and 2.2.1.2.5 below.

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e. An evaluation of criticism of the state's expanded delictual liability for the negligent and wrongful failure of its employees to prevent crime

i. Fagan's criticism: the instrumentalisation of state employees and the production of arbitrary outcomes

Besides inviting a debate on the nature of its liability, the expansion of the state's delictual liability arising from the negligent, wrongful failure of its employees to prevent crime has received criticism which, briefly stated, maintains that the reasoning in *Van Duivenboden* instrumentalises state employees and suggests that it may produce arbitrary outcomes in future cases.

Fagan has criticised the *Van Duivenboden* reasoning as "instrumentaliz[ing] the state employee whose failure properly to do his or her job happens to cause the state's failure to discharge its constitutionally-imposed protective duty."[133] In line with the argument raised by Du Bois and Wagener and discussed in the preceding section, Fagan suggests that, in its decision to impose vicarious liability on the state, the court was required to consider the conduct of the state's employees and whether their negligent failure to act amounted to the wrongful causation of the plaintiff's harm. However, he argues, the court failed to do so and, according to him, imposed vicarious liability on the basis of certain legal duties owed by the state employer to the public.

He maintains that, because the court emphasised the nature of the employer's duties, paid little attention to the nature of their employees' conduct and paid almost no attention to the question whether the employees breached their respective legal duties, the court's approach ultimately amounts to treating the state employees as the mere instruments of their employers. The employees are treated not as ends in themselves but as a means to an end; "that end being the need to hold the state accountable for *its* failure to discharge *its* duty."[134] This is ironic, he argues, because the CC, "applauded for putting dignity at the centre of its jurisprudence",[135] has herewith "initiated a development in the law of delict which is wholly at odds with

[133] Fagan (2008) *SALJ* 669-670.
[134] 670.
[135] 671.

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that."[136] Before evaluating this criticism, consider the example he uses to illustrate his argument.[137]

Suppose that the Mountain Club of South Africa ("**MCSA**"), having grown weary of the ongoing criminal activity on Table Mountain, decided to employ security guards to improve the safety on the mountain. Suppose further that security guard A is required by his employment contract to secure a specific area on the mountain each morning on weekdays. If he fails to do so, the MCSA may terminate his contract. B, a hiker, is assaulted one morning during the week in the area which A is required to secure. At the time A was sleeping under a bush while he was supposed to be on duty in a neighbouring ravine.

Fagan contends that an attempt by B to argue that A has committed a delict (and thus to hold the MCSA vicariously liable) would fail because, although A's failure to prevent the crime may be regarded as negligent, the causation of B's harm cannot be viewed as wrongful.[138] In contrast, he suggests, if A's employer was not a private organisation aimed at improving security on the mountain but the Minister of Safety and Security, then B's prospects of success with a delictual claim against A would improve significantly. The likelihood of successfully instituting such a delictual claim increases because, according to him, B would then be entitled to rely on the reasoning developed in *Van Duivenboden*. Fagan explains:[139]

> "So, [the security guard] did not act wrongfully and thus committed no delict because he was employed by the MCSA. But he would have acted wrongfully and would thus have committed a delict if he had been employed by the state. And the only reason for the difference in the law's treatment of [the security guard] is one that has nothing to do with him or what he did or did not do. For the only reason for the difference is that, in the latter but not the former case, [the guard] is capable of being used as an instrument or vehicle for attributing liability to the state."

Fagan therefore implies that the reasoning by the court in *Van Duivenboden* may produce arbitrary outcomes in the application of the vicarious liability doctrine: whereas the state may be held vicariously liable for the negligent failure of the police officer to prevent crime, vicarious liability will not be imposed on the MCSA for their guard's similar negligent failure. Also, he objects to the reasoning because it

[136] 671.
[137] 670-671.
[138] 670.
[139] 670-671.

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instrumentalises the employee, as a result of which the employee's dignity is also undermined. The following section responds to these criticisms.

ii. An evaluation of Fagan's criticism regarding the reasoning in *Van Duivenboden*

First, in reaction to the argument that the *Van Duivenboden* reasoning may produce arbitrary outcomes: the assertion that the crime victim's claim against the MCSA would fail because the plaintiff would not be able to prove wrongfulness is not substantiated other than by implying that the plaintiff would not be entitled to rely on the *Van Duivenboden* reasoning. However, it is not self-evident that the security guard's negligent failure to prevent harm could not be viewed as wrongful and that the MCSA, in turn, could not be held vicariously liable.

To assess his argument, it is worthwhile to restate the approach to determining wrongfulness. In *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* the CC held as follows:[140]

> "In the more recent past our courts have come to recognise […] 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 the 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."

Therefore, whether a specific guard's negligent failure to prevent crime may be regarded as wrongful for the purposes of determining his personal delictual liability will depend on an array of policy considerations and constitutional norms. Arguably, one relevant consideration is the nature of the employee's duty, which, in turn, may be deduced from the employment contract concluded by the employer and the employee as well as paying attention to the nature of the employer's duties. In other words, one of the considerations that may inform the court's value judgment concerning the reasonableness of imposing delictual liability on the employee may be the nature of the employer's duties.

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[140] 2011 (3) SA 274 (CC) para 122. See also *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC) para 23; *Country Cloud Trading CC v MEC, Department Of Infrastructure Development* 2015 (1) SA 1 (CC) para 21; *Loureiro v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) para 53.

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Returning to Fagan's example, the question seems to be whether, having regard to legal and public policy considerations as well as constitutional norms, it would be reasonable to impose delictual liability on the MCSA guard for his negligent failure to prevent the crime in the gorge. On the facts given in his example, it may be that a court would not impose delictual liability on the guard. However, this does not mean that the application of the reasoning in *Van Duivenboden* will result in arbitrary outcomes in different cases. It merely illustrates the application of the criteria laid down for wrongfulness: because the policy considerations and constitutional norms that are at play in establishing wrongfulness may differ from one factual scenario to another, different outcomes may be reached. When dealing with a police officer, the considerations mentioned in *Van Duivenboden* will necessarily be applicable, while they do not necessarily find application when the court assesses the MCSA guard's negligent failure.

In other words, the different outcomes that may be reached in similar situations are a function of the application of the broader wrongfulness enquiry. The production of different results is not because the law's treatment of the MCSA security guard is due to a reason that has "nothing to do with him or what he did or did not do."[141] On the contrary, the application of the wrongfulness enquiry takes due notice of what he did and what he was required to do. In this context it is worthwhile to emphasise that a MCSA guard, unlike a police officer, is not tasked with a statutory and constitutional duty to protect members of the public from crime. The fact that delictual liability may be imposed on a police officer in any of the abovementioned cases, but refused with regards to the MCSA guard in Fagan's example – despite the fact that both negligently fail to comply with their respective duties – may therefore be justified on the basis that what they are required to do differ in a fundamental way.

Lastly, it might also be said that, under different factual conditions, a MCSA guard's negligent failure to prevent crime could be regarded as wrongful, notwithstanding the fact that his employer is not tasked with the same constitutional duties as the state. This could occur where there are other policy considerations that warrant the imposition of delictual liability. For example, it may be the case that a special relationship of trust comes to exist between the MCSA, its guards and hikers on Table

[141] Fagan (2008) *SALJ* 670-671.

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Mountain.[142] Furthermore, it could be argued that the expectation was created that the plaintiff's interests would be protected, at least insofar as his bodily integrity is concerned and that such a consideration warrants the imposition of delictual liability.[143] Perhaps the fact that the area in which the assault occurred was under the control of the MCSA could be taken into account.[144] Fagan's apparent view that a MCSA guard's negligent failure to prevent the harm could never be considered as wrongful must therefore be rejected.

iii. Testing Fagan's criticism of the reasoning in *Van Duivenboden* against recent judgments relating to the negligent failure of private security guards to prevent crime

Moving attention slightly away from Fagan's example, it may be considered what the situation would be if the guard in question was appointed by a private security company. Could the negligent failure of such a guard to prevent harm be regarded as wrongful? If not, would it mean that the *Van Duivenboden* reasoning indeed produces arbitrary outcomes?

To answer these questions, we may first examine the judgment of the SCA in *Viv's Tippers (Edms) Bpk v Pha Phama Staff Services (Edms) Bpk t/a Pha Phama Security* ("***Viv's Tippers***"),[145] where the plaintiff's motor vehicle was stolen from premises in respect of which the occupier had contracted with a company to provide security services. The SCA had to consider whether the owner of the vehicle could institute a delictual claim against the security services company for the harm it had suffered as a result of the negligent failure by the company's security guard to keep the vehicle safe. Categorising the theft of the vehicle as pure economic loss, the court considered whether it would be reasonable to impose delictual liability on the security guard and,

[142] *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 (4) SA 901 (N); *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A).
[143] *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 (2) SA 520 (W); *Longueira v Securitas of South Africa (Pty) Ltd* 1998 (4) SA 258 (W).
[144] *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (A).
[145] (2010) (4) SA 455 (SCA).

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in turn, vicarious liability, on his employer.[146] Accordingly, the court considered the following policy reasons.

First, Lewis JA held that the guard's control over the truck at the time of the theft, the reasonable foreseeability of the harm as well as its preventability were irrelevant legal considerations within this context.[147] Further, she took the view that imposing liability *in casu* might lead to an unwarranted increase in the fees charged by private security firms and, also that it may potentially expose the providers of security services to unlimited liability.[148] In the judgment of Lewis JA, these policy considerations weighed against the imposition of liability on the security guard and wrongfulness was thus denied.

In addition, the court took into account the role played by an exclusion clause in the contract between the security services company and the party in occupation of the premises. This clause excluded the security services company's liability against third parties for any harm arising from the provision of security services. Despite earlier judgments that stated otherwise, Lewis JA held that the exclusion clause in the security services agreement operated effectively as against the non-contracting plaintiff:[149]

> "How can the contractual arrangement between the owner of the premises and the security provider be irrelevant to the question whether a duty should be imposed on the security provider to third parties whose property is stolen? [...] The terms of that contract must, in my view, play a role in assessing what the convictions of the community would be in relation to affording a claim for compensation to a non-contracting party."

Therefore, even though the SCA seemed to indicate that, on policy grounds, the security guard's negligent failure to prevent crime did not amount to wrongfulness, the court held that the exclusion clause in any event indemnified the security services company from any potential delictual claim brought against it by a third party victim of crime.

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[146] This categorisation was subsequently rejected by the SCA in *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA) para 37.
[147] *Viv's Tippers (Edms) Bpk v Pha Phama Staff Services (Edms) Bpk t/a Pha Phama Security* (2010) (4) SA 455 (SCA) para 12. See also A Price "The Contract/Delict Interface in the Constitutional Court" (2014) 25 *Stellenbosch Law Review* 501-510.
[148] (2010) (4) SA 455 (SCA) para 26.
[149] Para 13.

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At first glance, one may regard the outcome reached in *Viv's Tippers* in respect of wrongfulness as giving support to Fagan's claim that the *Van Duivenboden* reasoning may produce arbitrary outcomes. Along this line, it may be argued that, if the security guard was employed by the Minister of Safety and Security, then his negligent failure to prevent crime would have been regarded as wrongful which, in turn, would have facilitated the imposition of vicarious liability. However, because A is employed by a private security services company, the court cannot rely on the *Van Duivenboden* reasoning.

For the reasons set out below, it is argued that the SCA's conclusion regarding the wrongfulness of the security guard's negligent failure to prevent crime in *Viv's Tippers* does not mean that Fagan is correct in implying that the application of the *Van Duivenboden* reasoning produces arbitrary outcomes in similar factual scenarios.

First, in *Viv's Tippers,* the SCA arguably reached the wrong conclusion regarding wrongfulness. It may be argued that the control which the guard exerted over the relevant truck was a consideration pointing in favour of imposing liability.[150] Furthermore, Lewis JA's contention that reasonable foreseeability and reasonable preventability were irrelevant considerations in the context of wrongfulness is not in line with established precedent.[151] In fact, it is at odds with her own earlier judgment in *Premier, Western Cape v Faircape Property Developers (Pty) Ltd*, where she asserted that the "foreseeability of harm to the plaintiff is also a relevant consideration in the determination of lawfulness".[152] Additionally, it could be argued that the creation of an expectation or impression that the security services company would protect the plaintiff's interests was a policy consideration pointing towards imposing delictual liability.[153]

Another consideration that led the court to deny wrongfulness, the so-called fear of unlimited liability, is exaggerated. Since the court first handed down a decision in this

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[150] *Compass Motors Industries (Pty) Ltd v Callguard* 1990 (2) SA 520 (W) 526-527; *Leon Bekaert Southern Africa (Pty) Ltd v Rauties Transport (Pty) Ltd* 1984 (1) SA 814 (W).
[151] See Loubser & Midgley (eds) *The Law of Delict* 223; Neethling & Potgieter *Law of Delict* 65-66.
[152] *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* (41/2002) [2003] ZASCA 42 paras 42, 46 (references omitted).
[153] *Compass Motors Industries (Pty) Ltd v Callguard* 1990 (2) SA 520 (W); Loubser & Midgley (eds) *The Law of Delict* 222; Neethling & Potgieter *Law of Delict* 72-73.

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context in *Compass Motors Industries (Pty) Ltd v Callguard*,[154] there has only been one other decision in which a plaintiff has brought a delictual claim for damages following the theft of his motor vehicle after the negligent, wrongful failure of a security guard to prevent crime.[155] This hardly constitutes a flood of litigation.

In other words, if the court had taken the above considerations into account, it could easily have arrived at the conclusion the security guard's negligent failure to prevent crime was wrongful on the facts, regardless of the *Van Duivenboden* reasoning or the fact that the guard was not an employee of the state.

Lastly, the court's interpretation of the role which the exclusion clause played may be rejected on the basis that it seems contestable to argue that an exclusion clause in a contract between A and B may affect the delictual liability of A as against C.

There is another reason why the judgment in *Viv's Tippers* should not be seen as providing support for Fagan's argument, which comes to the fore in a subsequent judgment by the CC and which also dealt with the provision of security services by a private security company. In *Loureiro v iMvula Quality Protection (Pty) Ltd* ("***Loureiro***"),[156] the plaintiffs instituted delictual and contractual claims against the defendant, a private security company for the harm it had suffered after an on-duty security guard employed by the latter had allowed armed robbers, pretending to be police officers, into the plaintiffs' residence whereafter they assaulted the plaintiffs and stole some of their property totalling approximately R11 million.

The CC held that, taking into account policy considerations and constitutional norms, the security guard's negligent failure to prevent crime was wrongful.[157] It reasoned as follows:[158]

> "There are ample public policy reasons in favour of imposing liability. 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 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

[154] 1990 (2) SA 520 (W).
[155] *Longueira v Securitas of South Africa (Pty) Ltd* 1998 (4) SA 258 (W).
[156] 2014 (3) SA 394 (CC).
[157] Para 55.
[158] Para 56.

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> 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."

This conclusion was reached despite the fact that the role of the private security service industry was distinguished from that of the state, even though it fulfilled functions comparable to those falling within the domain of the police.[159] Nevertheless, this distinction – concerning the difference in the duties of the state and a private security services company as employers, and the resultant, differentiating effect this may have on the duties of respective entities' employees – did not lead the court to produce a different outcome to the one reached in *Van Duivenboden*.

Loureiro therefore provides a positive answer to the first question phrased above: the negligent failure of a private company's security guard to prevent crime could be regarded as wrongful. In fact, it is arguable that this extract suggests that some of the constitutional rights highlighted in the *Van Duivenboden* series of cases may similarly apply where the guard is appointed by a private security services company and not the state. The court makes reference to the "constitutional rights to personal safety and protection from theft of or damage to one's property",[160] which conceivably includes those rights referred to in *Van Duivenboden* (see paragraph 2.2.1.1.2 above). In summary, this judgment undermines the validity of Fagan's argument.

iv. Concluding remarks on Fagan's criticism regarding the reasoning in *Van Duivenboden*

Recent case law appears to support the view that the difference between the identity of a private security guard and a police officer does not automatically mean that the reasoning in *Van Duivenboden* produces arbitrary outcomes. If the Minister of Safety and Security is held vicariously liable because on certain facts his employee's negligent failure to prevent crime is regarded as wrongful, but a private security services company is not held vicariously for the negligent failure of one of its guards to prevent crime in comparable circumstances, it does not mean that the different outcomes may be labelled as arbitrary. Instead, the different outcomes will be a

[159] Paras 3-4.
[160] Para 56.

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function of the application of the established criteria for wrongfulness, i.e. relevant policy considerations and constitutional rights.

Furthermore, this appears to be theoretically sound considering the fact that there may very well be significant differences between scenarios where the Minister of Safety and Security is the employer as opposed to a private security company. One such difference lies in the fact that a police officer has a *constitutional* duty to protect *all* members of the public from crime, whereas a private security guard's duties are set out in the contract which it concludes with his employer.[161] As opposed to a *general* duty to promote safety and security for *all* members of the public and to prevent crime to *all* members of the public, the private security guard's duties are circumscribed by the contract it (or typically its employer) concluded with a contracting party who pays for those limited services. In addition to limiting the number of people to whom the duty is owed, the security services contract may also limit the manner, place and time in which such a duty is required to be performed. Although both the security services company and the state have crime prevention duties, there is a considerable difference in the nature and scope of these duties. This, in turn, may have a significant impact on the duties expected to be performed by the employees of the two entities.

Furthermore, it should be emphasised that, when determining whether the employee's negligent failure to prevent harm is wrongful, courts may have regard to the constitutional norm of state accountability. This consideration is absent in the case of a private security services company, presumably because, among other things, these companies do not exercise a public power and do not owe their duties to *all* members of the public. If a security services company breaches the terms of its contract, accountability will follow in the form of contractual liability.

Against this background, it does not appear problematic that in one case a police officer's negligent failure to prevent crime will be regarded as wrongful whereas a security guard's negligent failure may not be so regarded.

Fagan also criticised the *Van Duivenboden* reasoning because it apparently instrumentalises employees. In response, as argued above, an employee's contractual duty to his employer should also be a relevant legal consideration when

[161] See also Price (2014) *Stellenbosch Law Review* 509.

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determining wrongfulness for the purposes of delictual liability towards third parties. Obviously, the nature of the employee's duties will be informed by the nature of his employer's identity. Therefore, the court will focus on the work that the employee has elected, and is required to do, as well as other relevant considerations related to his failure to prevent harm. Viewed from this perspective, the employer's identity becomes a relevant consideration without instrumentalising the employee and it accordingly cannot be said that the court will ignore the employee's dignity. For these reasons, Fagan's instrumentalisation argument should also be resisted.

In summary, the finding of delictual liability in respect of a police officer who negligently fails to prevent harm is a function of the application of the wrongfulness enquiry, i.e. taking into account legal and public policy considerations and constitutional norms to decide whether it is reasonable to impose liability on the relevant negligent officer. Consequently, it may be said that the reasoning in *Van Duivenboden* does not produce arbitrary outcomes insofar as the employer's identity and the concomitant legal duties may be interpreted as influencing the question whether the failure to prevent harm from crime is wrongful. Similarly, taking these considerations into account as a part of the wrongfulness enquiry does not amount to the instrumentalisation of the state employee.

2.2.1.1.4 Conclusion: the expansion of the state's delictual liability due to the negligent and wrongful failure of state employees to prevent crime

Carmichele CC was widely recognised as introducing a favourable development within the South African law of delict.[162] It also paved the way for the expansion of state delictual liability for its employees' negligent and wrongful failure to prevent crime.

This expansion occurred by developing the law relating to the wrongfulness of an omission, with the courts holding that the existing common-law criterion had to be informed by constitutional rights, duties and underlying norms. It was the constitutional imperatives relating to the promotion of safety and security, the norm of state accountability, and other fundamental rights entrenched in the Bill of Rights that ultimately proved decisive. Essentially, these considerations persuaded courts to

[162] Neethling (2005) *TSAR* 409; Midgley & Leinius (2002) *SALJ* 27.

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impose delictual liability on negligent employees and, because the other requirements for vicarious liability had also been satisfied, it was uncontentious to take the additional step and impose vicarious liability on the state.

Various aspects of the series of cases which has had the effect of expanding state delictual liability have received attention from scholars. As explained above, the nature of the state's liability in delict (direct or vicarious) has been questioned. However, despite academic and limited judicial support, courts have continued to impose vicarious liability on the state where its employees negligently and wrongfully failed to prevent crime.[163] Furthermore, in this debate the broader question whether the continued expansion of state delictual liability provides a satisfactory solution to the issue of crime victim compensation, has not been considered. That question will be examined here and also in paragraph 2.2.1.2.5 below.

The point of view supported in this dissertation is that the constitutional development of this branch of the law is theoretically sound and that the individual outcomes reached in each of the discussed cases is unproblematic insofar as it has provided compensation to the individual plaintiffs involved. However, for the reasons set out below, it is argued that the continued expansion of state delictual liability for harm arising from crime in this context is undesirable.

In all four of the cases the direct cause of the plaintiff's harm was the wrongful and culpable conduct of a criminal: Coetzee was responsible for assaulting Carmichele, Mohamed assaulted, raped and robbed Van Eeden, Brooks shot Van Duivenboden and McArdell shot Hamilton. Notwithstanding the possibility of instituting a delictual claim against the criminal, all of the plaintiffs elected to follow a more indirect route in pursuit of the reparation of their harm and they argued that the state should be held delictually liable on the basis that its employees negligently and wrongfully failed to prevent crime. Considering the likelihood of success of instituting a delictual claim against each of the respective criminals, the decision to sue the state, in all probability, must have been made for financial reasons. Compared to the potential impecuniosity

[163] For example, see *PE v Ikwezi Municipality* 2016 (5) SA 114 (ECG); *Minister of Safety and Security v Booysen* (35/2016) [2016] ZASCA 201; *Minister of Defence v Von Benecke* 2013 (2) SA 361 (SCA); *Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security* 2012 (2) SA 137 (SCA).

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of the various criminals, the state, with its deep pockets, could offer successful litigants full compensation for all of the harm they had suffered.

The expanding state delictual liability presents a particularly thorny financial dilemma: in holding the state vicariously liable for the culpable wrongdoing of an employee and ordering it to pay the crime victim's full damages, it is the taxpayer who ultimately bears the cost. However, if tax-money allocated for the furtherance of safety and security (e.g. employing more police officials) is used to pay the victim's compensation or to settle civil litigation suits, then less funds will obviously be available, in the case of the police, to prevent crime and promote safety and security.[164] For instance, it is thought that the increasing civil litigation against the SAPS may lead to the retrenchment of 3000 police officials in the next three years.[165] Increased litigation, which follows the widening of the state's liability, may therefore result in a decreased ability to prevent crime. This, in turn, serves to further increase the likelihood of a higher crime rate and the accompanying litigation which may be instituted against the state on the basis that it failed to prevent crime.

This state of affairs is reflected in a report which asserts that between 2007/2008 and 2014/2015, "claims made annually against the SAPS increased by 533% if considering the original rand value, or 313% if adjusted to the same rand value".[166] This report, and its implications, will be discussed in further detail in chapter 4.[167] For present purposes, it suffices to note that the practical and financial implications of a persistently expanding state liability, may significantly undermine crime prevention efforts and, if left unaltered, may eventually completely exhaust the resources allocated for safety and security, potentially also rendering future crime victims without compensation in the process.

Finally, it is important to note two recent judgments which further emphasise the continuing expansion of state delictual liability and which illustrate the potentially crippling effects that may accompany it. Consider *Minister of Justice and Constitutional*

[164] See P Atiyah *The Damages Lottery* (1996) 80-81.
[165] L Prince "R14,6 mjd. se siviele eise teen polisie in boekjaar" (20 April 2017) available at <http://www.netwerk24.com/Nuus/Politiek/r146-mjd-se-siviele-eise-teen-polisie-in-boekjaar-20170420> (accessed on 20 April 2017).
[166] 31.
[167] Paragraph 4.2.3.5.

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Development v X ("***X***"),[168] the facts of which closely resembled those in *Carmichele (SCA)*. Here the court held the Minister of Justice and Constitutional Development as well as the Minister of Safety and Security vicariously liable on the basis that the wrongful and negligent failure of their employees to oppose the bail application of one Steyn caused him to be released on his own recognisance, allowing him the opportunity to abduct and rape the plaintiff's minor daughter.

In the cases preceding *X*, the court clearly took the view that the state employees' negligent failure to prevent the crime victims' harm was not *prima facie* wrongful for the purposes of delictual liability,[169] which meant that the plaintiff was required to prove wrongfulness in each case. This was achieved by making and proving factual allegations from which wrongfulness can be determined.[170] The reports of these cases also illustrated that, in the process, courts took into account, and weighed against each other, relevant legal and public policy considerations and constitutional norms to determine whether delictual liability should be imposed on the state employee (which would enable it to impose vicarious liability on the employer).

That approach is commendable because it proves that the court is conscious of the possibility that the continued expansion of state delictual liability may have a chilling effect on policing resources and the effective combating of crime.[171] In *X,* however, although the court mentioned the constitutional rights highlighted in *Van Duivenboden*, it failed to pay any attention to the policy considerations that were underlined by the earlier series of cases, or to mention the constitutional norm of accountability. Instead, it held "that unless public-policy considerations point in the other direction, an action for damages would be the norm."[172]

The meaning of the statement that an action for damages has become the norm under these circumstances is not entirely clear. The statement stops short of suggesting that, in instances where police officers have negligently failed to prevent crime, wrongfulness will be presumed. Nevertheless, it could be interpreted as implying a

[168] 2015 (1) SA 25 (SCA).
[169] See also *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) 156; *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC).
[170] Loubser & Midgley (eds) *The Law of Delict* 143.
[171] See *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 19.
[172] Para 18.

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subtle shift towards that development. If the remark by the SCA in *X* is interpreted in this way, it indeed signals the court's readiness to continue the further expansion of the state's vicarious liability in delict for harm arising from crime.

In *Bridgman NO v Witzenberg Municipality*,[173] a young woman aged 18 who suffered from a mild mental disability, was abducted and raped by three youths on the premises of Pine Forest Holiday Resort in Ceres. The resort was owned, managed and controlled by the Witzenberg Municipality. In his capacity as the *curator ad litem* of the rape victim, the plaintiff instituted a common-law delictual claim against the Municipality, arguing that the rape was caused by the negligent and wrongful omission of the Municipality. The High Court commenced its judgment with the following statement:[174]

> "It is the duty of the state, as well as the courts, to address the conditions that enable and continue to underlie this violence, and to prevent its repetition. This duty arises from the constitutional obligation upon the state to respect, protect, promote and fulfil the rights in the Bill of Rights; from the binding nature of the Bill on the legislature, executive, judiciary and all organs of state; and from the duty upon courts to promote the spirit, purport and objects of the Bill when developing the common law. The Constitutional Court has held that the Constitution and international law oblige the state to prevent gender-based discrimination and to protect the dignity, freedom, and security of women. Such constitutional obligations do not only fall on the South African Police Service. They must be respected and fulfilled by all organs of state. […] The resort was owned, managed and controlled by the Witzenberg Municipality. A municipality is an organ of state within the local sphere of government. As such it is bound to respect, protect, promote and fulfil the aforementioned rights in the Bill of Rights. The Municipality failed to protect Ms L from being raped. The wrongfulness of this omission is tested by reference to the legal convictions of the community, which by necessity are underpinned and informed by the norms and values of our society embodied in the Constitution. Because of its constitutional duties, and because it owned, managed and controlled the resort in the circumstances described further below, the failure on the part of the Municipality to prevent the rape was unlawful."

Significantly, the court was of the view that, similar to the SAPS, the municipality has a constitutional duty to prevent crime and that this duty was sufficient to conclude that the failure to prevent the plaintiff's harm was wrongful for delictual purposes – without considering any other policy considerations. This finding is far-reaching and could potentially expose South African municipalities to expansive delictual liability, with a multiplicity of similar claims being instituted on a similar basis. If this occurs, municipalities may have substantially fewer funds available to provide citizens with basic services relating to housing, electricity, water and sanitation.

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[173] 2017 (3) SA 435 (WCC).
[174] Paras 2-4.

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In addition to the outcome being undesirable from a practical level, the court's reasoning may also be questioned on the basis that it would be illogical to expect all state organs to assume the same responsibilities in relation to crime prevention and safety and security. In truth, the existence of a variety of state organs bears testament to the fact that various organs are assigned different tasks. To expect municipalities to perform the duties of the police is unrealistic and, as suggested, could produce unwarranted consequences.

Although not based expressly on the reasoning in the *Van Duivenboden* series of cases, this judgment illustrates the exceedingly broad contours of state liability which may follow if the current development of this branch of the law continues. Against this background, it is perhaps not unsurprising that, in his initial commentary regarding the judgment in *Van Duivenboden*, Neethling remarked:[175]

> "The ever expanding responsibility of the state to protect the right to physical-psychological integrity in the light of the Constitution and the state's ensuing delictual liability to compensate the victims of violent crimes, could eventually lead to the creation of a state compensation scheme, similar to the scheme which the *European Convention on the Compensation of Victims of Violent Crime* have in mind for European Union member states, for South Africa."

It may therefore be considered whether there are other alternatives for providing compensation to crime victims in this context. Before doing so, the issue of the state's expanding delictual liability must first be investigated in full and attention must therefore be paid to the extension of the state's liability for harm suffered due to crimes intentionally committed by its employees.

2.2.1.2 The expansion of the state's delictual liability for harm suffered due to intentionally-committed crimes of its employees

2.2.1.2.1 Introduction

In this section the focus turns to the judicial expansion of state delictual liability for the harm arising from intentionally-committed crimes of state employees.[176] In contrast to

[175] Neethling (2003) *TSAR* 792 (own translation). Neethling writes: "Die steeds uitdyende verantwoordelikheid van die staat om die reg op die fisies-psigiese integriteit in die lig van die grondwet te beskerm, en die staat se daaruit voortvloeiende deliktuele aanspreeklikheid om die slagoffers van geweldsmisdade te vergoed, kan uiteindelik daartoe lei dat 'n staatsvergoedingskema, soortgelyk aan die skema wat die *European Convention on the Compensation of Victims of Violent Crimes* vir Europese Unie-lidlande in die oog het, ook vir Suid-Afrika in die lewe geroep word."

[176] See *K v Minister of Safety and Security* 2005 (3) SA 179 (SCA); *K v Minister of Safety and Security* 2005 (6) SA 419 (CC); *Minister of Safety and Security v F* 2011 (3) SA 487 (SCA); *F v Minister of Safety and Security* 2012 (1) SA 536 (CC).

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the extension of state liability described and evaluated in paragraph 2.2.1.1 above, the growth of state liability in this context did not occur through the element of wrongfulness. Instead, it was enabled by the development of the third requirement for vicarious liability which holds that the delict must have been committed during the course and within the scope of employment.

This development, as indicated below, is significant, and means that the state may now be held vicariously liable in delict for harm arising from an intentional, criminal abandonment of an employment duty. The CC has thereby departed from the South African courts' initial unwillingness to impose vicarious liability in similar circumstances.[177] This part of the chapter provides the background against which the development occurred and will then evaluate it.

2.2.1.2.2 The background: South African courts' initial unwillingness to impose vicarious liability on employers for the intentionally-committed crimes of employees

Generally, employers may be held vicariously liable for delicts committed by their employees during the course and within the scope of their employment, even in the event that employees perform tasks authorised by employers in an unauthorised manner.[178] However, it is often problematic to determine whether a delict occurred within the course and scope of employment in so-called deviation cases. Typically, these are cases where an employee intentionally engages in conduct that could be described as a deviation from the tasks for which he was appointed.[179]

For a considerable period of time *Feldman (Pty) Ltd v Mall*[180] ("***Feldman***") was the leading case in establishing the third requirement for vicarious liability in deviation cases.[181] In determining whether this requirement has been met, the Appellate Division focused on the nature of the employee's duties and the degree of deviation

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[177] *Ess Kay Electronics (Pty) Ltd v First National Bank of Southern Africa Ltd* 1998 (4) SA 1102 (W); *Absa Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* 2001 (1) SA 372 (SCA); *Minister van Veiligheid en Sekuriteit v Phoebus Apollo Aviation BK* 2002 (5) SA 475 (SCA); *Costa da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy* 2003 (4) SA 34 (SCA); *K v Minister of Safety and Security* 2005 (3) SA 179 (SCA).
[178] *Costa da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy* 2003 (4) SA 34 (SCA).
[179] See Loubser & Midgley (eds) *Law of Delict* 389-392.
[180] 1945 AD 733.
[181] Wagener *Vicarious Liability* 107-108.

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therefrom. The approach adopted in *Feldman* has been described as the so-called abandonment of duty-approach,[182] and is explained as follows:[183]

> "It must be established whether the actions of the employee boils down to 'a complete relinquishment or abandonment of his duties in favour of some activity of his own'. For the purposes of answering this question, it does not matter whether the employee deviated so as to pursue his exclusively subjective purposes. It is important, however, to determine whether it may reasonably be stated that the employee, despite deviating for his own interest, completely distanced him from his obligations."

After *Feldman,* the Appellate Division formulated the so-called standard test for establishing vicarious liability in deviation cases in *Minister of Police v Rabie*[184] ("***Rabie***"):[185]

> "It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course and scope of his employment, and that in deciding whether an act by a servant does so fall, some reference is to be made to the servant's intention. The test in this regard is subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test."

Applying this test, the court held that a police sergeant, employed by the South African Police Service as a mechanic, had wrongfully assaulted, arrested and detained the plaintiff, while also fabricating charges against the latter. The assault and arrest had taken place when the sergeant had been off-duty, dressed in civilian clothing, in his private vehicle and in pursuance of his own private interests.

In determining whether the Minister should be held vicariously liable for the harm arising from the sergeant's intentionally-committed crime, the court held that, although the sergeant's work as a mechanic was limited to a time and place, his work as a policeman was not so restricted.[186] In the absence of specific instructions to the contrary, the sergeant could at any time and place perform his functions as a policeman, and, in certain circumstances, he might have been called upon to do so in the line of duty.[187] On the facts, he had identified himself as a policeman to the plaintiff and intended to act as such in effecting the arrest. As such, it seemed reasonable and fair to infer that the sergeant intended to exercise his authority as a policeman, and

[182] Scott *Middellike Aanspreeklikheid* 159-160; Wagener *Vicarious Liability* 105-106, 117-118.
[183] Scott *Middellike Aanspreeklikheid* 159-160. Own translation and sources omitted. See also Watermeyer CJ in *Feldman (Pty) Ltd v Mall* 1945 AD 733 735-736.
[184] 1986 (1) SA 117 (A).
[185] 134.
[186] 133.
[187] 133.

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was therefore acting in the course and within the scope of his employment.[188] This illustrates that an employer may be liable even in the event that his employee appear solely to act in his own interests and for his own purposes in a situation occasioned by his employment.[189]

In terms of this approach, it is therefore possible, despite the employee's subjective state of mind, to hold an employer vicariously liable for his employee's delict if the court is able to establish a sufficiently close connection between the employee's conduct and the purposes and business of his employer.

The decision in *Rabie* is not the only one in which an employer was held vicariously liable for the harm caused by the intentional, criminal wrongdoing of an employee. There are other instances in which the courts have reached similar conclusions, including *Hirsch Appliance Specialists v Shield Security Natal (Pty) Ltd*,[190] *Minister van Veiligheid en Sekuriteit v Japmoco BK h/a Status Motors*[191] and *Minister van Veiligheid en Sekuriteit v Phoebus Apollo Aviation BK.*[192]

Fagan and Wagener argue that these cases were wrongly decided and that, where an employee abandons his employment duty through intentional and criminal wrongdoing, the overwhelming likelihood is that there cannot be vicarious liability on the part of the employer.[193] Their argument may be summarised as follows. South African courts, both before and after *Rabie*, have never approached vicarious liability in deviation cases by applying the standard test developed in *Rabie.*[194] Specifically, courts, both before and after *Rabie*, never approached the question whether an employee had acted in the course and within the scope of his employment by applying the *Rabie* test.[195] Rather, determining whether an employee acted in the course and within the scope of his employment, or whether his criminal, intentional wrongdoing removed him outside the scope of his employment has always occurred alongside a "different, more specific, criterion [namely] whether the employee, in committing the

[188] 133-134.
[189] Loubser & Midgley (eds) *The Law of Delict* 390.
[190] 1992 (3) SA 643 (D).
[191] 2002 (5) SA 649 (SCA).
[192] 2002 (5) SA 475 (SCA).
[193] See Wagener *Vicarious Liability* 104-107, 111-115; Fagan *SALJ* (2009) 158-159.
[194] See Wagener *Vicarious Liability* 104-107, 111-115; Fagan *SALJ* (2009) 158-159.
[195] See Wagener *Vicarious Liability* 104-107, 111-115; Fagan *SALJ* (2009) 158-159.

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wrongdoing, nevertheless discharged his employment duty".[196] Fagan argues as follows:[197]

> "[The] common law never determined whether an employee's delict had been committed within the course and scope of his employment by asking whether he had intended only to promote his own interests and, if so, whether there nevertheless was a sufficiently close connection between his delict and his employment. Instead, it always did so by asking whether the employee's delict had been committed in the discharge of a duty imposed by his employer and defining his employment rather than the manner wherein it was to be carried out."

Wagener has stopped short of suggesting that, because an intentional wrongdoing always amounts to the abandonment of an employment duty, or, could never amount to the discharge of an employment duty, there can never be vicarious liability in these cases. However, he does argue that, where vicarious liability had been imposed in instances of intentional wrongdoing, "these decisions rest on a flawed understanding of [the] rules [of vicarious liability]".[198] Attention may be paid to three SCA judgments which, in line with Wagener's argument, reflect the South African courts' unwillingness to impose vicarious liability for the intentional wrongdoing by employees.

In *Absa Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd*[199] ("***Absa Bank***"), the employee in question had paid cheques payable to his employer into a bank account in the defendant's bank and which he operated. The employee thereby effectively stole from his employer. In answering the question whether the employee's intentional and criminal wrongdoing took place during the course and within the scope of his employment, the majority of the SCA referred to the decision in *Columbus Joint Venture v ABSA Bank Ltd,*[200] and held that the employee's unauthorised and criminal conduct was an abuse of his position that resulted in the defrauding of his employer.[201] This wrongdoing lacked any connection with the duties he was empowered or authorised to perform. The court reasoned that this was not a case of an improper execution of employment duties, but rather a case that the employee was not performing his duties at all.[202] Although it refrained from laying down a general

[196] Wagener *Vicarious Liability* 107. Authority for this argument is apparently drawn from the decision in *Mkize v Martens* 1914 AD 382 400, the earliest South African case on vicarious liability, where it was held that "[t]he whole question is whether the delict was committed […] in the exercise of the functions entrusted [to the wrongdoer]".
[197] Fagan (2009) *SALJ* 158.
[198] Wagener *Vicarious Liability* 115.
[199] 2001 (1) SA 372 (SCA).
[200] 2000 (2) SA 491 (W) 512.
[201] 2001 (1) SA 372 (SCA) paras 10-11.
[202] Para 9.

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principle that an employer can never be responsible for the intentional wrongdoing of an employee which causes the employer harm, the SCA affirmed that an employee who steals from his employer is the "antithesis of an act carried out in the course and scope of his employment".[203]

Shortly thereafter, in *Ess Kay Electronics (Pty) Ltd v First National Bank of Southern Africa Ltd*[204] ("***Ess Kay***"), the SCA considered whether the defendant should be held vicariously liable for the misappropriation of blank bank drafts by its clients. The court reasoned that an employee's act that promotes his own interests and purposes, and done outside the employee's authority, is not performed within the scope of employment, even if it was performed during the course of employment.[205] The SCA argued that it was the employee's extreme self-interest that meant that his wrongdoing could not be considered to have been completed during the course and within the scope of his employment.[206]

Later, in *Costa da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy*[207] ("***Costa***"), the court again indicated its unwillingness to hold an employer vicariously liable for the intentional and criminal abandonment of his employment duty. Here the plaintiff was assaulted by the defendant's employee after a confrontation between the two had occurred inside the premises of the tavern. The assault, however, took place outside the premises. In determining whether the defendant should be held vicariously liable for the intentionally-committed crime of its employee, the court reaffirmed the extract from Watermeyer CJ's judgment in *Feldman*[208] and stated that the "critical consideration is therefore whether the wrongdoer was engaged in the affairs of business of his employer."[209] In reaching its conclusion, it was held that the assault on the plaintiff outside the tavern occurred after he had abandoned his duties. It was a personal act of aggression done neither in furtherance of his employer's interests, nor

[203] Para 9.
[204] 2001 (1) SA 1214 (SCA).
[205] Para 7.
[206] Paras 12-20.
[207] 2003 (4) SA 34 (SCA).
[208] 1945 AD 731 743-744: "Another form in which the law is sometimes stated is that a master is liable for those wrongful acts of a servant which are done while he is on his master's business but not for those which are done while he is on a frolic of his own. This statement of the principle is misleading. The question is not whether the servant was on a frolic of his own at the time when the wrongful act was done but whether the act causing damage was an act done by the servant in his capacity as servant and not as an independent individual."
[209] 2003 (4) SA 34 (SCA) para 5.

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under his express or implied authority, nor as an incident to, or in consequence of, anything that the employee was employed to do.[210] Whereas the reasons for, and the circumstances leading up to, the assault may have arisen from the fact that the employee was employed by the defendant as a barman, the personal vindictiveness which led to the assault removed the possibility of the employer's vicarious liability.[211]

Notwithstanding the above, the SCA has applied the standard test formulated in *Rabie* in several cases since then.[212] Criticism that there is no such a test is therefore misplaced and fails to address the problems which its application raises in deviation cases. Furthermore, these cases illustrate that it is possible to impose vicarious liability where there has been intentional and criminal wrongdoing.[213] Nevertheless, the general tendency, as emphasised by the cases discussed above, appears to have been that an intentionally-committed crime removes an employee outside the course and scope of his employment. Analysing the reasoning of these cases to determine their correctness falls outside the scope of this dissertation. Instead, the next section will pay attention to the more recent judgments of the CC, which indicates a new willingness to hold the state vicariously liable for crimes committed intentionally by its employees and which have significantly expanded the state's delictual liability. These cases call for further investigation because they require us to consider whether there are alternatives to expanding the state's delictual liability to ensure that crime victims are properly compensated.

2.2.1.2.3 The judicial expansion of the state's vicarious liability for the harm caused by the intentionally-committed crimes of police officers

a. The decision of the SCA in *K v Minister of Safety and Security*

In *K v Minister of Safety and Security,*[214] three uniformed, on-duty police officers raped the plaintiff after offering to give her a lift home. The question for consideration was whether the Minister of Safety and Security, as employer of the three policemen, could be held vicariously liable for the conduct of these employees. Scott JA, writing for the

[210] Paras 5-8.
[211] Paras 5-8.
[212] For example, *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) and *F v Minister of Safety and Security* 2012 (1) SA 536 (CC).
[213] See further paragraph 2.2.1.2.3 below.
[214] *K v Minister of Safety and Security* 2005 (3) SA 179 (SCA).

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majority of the SCA, interpreted this to be a deviation case, but did not apply the *Rabie* standard test for determining vicarious liability. Instead, he adopted the approach set out in *Feldman* and focused on the question whether the police officials' deviating conduct could be regarded as the execution of the duties for which they were appointed.[215]

Holding that the policemen's deviation was of such an extreme degree that it could not be said that they were still exercising the functions for which they were appointed,[216] the SCA refused vicariously liable for the intentionally-committed crimes of the policemen. Scott JA's judgment was primarily based on the view that the policemen's conduct had been entirely self-serving and unauthorised, and that it could not be said that the employees were discharging their employment duties.[217] The decision was in conformity with *Absa Bank, Ess Kay* and *Costa*.

Following a previous decision of the CC in another deviation case, *Phoebus Apollo Aviation CC v Minister of Safety and Security*[218] ("***Phoebus Apollo***"), the SCA also held that the test for vicarious liability is constitutionally consistent and that the application of the requirements for vicarious liability does not raise a constitutional issue.[219]

It was notable that, in contrast to the subsequent judgment of the CC, the court did not place any emphasis on the notion that the trust which the victim may be said to have placed in the police officials could justify a finding of vicarious liability. The court also rejected the argument that each of the policemen failed to comply with a legal duty to protect the plaintiff, the breach of which may be used to justify a finding of vicarious liability.[220] Based on the evidence and the findings in the criminal case against the wrongdoers, Scott JA held that it was clear that the policemen had conspired to act in a positive, intentional and reprehensible manner.[221] The argument that each police

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[215] Para 4.
[216] Para 5.
[217] Para 5.
[218] 2003 (2) SA 34 (CC).
[219] 2005 (3) SA 179 (SCA) para 8.
[220] Para 7.
[221] Para 7: "The conduct of all three policemen was not only wrongful, it was criminal from the time they conspired to rape the appellant until the time the attack ended. Indeed, the inference is overwhelming that the three policemen formed a common intention to rape the appellant [...] Each gave support to the others in committing the crime. If only one had physically raped the appellant, all three could

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officer's conduct simultaneously amounted, on the one hand, to a positive, intentional act of rape and, on the other hand, a failure to act in accordance with legal duties while watching the other police officers raping the victim, was therefore rejected as being artificial and not anchored in practical reality.[222]

b. The judgment of O'Regan J in *K v Minister of Safety and Security*

On appeal in *K v Minister of Safety and Security*[223] ("***K (CC)***"), O'Regan J, who wrote the unanimous judgment of the CC, confirmed that this was a deviation case and applied the standard test, as developed in *Rabie*. At the time that the judgment was handed down, the CC's jurisdiction was confined to constitutional matters and issues connected therewith. Therefore, to establish jurisdiction, she was forced to distinguish the judgment of Kriegler J in *Phoebus Apollo,* where it was held that the application of the standard test for vicarious liability "is not a question of law but one of fact, pure and simple [and, as such] is of course not ordinarily a constitutional issue."[224] Kriegler J held that it is not for the CC "to agree or disagree with the manner in which the SCA applied a constitutionally acceptable common law test to the facts of the present case."[225]

To circumvent *Phoebus Apollo,* O'Regan J reasoned that the application of the requirements for vicarious liability, when applied to a new set of facts, amounted to a development of the common law. Therefore, in accordance with the CC's interpretation of section 39(2) of the Constitution in *Carmichele CC*, the development of the common law should be consistent with constitutional rights and norms contained in the Constitution.[226] The court took the view that applying the standard test without having regard to the normative influence of the Constitution would sterilise the common law.[227] Accordingly, it held that the application of the test had to be developed within a constitutional context and in pursuit of the socio-economic project which gives effect

nonetheless have been convicted of rape. They were at all times acting in pursuance of a common purpose."

[222] Para 7.

[223] 2005 (6) SA 419 (CC).

[224] *Phoebus Apollo Aviation CC v Minister of Safety and Security* 2003 (2) SA 34 (CC) para 9.

[225] Para 9.

[226] *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para 22.

[227] Para 22.

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to the spirit, purport and objectives of the Constitution.[228] In the process it emphasised that *Rabie's* standard test did not raise purely factual questions, but mixed questions of fact and law:[229] "The questions of law it raises relate to what is 'sufficiently close' to give rise to vicarious liability. It is in answering this question that a court should consider the need to give effect to the spirit, purport and objects of the Bill of Rights."

The CC held that, although the policemen's conduct was subjectively in their own interest, there was, objectively, a sufficiently close connection between their wrongdoing and their employment so as to hold the Minister vicariously liable in terms of the *Rabie* test.[230] The court identified the following factors in reaching its conclusion.

First, the CC emphasised that the constitutional rights to security of the person, dignity, privacy and equality are of paramount importance.[231] It also reaffirmed the policemen's constitutional duty to promote safety and to protect members of the public and highlighted women's right to be free from sexual violence.[232]

Secondly, the fact that the employees were on-duty, uniformed policemen driving a marked police vehicle was highlighted.[233] O'Regan J held that it had therefore been objectively reasonable for the applicant to accept their offer of assistance and to place her trust in them.[234]

Thirdly, although the three policemen had each acted positively in raping the plaintiff, the court held that each of them individually also failed to perform their constitutional duties to protect the plaintiff from harm and that such a failure, together with the aforementioned factors, provided a sufficient basis for establishing the necessary link between their intentional wrongdoing and their employment as policemen.[235]

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[228] Paras 32, 49-53.
[229] Para 32.
[230] Para 51.
[231] Para 51.
[232] Para 52.
[233] Para 52.
[234] Para 52.
[235] Para 53.

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Lastly, the court referred to the potential role that risk may play as a factor in the application of the standard test,[236] but it was not used as a factor in reaching the court's conclusion.

c. The majority judgment of Nugent JA in *Minister of Safety and Security v F*

In *Minister of Safety and Security v F*[237] ("***F (SCA)***"), the plaintiff instituted a delictual claim for damages against the Minister of Safety and Security after one of his employees, a police detective in plain clothes and on standby duty, raped the plaintiff in the process of giving her a lift home in an unmarked police vehicle. Nugent JA, who wrote the majority judgment of the SCA, sought to distinguish this case from *K (CC)* in the following way.

First, he interpreted O'Regan J's *omissio-commissio* argument as identifying two delicts: the positive, intentional delict of rape and, on the other hand, the wrongful and negligent failure on the policemen's part to fulfil their legal duties in preventing the rape of the victim. According to Nugent JA, the court's reasoning in *K (CC)* was based on the latter delict.[238]

Against this background, he held that the SCA would only be bound to the reasoning in *K (CC)* if it could be said that the police detective was under a similar legal duty as the policemen in *K (CC)* and that he similarly failed to comply with such a duty.[239] In this regard, Nugent JA stated that a police detective cannot be said to have duties capable of being breached when he is on standby duty.[240] Therefore, he decided that there was no possibility of maintaining that the police detective had breached a constitutional duty in raping the plaintiff, which wrongdoing could form the basis for drawing the necessary link with his employment.[241]

In reaching this conclusion, the SCA therefore noted the decision in *K (CC)*, distinguished it on significant factual differences and accordingly did not apply the

[236] Paras 34-44.
[237] *Minister of Safety and Security v F* 2011 (3) SA 487 (SCA).
[238] Paras 30-37.
[239] Paras 37-46.
[240] Paras 37-46.
[241] 2011 (3) SA 487 (SCA) paras 37-48.

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reasoning in that case. In short, the court held that there was no possibility of vicarious liability.

d. The majority judgment of Mogoeng J in *F (CC)*

The SCA's judgment, based on the facts that the police detective was not uniformed, drove an unmarked police vehicle and was not on duty at the time which the delict occurred, was not followed by the CC in *F (CC).*[242] The majority of the CC adopted a line of reasoning which echoed that of O'Regan J in *K (CC)*. Mogoeng J confirmed that the standard test developed in *Rabie* should be used in the event of a deviation case. In its application of this test the court highlighted the following "normative components"[243] relevant for establishing if a sufficiently close connection existed between the detective's employment and his wrongdoing.

First, the court emphasised the constitutional obligations of the state to promote members of society's rights to freedom and security of the person and dignity as well as the police's duty to prevent, combat and investigate crime and promote safety and security.[244]

Secondly, the court underlined the role played by trust: "the trust that the public is entitled to repose in the police also has a critical role to play in the determination of the Minister's vicarious liability in this matter."[245] Furthermore, Mogoeng J took the view that, by focusing on trust, the distinction between on-duty and standby duty became "less significant".[246] Because he found that there was convincing evidence on the basis of which to conclude that the victim indeed placed her trust in the detective *as a police official,*[247] there was seemingly no further need to analyse the nature of the detective's duty.[248]

Thirdly, the court rejected the SCA's interpretation of *K (CC)*, namely that the delict was based only on the wrongful failure to comply with a legal duty.[249] Although the

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[242] *F v Minister of Safety and Security* 2012 (1) SA 536 (CC).
[243] Para 52.
[244] Paras 53-61.
[245] Para 3; 62-68.
[246] Para 67.
[247] Own emphasis.
[248] Paras 62-68.
[249] Paras 69-73.

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court did not explain exactly how the intentional delict of rape assisted in establishing a sufficiently close connection between wrongdoing and employment, Mogoeng J nonetheless emphasised that it is an important factor.[250]

In conclusion, the majority applied the reasoning in *K (CC)* and held the state vicariously liable. In the following section, the widened state delictual liability in the case of intentionally-committed crimes will be evaluated.

2.2.1.2.4 An evaluation of the widened vicarious liability of the state for the harm caused by the intentionally-committed crimes of police officers

In this section it will specifically be considered whether the abovementioned development within the law of delict may be criticised for producing arbitrary outcomes, and to what extent O'Regan J's *commissio omissio*-argument and the applicability of human rights in drawing a sufficiently close connection between employment and wrongdoing is tenable. The role of trust will also be investigated. Lastly, it will be examined whether this development may produce uncertainty for future litigants.

a. Arbitrary outcomes produced by the judgments in *K (CC)* and *F (CC)*

i. The strength of the connection between wrongdoing and employment is made a function of the employer's identity

In the course of its judgment in *K (CC)*, the court stated that the police officers' duties to prevent crime also rested on their employer and, when the employees breached these duties, the employer seemingly also breached its similar but independent duty.[251] Such a double breach apparently assisted in justifying the conclusion that a sufficient connection has been established between the employees' crimes and the employer's business for purposes of establishing vicarious liability.[252]

To assess this reasoning, consider the following example.[253] Suppose a cleaner employed by the Minister of Safety and Security assaults a member of public. Fagan

[250] Paras 69-73.
[251] Para 51.
[252] Para 51. See also Fagan (2009) *SALJ* 197-198; Wagener (2008) *SALJ* 674.
[253] The example is based on the one provided in Fagan (2009) *SALJ* 197-198.

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argues that, based on the CC's "double-breach-of-duty-ground",[254] one may conclude that the Minister has also breached his duty to prevent crime. Furthermore, such a double breach may now form the basis for connecting the cleaner's assault with his employment, rendering the Minister vicariously liable. However, suppose that a cleaner employed by the Minister of Agriculture assaults a member of public in exactly the same way, place and time that the cleaner employed by the Minister of Safety and Security has done. In this example, however, no "double breach" is present. There is no duty owed by the Minister of Agriculture to protect members of the public and to prevent crime and, therefore there can be no breach of the employer's duty capable of laying the basis for connecting the cleaner's assault with his employment. This eliminates the possibility of drawing a sufficiently close connection between the employee's wrongdoing and his employment on the basis of the double-breach-of-duty-ground – despite the fact that the nature of the respective employees' wrongdoing was identical.

Fagan's interpretation and rejection of the double-breach-of-duty-argument is similar to his criticism of the *Van Duivenboden* reasoning insofar as it seems to suggest that it could produce arbitrary outcomes: if the double-breach-of-duty-argument is to be used as a valid reason in ascertaining whether the employee's intentionally-committed crime occurred during the course and within the scope of his employment, then the assault by the cleaner employed by the Minister of Safety and Security "would be more closely connected […] to his employment than would an identical assault by a cleaner employed to do exactly the same job, but [employed] by the Minister of Agriculture rather than Safety and Security."[255]

To the extent that Fagan's critique dismisses the importance of the employer's identity and duties as indicator of the duties of the employee, it is not persuasive. It is argued, to the contrary, that whether or not an employer will be held vicariously liable for an employee's intentional, criminal wrongdoing may depend to some extent on the identity of the employer.

It is submitted that the employer's identity is a factor that can help the court to establish whether the employee's wrongdoing falls within the scope of his employment. The

[254] 199.
[255] 199.

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nature, function and duties of an employer are relevant as the matrix within which the employee's scope of duties must be evaluated. In other words, to understand whether or not the employee's conduct fell within the scope of his employment, regard must be had to what his employment entails. To do so, it would be necessary to pay attention to the nature of the employer.

ii. Arbitrary protection of certain legal interests

In *K (CC)* the court emphasised that it was of "profound constitutional importance"[256] to protect the plaintiff's constitutional rights, which statement was approved and confirmed in *F (CC).*[257] Together with the notion of trust placed in the police, the desire to protect these constitutional rights laid the basis to conclude that there was a sufficiently close connection between the policemen's respective delicts and their employer's business.[258] The court referred to the rights relating to security of the person, dignity and the right to be free from sexual violence – all of which is principally aimed at protecting bodily integrity.

Wagener has argued that the Bill of Rights is a statement of a priority of a certain set of interests and that, arguably, within this priority, the right to personal safety and security ranks higher than the right to property.[259] He argues that, according to the CC's reasoning, therefore, it might be that the nature of the relevant human right could influence the question whether there is a sufficiently close connection between employment and wrongdoing. However, if the nature of a right, and therefore also the legal interest protected by the recognition of such a right, is determinative of the existence of a sufficiently close connection, it would render the application of the vicarious liability doctrine arbitrary:[260]

> "The nature of the interest infringed cannot make a delict closer to or further away from the harmdoer's employment. What matters to the question is rather the nature of what the harmdoer was asked to do, in terms of her employment contract, and the nature of her tortious act. On the reasoning of O'Regan J, however, we come to the counter-intuitive conclusion that the infringements of different types of interests will be either closer within or further outside the course and scope of employment; also, that the degree of the infringement of a particular interest will affect the answer to this question."

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[256] *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para 18.
[257] Paras 53-61.
[258] Para 58.
[259] Wagener (2008) *SALJ* 676; Wagener *Vicarious Liability* 138-140.
[260] Wagener (2008) *SALJ* 676; Wagener *Vicarious Liability* 138-140.

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The arbitrary impact of making the standard test for vicarious liability dependent upon the nature of the legal interest at stake may be illustrated by the following example, based on one provided by Wagener.[261] Suppose that an employee, tasked with delivering a package by vehicle, negligently drives the vehicle into an innocent passer-by so that the latter is seriously injured. Suppose further that the same employee, a month later, while delivering a package by vehicle, drives negligently again, but this time manages to miss any innocent passers-by, but collides with a third party's garden wall. Upon the reasoning of the court in *K (CC),* it would seem that the employee's conduct in the latter example will be regarded as further outside the course and scope of his employment merely on the basis of the nature of the legal interest that was harmed.

The law of delict aims to protect proprietary interests and, significantly, courts have emphasised that a positive infringement of a right to property, like a positive infringement of the right to bodily integrity, is *prima facie* wrongful.[262] One could therefore arguably expect the application of the vicarious liability doctrine to render similar and predictable results, regardless of whether a policeman infringes a victim's right to her bodily integrity or if he merely steals her wallet or jewellery. However, on the distinction which the CC draws, theft, although also a crime committed intentionally, would be considered further outside the scope of employment than raping someone. This development within the law of delict is undesirable.

b. O'Regan J's *omissio commissio*-argument

One of the most important reasons for the court's finding in *K (CC)* is O'Regan J's interpretation of each of the individual policemen's actions as simultaneously constituting both a positive, intentional delict in the form of rape as well as a wrongful and negligent failure to comply with their legal duties to protect the victim from crime.[263] The CC used the policemen's apparent failure to comply with their legal duties to

[261] The example is based on the one provided in Wagener (2008) *SALJ* 677.
[262] *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) para 12; *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC) para 19.
[263] *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) paras 49, 53.

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prevent crime to find a sufficiently close link between their employment and wrongdoing for the purpose of holding their employer vicariously liable.

This reasoning suggests that, if there is a breach of a legal duty, it may point towards a sufficiently close connection between the fact of employment and an employee's delict.[264] However, as the court intimated in *K (SCA)* and in line with Fagan's argument, a possible implication of this reasoning may be that the greater the breach by the employee of his duty, the closer the relationship between employment and the delict.[265] For logical reasons, this is an undesirable development of the doctrine of vicarious liability. In a comparable decision in *Lister v Hesley Hall Limited,*[266] the then House of Lords held that the application of this *omissio commissio*-argument to infer a sufficiently close connection between the wrongdoing and the fact of employment amounts to "indulging in sophistry," adding that this type of approach to vicarious liability is "both artificial and unrealistic".[267]

This argument may also lead to untenable outcomes from an employer's perspective. It could mean that the probability of holding a conscientious employer vicariously liable would be greater than the probability of vicarious liability being imposed on an indifferent employer.[268]

To illustrate: suppose that A is the type of employer who is focused on ensuring that his employees perform their duties in the proper manner.[269] He decides to impose several legal duties to ensure that his employees effectively perform their functions. In contrast, suppose that B is the type of employer who is unconcerned about the manner in which his employee's perform their functions. Accordingly, he decides not to impose a great number of legal duties on his employees, and provides them a large degree of discretion to act as they see fit.

All things being equal, because the breach of a legal duty now provides a reason to conclude that a sufficiently close connection exists between the employee's delict and his employment, it is more likely that employer A will be held vicariously liable than

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[264] Fagan (2009) *SALJ* 196-198. See also MM Loubser & T Gidron (2011) 57 "State Liability: Israel and South Africa" *Loyola Law Review* 727 777.
[265] Fagan (2009) *SALJ* 196-198. See also Loubser & Gidron (2011) *Loyola Law Review* 777.
[266] [2002] 1 AC 215 para 84.
[267] Para 84.
[268] Fagan (2009) *SALJ* 196-198.
[269] This example is based on the one provided in Fagan (2009) *SALJ* 196-198.

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employer B. This amounts to an undesirable development of the vicarious liability doctrine as it could potentially discourage the discharge of employment duties in a diligent and thorough manner.

Although the majority of the court did not expressly apply this argument in *F (CC)*, it did not reject it either. Mogoeng J did, however, reject the SCA's interpretation of the *ratio* in *K (CC)* and held that the policemen indeed committed both a positive, intentional delict (in the form of rape) as well as failing to prevent the crime. Without proffering an explanation, he held that such a fact contributes to the conclusion that a sufficiently close relationship exists between the employee's wrongdoing and the fact of his employment.

This line of reasoning may be questioned. What needs to be determined is whether an intentional deviation from employment duties falls within the course and scope of employment. The very aspect that typically presents problems in the context of vicarious liability, namely the fact that there has been a positive, intentional deviation from employment duties, cannot also serve as a factor in determining whether the conduct occurred in the course and scope of employment. Mogoeng J does not explain how the fact that the employee committed a positive, intentional delict may assist the court to infer a sufficiently close connection in these problematic deviation cases. Indeed, it is submitted that it should not be a factor in this regard. As argued further below, this kind of reasoning is theoretically unsound.

c. The applicability of human rights contained in the Bill of Rights

In both *K (CC)* and *F (CC)* the court emphasised the significant role that certain human rights may play in determining whether the state should be held vicariously liable for the intentional and criminal wrongdoing of its employees. The role which the CC envisages for fundamental human rights requires further examination.

First, it may be questioned whether the application of the standard test for vicarious liability in *K (CC)* and *F (CC)* constituted a constitutional issue. Prior to the decision in *K (CC),* the same court found in *Phoebus Apollo* that the standard test for vicarious liability is constitutionally justifiable and, furthermore, that the application of its requirements did not amount to a constitutional issue.

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In an attempt to circumvent that decision, O'Regan J argued that, whereas rules pertaining to the doctrine of vicarious liability were not problematic in *Phoebus Apollo,* it was placed in issue in *K (CC).*[270] O'Regan J held that, when applying the objective component of the *Rabie* test to new deviation cases, the court had to take sufficient notice of constitutional imperatives, because the application of the latter with regard to new factual circumstances amounted to a development of the common law, bringing section 39(2) of the Bill of Rights into play.

O'Regan J's argument may be questioned. It practically means that the application of any common-law rule or principle to a new set of facts will present constitutional issues and call for the development of the law. This may place a burden on the courts to hear an inordinate number of cases dealing with the constitutional development of the common law, which would be prejudicial to the administration of justice. In addition, it may seriously undermine the legal certainty pertaining to the existence and application of established common-law rules.

Secondly, it has been argued that the CC has misinterpreted section 39(2) of the Constitution. According to Fagan, this provision, if properly interpreted, does not impose a duty on courts to develop the common law whenever that would promote human rights.[271] Instead, section 39(2) only obliges a court which has decided to develop the common law for other reasons (e.g. commercial convenience) to ensure that this independently justified development also promotes human rights, and the values underlying them.[272] Accordingly, those rights and values are said to play merely a "secondary role", i.e. it only helps courts to choose between competing, independently justified changes to the common law while it cannot play the primary role of driving the common law's development.[273]

Rightly, this argument has not been accepted by the courts. Courts have clearly indicated that section 39(2) may be interpreted as providing a justification for developing the common law to promote fundamental human rights contained in the

[270] 2005 (6) SA 419 (CC) para 12.
[271] Fagan (2008) *SALJ* 671.
[272] 671.
[273] Fagan (2010) *SALJ* 611-623.

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Bill of Rights.[274] This dissertation will therefore not focus on determining the role that section 39(2) plays, or ought to play, in the South African private law, generally.

It is accepted that, generally, fundamental human rights may be taken into account when developing the common law. The focus here is rather on what role the constitutional rights and duties play in determining whether the state should be held vicariously liable for the intentionally-committed crimes of its employees. In considering this question, the following two points are relevant.

As mentioned above, the CC has insisted that the protection of the public's human rights to safety and security of the person, dignity, privacy and equality is of "profound constitutional importance" in this context.[275] Such a statement may generally be supported insofar as it seeks to give greater effect to rights pertaining to bodily integrity. However, the court's assertion that those rights are important because they assist not only in determining the nature of the course and scope of employment enquiry but also because they constitute substantive factors that needed to be considered in terms of that enquiry, is questionable.[276]

An appeal to any of the above constitutional rights cannot assist a court in determining whether certain conduct occurred within the course and scope of employment. In this regard, *K (CC)* and *F (CC)* must be distinguished from *Carmichele, Van Duivenboden, Van Eeden* and *Hamilton*, where the court had to determine whether the state employees' negligent omission was wrongful for the purposes of the law of delict. In *K (CC)* and *F (CC)*, however, the policemen's positive and intentional infringement of the respective plaintiffs' right to bodily integrity was *prima facie* wrongful.[277] It was therefore unnecessary to have regard to any of the above human rights to prove wrongfulness in the same way that it had been necessary in *Van Duivenboden, Van Eeden, Hamilton* and *Carmichele*.

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[274] See also AJ van der Walt *Property and the Constitution* (2012) 92-97; D Davis "How many positivist legal philosophers can be made to dance on the head of a pin? A reply to Professor Fagan" (2012) 129 *SALJ* 59-72.
[275] *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para 18.
[276] Wagener *Vicarious liability* 134-135.
[277] *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) para 12; *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC) para 19.

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For this reason, Loubser has made the point that the "constitutional arguments advanced by the court in K, such as they are, add nothing meaningful to the principles of vicarious liability. The references to constitutional rights, duties and values are vague and general and appear to be a constitutional garnish added to a conclusion reached on other grounds."[278]

d. Trust in the police as basis for the decision in *F (CC)*

In both *K (CC)* and *F (CC)* the court held that the respective rape victims trusted the relevant wrongdoers *as policemen*. In *K (CC)* this trust was regarded as objectively reasonable on the basis that the policemen were on duty, uniformed, drove a marked police vehicle and offered the plaintiff a lift home. These factors assisted the CC in justifying its conclusion that a sufficiently close connection could be established between the delicts of the policemen and the fact of their employment. The finding of trust was inferred from the surrounding evidence. Importantly, the court did not identify a relationship of trust *ex post facto* merely on the basis that it transpired that the wrongdoers were employees of the Minister of Safety and Security. The relationship of trust was not identified and applied retroactively so as to justify the compensation of an innocent victim of crime.

In *F (CC)* the court attached even greater value to the role that trust may play in the application of the standard test for vicarious liability. However, considering that the police detective was merely on standby duty, in civilian clothes and not driving a marked police vehicle, the role assigned to trust in this case may be questioned. From the evidence it appears that the victim only became aware of the fact that the wrongdoer may be a member of the police after she had accepted an offer for a lift home and while driving to the purported destination. This occurred after she had noticed what appeared to be a police radio and police dockets in the vehicle. During the course of the ride home, the victim grew suspicious and decided to climb out of the vehicle. After a while, when the detective returned to the area where the victim had climbed out, she once again decided to accept a lift and got into the detective's car for a second time. Clearly, at this stage there could be no question of any trust. In fact,

[278] MM Loubser "Strict Liability" in E Reid & D Visser (eds) *Private Law and Human Rights* (2013) 205-232 232-233.

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the victim had chosen to get out of the detective's vehicle exactly because she distrusted him. It is suggested that there was no convincing evidence from which the court could have inferred that the victim trusted the wrongdoer *as a policeman*.

It therefore appears that, in *F (CC),* the majority inferred trust in the absence of convincing evidence and arguably on the basis of knowledge that crystallized only after the event, namely that the detective was employed by the Minister of Safety and Security. This factor was then retrospectively applied in order to justify the compensation of an innocent victim. The conclusion that a person in plain clothes, in an unmarked, ordinary vehicle and on standby duty could inspire trust that he was a member of the police and thus clothed with certain legal duties is far-reaching. If the harm occasioned by a criminal who, in plain clothes and an unmarked vehicle, is pursuing his self-centred interests in a reprehensible manner, may be shifted towards the criminal's employer on the basis of the fact that it later became apparent that the employer was the state, it may potentially expose the state to near absolute delictual liability for any intentional and criminal wrongdoing by its employees.

In summary, there was no convincing evidence to suggest that the criminal in *F (CC)* was a policeman at the time of committing the crime. Nevertheless, the state was held delictually liable for the harm suffered by a crime victim and caused by a criminal in plain clothes, driving an unmarked vehicle and who was not on duty. It may be considered why the state should then not compensate all crime victims who have suffered harm at the hands of criminals in plain clothes, driving unmarked vehicles and acting in their self-interest.

e. The relevance of "standby duty" in determining a sufficiently close connection

The fact that the three policemen in *K (CC)* were on duty when they raped the victim contributed to the CC's conclusion that the victim's decision to trust them was objectively reasonable. One of the major factual differences between *K (CC)* and *F (CC)* is the fact that, in the latter case, the police detective was merely on standby duty. The trial court found that a police officer on standby duty is effectively on duty and that the detective accordingly owed the victim a legal duty to prevent harm and to

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promote safety and security. This enabled the trial court, in the light of O'Regan J's *omissio commissio*-argument in *K (CC)*, to conclude that the detective had negligently and wrongfully failed to comply with his duties, which failure was a factor in establishing a sufficiently close connection between the fact of his employment and his wrongdoing.

In *F (SCA),* the court rejected this conclusion for a variety of reasons.[279] The court highlighted the absence of any evidence of characteristics of employment while a detective was on standby duty.[280] The court specifically mentioned the fact that there was no evidence that the Minister of Safety and Security had exercised any control over the detective while he was on standby duty.[281] It also emphasised certain policy considerations which weighed against the trial court's argument. For example, the court's conclusion implied that a police officer can never be off duty since his duties were apparently of a continuing nature.[282] Most importantly, the SCA pointed out that the court's conclusion would effectively make the state the guarantor of good and virtuous behaviour of police officers at all times, simply because of their employment.[283]

The nature of the policeman's standby duty is therefore relevant in determining a sufficiently close connection between wrongdoing and employment. If it is taken to mean that the detective was off duty, it undermines the possibility that a relationship of trust could have been established between the victim and the wrongdoer *as a policeman*. However, if it may be equated to being on duty, the opposite follows. Similarly, if it means that the detective was off duty, it further undermines the possibility to conclude that the employer created the risk for the victim's harm *via* his employment. However, if it is interpreted as on duty, it facilitates the functioning of the risk theory in this regard. In his majority judgment in *F (CC)*, Mogoeng J held that, based on his finding that the victim did, in fact, trust the wrongdoer *as a policeman*, it was not necessary to come to any conclusion regarding the nature of the detective's standby duty.

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[279] *Minister of Safety and Security v F* 2011 (3) SA 487 (SCA) paras 40-48.
[280] Paras 40-44.
[281] Paras 41-48.
[282] Para 44.
[283] Para 45.

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Nevertheless, towards the end of his judgment, Mogoeng J remarked that the detective's "duty to protect the public while on standby was incipient [...] He could be summoned at any time to exercise his powers as a police official to protect members of the public."[284] While it is trite that a police officer can place himself on duty while he was off duty or on standby duty, thereby assuming certain legal duties, it does not follow logically that such a person, if he fails to do so, assumes any such legal duties. Any conclusion to the contrary would undermine the need for a distinction between on duty, off duty and standby duty and would effectively mean that those in service of the Minister of Safety and Security are under a constant and inescapable set of legal duties.

2.2.1.2.5 Conclusion: the expanded delictual liability of the state for the harm caused by the intentionally-committed crime of its employees

Whereas the state's delictual liability for harm arising from its employee's negligent failure to prevent crime was driven by a development of the law relating to wrongfulness, the widening of state liability in this context occurred through the court's reinterpretation of the requirements for vicarious liability, in particular the requirement that the employee's delict must occur in the course and within the scope of employment. Unlike the development described in paragraph 2.2.1.1 above, which may be described as theoretically sound but practically and financially problematic, the development of the law as described in paragraph 2.2.1.2 is problematic from both a theoretical and practical perspective. These issues are highlighted below.

Vicarious liability of an employer is aptly described as an exception to the fault-based point of departure of the law of delict.[285] One of the significant implications of imposing strict liability upon the state as employer is that the latter may be held liable regardless of the nature of its conduct. In other words, irrespective of whether the Minister of Safety and Security may be said to have conducted himself reasonably by, for example, incurring costs in providing appropriate training to each of his employees, properly instructing them to prevent crime and warning them to avoid causing harm to

[284] *F v Minister of Safety and Security* 2012 (1) SA 536 (CC) 556.
[285] Neethling & Potgieter *The Law of Delict* 389-391; Loubser & Midgley (eds) *The Law of Delict* 21-24.

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innocent citizens, he may still be held vicariously liable for the intentionally-committed crimes of his employees.

As an exception to the ordinary fault-based regime for delictual liability, the imposition of vicarious liability appears counter-intuitive and seems to stand in contrast with the notion that personal responsibility underpins the common law of delict. Such an exception to the rule, however, may be justified on the basis of a variety of policy considerations.[286]

In the first instance, it may be justified on the basis that, by employing certain individuals, employers expose other members of society to the risk of harm that may realise in the execution of the employee's duties. In other words, vicarious liability may be justified on the basis that, "where an employer creates or materially enhances the risk of a particular type of wrongdoing being committed, he should be held liable where one of his employees commits such a wrong."[287] To this may be added the normative consideration that the employer receives the benefit of the employee's work, including the opportunity to generate a financial profit.[288]

It has also been justified on the basis that it is fair, reasonable and just to impose vicarious liability on an employer since such an imposition would motivate him to take certain steps to prevent future harm. This means that deterrence may justify the imposition of vicarious liability.[289] In addition, courts and commentators have remarked that vicarious liability is justifiable because it is the employer who is in the best possible position to spread the loss by compensating innocent victims of harm. This may be done either by means of insurance or through internal measures such as, for example, price reductions or wage adjustments.[290]

Lastly, there are those who justify vicarious liability based on the desire to compensate innocent victims of harm.[291] This argument basically centres on the notion that it is fair, reasonable and just to ensure the compensation of an innocent victim of harm.[292] After

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[286] Scott *Middellike Aanspreeklikheid* 12.
[287] Wagener *Vicarious liability* 220 and see further at 14-63.
[288] Giliker *Vicarious Liability in Tort* 237-238.
[289] Neyers (2005) *Alberta Law Review* 7-8.
[290] Scott *Middellike Aanspreeklikheid* 28-30.
[291] Giliker *Vicarious Liability in Tort* 234.
[292] 234.

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all, it is argued, the victim of harm stands removed from the employer-employment relationship, and does not benefit from it, but may nonetheless be the victim of a delict committed by a person who may not be able to compensate him.[293]

Because vicarious liability is an exception to the ordinary fault-based point of departure for the law of delict and defendants may be held liable despite conducting themselves reasonably and lawfully, there is a desire to keep its scope within clearly defined limits. It is equally important that the doctrine of vicarious liability continues to protect and balance the respective interests of employer, employee and innocent victim. The need to ensure the clear demarcation of its scope and to maintain the necessary balance between the various interests demand the principled application of requirements for the imposition of vicarious liability. One of these requirements is that the delict must have been committed by an employee within the course and scope of employment.

In *K (CC)*, the court mentions two policy-based considerations that justify the imposition of vicarious liability: the compensation of innocent victims of harm and the prevention of similar future incidents, i.e. deterrence.[294] O'Regan J also warned that the imposition of absolute liability on employers must be avoided, thereby indicating the desire to maintain the balance between the various policy considerations as well as the competing interests of the employer, the employee and the victim of harm.[295]

Despite doing so, in both *K (CC)* and *F (CC)* the court focused predominantly on the compensation of the victim of harm. Such a shift in emphasis, especially considering the particular facts of *F (CC),* upsets the balance that was previously struck between the opposing interests of employer, employee and innocent victim within the context of the vicarious liability doctrine. This is an undesirable development of the doctrine.

In her judgment in *K (CC),* O'Regan J expressed the reservation that the expansion of the vicarious liability doctrine should not, without more, lead to holding the state vicariously liable merely on the basis that a state employee inflicted harm on an innocent victim in a reprehensible manner.[296] Such a reservation was not followed in Mogoeng J's judgment in *F (CC).* On the contrary, his judgment displays a willingness

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[293] 234.
[294] *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para 21.
[295] Para 21.
[296] Para 23.

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to expand the application of the doctrine and the state's delictual liability for harm arising from crime on the basis that an innocent plaintiff has fallen victim to a serious crime and requires compensation.

Against this background, it would appear that the true justification, or at least an important reason, for imposing vicarious liability on the state in *K (CC)* and *F (CC)* was to provide an innocent crime victim with compensation payable by a solvent employer. Indeed, one may argue that the reasoning of the CC went along these lines: the "plaintiffs have been wronged; they deserve compensation; the state can afford to pay; the state in any event has constitutional duties to protect and assist the vulnerable, but its functionaries acted unreasonably; therefore, it should pay."[297] If this is in fact the underlying basis for the judgments in *K (CC)* and *F (CC)*, it has arguably established a *de facto* compensation fund for harm arising from certain crimes on the basis that the state was somehow involved in the harm suffered by the victim of the crime.[298]

Such a judicial development of the vicarious liability doctrine and the expansion of the state's delictual liability to provide compensation for harm arising from crime should be questioned on a variety of grounds. First, as indicated above, it over-emphasises the interests of the innocent victim at the cost of striking a balance between the competing interests of the employer, employee and innocent victim.

Furthermore, despite the fact that it achieves the compensation of crime victims, it fails to provide an adequate reason for electing the employer as the most likely candidate for compensation:[299] it is not obvious why the victim must look towards the employer, and not alternative sources of compensation, such as a fund set up for this purpose or insurance.

Also, it fails to assist in drawing the established distinction between an employee and an independent contractor:[300] if compensation is indeed the goal that must be achieved, why is compensation not also demanded from those who appoint harm-causing independent contractors?

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[297] Price *The Influence of Human Rights* 137.
[298] 136.
[299] P Atiyah *Vicarious Liability* (1967) 22.
[300] Neyers (2005) *Alberta Law Review* 7.

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Lastly, the judicial development fails to justify the limiting function of the course and scope requirement for the imposition of vicarious liability. On the contrary, as the evaluation of particularly *F (CC)* indicated, it does not contribute towards the demarcation of the scope of application of vicarious liability.

In addition to the above, the development of the doctrine is problematic insofar as the reasoning developed by the CC in these cases may expose future litigants to uncertainty, thereby undermining the constitutional principle of the rule of law.[301] In *K (CC)* and *F (CC)*, the court developed the vicarious liability doctrine, and thereby expanded the state's delictual liability, by relying on certain factors to satisfy the course and scope of employment requirement. In both judgments, the CC focused on the constitutional duties of the state as employer, the relationship of trust between members of the police and the public and the dual nature of the delict as omission and commission, while in *F (CC)* the nature of the primary wrongdoer's employment at the time that the crime was committed also received attention.

Although the court in *K (CC)* did not hold that any of those factors were requirements for state vicariously liability, Mogoeng J seems to treat them as such in *F (CC)*:[302]

> "Accordingly, several interrelated factors have an important role to play in addressing the question whether the Minister is vicariously liable for the delictual conduct of Mr Van Wyk. The normative components that point to liability must here, as *K* indicated, be expressly stated. They are: the State's constitutional obligations to protect the public; the trust that the public is entitled to place in the police; the significance, if any, of the policeman having been off duty and on standby duty; the role of the simultaneous act of the policeman's commission of rape and omission to protect the victim; and the existence or otherwise of an intimate link between the policeman's conduct and his employment. All these elements complement one another in determining the State's vicarious liability in this matter."

To establish a sufficiently close connection and award compensation to the innocent victim, Mogoeng J narrows his focus to find a relationship of trust. He refers to trust as the factor that "creates the connection between employment and the wrongful conduct".[303] Furthermore, "if his employment as a policeman secured the trust the vulnerable person placed in him, and if his employment facilitated the abuse of that trust, the State might be held vicariously liable for the delict."[304]

[301] See further the argument presented in paragraph 4.2.3.4 in chapter 4.
[302] *F v Minister of Safety and Security* 2012 (1) SA 536 (CC) para 52.
[303] Para 62.
[304] Para 66.

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However, what would be the outcome in a future case where such a relationship of trust is clearly not present? Would the court be able to reach the same outcome as it does in *K (CC)* and *F (CC)*? It may be argued that, considering its treatment of the relationship of trust as a near requirement for vicarious liability, courts would be pressed to deny an otherwise deserving plaintiff a remedy where a relationship of trust is not present. This may particularly be the case where the primary wrongdoer is not employed by the Minister of Safety and Security. In other words, the focus of the court on the identified factors set out above may potentially deny deserving plaintiffs with meritorious claims compensation if those factors are not present. This may render the future application of the vicarious liability doctrine arbitrary on the basis that the judgments have established a type of "tax-funded, de facto insurance scheme for a small sub-set of victims of crime",[305] i.e. only those who can successfully prove a relationship of trust.

Alternatively, courts may continue along this track and try to seek out other factors present in different circumstances to justify the compensation of innocent victims of crime where the orthodox application of the vicarious liability requirements would result in the denial of a remedy. If so, the application of the vicarious liability requirements will be determined by the implementation of arbitrary factors, identified on a casuistic basis and driven by the desire to compensate crime victims. This may expose future litigants to uncertainty.

Therefore, although it may be said that the results produced by these specific judgments may be acceptable insofar as a victim of a violent crime received compensation, these results were reached by following an undesirable route, creating equally undesirable consequences.

As alluded to in paragraph 2.2.1.1.4, an additional problem that may accompany the expanded delictual liability of the state is a financial one. When the state employer is held vicariously liable for the culpable wrongdoing of an employee and ordered to pay the plaintiff's damages, it is the taxpayer who ultimately has to bear the cost. However, if taxpayer money is used to pay damages, then less money is available for performing

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[305] Price *The Influence of Human Rights* 136.

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the State's ordinary tasks, i.e. in the case of the police, preserving law and order and promoting safety and security.[306]

The continued expanding state delictual liability therefore presents the dilemma that, with less of the available tax monies being used to promote safety and security and to prevent crime, the likelier further failures to prevent crimes become. In addition, it may be asked whether it is fair, just or reasonable for courts to award substantial damages to one or two particular plaintiffs when this may contribute towards a less effective policing force and, potentially, the causation of harm to other crime victims, who will then be forced to shoulder the burden of harm themselves if they are not in a financial position to institute legal proceedings against the state or the primary wrongdoer.[307]

To conclude, it should be remembered that everyone has a right to personal safety and security. The state has a corresponding, all-embracing duty to promote safety and security and to prevent crime. In the event that the state fails to do so and an individual's right to his safety and security is infringed upon, the state should be held accountable. Under certain circumstances such a norm of accountability may give rise to a delictual claim to compensate a crime victim's harm. In *K (CC)* and *F (CC)* the court held that the circumstances warranted an award of damages and thus utilised tax-funded money to this effect. In doing so, a crime victim received an award of damages funded by taxpayers and the primary wrongdoer, the criminal, did not have to pay the victim's damages. Therefore, as suggested earlier, it may be argued that these judgments have created a type of *de facto* insurance scheme for a small sub-set of crime victims.[308]

However, it is conceivable that future crime victims may argue that the harm they suffered due to crime should be compensated without having recourse to the application of the rules relating to vicarious liability. This argument flows from the norm of state accountability, the state's comprehensive duty to ensure the safety and security of its citizens, as well as their fundamental right to personal safety and security. The reasoning of the courts in the recent state delictual liability cases – both in the *Van Duivenboden* branch and the judgments in *K (CC)* and *F (CC)* – indicate

[306] See also Atiyah *The Damages Lottery* 80-81.
[307] 81-82.
[308] See Price *The Influence of Human Rights* 136-137.

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that, where the state, through its employees, has negligently failed to comply with its constitutional duty to prevent crimes against the victim's bodily integrity, or where crimes were intentionally committed, compensation should be awarded to innocent victims of violent crime. Of course, it is arguable that *all* crimes which amount to an infringement of the victim's bodily integrity ultimately involve the state because it is the consequence of the state's failure to comply with its duties in preventing such crimes. If this argument is further pursued, the state should be regarded not only as the *de facto* insurance scheme for the small sub-set of crime victims assisted thus far by the courts, but as the ultimate insurer for harm arising from crime, at least insofar as the harm is due to the infringement of the victim's bodily integrity.

It may be pointed out that, while the recent developments relating to vicarious liability could have the effect of providing compensation to some victims of crime, the creation of such a *de facto* scheme was not the reason for extending liability. However, notwithstanding the fact that the reason for extending liability might not have been the establishment of a *de facto* scheme, it may be possible to describe the development of this area of the law along these terms and to question its desirability from a practical and theoretical perspective.

For the reasons above the expanded state delictual liability for intentionally-committed crimes of its employees may not be a desirable development.

In the following section, a description is provided of a further evidentiary problem that may confront a crime victim who elects to institute a delictual claim directly against the state in pursuit of compensation.

2.2.2 Evidentiary problems that may confront a crime victim who institutes a common-law delictual claim directly against the state for compensation of harm arising from crime

Cases where a crime victim has elected to institute a delictual claim and argued that the state itself (as opposed to any specific employee) negligently and wrongfully caused his harm and should thus be held directly liable in delict may present

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considerable evidentiary challenges to potential crime victims. These cases will be discussed and evaluated in this section.

In *Shabalala v Metrorail*[309] ("***Shabalala***"), three passengers shot and robbed the plaintiff while he was aboard one of the defendant's trains. The plaintiff instituted a delictual claim against the defendant, arguing that it was negligent in failing to employ sufficient security measures to ensure the safety of the public generally and, more specifically, in failing to take adequate steps to avoid the incident in which he was injured.[310] It was the plaintiff's case that this negligent omission had wrongfully caused his injuries.

The plaintiff testified that there were no security officials on the train or on the platform before the train left the station on the evening in question. There were thus no security officials that evening to check the authenticity of train tickets and control who boards the trains. The court accepted the plaintiff's evidence that none of the people on the platform waiting to board the train looked suspicious. Further, the plaintiff was unable to indicate whether the robbers were in the group of people on the station or whether they were on the train already and he was not capable to indicate what steps the defendant should have taken to prevent the attack from occurring.

The SCA correctly pointed out that the question for consideration was whether the defendant's conduct was negligent. In his judgment, Scott JA therefore correctly sought to determine whether the defendant's conduct was reasonable in the circumstances.[311] In conducting this enquiry, the court focused on two questions. First, would the reasonable person in the position of the defendant have foreseen the harm which the plaintiff suffered and, secondly, would the reasonable person in the position of the defendant have prevented the harm if it was indeed foreseeable? In evaluating these questions, Scott JA noted that the grounds of negligence that the plaintiff relied upon were of a "general nature and relate[d] to a *systemic failure on the part of [the defendant]*."[312] In other words, this was not a case where a specific employee had allegedly caused the plaintiff's harm through his negligence, but, rather, an instance

[309] 2008 (3) SA 142 (SCA).
[310] Para 6.
[311] See *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 (1) SA 827 (SCA).
[312] 2008 (3) SA 142 (SCA) para 6 (own emphasis).

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of direct liability and it was the conduct of the defendant itself – specifically whether the system it had designed to keep railway passengers safe – that was the focus of the enquiry.

Having held that the plaintiff's harm was foreseeable,[313] the SCA had to establish whether the alleged general failure on the defendant's part to put measures in place that would guarantee the safety of commuters was reasonable. To this extent, it was apparent that the defendant had adopted measures to minimise or prevent crime on the trains by employing some security guards on trains and on station platforms. The pertinent question was whether the plaintiff had discharged the burden of establishing that those measures were unreasonable in the circumstances.

The court concluded that, to prevent the harm in this case, the defendant would have had to employ at least one security guard on each of its coaches, especially in light of the assailants' willingness to use their guns and frequent armed attacks on security guards. Loubser and Midgley summarise the situation as follows:[314]

> "Moreover, assuming that the presence of a security guard in the coach would have prevented the harm from occurring, the question then arises of whether [the defendant] could reasonably be required to employ a guard on every coach on every train. The court found that such requirement would be unreasonable because of the large number of coaches involved, and in terms of the cost and effort. It might have been reasonable to require security guards on every coach where lines have been identified as being particularly vulnerable to criminal activities, but no evidence to this effect had been tendered."

The reasoning of the SCA cannot be faulted. It applied the established common-law test for negligence on the facts and arrived at the conclusion that, although the harm befalling the plaintiff was reasonably foreseeable, a reasonable person in the position of the defendant would not have taken the steps required to prevent such harm because it would have placed upon it an unreasonable burden to incur an inordinate amount of costs.

The unreasonable burden and costs of preventing harm in this case stems from the fact that the defendant operated a nation-wide railway structure, with thousands of coaches falling under the scope of its responsibility. It would have had severe economic consequences for the defendant to employ the necessary steps to prevent

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[313] Para 7.
[314] Loubser & Midgley (eds) *The Law of Delict* 129.

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the plaintiff's harm. As a result, however, an otherwise deserving victim of crime was left without a remedy to repair the harm he suffered arising from crime.

Subsequently, in *Mashongwa v Passenger Rail Agency of South Africa*[315] ("***Mashongwa***"), the plaintiff boarded a train operated by the defendant. Shortly after its departure, four unarmed men entered the plaintiff's coach and demanded his mobile phone, wallet and money. After he handed these to his assailants, they assaulted him, picked him up and threw him off the train through the open doors of the coach as the train approached the next station.

Seeking damages in delict, the plaintiff argued that the defendant "did not adopt reasonable measures for his safety"[316] and that, "as an organ of state, [it] had a duty to respect, protect, promote and fulfil his constitutional rights by reason of its responsibilities in terms of the [South African Transport Services Act 9 of 1989]."[317]

The High Court found that the defendant had been negligent in failing to ensure that the train doors were closed when the train initially departed and in failing to deploy at least one armed guard on each train. The SCA overruled this decision by applying the reasoning in *Shabalala* insofar as the defendant's alleged negligent failure to deploy security guards in each train was concerned:[318]

> "Whether there were security guards on the other coaches is unclear. What is clear is that there were no guards in his coach. It is also clear that to avert the attack there would have had to have been at least one security guard in his coach. I say at least one because, given the number of attackers, a single security guard may well have made no difference. But even if one were sufficient to avert the attack, the question remains whether it would be reasonable to require Prasa to have a security guard in every coach. To insist on such a requirement would exceed by far the precautionary measures to be expected of Prasa […] In *Shabalala* Scott JA accepted that in order to avert the attack on the appellant, there would have had to be, at least, one security guard in Mr Shabalala's coach. But in view of the brazen nature of the attack, where the assailant had shot Mr Shabalala three times when he said he had no money on him, the learned judge found that it was doubtful that one guard, even if armed, would have made any difference. Like Scott JA, I too have my doubts whether the presence of a guard in the particular coach would have made any difference in this case."

[315] 2016 (3) SA 528 (CC). See also *Mashongwa v Passenger Rail Agency of South Africa* (GNP case NO 29906/2011); *Passenger Rail Agency of South Africa v Mashongwa* (2014) ZASCA 202.
[316] 2016 (3) SA 528 (CC) para 8.
[317] Para 8.
[318] *Passenger Rail Agency of South Africa v Mashongwa* (2014) ZASCA 202 para 9 (references and footnotes omitted).

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The SCA held that the defendant's failure to provide adequate security measures to ensure the plaintiff's safety was reasonable and, further, that its failure to ensure that the coach doors were closed while the train was in motion was also not negligent.[319]

On appeal, the CC focused its attention on determining whether the defendant's alleged negligent failures wrongfully caused the plaintiff's harm.[320] Mogoeng CJ's reasoning may be questioned on other bases,[321] but for present purposes it is sufficient to note that the court held that the defendant wrongfully caused the plaintiff's harm and then considered whether (a) the defendant's failure to deploy security guards in the plaintiff's train and/or (b) its failure to close the train's doors could be regarded as negligent.

In response to (a), Mogoeng CJ dealt only with the preventability of harm, and it must therefore be assumed that the court found that the harm was reasonably foreseeable. In this context, the CC seemed to follow the SCA's reasoning in *Shabalala* as it emphasised the fact that "Prasa is not required to provide measures that will guarantee its rail commuters absolute freedom from crimes of violence […] It is only obliged to provide measures consonant with a proper appreciation of the constitutional and statutory responsibilities it bears."[322]

The court conducted a thorough evaluation of the preventative security measures that the defendant undertook in the circumstances, noting that the defendant identified specific crime hotspots and analysed crime patterns on the basis of which a particular security and deployment plan for the security guards were outlined and confirmed that the defendant enlisted the services of 600 security guards in the region in which the assault had taken place, although none of them were posted on a train.[323] The court also took into account the fact that the defendant's senior security officials met with the police on a regular basis to assess the security situation,[324] and because criminal incidents were more often reported during the festive season, pre-existing security

[319] Para 10.
[320] 2016 (3) SA 528 (CC) para 19.
[321] For instance, the court's reasoning relating to wrongfulness and factual causation may also be questioned. However, such an analysis falls outside the ambit of this dissertation.
[322] 2016 (3) SA 528 (CC) para 34.
[323] Para 37.
[324] Para 37.

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measures were reinforced during this period.[325] Lastly, stop, search and seizure operations were also conducted on trains during the festive season.[326]

Against this background, the court correctly weighed the risk of harm (and its magnitude, if materialising) against the burden and costs associated with taking preventative steps.[327] In his evaluation, Mogoeng CJ stated that the plaintiff "was thrown out of a train that operated in a region that had very few incidents of violent crime."[328] In fact, "[s]o low was the risk that the highest incidence reported in the entire region was five per month."[329] In relation to the financial implications of preventing harm, the CC noted the defendant's evidence that, budgetary constraints taken into account, PRASA's annual budget for security in the northern region stood at about R80 million.[330] In response to the possibility of deploying security guards on each coach or train in the region,[331] the defendant noted that the cost of such an exercise could easily rise to over R200 million per year for the northern region alone.[332]

Ultimately, the CC held that the defendant's failure to post a security guard on the train had not been negligent.[333] It should be mentioned that the court found that the defendant was negligent in respect of (b) above (i.e. in failing to close the doors) and that this negligent failure was the cause, in fact and law, of the plaintiff's harm. Because the court also concluded that the negligent failure to close the door wrongfully caused the plaintiff's injury, the defendant was held liable in delict for the victim's harm. Therefore, the plaintiff – a victim of violent crime – was successful in claiming compensation for his harm from the defendant.

[325] Para 37.
[326] Para 37.
[327] See *Ngubane v South African Transport Services* 1991 (1) SA 756 (A); *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA); *Enslin v Nhlapo* 2008 (5) SA 146 (SCA); *Shabalala v Metrorail* 2008 (3) SA 142 (SCA); Loubser & Midgley (eds) *The Law of Delict in South Africa* 124-129 where the following factors are identified as relevant in establishing the preventability of harm: the degree or extent of the risk created by the defendant's conduct, the gravity of the possible consequences if the risk of harm materialises, the utility of the defendant's conduct and the burden of eliminating the risk of harm.
[328] 2016 (3) SA 528 (CC) para 39.
[329] Para 39.
[330] Paras 38-39.
[331] Paras 38-39.
[332] Paras 38-39.
[333] Paras 41-43.

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Nevertheless, *Mashongwa*, like *Shabalala*, illustrates that where a crime victim institutes a delictual claim based on an alleged systemic failure of the state to prevent foreseeable harm, it may face daunting evidentiary challenges.

First, these judgments illustrate how difficult it is to prove negligence where you are dealing with so-called systemic failures of the state to prevent crime. When establishing the preventability of harm under the common-law test for negligence, courts are required to weigh the risk of harm (as well as its extent, if it materialises) against the costs and burden associated with harm prevention.

Where the defendant that is sought to be held directly liable is a nation-wide train operator, with a vast network of trains and railways, the preventative measures required to prevent harm on a systemic level may conceivably take on astronomical financial proportions. In other words, as these cases indicate, the costs involved in preventing harm may simply be too much in these instances. The figures mentioned in *Mashongwa* imply that requiring the state-owned railway operator to prevent harm to train passengers by providing a guard in each coach is, financially speaking, unsustainable. Further, given the general socio-economic status of train passengers, it would not be a viable option to subsidise such preventative measures through an increase in the price of train-tickets.

The result of all of the above is that, unless there is the possibility of pursuing an alternative route to compensation, the victim will likely be unable to receive compensation.

Secondly, as illustrated by the level of detail given to specific factual circumstances in especially *Mashongwa*, proving the preventability of harm requires a plaintiff to be able to illustrate the measures that were put in place by the defendant as well as other steps which a reasonable person would have taken. As will be explained in further detail in chapter 3, this is a difficult, time-consuming, costly and protracted exercise which most crime victims arguably will not be able to undertake, thereby potentially leaving them without a remedy.

The reasoning in *Shabalala* and *Metrorail* thus emphasises the prejudicial effect which the principled application of the common-law approach to negligence may have in cases where a state entity is sought to be held directly liable for its alleged systemic

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negligence. Ultimately, this evidentiary burden may prove too much of a stumbling block for most victims of crime and, without a viable alternative to provide compensation, they are left to shoulder their own costs.

2.3 The statutory response to providing compensation to crime victims

For a variety of reasons, crime victims may elect not to institute delictual proceedings against the actual perpetrator of the crime in a civil court. If so, it may be asked whether there are statutory mechanisms that could assist crime victims in receiving compensation for harm suffered as a result of crime. In this section, attention will be given to answering this question by describing and evaluating the provisions contained in the Criminal Procedure Act, which currently represent the sole statutory possibility in claiming crime victim compensation. Regard will also be had to the POCA, which may provide a source of compensation to a select category of crime victims.

2.3.1 The Criminal Procedure Act

The Criminal Procedure Act contains provisions that relate to the compensation of crime victims. Section 297(1)(a)(i) of the Act authorises a court to postpone the sentencing of a convicted person for up to five years on certain conditions, including making payment of compensation, providing community service or reparation in kind.[334] The section also authorises the suspension of the whole or any part of the sentence for up to five years, apart from cases where a minimum punishment has been prescribed.[335]

Section 300 of the Act allows a court, when convicting a person of an offence which has caused damage to, or loss of, property (including money) belonging to another, to award such a victim of the crime compensation for the damage or loss of his property.[336] A court will, however, only issue such a compensation order if the crime victim has specifically applied for it, or if the state prosecutor is instructed by the victim

[334] See also Von Bonde *Redress for Victims of Crime in South Africa* 83.
[335] SALRC *A Compensation Fund for Victims of Crime* 47.
[336] Section 300 of the Criminal Procedure Act.

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of crime to apply on his behalf, or if the state prosecutor has been expressly instructed by the state to do so.[337] A superior court is not limited to a specific amount when making its order, but a regional and a magistrate's court is limited to an amount determined by the Minister of Justice by way of notices in the Government Gazette.[338] An order in terms of section 300 has the status of a civil judgment. Imprisonment cannot be imposed in the event of non-payment.[339]

In terms of section 300, the victim has a period of sixty days within which to renounce the award in writing and to effect repayment of any amount already received. In the event that the victim decides to accept the court's order, however, he will not be entitled to institute civil proceedings against the perpetrator in respect of any other form of compensation in a civil court.[340] In other words, if he does accept the order, it "takes the place of any other civil legal remedy that the injured party might have against the accused."[341] The reason for this is the so-called once-and-for-all rule, according to which a plaintiff has only one opportunity to claim damages arising from a single cause of action.[342]

Section 301 of the Act states that, where a person is convicted of theft or any other offence whereby the person has unlawfully obtained property, and he has sold the property or a part thereof to another person who had no knowledge that it was stolen or unlawfully obtained, the court may, on application by the purchaser and on restitution of the property to the owner thereof, order that, out of any money taken from the accused on his arrest, a sum not exceeding the amount paid by the purchaser be returned to him.

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[337] Joubert et al *Criminal Procedure* 346.
[338] R1 000 000 in respect of a regional court and R300 000 in respect of a magistrate's court – see Government Gazette 36111 of 30 January 2013.
[339] Von Bonde *Redress for Victims of Crime in South Africa* 89.
[340] 91.
[341] 91. See also JM Potgieter, L Steynberg & TB Floyd *Visser & Potgieter's Law of Damages* 3 ed (2012) 158.
[342] Von Bonde *Redress for Victims of Crime in South Africa* 91; Visser & Potgieter *Law of Damages* 158.

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2.3.2 Critical evaluation of the provisions in the Criminal Procedure Act that provide a crime victim with assistance to claim compensation

The common law of delict's deficiencies in compensating crime victims have already been noted above. It must now be considered whether the Act is effective with regard to the compensation of these victims.

With regards to the sentences that may be imposed in terms of section 297 of the Act, it has been remarked that they "are very scarce and the main reason for this is the lack of means of offenders."[343]

In *S v Seedat*,[344] the appellant was convicted of raping the 58-year-old complainant, to whom he had delivered a bedside lamp and groceries. The High Court referred to sections 297(1)*(a)*(i)*(aa)* and 297(4) of the Criminal Procedure Act. The first section permits a court that convicts a person for an offence, "other than an offence in respect of which any law prescribes a minimum punishment", to "postpone" the passing of sentence for a period not exceeding five years, and release that person concerned on one or more conditions, including compensation.[345] On the other hand, section 297(4) allows a court that "convicts a person of an offence in respect of which any law prescribes a minimum punishment", to pass sentence in its discretion and to order the operation of a part thereof to be "suspended" for a period not exceeding five years on any condition referred to in para *(a)* of sub-section (1).[346] As a result, the High Court adopted a proposal made at the trial by the complainant that the appellant pay her compensation. The court thus suspended the sentencing of the appellant for a period of three years on condition that he pay her the amount of R100 000 in instalments. The state appealed against the sentence on the grounds that it was incompetent and invalid.

On appeal, the SCA held that the postponement of sentence in terms of section 297(1) of the Act was not available as a sentencing option in the matter as it specifically

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[343] Von Bonde *Redress for Victims of Crime in South Africa* 88. See also Scott (1967) 8(2) *William & Mary Law Review* 278; B Cameron "Compensation for Victims of Crime, The New Zealand Experiment" (1963) 12 *Journal of Public Law* 368; M Fry "Justice for Victims" (1959) 8 *Journal of Public Law* 191 192; J Goodey *Compensating Victims of Violent Crime in the European Union* (2003) 11.
[344] 2017 (1) SACR 141 (SCA).
[345] Para 33.
[346] Para 33.

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prohibited postponement of the sentence where the accused was convicted of an offence for which the law prescribed a minimum sentence.[347] If, however, it was the intention of the High Court to invoke the provisions rather of section 297(4) it could have done so, but it would then have had to impose a sentence for a specific term of imprisonment and then order that the operation of a part of it be suspended for a specified period not exceeding five years on any condition, including compensation.[348] The SCA held as follows:[349]

> "Whilst I accept that the complainant may have thought that it would be appropriate to make the appellant rather pay monetary compensation for what he did, her views are not the only factor to be taken into account. Rape has become a scourge in our society and the courts are under a duty to send a clear message, not only to the accused, but to other potential rapists and to the community that it will not be tolerated […] Whilst the object of sentencing is not to satisfy public opinion, it needs to serve the public interest […] Criminal proceedings need to instil public confidence 'in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime' […] Indeed, the public would justifiably be alarmed if courts tended to impose a suspended sentence coupled with monetary compensation for rape […] As the state has contended, a sentence entailing a businessman being ordered to pay his rape victim in lieu of a custodial sentence is bound to cause indignation with at least a large portion of society."

The judgment of the SCA in this case illustrates, on the one hand, the limited scope of application of section 297 of the Act and, on the other hand, sends a clear message to future rape victims about the unlikely possibility of receiving compensation *via* the existing statutory mechanisms.

Although section 300 of the Act provides the crime victim with some form of procedural assistance in being compensated, it also has serious limitations.[350] In the first instance, it relates only to "damage to or loss of property (including money) belonging to some other person" and does not provide a court with the authority to award an order in respect of non-patrimonial harm or harm that arises from bodily injuries.[351] In *S v Lekgathe,*[352] the court noted this shortcoming, remarking that "[t]his seems to be a *casus omissus* in the Act which should be rectified." However, at the time of writing, it has not been amended. It is recommended that this change be made to provide more effective compensation to crime victims. However, for the reasons highlighted

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[347] Paras 35-36.
[348] Paras 35-36.
[349] Paras 39-40.
[350] See also the SALRC *A Compensation Fund for Victims of Crime* 191, where it is stated that the current provisions of the Act is "seldom applied in practice and the majority of civil courts are under-utilized."
[351] See also Von Bonde *Redress for Victims of Crime in South Africa* 92.
[352] 1982 (3) SA 104 (B) 112.

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below, it is doubted whether this will make a practical difference to the issue of crime victim compensation.

Secondly, as Von Bonde argues, with reference to section 300, the injured party has to be the owner of the property or money and the scope of the compensation that may be awarded is therefore significantly limited.[353] The term "injured person" in section 300 is strictly interpreted which means that if stolen goods are sold to an innocent purchaser and vindicated in his hands, he cannot receive compensation under section 300 for whatever harm he may have suffered as a result of the sale and subsequent vindication, but will have to rely on the normal delictual action or on an order in terms of section 301.[354]

Thirdly, the application of section 300 is limited to cases where the quantification of damages is reasonably "straightforward".[355] In addition, the section is also "inappropriate in motor vehicle accident cases because a criminal court will not be in a position to determine the contributory negligence of the injured party. For this the private law system with its extensive battery of pre-trial pleadings should be utilised to clarify the issues between the parties."[356]

It must also be emphasised, again, that crimes are very often committed by members of society who are financially unable to compensate the harm which they cause.[357] As a result, any orders given by a court against a perpetrator may be practically useless, thereby exposing the victim of crime to the burden of carrying his loss at his own cost. More attention will be given to this issue in chapter 4. For present purposes, it may be added that this could result in a crime victim being placed in a vulnerable position,

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[353] Von Bonde *Redress for Victims of Crime in South Africa* 92.
[354] 92.
[355] 92.
[356] 92.
[357] SALRC *A Compensation Fund for Victims of Crime* 281-282: "Even where a conviction takes place, international experience suggests that emphasising compensation from the perpetrator will produce poor results. In South Africa, it has been shown that the majority of accused persons do not have the means to compensate their victims. Moreover, it has been argued that it is particularly difficult or inappropriate for accused people to be expected to pay compensation when they are imprisoned for an extended period and, consequently, have no earnings […] Even in Europe, where criminal justice systems are significantly better resourced than in South Africa, payments made by offenders to victims occur in relatively few cases. This is because offenders, when apprehended, are generally poor and unable to make payments to the victim." See also Miers (2014) 20(1) *International Review of Victimology* 148-154.

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whereas the perpetrator's position is seemingly protected insofar as that he may avoid the penalty of incarceration.

Lastly, as noted in the SALRC Report, section 300 of the Act "is inadequate in that it only provides for compensation in cases of damage or monetary loss as a result of theft or fraud. It is insufficient for compensation in cases of assault."[358]

It is therefore concluded that the existing statutory mechanisms provided in the Act for assisting victims to receive some form of compensation from the wrongdoer is inadequate. Even if it were to be reformed to broaden its ambit, this would be cold comfort for the victim who is faced with a wrongdoer who lacks the means to provide compensation.

2.3.3 The Prevention of Organised Crime Act

The Criminal Procedure Act is not the only legislation that may be relevant within the context of crime victim compensation. The POCA seeks to introduce measures to combat organised crime, money laundering and criminal gang activities; prohibit certain racketeering and money-laundering activities; and criminalise certain gang activities. The Act also provides for the recovery of the proceeds of unlawful activities (through confiscation orders) and the civil forfeiture of criminal assets that have been used to commit an offence (through forfeiture orders).[359]

Chapter 7 of the POCA establishes the Criminal Assets Recovery Account ("**CARA**") as a separate account in the National Revenue Fund.[360] The CARA is funded by moneys derived from the fulfilment of confiscation and forfeiture orders as well as other sources.[361] In accordance with section 69A(1) of the POCA, Cabinet, after considering

[358] SALRC *A Compensation Fund for Victims of Crime* 160.
[359] A Kruger *Organised Crime and Proceeds of Crime Law in South Africa* 2 ed (2013) 75-151.
[360] Section 63 of the POCA.
[361] See section 64 of the POCA: the CARA may also be funded by the balance of all moneys derived from the execution of foreign confiscation orders as defined in the International Co-Operation in Criminal Matters Act 75 of 1996; any property or moneys appropriated by Parliament, or paid into, or allocated to, the account in terms of any other Act; domestic and foreign grants; any property or amount of money received or acquired from any source; and all property or moneys transferred to the Account in terms of this Act.

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the recommendations of the CARA committee,[362] may allocate the property and money standing to the credit of the CARA to specific law enforcement agencies; any institution, organisation or fund contemplated in section 68(c) of the Act; or the administration of the CARA. Section 68(c) of the Act states that one of the objects of the CARA committee is "to advise Cabinet in connection with the rendering of financial assistance to any other institution, organisation or fund established with the object to render assistance in any manner to victims of crime".

Significantly, the POCA does not state that the funds in the CARA should be used to compensate crime victims. In fact, the Act does not contain any reference to the compensation of crime victims. That the purpose of the POCA and the CARA is not crime victim compensation is demonstrated by various government publications. For instance, in CARA's annual report for 2010/2011, the Department of Justice and Constitutional Development ("**DJCD**") notes that the "underlying hypothesis of asset forfeiture legislation [like the POCA] is that, by confiscating or forfeiting the profits or proceeds of crime, the incentive for committing specific crimes is reduced."[363] In *Prophet v National Director of Public Prosecutions*,[364] the CC also emphasised this as the POCA's main purpose, and explained that the POCA established two mechanisms "to ensure that property derived from an offence or used in the commission of an offence is forfeited to the State", namely confiscation and forfeiture orders.[365]

In its discussion of confiscation orders in *S v Shaik*,[366] the CC again emphasised the primary purpose underlying the POCA, and emphasised the following objective of the Act: "[to ensure that] no person convicted of an offence should benefit from the fruits of that or any related offence [and that] legislation is [therefore] necessary to provide

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[362] In terms of section 68 of the POCA, the CARA committee is responsible for advising Cabinet in relation to the forfeiture of property to the State that may occur under chapter 6 of the POCA; financial assistance offered to law enforcement agencies to combat organised crime, money laundering, criminal gang activities and terrorist activities.
[363] The DJCD *Criminal Asset Recovery Account (CARA) Annual Report 2010/2011* (2011) 1. Since 2013, it appears that the information pertaining to the POCA, the CARA and asset forfeiture has been included in the annual report of the National Director of Public Prosecutions as well as the DJCD's annual performance plan. In this regard, the DJCD *Annual Performance Plan 2017/2018* (2017) 150 highlights this objective.
[364] 2007 (6) SA 169 (CC) para 60.
[365] See chapters 5 and 6 of the POCA.
[366] 2008 (5) SA 354 (CC) para 21.

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for a civil remedy for the restraint and seizure, and confiscation of property which forms the benefits derived from such an offence."[367] The CC further held:[368]

> "From this primary purpose, two secondary purposes flow. The first is general deterrence: to ensure that people are deterred in general from joining the ranks of criminals by the realisation that they will be prevented from enjoying the proceeds of the crimes they may commit. And the second is prevention: the scheme seeks to remove from the hands of criminals the financial wherewithal to commit further crimes."

Kruger provides the following example to explain the purpose underlying the POCA:[369]

> "[The POCA] focuses on the events at racketeering, and on assets, in dealing with confiscation or forfeiture, not on the perpetrator. Say there is a 'drug house' in the community, but there is no evidence to link the owner of the house to the selling of drugs. In such case a forfeiture order in respect of the house can be obtained (because the house is an instrumentality of an offence) under Chapter 6 of POCA. The drug house is thus closed down and the crime stopped. Further drug-dealing in that house is prevented. In this manner POCA acts to prevent crime. The new paradigm created by Chapter 6 of POCA is one in which the instrumentality or proceeds of crime are the target, not the person who committed the offence. This approach creates new possibilities for the prevention and detection of crime."

Notwithstanding the fact that crime victim compensation is not one of the main objectives of the POCA, it has nevertheless made an impact in this context. It does in the following way:[370]

> "[Once the Asset Forfeiture Unit has claimed] the fruits of the crime on behalf of society; it takes the profit out of crime. If there is a direct victim of the crime, money from assets forfeited goes to that victim. If there is no victim the money goes into the [CARA]. The Cabinet then decides what to do with it. By September 2007, R120 million had been deposited in that account and R73 million paid out to victims of crime."

According to the DJCD's annual report for 2015/2016 ("**DJCD 2015/2016 Annual Report**"), the following payments have been made to victims of crime since 2008: R53 million (2009/2010), R18 million (2010/2011), R93 million (2011/2012), R28 million (2012/2013), R84 million (2013/2014), R1 658 million (2014/2015) and R390 million (2015/2016).[371] As Kruger indicates, payment from forfeited assets goes to the victim of the specific crime. However, the DJCD 2015/2016 Annual Report does not indicate the nature of the forfeited assets or to what category of crime victim(s) the payments were made. Instead, it states that, regarding organised crime "[p]articular focus was on various areas such as illegal precious metals including copper, rhino-related

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[367] See also the preamble of the POCA; Kruger *Organised Crime* 1-11.
[368] 2008 (5) SA 354 (CC) paras 51-52.
[369] Kruger *Organised Crime* 1.
[370] Kruger *Organised Crime* 10. A detailed description and analysis of the confiscation and forfeiture procedures under the POCA falls outside the scope of this dissertation. In this regard, see Kruger *Organised Crime* 75-151.
[371] DJCD *Annual Report 2015/2016* (2016) 110.

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offences, drug dealings, illicit mining and tax matters."[372] Elsewhere it states that the "cases of higher value were processed. Improved focus [was placed] on high-value case[s]".[373]

An overview of case law relating to asset forfeiture and confiscation indicates that these cases are predominantly concerned with drug-dealing,[374] keeping a brothel,[375] corruption and bribery,[376] fraud,[377] and cases where motor vehicles were used as an instrumentality in the commission of an offence.[378]

Against this background, and for the following reasons, it is submitted that the POCA does not provide an adequate solution to the broad problem of crime victim compensation.

First, generally speaking, it is clear that asset forfeiture and confiscation cases do not focus on instances of violent crime or ensuring the compensation of violent crime victims *via* the available POCA mechanisms. Arguably, this is because, when compared to the assets involved in the above "high-value cases", there are generally-speaking no significant assets involved in the commission of violent crimes such as murder, rape or assault. This means that the general financial impecuniosity of violent criminals and the lack of any significant assets being used as instruments in the process prevent the POCA mechanisms from being used in this context.

Secondly, although the amounts paid out to victims in a particular financial year may appear as significant (e.g. R390 million in 2015/2016), it ought to viewed against the

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[372] 100.
[373] 108.
[374] Kruger *Organised Crime* 134; *NDPP v Cole* 2005 (2) SACR 553 (W); *NDPP v Parker* 2006 (1) SACR 284 (SCA); *Singh v NDPP* 2007 (2) SACR 326 (SCA); *NDPP v Van der Merwe* 2011 (2) SACR 188 (WCC); *Van der Burg v NDPP* 2012 (2) SACR 331 (CC).
[375] Kruger *Organised Crime* 134; *NDPP v Geyser* [2008] ZASCA 15; *Mohunram v NDPP* 2007 (4) SA 222 (CC); *NDPP v Bosch* 2009 (2) SACR 547 (KZP); *NDPP v Salie* 2015 (1) 121 (WCC).
[376] Kruger *Organised Crime* 142; *NDPP: In re Appeal* 2005 (2) SACR 610 (N); *S v Shaik* 2008 (2) SACR 165 (CC); *NDPP v Gardener* 2011 (1) SACR 612 (SCA); *NDPP v Ramlutchman* 2017 (1) SACR 343 (SCA).
[377] Kruger *Organised Crime* 143; *NDPP v Ro Cook Properties (Pty) Ltd; NDPP v 37 Gillespie Street Durban (Pty) Ltd; NDPP v Seevnarayan* 2004 (2) SACR 208 (SCA); *Ntsoko v NDPP* 2016 (1) SACR 103 (GP).
[378] Kruger *Organised Crime* 137-142. For example: drunken driving cases (e.g. *NDPP v Van Staden* 2007 (1) SACR 338 (SCA)); cases involving trading abalone (e.g. *NDPP v Gouws* 2005 (2) SACR 193 (SE); *NDPP v Swart* 2005 (2) SACR 186 (SE)); cases where drugs was transported (e.g. *NDPP v Seleoane* [2003] 3 All SA 102 (NC)); and illegal hunting or poaching cases (*NDPP v Mniki* [2010] ZAECPEHC 39 (29 June 2010)).

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number of successful forfeiture cases for that period (e.g. 389 in 2015/2016). Assuming that victims in each of those cases received money from the proceeds of unlawful activities, it would arguably still result in a relatively few number of crime victims receiving a significant amount of money (e.g., on average, and assuming there was one victim per case instituted in 2015/2016, each victim would have received approximately R1 million). However, when compared to the substantial number of violent crime victims in South Africa on an annual basis,[379] the solution offered by the POCA appears to be unsatisfactory, at least insofar the legal position relating to the compensation of violent crime victims is concerned.

It may further be noted that, although the POCA's purpose does not relate to compensation, once the proceeds from confiscation and forfeiture orders have been paid into the CARA, it could potentially be used for the purpose of crime victim compensation if the CARA committee were to advise Cabinet to advance the funds to a specific institution, organisation or fund which, in turn, uses the funds to compensate certain crime victims. However, as indicated below, this appears not to have been the practice up to date.

A 2014 report by the DJCD concerning the CARA records the history and current status of the property and moneys forfeited and confiscated to the state and deposited into the CARA ("**DJCD 2014 Report**").[380] It is clear that the annual amounts collected by CARA since its inception in 1999 up to 31 January 2014 has varied considerably.[381] For instance, in the period 1999-2003, approximately R18 million was collected, in 2008-2009 almost R66 million was collected, while the revenue for the 2013-2014 period was substantially higher (almost R95 million) "due to the finalization of three big cases named *Taunenbaum* (R53 million), *King* (R9million) and *Rhino Horns* (R4million) and 15 case [sic] of between R500 000 and R3 million) in the current financial year."[382] The 2015/2016 annual report by the National Director of Public

[379] See paragraph 1.1 in chapter 1 and paragraph 4.2.3.1 in chapter 4.
[380] DJCD *Report to the Criminal Assets Recovery Committee (CARC) on the Property and Moneys Forfeited and Confiscated to the State and Proceeds Deposited into the Criminal Assets Recovery Account (CARA)* (2014).
[381] 4.
[382] 4.

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Prosecutions further notes that R58 million and R54 million was paid into the CARA in respect of 2014/2015 and 2015/2016.[383]

At the time that the DJCD 2014 Report was published, only two allocations of CARA funds had been made. In 2006 R73 million was allocated while Cabinet approved an allocation of R250 million in 2011, bringing the total amount of CARA funds allocated by Cabinet to approximately R323 million.[384] As at 31 January 2014, there was approximately R182 million left in the CARA.[385] In its 2016 annual report, the National Director for Public Prosecutions noted that "[t]he CARA-funds are now depleted".[386]

The DJCD 2014 Report provides further details of how the CARA funds have been allocated in the past.[387] The DJCD received R150 million for the establishment of an Anti-Corruption Task Team and R20 million aimed at providing domestic violence and victim support services; the Department of Social Development was awarded a total amount of R26 million for funding existing shelters for crime victims and vulnerable groups as well as funding the Civil Society Organisation; the Department of Correctional Services was allocated approximately R23 million that was earmarked for the establishment of 53 modern parole board offices that may provide easy access to crime victims who "wish to participate in the mediation process with offenders who are in the correctional facilities";[388] the SAPS were provided approximately R11 million to re-establish 45 victim friendly facilities in police stations; and the National Prosecuting Authority was allocated R20 million to cover "curator expenses in high profile cases".[389]

Section 4 of the 2014 DJCD Report contains the details relating to the use of the allocated funds by each beneficiary.[390] None of the beneficiaries refer to crime victim compensation or contemplate using its allocated funds to be used to compensate those who suffer harm arising from crime. From this report it may therefore be inferred that the proceeds collected from forfeiture and confiscation procedures and paid into

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383 National Director of Public Prosecutions ("**NDPP**") *Annual Report 2015/2016* (2016) 51.
384 DJCD *Report to the Criminal Assets Recovery Committee* (2014) 5.
385 7.
386 NDPP *Annual Report 2015/2016* (2016) 54.
387 DJCD *Report to the Criminal Assets Recovery Committee* (2014) 7.
388 7.
389 7.
390 DJCD *Report to the Criminal Assets Recovery Committee* (2014) 8-13.

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the CARA have thus far had little, if any, effect on the issue of crime victim compensation.

Although it may therefore be possible for CARA funds to be allocated to future beneficiaries with the purpose of crime victim compensation, this has not been the practice up to date. It is proposed that, if the South African legislature were to establish a statutory compensation fund for crime victims, a proposal be made by such a fund to the CARA committee in terms of which it is requested that some of the funds in the CARA be made available for the purpose of crime victim compensation.[391]

Ultimately, the POCA is concerned predominantly with organised crime and provides certain procedures to accumulate proceeds from unlawful activities within this context. However, this dissertation does not concern the commission of organised crime or the potential remedies that may be used in response thereto. This dissertation does not focus on crime prevention, deterrence or ensuring that criminals do not benefit from their own wrongdoing. It focuses on the issue of crime victim compensation. It is submitted that the procedures set in place by the POCA is insufficient and unsatisfactory in providing sufficient crime victim compensation.[392]

2.4 Conclusion

This chapter investigated the way in which crime victims may seek compensation within the current South African legal system. It is trite that they may institute common-law delictual claims against the actual perpetrator of the crime and the Criminal Procedure Act could potentially also provide limited procedural assistance to claim compensation from the actual criminal. For what is arguably predominantly financial reasons, crime victims very rarely make use of either of these options. Instead, an overview of the South African law reports illustrate that they rather seek to hold other financially capable entities vicariously liable, arguing that, in some way or another, their harm was wrongfully caused by the culpable conduct of these entities'

[391] See further paragraph 4.2.4.1 in chapter 4, where the potential funding of the proposed compensation fund is discussed in further detail.
[392] See paragraph 4.2.4.1 in chapter 4 where it is argued that, if a statutory crime victim compensation fund were to be enacted, the fund would be well-advised to approach the CARA with a request to make available funds to the proposed crime victim compensation scheme for the purpose of crime victim compensation.

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employees. In this context, victims often attempt to hold the state vicariously liable but a private security services company has also been held liable in this way.

Most of this chapter highlighted particular conceptual problem areas that have arisen as a result of the expanded state delictual liability. For the various reasons outlined above,[393] it may be doubted whether the expansion of the state's delictual liability for the negligent, wrongful failures of its employees to prevent crime is desirable over the long term. It may be worthwhile to consider whether there are alternatives for providing compensation to crime victims. Similarly, the comparable development of state delictual liability in the context of harm caused by intentionally-committed crimes of state employees, is regarded as undesirable from a theoretical and practical perspective.[394]

In addition, it was indicated that, if a crime victim suffers harm as result of so-called systemic negligence, he may have severe difficulty in satisfying the evidentiary burden of proof in those specific cases. Lastly, considerably less attention was given to statutory mechanisms that facilitate the compensation of crime victims. This reflects the lack of specific legislation aimed at compensating crime victims, a topic which will be discussed in further detail in chapters 4 and 5.

Criticism of the state's expanded delictual liability is particularly apposite in the case of South Africa. Considering the fact that police resources are already overextended by the high levels of crime in South Africa, it seems inappropriate to award substantial amounts of damages to individual plaintiffs if this will ultimately result in less of the overall budget awarded to the Minister of Safety and Security being used to promote general safety and security.[395] In addition, taking into account the fact that it is the public at large that shoulders the cost of awarding the plaintiff damages while the individual wrongdoers are rarely made to pay any kind of damages, the development appears to be problematic.

It may be said that the judgments handed down by the CC which were discussed in this chapter illustrate the fact that the law of delict appears to be "uninterested in seeing that the parties really responsible for causing the damage should pay for what they

[393] See paragraph 2.2.1.1.4 above.
[394] See paragraph 2.2.1.2.5 above.
[395] Atiyah *The Damages Lottery* 81-82.

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have done, it is only interested in seeing that every effort is made to enable the injured party to recover from *someone*, no matter who."[396] The desire to compensate the crime victim by seeking out a solvent, potentially blameless entity raises questions which are not at odds with the view that the law of delict's primary function is compensation, but does require one to reconsider who is to take responsibility for compensation.[397]

Indeed, the expansion of state delictual liability, especially where the SAPS is concerned, may be regarded as "a very slippery slope":[398] does the fact that courts appear more and more willing to hold the Minister of Safety and Security delictually liable because its employees negligently fail to comply with their safety and security duties, not also mean that courts should similarly hold that it would be negligent of a local municipal authority "not to build a new roundabout here, or to install traffic lights there, or perhaps to turn a single carriage road into a dual carriage road"?[399] Or, as the recent judgment in *Witzenberg* illustrates, for the failure to prevent crime?

Further, as indicated, *K (CC)* and *F (CC)* exhibit the CC's readiness to adopt strained interpretations of the principles relating to vicarious liability of the state for harm arising from crime to compensate innocent crime victims. It appears that the courts have reached a stage where they are willing to compensate the victims of violent crime in any given circumstance – whether their harm arose from the negligent failure of a state employee to prevent crime or from the intentionally-committed crime of a state employee. It may be said that the courts, mindful of the surge in criminal activity and the vulnerability of most crime victims, and cognisant of their duty to give effect to the individual's constitutional right to personal safety and security, as well as the state's constitutional obligation to promote safety and security, have created a *de facto* compensation scheme for harm arising from crime, which, however, compensates only a select few. Given the criticism set out in this chapter, this is not a satisfactory state of affairs.

The reasoning by the CC in these cases signals the court's preparedness to apply relevant principles of delict widely in favour of victims of infringement of bodily integrity,

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[396] 83.
[397] See further chapter 6.
[398] Atiyah *The Damages Lottery*: Atiyah reacts to the potential expansion of state liability in tort in the United Kingdom, but the argument is also applicable in the South African context.
[399] 83-84.

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regardless of whether or not the harm arose from a negligent failure of a state employee to prevent crime or from the intentional, criminal wrongdoing of the latter. As discussed earlier, it is apparent that the court is prepared to search for circumstantial factors on an *ad hoc* basis in order to justify the imposition of vicarious liability on the state where a principled application of the common-law requirements for vicarious liability would deny the plaintiff a remedy.

These points of criticism provide the *impetus* for this dissertation. If they are to be heeded, it necessarily raises the question whether an alternative way exists to award compensation to crime victims in the position of the respective plaintiffs in *K (CC)* and *F (CC)* as well as other victims of intentionally-committed crimes.

One particular alternative that has been adopted in a variety of foreign jurisdictions is the establishment of a statutory compensation fund for crime victims.[400] It may therefore be worth considering whether the detrimental development of the doctrine of vicarious liability and the expansion of state delictual liability should be pre-empted by the establishment of a statutory compensation fund for crime victims where, generally, victims of crimes are allowed compensation for some, or all of, the harm arising from crime. The creation of such a fund as an alternative for the current trend of widening delictual liability of the state for harm arising from crime would be a response to the implications of the recent judicial development, namely that some or other mechanism needs to be put in place to provide compensation for harm arising especially from violent crime.

Before any practical issues relating to the potential development of the law of delict may be considered, there is a preliminary question that requires attention: on what basis could the potential preferential treatment of crime victims – as opposed to another category of victims of harm – be justified within the South African law of delict? The next chapter will seek to assist in answering this question by investigating the legal and public policy considerations that have justified the legislative intervention in the law of delict in the past.

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[400] See also chapter 5.

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CHAPTER 3: LEGAL AND PUBLIC POLICY CONSIDERATIONS THAT JUSTIFY LEGISLATIVE DEVELOPMENT OF THE LAW OF DELICT

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CHAPTER 3: LEGAL AND PUBLIC POLICY CONSIDERATIONS THAT JUSTIFY LEGISLATIVE DEVELOPMENT OF THE LAW OF DELICT

3.1 Introduction

The previous chapter examined the way in which crime victims may be compensated within the current South African legal system. They may institute common-law delictual claims against the actual perpetrator in search of compensation, whereas the Criminal Procedure Act 51 of 1977 provides limited procedural assistance in recompensing the harm they suffered.

Chapter 2 identified a number of problems relating to crime victim compensation. For financial reasons, crime victims are unlikely to institute delictual proceedings against the perpetrator of the crime. Furthermore, the expansion of the state's liability for harm arising appears to be undesirable on theoretical and practical levels. Also, crime victims interested in instituting delictual claims directly against the state may likely face significant evidentiary difficulties in proving systemic negligence. Further, the assistance provided by the Criminal Procedure Act in relation to crime victim compensation is unsatisfactory. Lastly, although it provides some degree of relief to victims of organised crime, the Prevention of Organised Crime Act 121 of 1998 does not focus on crime victim compensation and fails to provide effective assistance to victims of violent crime.

Chapter 2 highlighted the financial burden imposed on the state as a result of its expanded liability and the unwarranted implications which this may hold. Against that background, it was concluded that the current legal position relating to crime victim compensation is inadequate and it was proposed that an alternative method should be investigated to provide compensation for crime victims. One particular alternative that has been adopted in a variety of foreign jurisdictions is the establishment of a statutory compensation fund for crime victims.[1]

However, academics have raised their concern over the lack of a justifiable basis for this type of legislative intervention: "the idea of selecting this group of injured and

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[1] See footnote 59 in paragraph 1.5 in chapter 1 for a list of the jurisdictions that have adopted this alternative.

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disabled people for special treatment is not easily defensible."[2] Academics have consequently emphasised a "fundamental problem"[3] that confronts reformers of the law of delict/tort law in this context, which is that "it is difficult to find a satisfactory rationale for singling out violent-crime victims from other groups of unfortunates for special treatment by the state."[4]

The problem with justifying statutory development through the enactment of a crime victim compensation fund has also been highlighted in South Africa. It will be recalled that the South African Law Reform Commission ("**SALRC**") examined this potential alternative and published a report on their findings in 2004 ("**SALRC Report**"),[5] while a doctoral dissertation[6] has also examined the establishment of compensation fund. However, as indicated in chapter 1, neither of these research projects dealt with the issue of justification.[7] Against that background, and with chapter 2 concluding that the current South African legal position relating to crime victim compensation is unsatisfactory, this dissertation will aim to provide a theoretical framework that could guide subsequent deliberation on whether legislative development of the law of delict relating to crime victim compensation is justified.

Justifying the potential enactment of a statutory crime victim compensation fund is important for a series of reasons. Obviously, as the SALRC itself pointed out, "developing a motivation for the establishment of a [statutory compensation fund] in

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[2] P Cane Atiyah's *Accidents, Compensation and the Law* 8 ed (2013) 303-308.
[3] South African Law Reform Commission Project 82: *Sentencing (A Compensation Fund for Victims of Crime)* (2004) 182-183. See also RE Scott "Compensation for Victims of Violent Crimes: An Analysis" (1967) 8(2) *William & Mary Law Review* 277 281; Cane *Atiyah's Accidents* 303-308.
[4] SALRC *A Compensation Fund for Victims of Crime* 182-183; Scott (1967) *William & Mary Law Review* 281; Cane *Atiyah's Accidents* 303-308.
[5] SALRC *A Compensation Fund for Victims of Crime*.
[6] See JC von Bonde *Redress for victims of crime in South Africa: A comparison with selected Commonwealth jurisdictions* Unpublished LLD thesis Nelson Mandela Metropolitan University (2007).
[7] The SALRC Report provides a summary of the violent crime situation in South Africa, the impact of crime on South Africa, outlines the South African legal system's compensatory regime, provides a comparative overview of the compensation funds for violent crime victims established in some foreign jurisdictions, deals briefly with the advantages and disadvantages of establishing a compensation fund for crime victims in South Africa, examines the role of the criminal justice system in addressing the harm done to the victim of crime, but it does not set out the legal and public policy considerations that may justify the legislative development of the law of delict. Similarly, Von Bonde's thesis focuses on the rationale underlying the restitution of crime victims, sets out the historical development of the compensation fund for crime victims in foreign jurisdictions, provide a comparative overview of the compensation funds that have been established in foreign jurisdictions (including England, India and New Zealand), examines the role of the criminal justice system (both in South Africa and abroad) in providing compensation to crime victims, but does not provide a justificatory framework for the statutory intervention in the law of delict.

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SA remains incomplete, and must be completed if legislation is to be drafted, since no law should be passed without its objectives being clearly defined and costed."[8]

As pointed out, intervention of this kind, which necessarily requires taxpayer funding, would require a justifiable policy basis to explain why preferential treatment is being offered to crime victims as a specific category. Also, one would need a basis of this kind to inform the purpose, scope and extent of the statute, if it were to be enacted.

A clear policy framework would further assist in guiding interpretation of particular provisions of the potential act. Indeed, without such a basis, the statute may present potential crime victims, administrators and courts with an untenable level of uncertainty. For example, in the absence of a coherent and fixed policy basis, the statute may create problems of interpretation. And if uncertainty regarding such a potential statute should lead to litigation, it will fall to a court to identify the statute's underlying policy considerations. It may, however, be questioned whether it is desirable to have judges, who are not privy to the legislative process preceding the enactment of a statute, make such a broad determination when adjudicating on a specific matter.

To investigate the justifiability of the proposed fund, the following approach will be adopted. This chapter will advance a theoretical framework that provides an outline for justifiable statutory reform of the law of delict insofar as compensation of victims is generally concerned. This will be done by identifying legal and public policy considerations which the legislature have used in the past to develop specific areas within the law of delict. To do so, the background to, and policy bases of, the three major statutes that have developed the law relating to the compensation of specific categories of victims in the past will be examined in this chapter. Once this has been done, chapter 4 will concentrate on the more specific issue, i.e. whether the potential enactment of a statutory compensation fund for crime victims could fit into such a framework.

Regarding the approach outlined above, it may be pointed out that there is a difference between the reasons advanced for the justification of the proposed fund and the scope of such a scheme. Therefore, the following distinction has been drawn: while this

[8] SALRC *A Compensation Fund for Victims of Crime* 318-319.

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chapter and chapter 4 deal with the issue of justification of the fund, chapter 5 deals with the specific issues related to its scope (if it were to be enacted). Accordingly, this chapter and chapter 4 deal mainly with legal and public policy considerations justifying statutory reform of the law of delict in South Africa, whereas chapter 5 refer to issues of policy and administrative convenience.

This chapter will draw attention to the historical development of specific South African statutes which have had a significant impact on the common law of delict. Attention will specifically be paid to the historical development of the following statutes: the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ("**COIDA**"), the Road Accident Fund Act 56 of 1996 ("**RAF Act**"), as amended by the Road Accident Fund Amendment Act 15 of 2005 ("**RAFA Act**") and the Consumer Protection Act 68 of 2008 ("**CPA**"). Although there are several other statutes that have had a significant influence on the law of delict,[9] the focus will be on these statutes because they predominantly deal with the compensation of a specific group of victims of harm: motor vehicle accident victims, victims of defective consumer products and those who suffer harm as a result of occupational injuries and diseases.

In some way or another, all of these statutes have singled out a collection of individuals for preferential treatment while aligning themselves with the primary function of the law of delict, i.e. the compensation of harm.[10] In addition, the COIDA and the RAF Act have also established statutory compensation funds. Considering that this dissertation aims to investigate the feasibility of establishing a similar fund aimed at compensating a different group of victims, it is appropriate to examine the legal and public policy considerations that have justified the enactment of these similar statutes.

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[9] For example, the Apportionment of Damages Act 34 of 1956, which was described as being the "most important piece of law reform that has been carried out in the field of private law since Union". See RG McKerron (1956) *The Apportionment of Damages Act* 1.

[10] For overviews of the function of the law of delict, see JC Macintosh *Negligence in Delict* 1 ed (1926) 1; FP van den Heever *Aquilian Damages in South African Law* (1944) 3; RG McKerron *The Law of Delict: a Treatise on the Principles of Liability for Civil Wrongs in the Law of South Africa* 7 ed (1971); NJ van der Merwe & PJJ Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* 3 ed (1976) 1-3; J Neethling & JM Potgieter *Neethling-Visser-Potgieter Law of Delict* 7 ed (2015) 3-17; JC van der Walt & JR Midgley *Principles of Delict* 4 ed (2016); MM Loubser & JR Midgley (eds) *The Law of Delict in South Africa* 2 ed (2012) 8-11. These authors are in agreement insofar as compensation is regarded as being the primary function of this branch of the law. The matter of the law of delict's function will be returned to in the final chapter 6.

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The considerations that will be discussed in greater detail include the following. First, the following specific policy considerations which have justified legislative intervention within particular areas of the law of delict will be described: the need to combat the risk of harm, the role of the Constitution and the need to promote the constitutional right to social security and evidentiary problems relating to the application of the common-law fault requirement. Thereafter, general considerations which supported statutory reform of particular areas of the law of delict will be highlighted, including general dissatisfaction with the high transaction costs and levels of undercompensation characteristic of the civil procedural system, the preference for statutory as opposed to judicial reform and the need to avoid arbitrary outcomes.

In conducting this investigation, use will also at times be made of legal comparative methodology, which has proven to be an instructive tool to understand domestic law and to evaluate it in the light of the experiences of other jurisdictions.

3.2 Specific legal and public policy considerations that have justified the statutory reform of the South African law of delict

3.2.1 The need to combat the risk of harm

3.2.1.1 Introduction

Generally, the existence and extent of a risk of harm has played an important role in the South African legislature's decision to develop the law of delict.[11] This has especially been the case in the context of motor vehicle accidents, occupational injuries and diseases and defective consumer products. In the following part of the chapter, attention will therefore be paid to the role that risk has played in the enactment of various statutes that provide compensation for injuries sustained in these contexts.

[11] See MM Loubser *Inleiding tot MMF-Wetgewing* (1993) 3; D van der Nest "Motor vehicle accidents" in MP Olivier, N Smit & ER Kalula (eds) *Social Security: A Legal Analysis* (2003) 501-516; MP Olivier "Social Security: Core Elements" in WA Joubert & JA Faris (eds) *LAWSA* 13(3) second edition (2007) paras 158-159; MM Loubser & E Reid *Product Liability* (2012) 4-5. For a comparative perspective, see also Cane *Atiyah's Accidents* 326-357, 459-487; J Stapleton *Product Liability* (1994) 6; S Deakin, A Johnston & B Markesinis *Markesinis and Deakin's Tort Law* 7 ed (2013) 51-60, 599-604; B Markesinis & H Unberath *The German Law of Torts* 4 ed (2002) 714-717, 724-729.

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3.2.1.2 Motor vehicle accidents

The introduction of the motor vehicle towards the end of the 19th century had profound consequences of a technical, social, financial and legal nature.[12] One of the effects that accompanied its introduction to the marketplace was the increased risk of harm to especially bodily integrity and property. Arguably, this characteristic of motor vehicles provided the dominant reason for legislative reform within this context.[13] Writing about the general impact which motor vehicles have had on the law of delict, Cooper states:[14]

> "A motor car is a potentially dangerous machine. Its technical improvement, with the attendant increase in speed, and the increase in the volume of vehicular road traffic, with the inevitable increase in the number of accidents (which can be described as the materialization of the risk inherent in the operation of the motor car), have confronted the courts with a variety of delictual problems requiring judicial determination. In the process the motor car has become the single most potent instrument for the development and reform of the law of delict in the twentieth century."

More specifically, the rise of motor vehicles produced an increase of two types of risk. First, the rise in motor vehicle traffic has brought about a significant increase in risk to the bodily integrity and property of drivers, passengers and pedestrians.[15] This is substantiated by the following data in respect of the use of motor vehicles in South Africa:[16]

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[12] W Cooper *Delictual Liability in Motor Law* 2 ed (1996) 1.
[13] 2-3.
[14] 2.
[15] Loubser *Inleiding to MMF-Wetgewing* 3; Van der Nest in *Social Security* 501-516; Olivier "Social Security" in *LAWSA* 13(3) paras 158-159.
[16] Arrive Alive Motor Vehicle Accident Crash Statistics 1930 – 2000 <https://www.arrivealive.co.za/stats.aspx> (accessed on 10 March 2016). In addition, it may be noted that in 2013 the International Transport Forum reported that the road accident fatality rate in South Africa was "among the highest rates worldwide", while South Africa was ranked worst out of the 36 countries investigated. See International Transport Forum *Road Safety Annual Report* (2013) 384.

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Fatalities, injuries and property damage resulting from motor vehicle accidents							
Year	Amount of vehicles on South African roads	South African population (in millions)	Road traffic crashes	Fatal road traffic crashes	People killed in road traffic crashes	People injured in road traffic crashes	Road traffic crashes resulting in property damage only
1935	284 216	N/A	31 759	719	897	13 532	21 518
1940	402 757	N/A	36 655	842	910	13 723	25 399
1950	636 292	11.36	51 966	886	952	17 497	38 081
1960	1 236 570	16.26	116 688	2 755	3 051	42 416	85 564
1970	2 121 227	21.50	205 267	7 078	7 948	70 181	155 800
1980	3 494 748	23.80	319 507	6 589	7 572	88 791	256 796
1990	5 200 153	30.60	433 287	9 174	11 157	130 773	344 274
2000	6 814 531	43.33	498 222	6 679	8 494	159 704	401 403
2010	9 892 400	50.90	N/A[17]	10 837	13 967	N/A	N/A

Generally, when the risk of injury to the person or property materialises as the result of the culpable conduct of another, the victim may institute a delictual claim against

[17] OA Osidele *An Analysis of Patterns and Trends of Road Traffic Injuries and Fatalities in Vhembe District, Limpopo Province, South Africa* Unpublished LLM dissertation University of Venda (2016) at page ii estimates that there were more than 500 000 accidents in 2010.

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the wrongdoer in search of compensation of his harm.[18] Wrongdoers, however, are often unable to pay any or all of the damages required to repair the victim's harm.[19] In *Law Society of South Africa v Minister for Transport,*[20] Moseneke DCJ remarked that, "[in his] view, the number of drivers and owners who would be able to pay would be very small."[21] In turn, this inability may expose a wrongdoer's victim to the further risk of receiving limited or no compensation in respect of the harm they suffered.[22] Nugent JA referred to the impact that risk has in this context as follows:[23]

> "People need cars, cars knock people over, people are injured, we cannot bear the cost of knocking people over. It is inherently risky for those who knock people over and for those who are knocked over. The two problems are: People who are driving cannot afford the risk of knocking people over and the people who are using the roads cannot afford the risk of being knocked over."

To protect road users from the potential realisation of such risks and to ensure the compensation of motor vehicle accident victims, the South African legislature decided to intervene in the law of delict by enacting motor vehicle accident legislation. The remainder of this paragraph contains a brief historical background of the development of this legislation, which sheds light on the considerations that could justify a legislature's potential future reform of the law of delict.

To a certain extent, the South African legislation that was introduced in this context was based on similar statutes enacted by the English legislature during the course of the 1930's.[24] It might therefore be worthwhile to reflect on the policy reasons that influenced the English legislature in this regard.

During the first part of the 19th century, under traditional "'horse and buggy law' […] the driver or rider was only liable in so far as he was at fault."[25] Following the judgment

[18] *Law Society of South Africa v Minister for Transport and Another* 2011 (1) SA 400 (CC) para 50. Recent amendments to the RAF Act have, however, abolished the motor vehicle accident victim's common-law claim against wrongdoers. See further paragraph 5.5.1.1 in chapter 5.
[19] *Workmen's Compensation Commissioner v Norwich Union Fire Insurance Society Ltd* 1953 (2) SA 546 (AD) 551; Loubser *Inleiding to MMF-Wetgewing* 3; Van der Nest in *Social Security* 502; Olivier "Social Security" in *LAWSA* 13(3) para 158-159.
[20] 2011 (1) SA 400 (CC).
[21] Para 50.
[22] Loubser *Inleiding to MMF-Wetgewing* (1993) 3; Van der Nest *Social Security: A Legal Analysis* (2003) 502; Olivier "Social Security" in *LAWSA* 13(3) paras 158-159.
[23] Road Accident Fund Commission ("**RAFC**") *Report of the Road Accident Fund Commission* (2002) 103.
[24] *Op't Hof v SA Fire & Accident Insurance Co Ltd* 1949 (4) SA 741 (W) 743.
[25] JR Spencer "Rylands & Fletcher: a Chapter of Accidents in the History of Law and Motoring" (1983) 42(1) *Cambridge Law Journal* 65 65-66.

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in *Rylands v Fletcher*,[26] however, the theory of strict liability emerged, as a result of which it was held that damages could be payable when injury was inflicted in the course of conducting a business for profit, even if there was no question of fault.[27] It was argued that, if a car damaged people or property, the person who brought the car onto the highway should be held strictly liable.[28] This development, however, came to a halt in *Wing v London General Omnibus Company*,[29] when the Court of Appeal dismissed the notion that motor cars were, generally speaking, inherently dangerous things. The effect of this judgment was that the law of torts relating to motor vehicle accidents in the early 20th century was made to rest "squarely upon the basis of fault liability upon which it has rested ever since."[30]

Although the number of motor vehicle accidents in the United Kingdom ("**UK**") was initially small and ownership of vehicles was restricted to a limited, wealthy class, they gradually became cheaper, which meant that ownership became more widespread.[31] The significant rise in motor vehicles in the UK resulted in a substantial surge in the number of motor vehicle accidents.[32] The fact that the appeal for reform of the branch of law dealing with the compensation of harm caused by motor vehicle accidents reached a highpoint during this period is therefore unsurprising.[33] Bartrip describes the increased use of motor vehicles and its accompanying risk of harm as follows:[34]

> "Whatever the perceived or alleged benefits of motorised transport, it cannot be doubted that motor vehicles took a tremendous toll of human life and limb in twentieth-century Britain. Official records for the years 1930 to 1939 (inclusive) indicate that 69824 people died on Britain's roads, at an average rate of just over 7000 per year. Between 1920, when records began, and 1930 the annual number of road deaths rose at a staggering rate from 4886 to 7305."

To address the issue of motor vehicle accidents and related matters, a Royal Commission was appointed in 1928. On the basis of its recommendations, a bill was proposed and ultimately passed by the English legislature as the Road Traffic Act of 1930. Significantly, the Act introduced a system of third party compulsory insurance,

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[26] [1868] UKHL 1.
[27] P Bartrip "No-Fault Compensation on the Roads in Twentieth Century Britain" (2010) 69(2) *Cambridge Law Journal* 263 266.
[28] Spencer (1983) *Cambridge Law Journal* 65-66.
[29] [1909] 2 KB 652 666-667.
[30] Spencer (1983) *Cambridge Law Journal* 66-73.
[31] R Merkin & S Dzibion "Tort Law and Compulsory Insurance" in TT Arvind & J Steele (eds) *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (2013) 303-329 307.
[32] Merkin & Dzibion "Tort Law and Compulsory Insurance" in *Tort Law and the Legislature* 307.
[33] Bartrip (2010) *Cambridge Law Journal* 263.
[34] P Bartrip "Pedestrians, Motorists, and No-Fault Compensation for Road Accidents in 1930s Britain" (2010) *Journal of Legal History* 45 45-46.

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making it unlawful to use a motor vehicle unless an insurance policy in respect of "third party risks" was in force.[35] This system of compulsory third party insurance has been maintained under the Road Traffic Act of 1988.[36]

Similar to England, South Africa experienced a dramatic increase in the use of motor vehicles during the course of the 1930's which brought with it an increase in motor vehicle accidents.[37] Analogous to the situation in England, this led to considerable pressure being exercised on the South African legislature to alleviate the plight of road accident victims.[38] The need was expressed to protect motor vehicle accident victims against the possibility of limited or no recovery of harm because the wrongdoer "was a 'man of straw' and unable to pay the road accident victim's loss or damage."[39] Accordingly, the South African legislature followed the lead of the English legislature in 1939 when it decided to introduce the first bill aimed at protecting motor vehicle accident victims. During a debate of the bill, the Minister of Finance referred to the legal and public policy considerations underlying justifiable legislative reform of the law of delict within this context:[40]

> "I am of the view that this Bill may be described as one which is designed to meet a long-felt want. Its object is to ensure the payment of compensation for injuries or death caused by negligence in the use of motor transport. I think honorable members are aware that there are a considerable number of motor vehicles in the Union driven by people who are not insured against what are known as third party risks. I think I shall probably be correct in saying that that is the case with the majority of the motor vehicles in the Union, and that, of course, means that when harm is brought about through the negligence of an uninsured motorist and he is unable to meet a claim for compensation, the innocent victim is left without any redress."

The Motor Vehicle Insurance Act 29 of 1942 ultimately came into effect in 1946. Its aim, as stated in its preamble, was to "provide for compensation for certain loss or damage caused unlawfully by means of motor vehicles and for matters incidental thereto." The Act introduced compulsory third party insurance on a national scale and compelled the owners of motor vehicles, generally, to take out insurance so that motor

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[35] F Deak "Compulsory Liability Insurance under the British Road Traffic Acts Of 1930 And 1934" (1936) *Law and Contemporary Problems* 565 566.
[36] See section 143 of the Road Traffic Act of 1988.
[37] See the table in paragraph 3.2.1.2 above. See also the second reading of the draft Motor Vehicle Insurance Act 29 of 1942 in Parliament, where the Minister of Finance refers to this consideration as legal and public policy consideration justifying the Act: *Debatte van die Volksraad Deel 43* (1942) 1255-1259.
[38] RAFC *Report of the Road Accident Fund Commission* 108-112.
[39] 108.
[40] *Debatte van die Volksraad Deel 43* (1942) 1255-1259 (own translation).

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vehicle accident victims may be properly compensated for the harm which they suffered arising from the negligent and unlawful driving of a motor vehicle.[41]

In *Rose's Car Hire (Pty) Ltd v Grant*,[42] the Appellate Division confirmed that the intention behind the legislature's decision was to ensure, through the compulsory insurance of motor vehicles, that injured persons or their dependants who might not be able to recover damages owing to the inability of the parties liable to pay, should receive full compensation from insurers in as many cases as possible. Shortly thereafter, in *Aetna Insurance Co v Minister of Justice*, the same court reaffirmed the purpose of the legislative intervention as follows:[43]

> "The obvious evil that [the Act] is designed to remedy is that members of the public who are injured, and the dependants of those who are killed, through the negligent driving of motor vehicles may find themselves without redress against the wrongdoer. If the driver of the motor vehicle or his master is without means and is uninsured, the person who has been injured or his dependants, if he has been killed, are in fact remediless and are compelled to bear the loss themselves. To remedy that evil, the Act provides a system of compulsory insurance."

The 1942 Act underwent regular amendments and was replaced by the Compulsory Motor Vehicle Insurance Act 56 of 1972, which came into operation in 1972. The motivation behind the enactment of new legislation was not to pursue a purpose different to that outlined above, but rather to amend the mechanics by means of which the aim was sought to be achieved.[44] As is evident from a series of cases dealing with liability under the 1972 Act,[45] the legislature's primary focus was still the protection of those who suffer harm[46] as a result of motor vehicle accidents and who might be unable to recover damages owing to the wrongdoer's inability to pay compensation.[47]

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[41] HB Klopper *Law of Third Party Compensation* (2000) 3; Cooper *Motor Law* 3. See also RAFC *Report of the Road Accident Fund Commission* 110: the insurance would cover harm as a result of bodily injuries or death of a breadwinner arising from the culpable and unlawful driving of a motor vehicle, but did not cover property damage or other harm which may have been suffered as a result of the accident.
[42] 1948 (2) SA 466 (A) 471.
[43] 1960 (3) SA 273 (A) 285.
[44] The Act required the insurance of the vehicle and not insurance of the owner or driver. It also provided cover (through the newly established Motor Vehicle Assurance Fund), for the first time, for loss occasioned by uninsured or unidentified motor vehicles. See further *Law Society of South Africa v Minister for Transport* 2011 (1) SA 400 (CC) para 20.
[45] See *Commercial Union Assurance Company of South Africa Ltd v Clarke* 1972 (3) SA 508 (AD) 518; *AA Mutual Insurance Association Ltd v Biddulph* 1976 (1) SA 725 (AD) 738; *Webster v Santam Insurance Co Ltd* 1977 (2) SA 874 (AD) 881; *Nkisimane v Santam Insurance Co Ltd* 1978 (2) SA 430 (AD) 435.
[46] As was the case with its predecessor, the insurance policies taken out as a result of the Act would cover only harm arising from bodily injuries or the death or bodily injuries of a breadwinner.
[47] The preamble of the Act reads as follows: "To provide for the compulsory insurance of certain motor vehicles in order to ensure the payment of compensation for certain loss or damage unlawfully caused by the driving of such motor vehicles; for the payment of compensation where the loss or damage is caused by the driving of an uninsured or unidentified motor vehicle; and for incidental matters." See

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Similar to its predecessor, the Act was based on the common-law principles of delictual liability, which required an accident victim to prove that his harm had been caused by the culpable and unlawful driving of a motor vehicle.

The 1972 Act was substituted by the Motor Vehicle Accident Act 84 of 1986 ("**MVA Act**"). The MVA Act, which came into operation in 1986, introduced a number of changes.[48] Importantly, it replaced the former system of compulsory third party insurance with a system of statutory assumption of liability in respect of harm suffered by road users as a result of the negligent and unlawful driving of a motor vehicle.[49] To achieve this, the legislature established the Motor Vehicle Accident Fund ("**MVA Fund**"), financed by fuel levies, to fund the new statutory system of compensation of harm. Because the MVA Act was effective only in South Africa and Namibia but not in the former so-called independent territories of Transkei, Bophuthatswana, Venda and Ciskei, the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 ("**MMF Act**") was enacted in 1986 with the view to bringing about a uniform system of third party compensation.[50] The MMF Act remained applicable up to 1997, when the newly enacted RAF Act came into operation.

The RAF Act essentially has the same object as that of its predecessors, namely the "payment of compensation for loss or damage wrongfully caused by the driving of motor vehicles."[51] It was based on the common-law elements for delictual liability and has retained fault as the basis for liability. Although it has been argued that the effect of the Act was to "suspend the common law delictual action against the wrongdoer and to compel the road accident victim to institute his claim against the Road Accident Fund",[52] the delictual claim of the victim was left intact and victims therefore had the option of instituting a claim against the wrongdoer in respect of harm that was not covered under the RAF Act.

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also A Suzman, G Gordes & MW Hodes *The Law of Compulsory Motor Vehicle Insurance in South Africa* 3 ed (1982) 4-6.

[48] *Law Society of South Africa v Minister for Transport* 2011 (1) SA 400 (CC) para 21; Klopper *Law of Third Party Compensation* 4.

[49] Klopper *Law of Third Party Compensation* 4.

[50] 4.

[51] Section 3 of the RAF Act. See also RAFC *Report of the Road Accident Fund Commission* 111-112: Not all damage caused by the unlawful and negligent driving of a motor vehicle can be recovered from the RAF. See paragraph 5.7 in chapter 5 for a discussion of the limitation and exclusion of liability under the RAF Act.

[52] RAFC *Report of the Road Accident Fund Commission* 111.

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In its 2002 report, the Road Accident Fund Commission ("**RAFC**") described the fault-based compensation system established under the RAF Act as "unreasonable, inequitable, unaffordable and unsustainable."[53] Among other things, the RAFC found that the Act's insistence on fault-based liability contributed to its financial decline. The criticism of the RAF Act's fault-based liability regime is discussed in further detail in paragraph 3.2.3.3.1 below.

The victim's common-law right to claim compensation from a wrongdoer for harm that is not compensable under the RAF Act was abolished by section 9 of the RAFA Act, which came into force on 1 August 2008. In *Law Society of South Africa v Minister for Transport*,[54] the Constitutional Court ("**CC**") was requested to consider the constitutional validity of this amendment.[55] As will be discussed in greater detail in chapter 5, the CC held that it passed the necessary rationality test and confirmed that the abolition of the common-law claim against the wrongdoer was justifiable.[56]

In its judgment, the CC referred also to the dominant consideration that triggered the amendment – the need to compensate victims of harm that manifests when the risk created by motor vehicles materialises – as well as future reform of the system. In this context, reference was made to the legislature's intention to ultimately replace the common-law system of compensation with a set of limited no-fault benefits which would form part of a broader social security net as public financial support for people who are poor, have a disability or are vulnerable.[57]

The amendments introduced by the RAFA Act provide further evidence of the primary consideration that underlies the enactment of motor vehicle accident legislation in South Africa, namely that it aims to provide compensation where the risk of harm associated with motor vehicle accidents materialises.[58] As explained by the Minister of Transport, although the economic viability of the RAF is an important goal, the ultimate vision is that a new system of compensation for motor vehicle accident victims

[53] Department of Transport *Policy Paper for the RABS* (2011) 13. See also paragraph 3.2.3.3.1 below for a detailed discussion of the ways in which the fault requirement has provided motivation for legislative development of the law of delict.
[54] 2011 (1) SA 400 (CC).
[55] 2011 (1) SA 400 (CC) para 15. See also paragraph 5.5.1.1 in chapter 5.
[56] *Law Society of South Africa v Minister for Transport* 2011 (1) SA 400 (CC) paras 35, 75-80, 103. See also paragraph 5.5.1.1 in chapter 5.
[57] 2011 (1) SA 400 (CC) paras 44-45.
[58] See also paragraph 5.5.1.1 in chapter 5.

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must be established and integrated into a comprehensive social security system that offers life, disability and health insurance cover for all accidents and diseases.[59] To achieve the desired reform, the legislature therefore drafted the Road Accident Benefit Scheme Bill ("**RABS**") in 2014. Should it be enacted, the current fault-based system of liability administered by the RAF will be replaced by a new social security scheme for road accidents.

The need to further the constitutional right to social security as a consideration justifying legislative intervention in the law of delict will be analysed in paragraph 3.2.2 below. For the purpose of this part of the chapter, it is sufficient to note here that the proposed RABS is aimed not only at continuing the achievement of the primary aim outlined by its predecessors, namely the protection of the victim's interests by ensuring that he is properly compensated, but also at the promotion of the wrongdoer's interest insofar as the victim's common-law right to claim damages for residual harm has been abolished. In doing so, it may be argued that the legislature seeks to address not only the risk of no compensation to which road users are generally exposed, but also the risk of liability to which culpable road users may be exposed.[60]

From the above, it appears that motor vehicle accident legislation may be regarded as "social legislation"[61] aimed at the "widest possible protection and compensation"[62] of road users by compensating them against harm that arises from the culpable and unlawful driving of a motor vehicle.

The RAF Act, its predecessors and its proposed successor provides for the substitution of a compensation fund or an insurance company in the place of a culpable wrongdoer to ensure compensation for a motor vehicle accident victim or his family.[63] These legislative developments resulted in a conceptual shift from protection of the wrongdoer to acceptance of the need to provide protection and support for all victims of road accidents.[64]

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[59] Paras 44-45.
[60] See the statement of Nugent JA in RAFC *Report of the Road Accident Fund Commission* 103: "The two problems [relating to motor vehicle accidents] are: "People who are driving cannot afford the risk of knocking people over and the people who are using the roads cannot afford the risk of being knocked over."
[61] *Pithey v Road Accident Fund* 2014 (4) SA 112 (SCA) para 18 (footnotes omitted).
[62] Para 18.
[63] Olivier "Social Security" in *LAWSA* 13(3) para 159.
[64] Para 159.

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The replacement of the wrongdoer by the RAF undermines the notion that the victim's harm should be compensated – or corrected – by the person who culpably and wrongfully caused it. The fund's existence is therefore arguably not aligned with the so-called corrective justice account for the South African law of delict.[65]

Proponents of the corrective justice account highlight the fact that, properly understood, there must be correlativity between the person who has the duty to rectify the wrong and the person who has suffered the wrong. The corrective justice account of the law of delict may be contrasted with a distributive justice-based justification for this branch of the law. Whereas the latter is concerned with the allocation of resources throughout society as a whole and the criteria on which such an allocation occurs, the basic idea with the former is to do justice between two parties, i.e. it is concerned with whether there should be any allocation and if so, to what extent and in what form and on what basis from one person back to another. In other words, from a corrective justice point of view, the law of delict is concerned with justice as between a plaintiff and wrongdoer. Likewise, it is not – and should not – be concerned with a global economic picture. Rather, the principles of bipolarity, correlativity and equality should obtain.

Nonetheless, the RAF may be said to fulfil the primary function of the law of delict (compensation of harm), remains based on delictual principles for the time being and is regarded by courts and academics as constituting a significant part of the South African law of delict.[66]

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[65] See A Fagan "The right to personal security" in E Reid & D Visser (eds) *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (2013) 130-155. See generally E Weinrib *The Idea of Private Law* (1995); E Weinrib "Corrective Justice in a Nutshell" (2002) 52 *University of Toronto Law Journal* 34; G Fletcher "Fairness and Utility in Tort Theory" (1972) 85 *Harvard Law Review* 537; J Coleman "Corrective Justice And Wrongful Gain" (1982) 11 *Journal of Legal Studies* 421–440; J Coleman "Property, Wrongfulness, and the Duty to Compensate" (1987) 63 *Chicago-Kent Law Review* 451-470; J Coleman "The Mixed Conception Of Corrective Justice" (1992) 77 *Iowa Law Review* 427–444; J Coleman *Risks and Wrongs* (1992); J Coleman "Tort Law and the Demands of Corrective Justice (1992) 67 *Indiana Law Review* 349–378; J Coleman "The Practice of Corrective Justice" in DG Owen (ed) *Philosophical Foundations of Tort Law* (1995) 53-73; J Coleman "Doing Away with Tort Law" (1995) 41 *Loyola of Los Angeles Law Review* 1148–1170. See paragraph 6.3.2 in chapter 6 for concluding remarks about the function of the South African law of delict and whether it may be understood as solely aimed at achieving corrective justice.

[66] For example, a discussion of the salient provisions of the RAF is included in Loubser & Midgley (eds) *Law of Delict* 294-301.

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Lastly, it may be said that, although the legislative intervention did not result in the decrease of the risk of harm arising from the use of motor vehicles, i.e. in securing general road safety or deterring future motor vehicle accidents, or in deterring future motor vehicle accidents,[67] it was successful insofar as addressing the risk of litigating "against drivers who often were not in a financial position to compensate accident victims for their losses."[68]

3.2.1.3 Occupational injuries and diseases

The exposure to risk of harm and associated risk of no compensation has also served as significant motivation for the enactment of legislation aimed at compensating employees who are injured or become diseased during the course and scope of their employment.[69] Generally, legislative intervention within this context may be justified on the basis that employers often expose their employees to risks specifically associated with their activities as employees, i.e. to suffer an accident at work or to sustain an illness that is related to specific health risk of the task assigned to the employee.[70]

Apart from exposing their employees to specific risks associated with their employment activities, an employer exposes the employee to the additional risk of no compensation in the event that the risk of harm materialises. Of course, the exposure to these risks occur while the employer stands to benefit financially from the efforts of his employee.[71]

A brief overview of the historical development of legislative intervention within this context is provided in the rest of this paragraph, and attention is paid to the policy considerations that justified reform of this area of the law.

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[67] See the table in paragraph 3.2.1.2.
[68] Department of Transport *Policy Paper for the RABS* 6.
[69] See *Jooste v Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC) 1; Markesinis & Unberath *The German Law of Torts* 728-230; S Deakin, "Tort Law and Workmen's Compensation Legislation: Complementary or Competing Models?" in TT Arvind & J Steele (eds) *Tort Law and the Legislature* (2013) 253 253-257.
[70] Markesinis & Unberath *The German Law of Torts* 728.
[71] See further below for an explanation of the operation of the enterprise risk theory in this context.

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Prior to legislative intervention, the position of South African employees who were injured at the workplace was similar to that of motor vehicle accident victims in the pre-legislation era, i.e. they had to institute a common-law delictual claim against their employer to obtain compensation for the harm they had suffered.[72] In doing so, they were required to prove that, amongst other things, their employer was at fault, which typically meant that they had to prove their employer's negligence. As was the case with motor vehicle accident legislation, the South African statutes that were enacted to develop the law of delict in this context were based on similar English statutes enacted during the course of the late 19th and early 20th centuries.[73]

Despite it being possible for employees in 19th century England to institute tort claims against their employers for personal injuries suffered in the workplace as a result of their employers' negligence, employees generally did not do so.[74] This may be as a result of a variety of legal considerations, including the difficulty in proving fault in the form of negligence,[75] and the existence of "several draconian defences",[76] i.e. the doctrine of common employment, contributory negligence and *volenti non fit iniuria* which, to a large extent, enabled employers to evade tortious liability for harm caused to an employee during the course and scope of employment.[77] Additional social, political and economic considerations that made it problematic for English employees to institute tort claims against their employers have been described as follows:[78]

> "[M]any workers never thought of suing because they were not even aware that a wrong had been done to them. An accident was an everyday occurrence and part of their way of life, and the risk of injury was seen as in the hands of Fate rather than the employer. If workers were aware that a wrong had been done, they were often ignorant of the possibility of bringing a claim. Those who knew of the tort system found it very difficult to get legal advice. If they did sue, they faced the prospect of incurring legal costs. A more significant deterrent was the likelihood that a tort claim would lead to the loss of work-related benefits such as employer's sick pay, or continued employment in an easier job, or medical treatment from work doctors. Suing an employer often meant antagonising the most powerful men in the region and jeopardizing not

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[72] *Workmen's Compensation Commissioner v Norwich Union Fire Insurance Society Ltd* 1953 (2) SA 546 (AD) 551.
[73] *Victoria Falls Power Co. Ltd v Lloyd No.* 1908 TS 1164 1165, 1182; Select Committee of the House of Assembly *Report of the Select Committee on Compensation to Workmen* (1904) 15, 17-18.
[74] MA Stein "Victorian Tort Liability for Workplace Injuries" (2008) *University of Illinois Law Review* 935 submits that, in England, the first reported decision of an employer being sued in tort by his employee for a personal injury suffered at the workplace may be traced to 1837.
[75] See paragraph 3.2.3 below.
[76] R Lewis "Employer's Liability and Workers' Compensation: England and Wales" in K Oliphant & G Wagner (eds) *Employer's Liability and Workers' Compensation* (2012) 137 138.
[77] Deakin et al *Tort Law* (2013) 541-545; Deakin "Tort Law and Workmen's Compensation Legislation: Complementary or Competing Models?" in *Tort Law and the Legislature* 253-257.
[78] Lewis "Employer's Liability and Workers' Compensation: England and Wales" in *Employer's Liability and Workers' Compensation* 139.

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only one's employment prospects, but also one's housing, church membership and even access to town poor relief. Nor could workers easily endure the lengthy, complicated and uncertain litigation process itself. Their claims then were opposed by the best lawyers and by morally questionable defence strategies. The final difficulty faced by the workers was that they often needed what tort could not supply: urgent recompense to replace their wage loss."

Other policy considerations that influenced the English legislature to interfere with the *status quo* and to develop the law relating to harm suffered by employees in the course and scope of their employment, may be summarised as follows: the demand for workplace safety, the continuing pressure exerted by trade unions and industrial disputes, the courts' reaffirmation of workers' entitlement to a high degree of protection, the steady growth of litigation concerning workplace accidents that became an accepted part of the employment system and the fact that liability insurance became readily available for employers after 1880.[79] In addition, the industrial revolution in 19th century England caused a significant increase in industrial accidents in the form of railroad crashes, coalmine explosions, steamboat fires, etc.[80]

The English legislature responded by enacting the Workmen's Compensation Act in 1897. It thereby introduced a no-fault based compensatory system outside tort.[81] The 1897 Act imposed a statutory duty on employers to make limited payments to the victims of industrial accidents, irrespective of whether those injuries resulted from the culpable wrongdoing of the employer – as long as the accidents arose out of and in the course of employment.[82] The decision to hold the employer liable regardless of whether or not they acted culpably may be explained with reference to the concept of enterprise risk or enterprise liability.[83] In this regard, Deakin writes:[84]

"The employer as 'enterprise' has a duty of care to have regard for the safety and welfare of its employees and incurs liability to third parties injured by the negligence of those employees not simply because it has 'deep pockets' or because of a supposed symmetry between risks and profits, but because its organisational capacity enables it to manage the risks of injury internally, through the bureaucratic structures of the firm, while its financial resources and position in the market make it possible for it to absorb and channel potential liabilities through insurance.

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[79] S Hedley "Tort and Personal Injuries, 1850 to the Present" in TT Arvind & J Steele (eds) *Tort Law and the Legislature* (2013) 235 235-242.
[80] JM Kleeberg (2003) "From Strict Liability to Workers' Compensation: The Prussian Railroad Law, the German Liability Act, and the Introduction of Bismarck's Accident Insurance in Germany, 1838-1884" *Journal for International Law and Politics* 57-58.
[81] Lewis "Employer's Liability and Workers' Compensation: England and Wales" in *Employer's Liability and Workers' Compensation* 140.
[82] Lewis "Employer's Liability and Workers' Compensation: England and Wales" in *Employer's Liability and Workers' Compensation* 140; D Brodie *Enterprise Liability and the Common Law* (2010) 2.
[83] Brodie *Enterprise Liability* 2-7.
[84] Deakin "Tort Law and Workmen's Compensation Legislation: Complementary or Competing Models?" in *Tort Law and the Legislature* 254.

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> Insurance […] makes it possible for firms to shift certain losses, but also sets implicit standards of care, which operate through the monitoring activities, undertaken by liability insurers."

The first local legislation aimed at addressing the issue of compensation for employees was the Cape Employer's Liability Act 35 of 1886, which was replaced by the enactment of the Workmen's Compensation Act 40 of 1905 (Cape of Good Hope).[85] Many of the policy considerations underlying the 1905 Act as well as succeeding legislative interventions are reflected in the 1904 Report of the Select Committee on Compensation to Workmen.

From its report, it is clear that there was significant concern about securing compensation for injured employees and doing so as "quickly and as cheaply as possible."[86] It was stated that one of the chief advantages of introducing statutory reform would be that it would provide what the law of delict failed to do at the time, i.e. the speedy provision of a fixed amount of money *in lieu* of the lost wages and to "ensure that the sum shall be paid with as little litigation as possible."[87]

Another consideration that justified the legislature's intended development of this branch of the law was the fact that, in "ninety-nine cases out of every hundred the workman does not know what he can demand, and if his employer pays him anything at all he considers it as an act of charity. In the great majority of cases he has an action, and does not bring it."[88]

It was also argued that the enactment of legislation would undermine the influence which the defence of contributory negligence had on an employee's potential common-law delictual claim for damages, i.e. to give the employee an action despite the fact that his negligence contributed towards the accident.[89]

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[85] The Act is based on the English Act of 1897: Select Committee Rep*ort of the Select Committee on Compensation to Workmen* (1904) 15, 17. See JJ Jansen van Vuuren *A Legal Comparison between South African, Canadian and Australian Workmen's Compensation Law* Unpublished LLM thesis University of South Africa (2013) 25.

[86] Select Committee *Report of the Select Committee on Compensation to Workmen* 2. See also at 9, 14 where it is made clear that all relevant parties sought a way to deal with employer and employee disputes as quickly and cheaply as possible and that what is required is "simple machinery" for securing compensation for the injured employee.

[87] Select Committee *Report of the Select Committee on Compensation to Workmen* 12.

[88] 14.

[89] 14. It may be noted that the doctrine of common employment was not considered to be a part of the South African common law of delict: *Waring & Gillow v Sherborne* 1904 TS 340. Accordingly, unlike the position in England, it did not play the same role in motivating legislative change.

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Lastly, the employees sought to improve their safety:[90]

> "From a workmen's point of view the Bill is a most desirable one in every respect. At the present time workmen are entirely dependent on the generosity of their employers for compensation. Now, gentlemen, it is but natural that an employer of labour should desire to obtain the utmost amount of work for the least possible cost; in the pursuit of that object he is apt to overlook certain precautionary measures which he should take to ensure the safety of his workmen, and we maintain that there should be such an Act so based that it would compel the employer to take these precautionary measures."

Therefore, it seems that the decision by the legislature to develop the law of delict relating to the compensation of employees were motivated by similar policy considerations than those underlying the English legislature's development of law of negligence regarding workplace injuries and diseases.

A similar statute, the Workmen's Compensation Act 36 of 1907, was enacted in the Transvaal.[91] The Transvaal Act was "almost identical"[92] to the English Workmen's Compensation Act of 1906. The Act applied to the whole country after unification in 1910, but was replaced by the Workmen's Compensation Act 25 of 1914 which, in turn included a series of industrial diseases following an amendment in 1917 through the Workmen's Compensation (Industrial Diseases) Act 13 of 1917.[93] Importantly, both these Acts required employees to prove fault on the part of the employer.[94]

In its early form, the Workmen's Compensation Act was ineffective at providing adequate compensation because employers were not compelled to insure their employees against the risk of workplace injuries.[95] As a result, employers that did not have insurance could face insolvency if they were held liable for their employees' harm. Also, injured or diseased employees were exposed to the risk that the employer would not be in a position to provide compensation, thereby rendering the employee potentially unable to earn further income.[96]

By 1930, and with the benefit of using the English statute as example, employees, industry and the South African government recognised the need for compulsory

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[90] Select Committee *Report of the Select Committee on Compensation to Workmen* 64-65.
[91] Van Vuuren *Workmen's Compensation Law* 25.
[92] *Victoria Falls Power Co., Ltd v Lloyd, No*. 1908 TS 1165, 1172.
[93] Van Vuuren *Workmen's Compensation Law* 26; *Mankayi v Anglogold Ashanti Ltd* 2011 (3) SA 237 (CC) paras 45-46. At that stage, similar statutes were also in place in France, Germany, New Zealand and certain Australian states. See Select Committee *Report of the Select Committee on Compensation to Workmen* 14.
[94] *Mankayi v Anglogold Ashanti Ltd* 2011 (3) SA 237 (CC) paras 45-46.
[95] Van Vuuren *Workmen's Compensation Law* 26.
[96] 26.

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insurance.[97] The 1914 and 1917 statutes were accordingly replaced by the Workmen's Compensation Act 59 of 1934, which provided for a system of compensation to be paid by the employer if an employee suffered harm as a result of an accident arising in the course and scope of his employment. Pursuant to the passing of the Act, employees were no longer required to prove fault on the part of the employer to obtain compensation.[98] Importantly, the Act made insurance compulsory through private companies rather than a state fund favoured by workers and trade unions.[99] The office of the Compensation Commissioner was established and tasked with the mediation of compensation settlements between employees and employers that was ultimately funded through the compulsory insurance obtained by employers.[100]

The Workmen's Compensation Act 30 of 1941 replaced the 1934 Act and introduced a new system of compensation by establishing a state "accident fund"[101] to which all employers would contribute on the basis of employer's wage budgets[102] and from which employees were to be compensated.[103] Employees were entitled to compensation from the fund if they could prove that they had suffered harm as a result of an "accident arising out of and in the course of […] employment and resulting in a personal injury".[104] While the Act established a compensation fund, it also indemnified employers against potential delictual claims which employees may have had against them.[105] In *R v Canquan*,[106] the court summarised the purpose of the Act by stating that it was "designed to protect the interests of employees and to safeguard their rights, and its effect is to limit the common law rights of employers and to enlarge the common law rights of employees."

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[97] See D Budlender "The Workmen's Compensation Act" (1984) *South African Labour Bulletin* 9(4) 22 22-41.
[98] *Mankayi v Anglogold Ashanti Ltd* 2010 (5) SA 137 (SCA) para 16.
[99] United States Agency International Development *Worker's Compensation in the Republic of South Africa* (2008) 3.
[100] Van Vuuren *Workmen's Compensation Law* 26.
[101] See section 64 of the Act.
[102] See section 68 of the Act.
[103] *Mankayi v Anglogold Ashanti Ltd* 2010 (5) SA 137 (SCA) para 17.
[104] Section 2 of the Act.
[105] Section 7: "(a) no action at law shall lie by a workman or any dependant of a workman against such workman's employer to recover any damages in respect of an injury due to accident resulting in the disablement or the death of such workman; and (b) no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of any such disablement or death."
[106] 1956 (3) SA 355 (E) 368.

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The COIDA repealed the Workmen's Compensation Act and came into operation in 1994. It provides for the compensation of employees injured in accidents[107] that arose out of and in the course of their employment,[108] or who contracted occupational diseases.[109] In accordance with section 15 of the Act, a statutory compensation fund was established to which employers are required to contribute[110] and from which compensation and other benefits are paid to employees.[111] In addition to establishing a fund from which an employee may obtain limited compensation, section 35(1) of the Act abolished the employee's common-law right to institute a delictual claim against his employer for any harm resulting from accidents suffered during the course and scope of the employment.[112] When instituting his statutory claim against the compensation fund, an employee is not required to prove fault.[113]

In the leading judgment on the matter, *Jooste v Supermarket Trading (Pty) Ltd,* the CC described this development as follows:[114]

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[107] "Accident" is defined as an "accident arising out of and in the course of an employee's employment and resulting in a personal injury, illness or the death of the employee."

[108] See *MEC for Health v DN* 2015 (1) SA 182 (SCA) for a discussion on the course and scope of employment requirement within the context of the COIDA. It may be noted that, apart from the COIDA and its antecedent legislation, which relates to the interests of all employees in industry generally (including commerce and services), another strand of legislative development concentrated specifically on the interests of mineworkers. The Occupational Diseases in Mines and Works Act 78 of 1973 (and its predecessors) was a legislative response to the deleterious diseases contracted by mineworkers. Its history may be briefly summarised as follows: the Miners' Phthisis Allowances Act of 1911 was first enacted in 1911, and succeeded in 1912 by the Miners' Phthisis Act of 1912. The 1912 Act was amended by the Miners' Phthisis Amendment Act of 1914. The Miners' Phthisis Amendment Act of 1914 was succeeded by the Miners' Phthisis Act of 1916 (1916 Act). It repealed parts of the 1912 Act and the whole of the Miners' Phthisis Amendment Act of 1914. The Miners' Phthisis Acts Consolidation Act of 1925 was enacted in 1925 and was in turn repealed by the Silicosis Act of 1946. The Pneumoconiosis Act of 1956 superseded the Silicosis Act. The 1956 Act was superseded by the Pneumoconiosis Compensation Act of 1962. In 1973, the Occupational Diseases in Mines and Works Act 78 of 1973 repealed previous legislation and consolidated the law relating to the payment of compensation in respect of certain diseases contracted by persons employed in mines and work. See further *Mankayi v Anglogold Ashanti Ltd* 2011 (3) SA 237 (CC) paras 26-35.

[109] See section 65 of the Act.

[110] See section 87 of the Act.

[111] See section 16 of the Act.

[112] Section 36 of the Act preserves and regulates an employee's rights against a third party who may incur liability to the employee.

[113] Although the Act therefore continues its predecessor's abandonment of the fault requirement, it does play a limited role. Section 56(1) of the Act provides that, if a person has met with an accident or contracted an occupational disease owing to his or her employer's negligence, the employee may apply to the commissioner to receive increased compensation in addition to the compensation normally payable in terms of this Act.

[114] 1999 (2) SA 1 (CC) para 15. See also *MEC for Education, Western Cape Province v Strauss* 2008 (2) SA 366 (SCA) paras 11-12; *Healy v Compensation Commissioner* 2010 (2) SA (E) 470 para 11; *Sanan v Eskom Holdings Ltd* 2010 (6) SA 638 (GSJ) para 8; *MEC for Health, Free State v DN* 2015 (1) SA 182 (SCA) paras 6-7; *Thomas v Minister of Defence and Military Veterans* 2015 (1) 253 (SCA) para 6.

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> "The Compensation Act supplants the essentially individualistic common-law position, typically represented by civil claims of a plaintiff employee against a negligent defendant employer, by a system which is intended to and does enable employees to obtain limited compensation from a fund to which employers are obliged to contribute."

As was the case with motor vehicle accidents, the establishment of a statutory compensation fund appears to undermine the idea that compensation should be paid by the person who culpably and wrongfully caused it, in an attempt to thereby correct his wrong. The existence of a compensation fund in this context is therefore similarly not aligned with the so-called corrective justice explanation for the law of delict.[115] Notwithstanding, it is successful in achieving the function set out by the law of delict – compensation of harm. Arguably, more injured and diseased employees receive compensation from the fund than would otherwise have been the case if they were required to institute common-law delictual claims against their employers. As will be expanded upon in chapter 6, it is proposed that the COIDA constitutes an important part of the South African law of delict,[116] and that it requires that ideas about the role of the law of delict in the South African context be revisited.

Against this background, it may be said that the development of the law of delict by the enactment of legislation that provides compensation for workplace-related injuries and diseases may be regarded as a response to the risk of injury to which the employee is exposed as a result of his employment as well as the potential risk of not being able to recover any compensation for the harm that is suffered once the risk materialises. In *Jooste v Supermarket Trading (Pty) Ltd*,[117] the CC confirmed the role of risk and remarked that, in the absence of any legislation "there would be no guarantee that an award would be recoverable because there would be no certainty that the employer would be able to pay large amounts in damages. It must also be borne in mind that the employee would incur the risk of having to pay the costs of the employer if the case were lost."

The exposure to risk has also played a significant role in the adoption of workplace legislation in foreign jurisdictions. The adoption of the no-fault based legislation to

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[115] See Fagan "The right to personal security" in *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* 130-155. As indicated earlier, see paragraph 6.3.2 in chapter 6 for concluding remarks in this context.

[116] For example, a discussion of the salient provisions of the COIDA is included in Loubser & Midgley (eds) *Law of Delict* (2012) 196-200.

[117] 1999 (2) SA 1 (CC) para 15.

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compensate injured and diseased employees is "consistent with a widespread moral idea that it is not unjust to impose a strict liability on those who cause loss while taking risks in pursuit of commercial profit, even where the risk is unforeseeable or cost-justified."[118]

In conclusion, it appears that the leading policy consideration underlying legislative development of the law of delict in this field is the attempt to ensure that employees will receive compensation, albeit limited, in respect of the materialisation of an employment risk during the course and scope of employment.[119] It appears that the notion of enterprise liability best explains why to impose liability for harm specifically on employers.

3.2.1.4 Defective consumer products

The design, manufacture, distribution and sale of products and services are, generally, central to the wealth and welfare of any society, but bring about disease, injury and even death for a wide range of individuals.[120] The rise of industrialisation in the 19th century and consumerism in the 20th century led to a substantial increase in the manufacturing and distribution of consumer products.[121] This meant that, more than ever before, consumers were being exposed to an unremitting series of manufactured goods. Because technology grew more sophisticated and often coupled with expertise, consumers knew very little about the products that reached them. It is therefore unsurprising that many of these products posed a significant risk to the wellbeing of consumers who chose to make use of them.[122] Even where the risk of harm was not particularly great, it was accepted that, should it materialise, the harm suffered by the consumer would be severe.[123]

In response to the rise in consumer products, the growing risk of exposure to harm and the difficulty of holding manufacturers liable for the harm suffered by consumers as a result of defective products, the South African legislature introduced a strict

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[118] Stapleton *Product Liability* (1994) 195.
[119] Cane *Atiyah's Accidents* 332.
[120] E van Eeden *Consumer Protection Law in South Africa* (2013) 367.
[121] Stapleton *Product Liability* 9-16.
[122] Van Eeden *Consumer Protection Law* 370.
[123] W van Gerven, P Larouche & J Lever J (eds) C*ases, Materials and Text on National, Supranational and International Tort Law* (2000) 599.

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liability regime for harm suffered as a result of defective products when it enacted the CPA.[124] Set out below is a brief overview of the historical development which culminated in the statutory reform of the law of delict in this context.

As is the case with the rise of product liability as a distinct area of the law in a variety of other jurisdictions, this development in the South African law may be traced back to progress made by the courts in the United States of America ("**USA**"). Indeed, the judicial development of the law by American courts is generally regarded as the precursor to the global increase of legislative intervention aimed at compensating victims of defective consumer products.[125]

As will be discussed in greater detail below, the American judicial innovations enabled these victims to litigate against the sellers and manufactures of defective products through alterations of the existing tort or contract law.[126] The courts' approach was ultimately captured in the American Law Institute's Second Restatement of Torts in 1965, whereafter, as Reimann describes:[127]

> "[in] the 1960s and 1970s, the principle of strict product liability swept through the United States, and became the rule in most, though not all, states of the Union. European scholars and policy makers watched this development with great interest. In part, they were fascinated by the activism of the American courts, which fashioned a new consumer protection regime".

Because the rise of the strict liability regime is generally regarded as originating within the American courts,[128] special attention will be placed on the judicial expansion of liability for defective consumer products within this jurisdiction.

The economic expansion that industrialisation produced in especially the USA, was accompanied by a significant increase in the volume of consumer transactions.[129] The types of products manufactured and sold by way of these transactions posed a

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[124] The Act came into effect in 2010.
[125] M Reimann, "Product Liability" in M Bussani & AJ Sebok (eds) *Comparative Tort Law: Global Perspectives* (2015) 250-279 251. See also Van Eeden *Consumer Protection Law in South Africa* 1-5, 21-22; M Reimann, "Liability for Defective Products at the Beginning of the Twenty-First Century: Emergency of a Worldwide Standard?" (2003) 51(4) *American Journal of Comparative Law* 751 756, 761; Stapleton *Product Liability* 3-36.
[126] Reimann "Product Liability" in *Comparative Tort Law* 251.
[127] Reimann "Product Liability" in *Comparative Tort Law* 251. See also Van Eeden *Consumer Protection Law in South Africa* 1-5, 21-22; Reimann (2003) *American Journal of Comparative Law* 756; Stapleton *Product Liability* 3-36.
[128] Reimann "Product Liability" in *Comparative Tort Law* 251. See also Van Eeden *Consumer Protection Law in South Africa* 1-5, 21-22; Reimann (2003) 51(4) *American Journal of Comparative Law* 756-761, 835; Stapleton *Product Liability* 3-36.
[129] Stapleton *Product Liability* 10.

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significantly higher risk of bodily injuries or property damage than was the case earlier during the 19th century:[130]

> "Sometimes the nature of the new type of good made inspection difficult or impossible at least without expert technical advice, which was often in short supply. Even if the intrinsic nature of the good did not produce this situation, the volume of transactions and the new forms in which products were packaged and delivered often did. But most importantly of all, inspection was often rendered difficult if not impossible – at least for commercial buyers in the chain – by the increasing number of contracts formed between parties acting at a distance, in some cases before the relevant goods had come into existence, and the speed at which goods were passed down the lengthening commercial chain."

Most American consumers who were harmed by manufactured products were faced with a stumbling block; because they were not contractually linked to the manufacturer in question, they lacked a contractual remedy.[131] In cases where a consumer did have the option of instituting a contractual claim against a manufacturer, there was the possibility that it did not have sufficient funds or insurance to compensate the injured consumer for the harm suffered. In other words, much like the victims of motor vehicle accidents or those who suffered from injuries or diseases sustained during the course and scope of their employment at the turn of the previous century, consumers were exposed to an increased risk of harm and its accompanying risk of receiving limited or no compensation.

To deal with this problem, American courts developed contract law in a series of cases in the early 20th century[132] so that the requirement of privity of contract was partially relinquished and less reliance was placed solely on contract to protect consumers from harm as a result of defective products.[133] The courts expanded the liability of manufacturers by relying on the idea of a transmissible warranty that goods are free of defects.[134] As a result, the action for breach of warranty was ultimately made available not only to the immediate purchaser of a product, but also to other persons who may reasonably have expected to use, consume or be affected by the goods.[135]

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[130] 11.
[131] See Stapleton *Product Liability* 9-16; Loubser & Reid *Product Liability* 4-9.
[132] Deakin et al *Tort Law* (2013) 590-607.
[133] See Loubser & Reid *Product Liability* 24.
[134] Loubser & Reid *Product Liability* 24.
[135] The abandonment of privity of contract in favour of protecting a broader consumer interest is reflected in the well-known judgment of Traynor J in *Escola v Coca-Cola Bottling Co of Fresno* 24 Cal.2d 453, 150 P.2d 436, where it was noted that privity should be abandoned and that the public policy considerations underlying the implied warranty of merchantability should be used to construct an independent and strict liability for defective products in tort. Further extension took place in *Henningsen v Bloomfield Motors Inc.* 32 N.J. 358, 161 A.2d 6. See also Loubser & Reid *Product Liability* 24; Stapleton *Product Liability* 21.

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In *Greenman v Yuba Products*,[136] the Supreme Court of California took the first steps to move away from the contractual route and laid down a principle of strict liability in tort for defective consumer products.[137] The gradual development of the manufacturer's liability in American courts ultimately led to the adoption in 1965 of section 402A of the American Law Institute's Restatement (Second) of Torts, which purported to provide a strict liability regime for defective products.[138]

During this time, victims of defective consumer products in European jurisdictions generally had to seek refuge in the law of contract and tort law if they intended to seek compensation for their harm.[139] In the UK, for example, Stapleton writes that "[l]ittle changed in the relevant UK common law from the removal of the privity barrier to tort claims for physical loss in *Donoghue v Stevenson* (1932) until the turn of the 1960s."[140]

A victim of a defective product could thus sue a retailer for the harm to his person or property under the warranties as to the quality of the product implied under the Sale of Goods Act.[141] However, courts continued to give effect to the privity requirement in contract law and a third party who suffered harm, regardless of the foreseeability thereof, was therefore not entitled to sue for breach of contract.[142]

Further, consumers who intended to sue someone other than the immediate seller of the defective product, could do so only in the event that such a person had made an express warranty with regard to the quality of the product.[143] Despite the House of Lord's confirmation in *Donoghue v Stevenson*[144] that the ultimate consumer had a tort claim against the ultimate manufacturer of the defective product, the plaintiff was still required to prove negligence.[145] The end result therefore was that, compared to the developments initiated by American courts, victims of defective consumer products in

[136] 59 Cal 2d 57.
[137] G Howells, "Product Liability" in J Smits (ed) *Elgar Encyclopedia of Comparative Law* (2006) 578-587 579.
[138] Loubser & Reid *Product Liability* 7.
[139] See generally Stapleton *Product Liability* 37-45; Markesinis & Unberath *German Tort Law* 748-749, 881-883; Reimann "Product Liability" in *Comparative Tort Law* 251-253.
[140] Stapleton *Product Liability* 37.
[141] Stapleton *Product Liability* 37; Deakin et al *Tort Law* 590.
[142] Deakin et al *Tort Law* 590.
[143] Stapleton *Product Liability* 37-38.
[144] [1932] AC 562.
[145] Deakin et al *Tort Law* 590.

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the UK received considerably less protection against the risk of harm which manufactured products carried with them.

The legal position was similar in Germany, where, prior to the legislature's ultimate intervention in 1989,[146] liability for harm arising from defective consumer products was regulated by tort and contract law.[147] In 1956 the German Bundesgerichtshof[148] denied the driver of a new bicycle a remedy in tort when the handlebar broke because of the technical deficiency of the steel, resulting in the plaintiff's bodily injuries. The court held that the weakness in the steel was practically undiscoverable and that the manufacturer had not breached its duty of care and was therefore not negligent. However, in 1968, the same court brought about a "fundamental change"[149] when it held that, "if the cause of the damaging factor can only be located within the premises of the producer, his negligence is presumed."[150]

This judicial attempt at developing the law to assist the victim of a defective consumer product in finding compensation for his harm was borne out of considerations related to fairness: "[i]t would be unjust for the victim […] to be forced to prove circumstances within the enterprise which would only allow the conclusion that the producer was negligent. The factory of the manufacturer is not accessible to him. It is therefore the defendant who must show that he did not act negligently."[151] This change in the legal position "was no doubt influenced by the developments in the USA […] and the adoption of s 402A of the Restatement of Torts Second."[152]

Despite the judicial development to assist victims of defective products in claiming compensation, Taschner maintains that the German courts provided only "half-way solutions [which] showed the need to change the law, [and that] they were not definite ways to reach a satisfactory result."[153] Similarly, writing about European jurisdictions generally, Reimann states that the "courts in Western Europe struggled to protect

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[146] The Products Liability Act of 1989.
[147] R Grote "Product Liability under German and European Law" in M Wendler, B Buecker & B Tremml (eds) *Key Aspect of German Business Law* (2006) 111-120 111.
[148] BGH VIZR 36/55, 'Der Betrieb' 1956 at 592.
[149] D Fairgrieve *Product Liability in Comparative Perspective* (2005) 100.
[150] HC Taschner "Product liability: basic problems in a comparative law context" in D Fairgrieve (ed) *Product Liability in Comparative Perspective* 155 159.
[151] 159. See also Reimann "Product Liability" in *Comparative Tort Law* 252.
[152] Fairgrieve *Product Liability in Comparative Perspective* 100.
[153] Taschner "Product liability: basic problems in a comparative law context" in *Product Liability in Comparative Perspective* 159.

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victims of defective products without openly breaking with the traditional rules of contract […] and tort."[154]

Dissatisfaction concerning the inability of existing liability regimes to provide redress for consumers therefore grew steadily.[155] The concern was amplified by the thalidomide drug disaster of the 1960s. During 1961 it was recognized that the pregnancy drug thalidomide had caused birth defects in the children of some of its users. Almost 8 000 children in over 30 countries were affected.[156] The difficulties that were experienced by the deformed children in obtaining compensation from the manufacturer assisted in focusing attention on the uncertainties and difficulties experienced when instituting a tort claim for negligence as well as the slow and expensive process of litigation.[157]

Therefore, at the time that proposals for a European Community directive on Products Liability were first considered in the 1970s, it was not possible to speak of product liability law as such in either Germany or England.[158] In both countries, the legislature intervened by adopting product liability legislation subsequent to the Member States of the European Community adoption of Council Directive 85/374/EEC on 25 July 1985. The directive had the "dual aim of harmonising the conditions of competition in the internal market and ensuring adequate protection for victims of unsafe products across the Member States."[159] Broadly, the directive provides that, where someone can prove that his bodily integrity or property has been physically harmed by a defective product that was put into circulation in the ordinary course of business, he can institute a claim against its manufacturer, importer, own-brand supplier or a mere supplier, without having to prove negligence against any specific party or that the defendant caused the defect.[160]

In England, the enactment of the Consumer Protection Act of 1987 can be traced to this directive and it seeks to give effect to its principles. Generally, this Act, as read with the directive, imposes strict liability on manufacturers, distributors and retailers

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[154] Reimann "Product Liability" in *Comparative Tort Law* 252.
[155] Loubser & Reid *Product Liability* 9.
[156] Stapleton *Product Liability* 42.
[157] 42.
[158] Deakin et al *Tort law* 590; Markesinis & Unberath *German Tort Law* 748-749, 881-883.
[159] Loubser & Reid *Product Liability* 9.
[160] See Stapleton *Product Liability* 49.

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for harm arising from defective products. Similarly, in Germany, the Products Liability Act of 1989 followed the 1985 Directive and introduced a strict liability on manufacturers for harm arising from defective products.[161]

In contrast to the American, English and German legislatures, the South African legislature took significantly longer before it finally decided to develop the delictual principles relating to harm suffered as a result of defective products. The CPA was enacted in 2008 and only became operative in 2010. Section 61(1) of the Act introduced a framework in terms of which producers, importers, distributors or retailers may be held strictly liable for bodily injuries or property damage which has been brought about by the supply of unsafe goods or a product failure, defect or hazard, or inadequate instructions or warnings for the use of certain goods.

Prior to its enactment, however, the legal position was that a consumer who suffered harm as a result of a defective product could institute either a contractual claim against the seller of the product in question or, alternatively, pursue a delictual remedy against a member of the supply chain. The South African law of contract, however, did not undergo a similar development with regard to the extension of warranties and consumers who pursued this route remained bound by the principle of privity of contract.[162] In terms of the South African common law of contract, a manufacturer may be held liable to a purchaser for breach of warranty on the basis of agency or a contract for the benefit of a third party.[163] However, these contractual mechanisms ultimately have limited practical effect in assisting consumers who have suffered harm as a result of a defective product against manufacturers.[164]

On the other hand, a plaintiff who instituted a delictual claim[165] is bound to prove all of the common law elements for delictual liability. In the context of defective consumer

[161] Markesinis & Unberath *The German Law of Torts* 748.
[162] D Hutchison & CJ Pretorius *The Law of Contract in South Africa* 2 ed (2012) 21-32. See also Van Eeden *Consumer Protection Law* 73-87, 372; Loubser & Reid *Product Liability* 23-35.
[163] Loubser & Reid *Product Liability* 24; M Dendy "Agency and Representation" in WA Joubert & JA Faris *LAWSA 1* 3 ed (2014) para 175.
[164] Loubser & Reid *Product Liability* (2012) 24; ADJ van Rensburg, JG Lotz & T van Rhijn "Contract" in WA Joubert & JA Feris *LAWSA 9* 3 ed (2014) para 425.
[165] Loubser & Reid *Product Liability* 24: an action based on the manufacturer's pre-contractual representations.

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products, the elements of fault (in the form of negligence), causation[166] and fault[167] are particularly difficult to prove. In *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* ("***Wagener***"),[168] the SCA was requested to develop the common law of delict by doing away with the requirement of fault.[169] However, the court refrained to do so, stating that any reform of the law of delict in this context was better left to the legislature.[170]

The apparent lack of an effective remedy with which to compensate harm suffered by a consumer may therefore be said to have been a convincing policy-based consideration for the legislative development of this branch of the law, both in South Africa and elsewhere. Of course, as stated above, a desire for an effective remedy was the result of the risk of harm to which consumers were exposed by especially modernised, technologically-advanced manufacturers and the accompanying risk of potentially receiving no compensation should the harm materialise.

The legislative development of the delictual remedies in respect of harm caused by defective consumer products occurred through the introduction of a strict liability regime for producers, importers, distributors and retailers. The most convincing policy-based justification for the legislature's development of the law of delict may arguably be found in the notion of enterprise liability. Consumers are exposed to risks inherent to certain products from which manufacturers stand to make a profit. Therefore, the costs of accidents should be imposed on the manufacturers, who, additionally, often are best placed to take steps to avoid the risk of damage (by taking precautions at the design and manufacturing stages of production)[171] or to minimise its effects (through the adoption of insurance or through pricing of products).[172] This point has also been illustrated in the landmark American decision *Escola v Coca-Cola Bottling Co*:[173]

> "Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards

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[166] See Loubser & Reid *Product Liability* 53-55 for the difficulties relating to proving causation in this context.
[167] See Loubser & Reid *Product Liability* 46-50 for the difficulties relating to proving fault in this context. See also *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* 2003 (4) SA 285.
[168] 2003 (4) SA 285 (SCA) para 10.
[169] Paras 17, 27-30.
[170] See below in paragraph 3.3.2.
[171] Deakin et al *Tort Law* (2013) 590-591.
[172] Loubser & Reid *Product Liability* 5; Stapleton *Product Liability* 162-184.
[173] 24 Cal. 2d 453, 462 (1944) (emphasis added).

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> and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. *However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.*"

In conclusion, it may be argued that, as was the case with statutory intervention in the area of motor vehicle accidents and workplace-related injuries and diseases, the most prominent underlying consideration for the development of the fault-based common law of delict in relation to harm suffered as a result of a defective product is the creation of a risk of harm and the additional risk that the injured consumer may not find compensation as a result of an insolvent manufacturer, evidentiary difficulties or ineffective legal remedies. The introduction of strict liability by the legislature has been justified by the notion of enterprise liability in the context of both occupational injuries and diseases as well as defective consumer products.[174]

3.2.1.5 Conclusion: the need to combat the risk of harm

At the advent of the previous century, the protection from the risk of potential harm was still largely assumed to be a matter which people had to attend to themselves. Upon the materialisation of such a risk, people were similarly presumed to take responsibility for obtaining compensation for their harm by instituting legal action against the wrongdoer.[175] In other words, those who suffered harm as a result of the culpable wrongdoing of others were largely dependent on the remedies available in the common law of delict. Generally, this meant that the victims of harm had to find the time and funds to institute legal proceedings against a wrongdoer and provide sufficient evidentiary proof that the wrongdoer's culpable conduct was indeed the cause of their harm.

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[174] See Stapleton *Product Liability* 20.

[175] For a comparative perspective, see Hedley "Tort and Personal Injuries, 1850 to the Present" in *Tort Law and the Legislature* 235.

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However, over the course of the 20th century, a shift gradually occurred and the law of delict was developed by the South African legislature. The shift originated in the context of accidents that took place in the workplace, which may be said to have been characterised by an initial reluctance to regulate the behaviour of employers,[176] and the court's original individualistic approach which saw employers being held liable for workplace accidents only in the event that the victim could prove personal fault on the part of the employer.[177] The development of the law of delict, as driven by the South African legislature, ultimately led to a growing demand for workplace safety, legal certainty and, most importantly, a cheaper and quicker way of compensating employees who suffered harm when an employment-related risk of harm materialised. Although there were other compelling considerations, it may be argued that, ultimately, the employees' exposure to an ever-increasing risk of harm and the accompanying risk of not being able to receive compensation provided the predominant consideration for the legislature's decision to intervene.

Similarly, as a result of the increase in the number of motor vehicles during the course of the 20th century, the number and frequency of motor vehicle accidents grew significantly. Perhaps more than occupational accidents, this upsurge exposed road users to a substantial risk of harm and an accompanying risk of receiving no compensation in the event that the risk should materialise. Again, the legislature intervened by developing the law of delict. This was initially done by retaining the motor vehicle accident victim's delictual remedy against a wrongdoer while also introducing the notion of compulsory third party insurance.[178] In doing so, the legislature shifted the responsibility to compensate the motor vehicle accident victim to a source other than the wrongdoer. The legislature's desire to address the risk of receiving no compensation also saw it further develop the law relating to motor vehicle accidents by replacing the system of compulsory third party insurance with a centralised compensation fund, financed through fuel levies.

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[176] Select Committee *Report of the Select Committee on Compensation to Workmen* 64-65. See also Hedley "Tort and Personal Injuries, 1850 to the Present" in *Tort Law and the Legislature* 236.
[177] See further Hedley "Tort and Personal Injuries, 1850 to the Present" in *Tort Law and the Legislature* 237.
[178] Hedley "Tort and Personal Injuries, 1850 to the Present" in *Tort Law and the Legislature* 243: "Third-party insurance was first offered to carriage drivers in 1875, and to motorists in 1896". Furthermore, compulsory insurance was introduced by the Road Traffic (Compensation for Accidents) Bill in 1934.

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Recently, the legislature abolished the motor vehicle accident victim's right to a common-law delictual remedy in respect of the harm not covered by the RAF Act. Although such a legislative development was held to be constitutionally valid, it arguably undermines the initial legislative project of ensuring the compensation of the victim's harm in the case of a risk eventuating, and is furthermore indicative of the legislature's attempt to offer protection also to the wrongdoer. The legislature has attempted to justify these amendments as constituting part of greater reform towards a comprehensive social security for all individuals.

The statutory development of the law of delict by the introduction of a strict liability regime in respect of producers, importers, distributors or retailers was also, to a great extent, driven by the dramatic increase in the production of consumer goods which brought about an ever-increasing risk of harm associated with a modern, mechanised society that produces potentially hazardous products.

Although the utility of motor vehicle transport, increased labour forces and a growing manufacturing sector is clearly visible, the benefit is accompanied by an amplified risk of harm. The South African legal system produced a solution in which these activities were permitted, but only on condition that the most appropriate enterprise were saddled with the cost of the risks they produced.[179]

The previous chapter highlighted the increasing expansion of the state's delictual liability for harm that arises from crime. The development is disquieting also from a crime prevention perspective because, with more of available tax-payer funds being spent on litigation and the payment of full compensation to crime victims, less of the funds are directed to promoting safety and preventing crime. In turn, this creates greater possibilities for the further extension of the state's delictual liability. In other words, the current judicial trend indirectly contributes to the increased risk of crime by diminishing available resources intended for crime prevention. At the same time, the recent development responds to the risk of receiving no or limited compensation in the event of suffering from crime – but only in respect of a limited number of crime victims who are able to institute litigious proceedings against the state. Therefore, the ongoing tendency to expand the state's delictual liability indirectly contributes to the increased

[179] See also Markesinis & Unberath *The German Law of Torts* 716.

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likelihood of being a victim of crime while it provides a compensatory solution only to those who are capable of proving liability in court.

Viewed against the background of statutory development, which highlights the potentially more effective victim compensation strategy that exists through the legislative reform of the law of delict, the current judicial development pertaining to crime victim compensation appears unattractive.

3.2.2 The role of the Constitution and the need to promote the constitutional right to social security

3.2.2.1 Introduction

In this part of the chapter, attention will be given to the role which the Constitution of the Republic of South Africa,1996 (the "**Constitution**") has played in justifying the statutory development of the law of delict. As discussed in greater detail below, the Constitution has been particularly important insofar as it has promoted the right to social security through the legislative reform of the law of delict.

3.2.2.2 Salient provisions of the Constitution

Before attention is given to the promotion of the right to social security, it would be appropriate to summarise the salient provisions of the Constitution.

The Constitution is the supreme law of the country,[180] central to the country's legal system and it determines the validity of all law, including the law of delict.[181] The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state.[182] It also applies to the conduct of natural persons and juristic persons, when appropriate.[183] The Constitution also enjoins every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when interpreting

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[180] Section 2 of the Constitution.
[181] Loubser & Midgley (eds) *The Law of Delict* 32.
[182] Section 8(1) of the Constitution.
[183] Section 8(2) of the Constitution.

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any legislation and when developing the common law.[184] Section 7(2) of the Constitution imposes upon the state a positive duty to protect and promote the rights contained in the Bill of Rights. Importantly, section 27(1)(c)[185] refers to the right to social security and section 27(2)[186] imposes upon the state a mandatory duty to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

In the following paragraphs, the statutory development of the law of delict will be examined to establish the role which the constitutional right to social security has fulfilled as a legal consideration that justifies the legislative intervention in the law of delict. Particular attention will be given to the development of the area of the law that relates to motor vehicle accidents and occupational injuries and diseases.

3.2.2.3 The constitutional right to social security

Academic literature reflects the difficulty in providing an adequate definition for social security that may be applied consistently.[187] South African legislation, international legislation and academics provide different definitions of the concept.[188] Some sources concentrate on an enumerated list of social risks to which a legislative response is required, whereas others focus on the nature of the state's involvement in addressing the risk or the aims that are to be served by providing social security.[189] A detailed analysis regarding the nature of social security falls outside the scope of this dissertation and the remainder of this section will describe its meaning for the purpose of this dissertation.

First, it would be appropriate to distinguish the promotion of social security as a policy consideration from the need to combat risk.[190] The promotion of social security is not

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[184] Section 39(2) of the Constitution.
[185] This section states that everyone has the right to access to "social security, including, if they are unable to support themselves and their dependants, appropriate social assistance."
[186] This section states that the "state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."
[187] Olivier "Social Security: Framework" in *LAWSA 13(2)* (2012) para 15.
[188] Olivier "Social Security: Framework" in *LAWSA 13(2)* (2012) para 15.
[189] Olivier "Social Security: Framework" in *LAWSA 13(2)* (2012) para 20 provides a list of the risks addressed. See also MP Olivier, MC Okpaluba, N Smit & M Thompson (eds) *Social Security Law: General Principles* (1999) 9-17.
[190] See paragraph 3.2.1 above.

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only focused on addressing the risk of a specific type of harm and the accompanying risk of potentially receiving no or limited compensation. Legislation that is aimed at promoting social security typically casts the net wider and attempts to support individuals with no or low income, provide adequate standard of living and puts in place a social safety net against destitution.[191] As alluded to in its policy paper regarding the proposed RABS, the right to social security system does not focus only at compensating harm that arise within a specific context.[192]

Instead, social security arrangements consist of a range of collective and individual social, fiscal, occupational and welfare measures of private, public and mixed origin aimed at providing social cover to members of society.[193] In other words, the consideration discussed in this part of the chapter is not the same as the one discussed in paragraph 3.2.1 above. While the latter concentrated solely on the issue of compensation of the victim's harm (once a particular risk has materialised), the promotion of the constitutional right to social security has a broader scope which embraces other non-compensatory objectives, including empowering the historically disadvantaged,[194] promoting fundamental human rights (particularly human dignity),[195] addressing past injuries,[196] and seeking to provide an adequate standard of life to all individuals.[197]

In the following part of the chapter, attention will be given to instances of legislative development of the law of delict that were justified in part by the need to advance the constitutional right to social security.

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[191] 7-8.
[192] Minister of Transport *Policy Paper* 5-6.
[193] 5-6.
[194] In doing so, the legislation addresses poverty and social exclusion, which may be regarded as a key to social protection. It also enhances other constitutional values and principles, such as equality, non-sexism and non-racism. See Olivier, Smit & Kalula *Social Security* 35.
[195] See Olivier, Smit & Kalula *Social Security* 36: "There is some Constitutional Court authority for the view that social security-related rights are aimed at more than simply restoring material disadvantage [...] In *Grootboom,* the court emphasised the strong link between human dignity and the giving effect to access of adequate housing."
[196] See Olivier, Smit & Kalula *Social Security* 53: "Fundamental reform of South Africa's social security system aims to redress past injustices, particularly the country's legacy of poverty and equality."
[197] See Minister of Transport *Policy Paper* 5-6.

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3.2.2.4 Legislative intervention that gives effect to the constitutional right to social security

3.2.2.4.1 Legislative intervention in the area of motor vehicle accidents that gives effect to the constitutional right to social security

Referring to the statutory motor vehicle accident compensation scheme established to cover the risks to which road users are exposed, the CC held that it "seems plain that the scheme arose out of the social responsibility of the State. In effect, it was, and indeed still remains, part of the social security net for all road users and their dependants."[198]

During the parliamentary debate concerning the introduction of the 1942 Act and accompanying compulsory third party insurance scheme, it was stressed that, regardless of the accompanying cost which a compulsory third party insurance system may bring, members of society should realise that the Act "aims at the protection of those who cannot look after themselves."[199] In particular, the "principle of security"[200] was emphasised to ensure protection of the road users' interests and safety. Those in favour of the legislation stressed the impact of injury and disability upon road users:[201]

> "Those people who were injured are suffering day in and day out in their work; they are unable to look after their families, and because those families have to endure great hardships while the children are young, they cannot enjoy their legitimate share in life. Those are the people we should primarily think of. They must be looked after. The people who are injured must first of all be nursed back to health, which means an enormous amount of work for the hospitals and for the nursing services, and also for the medical services of this country."

Because of its adherence to fault-based liability, the RAF Act, however, has been criticised as a failed system that is "unreasonable, inequitable, unaffordable and unsustainable."[202] As discussed elsewhere in this chapter,[203] the requirement for fault has a significantly detrimental impact on the successful pursuit of compensation by a motor vehicle accident victim. In turn, it is argued, a significant amount of those victims are left uncompensated and without the ability to earn income. To address this concern, and to provide greater effect to the right to social security, the legislature has

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[198] 2011 (1) SA 400 (CC) para 17.
[199] RAFC *Report of the Road Accident Fund Commission* 109.
[200] 109.
[201] 109.
[202] Minister of Transport *Policy Paper* 13.
[203] See paragraph 3.2.3.3.

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proposed the RABS. In *Law Society of South Africa v Minister for Transport,*[204] the purpose of the proposed scheme was described as follows:

> "[T]he ultimate vision is that the new system of compensation for road accident victims must be integrated into a comprehensive social security system that offers life, disability and health insurance cover for all accidents and diseases. [The Minister] acknowledges that a fault-based common-law system of compensation for road accident victims would be at odds with a comprehensive social security model. The intention is therefore to replace the common-law system of compensation with a set of limited no-fault benefits which would form part of a broader social security net as public financial support for people who are poor, have a disability or are vulnerable. […The] new scheme is a first step to greater reform."

Furthermore, the policy paper for the RABS makes it clear that the proposed no-fault based compensatory scheme must be understood against the social and economic reality of South African society, which is characterised by great disproportions in income and lifestyle.[205] The RABS is cognisant of historical disadvantages prevalent in the South African society and is a legislative attempt to develop the existing common law of delict as it relates to compensation of motor vehicle accidents as well as an attempt to contribute to the state's broader social security reform process.[206] By removing the requirement of fault, the legislature makes provision that social security benefits will be made available to a wider group of road accident victims,[207] in the process seeking to provide an adequate standard of life to all citizens. In doing so, the legislature strives to promote the principle of social inclusion as well as the notion that the "risk of misfortune should become the comprehensive and collective responsibility of society as a whole."[208]

3.2.2.4.2 Legislative intervention in the area of occupational accidents and injuries that gives effect to the constitutional right to social security

Occupational injury and disease schemes are generally considered to be the oldest form of social security coverage in the world.[209] It is also regarded as the most widespread system of social security, and if the "various branches of social security from different countries are examined it is clear that almost every country […] has an

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[204] 2011 (1) SA 400 (CC) paras 45-46.
[205] Minister of Transport *Policy Paper* 6-7.
[206] 6-7.
[207] 6-7.
[208] 7.
[209] International Labour Office *Strengthening the Role of Employment Injury Schemes to Help Prevent Occupational Accidents and Diseases* (2013).

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insurance scheme to cover these risks."[210] Generally, these schemes give effect to the right to social security by promoting workplace safety and providing compensation, medical care, vocational rehabilitation, and further benefits to employees as well as survivors' benefits for families of victims of occupational accidents.[211]

As noted above, the COIDA introduced significant changes in respect of the protection of employees' rights and, although it did not intend to provide a kind of general health cover for every accident or disease which an employee may suffer from, it may nevertheless be regarded as social security legislation, aimed at the provision of a more equitable compensation dispensation in regard to injuries suffered and diseases contracted by employees.[212] Specifically, where earlier legislation was based on the principle of individual employer liability as covered by private insurance, the subsequent legislation introduced the principle of no-fault based liability and limited benefits covered by a public scheme.[213] The introduction of such a scheme, which does not require an employee to prove fault on the part of the employer, weakens the likelihood of lengthy and costly legal disputes and provides a more streamlined administrative process for the effective compensation of injured employees. As such, this piece of "social legislation"[214] promotes the social and economic welfare of employees.

Therefore, taking into account that it sought to promote workplace safety, rehabilitate injured or diseased employees and provide compensation to those who have fallen victim to accidents that have occurred during the course and scope of employment, it may be said that the legislative development of a no-fault based compensation scheme for occupational injuries and diseases in South Africa is an example of the promotion of the constitutional right to social security.[215]

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[210] Olivier et al *Social Security Law* 312.
[211] International Labour Office *Strengthening the Role of Employment Injury Schemes*.
[212] For example, the exclusion of higher-income earners was removed.
[213] Olivier "Social Security: Framework" in *LAWSA* 13(2) para 9.
[214] In *Molefe v Compensation Commissioner and Another* (25579/05) [2007] ZAGPHC 365 para 5, Seriti J found that the "Compensation for Occupational Injuries and Diseases Act [...] is a social legislation and according to section 39(2) of the Constitution, it must be interpreted in such a manner that the said interpretation promotes the spirit, purport and objects of the social security right as enshrined in section 27 (l)(c) of the Constitution."
[215] P Myburgh, N Smit & D van der Nest "Social security aspects of accident compensation: COIDA and RAF as examples" *Law, Democracy and Development* (2011) 43 43.

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3.2.2.5 Conclusion

Social security arrangements consist of a range of collective and individual social, fiscal, occupational and welfare measures of private, public and mixed origin aimed at providing social cover to members of society and at combating certain risks.

The statutory compensation schemes that provide compensation for harm arising from motor vehicle accidents and occupational injuries and diseases constitute a part of the broader social security project in South Africa. These schemes afford a variety of victims the possibility to obtain compensation in a relatively affordable and quick manner and without having to pursue a more costly, time-consuming litigious route. In doing so, they protect people from misfortune, distress and the significant risks to life caused by unemployment, illness, injury, disability and death of a breadwinner, and thereby give effect to the constitutional right to social security.

The Constitution has been particularly important in developing the law of delict by promoting the constitutional right to social security. It may be argued that the COIDA and the RAF Act are aimed at giving effect to this constitutional imperative insofar as they afford victims of motor vehicle accidents, workplace injuries and diseases the fullest possible protection of their legal interests.[216] Furthermore, the proposed no-fault based compensatory model sought to be introduced under the RABS has pertinently been justified on the basis that it seeks to give "effect to the [right to] reasonable access to social security and health care."[217]

The South African legislature's development of the law of delict pertaining to the compensation of accident victims is therefore justified insofar as it addresses particular and pervasive social risks to which all members of society are exposed and responds to the broader constitutional project that includes empowering the historically disadvantaged,[218] promoting fundamental human rights (particularly human

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[216] MP Olivier, JF Khoza, L Jansen van Rensburg & E Klinck "Constitutional Issues" in MP Oliver, N Smit & E Kalula (eds) *Social Security: A Legal Analysis* (2003) 49-119; Van Eeden *Consumer Protection Law* 92; *Law Society of South Africa v Minister for Transport and Another* 2011 (1) SA 400 (CC).
[217] *Law Society of South Africa v Minister for Transport* 2011 (1) SA 400 (CC).
[218] See footnote 193 above.

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dignity),[219] addressing past injuries[220] and seeking to provide an adequate standard of life to all individuals.[221]

3.2.3 Evidentiary problems with applying the common-law requirement of fault

3.2.3.1 Introduction

Although the law of delict recognises exceptional circumstances where it is not required, a plaintiff must, generally, prove fault. This means that, first, the victim is required to prove that the wrongdoer had the capacity to be at fault.[222] To do so, a plaintiff must prove that the defendant had the mental ability to distinguish between right and wrong and to act in accordance with that distinction.[223] If the wrongdoer is shown to be accountable, the plaintiff must prove that the wrongdoer acted either intentionally or negligently. With regard to the former, it must be proven that the defendant had the direction of will to cause him harm and that the wrongdoer was conscious of the wrongfulness of his act.[224] In respect of the latter, the plaintiff must prove that the wrongdoer's conduct failed to measure up to the standard of the objective reasonable person.[225]

3.2.3.2 Reasons for fault-based liability

Despite strong arguments that may be raised in support of the departure from fault-based liability, the South African courts have reiterated the requirement for proving fault when establishing delictual liability.[226] There are convincing reasons in favour of such a general position, and these may briefly be summarised as follows. First, the fault principle embodies and gives effect to fundamental ideas about personal responsibility: a person who injures another through his culpable conduct ought to be

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[219] See footnote 194 above.
[220] See footnote 195 above.
[221] See footnote 196 above.
[222] Neethling & Potgieter *Law of Delict* 131; Loubser & Midgley (eds) *The Law of Delict* 104.
[223] *Eskom Holdings Ltd v Hendricks* 2005 (5) SA 503 (SCA) 511.
[224] *Le Roux v Dey; Freedom of Expression Institute Amici Curiae* 2011 (3) SA 274 (CC).
[225] *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 (1) SA 827 (SCA); *Kruger v Coetzee* 1966 (2) SA 428 (A)*; Loureiro and Others v Imvula Quality Protection (Pty) Ltd* [2014] ZACC 4.
[226] *Oppelt v Department of Health, Western Cape* 2016 (1) SA 325 (CC); *Jacobs and Another v Transnet Ltd t/a Metrorail and Another* 2015 (1) SA 139 (SCA); *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC).

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held responsible for the harm caused by his conduct by being required to compensate the injured person.[227] This view, namely that the wrongdoer is called on to correct the harm suffered by the victim precisely because he was the one who culpably and wrongfully caused it, is in line with the corrective justice rationale for the compensatory function of the law of delict.[228] The insistence on fault-based liability therefore echoes the moral notion of dessert, i.e. the idea that only those who have caused another person's harm by acting in a blameworthy manner, should be made to pay compensation.

To explain and justify the role of the fault requirement, emphasis is sometimes placed on its relationship with deterrence, a function which the law of delict may be said to fulfil.[229] Doing away with the requirement of fault would mean that the reasonableness of someone's conduct would be largely irrelevant when establishing delictual liability, potentially impacting on the role that deterrence may play as well as the motivation to act reasonably, particularly when doing so may prove to be a costly and time-consuming affair.

Law-and-economics scholars have argued that the primary goal of fault-based liability is not that it encourages the avoidance of all harm, regardless of costs, but, rather, that it seeks to achieve an optimal balance between the number of injuries and the social benefits of the activities which produce them.[230]

The appraisal of the fault requirement for delictual and tortious liability, generally, has evoked a vast amount of academic writing.[231] Further analysis of the philosophical, legal and economic arguments in respect of the fault requirement falls outside the scope of this dissertation. Instead, the focus will be placed on specific considerations regarding the fault requirement that have motivated the South African legislature to develop the law of delict.

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[227] Cane *Atiyah's Accidents* 189.
[228] Weinrib (2002) *The University of Toronto Law Journal* 349-356; J Gardner "What is Tort Law For? Part 1. The Place of Corrective Justice" (2011) 30 *Law and Philosophy* 1-14; Coleman "The Practice of Corrective Justice" in *Philosophical Foundations of Tort Law*; Fagan "The right to personal security" in *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa*130-155.
[229] Loubser & Midgley (eds) *The Law of Delict* 10.
[230] C Brown "Deterrence in Tort and No-Fault: The New Zealand Experience" (1985) *California Law Review* 73(3) 976 976-977.
[231] See in particular Cane *Atiyah's Accidents* 174-199.

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3.2.3.3 Legislative intervention: doing away with the fault requirement

Notwithstanding the above, and despite the fact that fault is generally required for delictual liability, the South African legislature has nevertheless elected to develop the law of delict by abolishing the fault requirement in specific contexts. In this part of the chapter, attention will be given to the reasons that have justified the legislative development in these instances.

3.2.3.3.1 The evidentiary difficulty in proving fault in the context of motor vehicle accidents

In its report, the RAFC, tasked with conducting an inquiry into and making recommendations regarding a "reasonable, equitable, affordable and sustainable system for the payment by the Road Accident Fund of compensation or benefits in the event of the injury or death of persons in road accidents in the Republic",[232] noted that it "is increasingly felt that fault cannot really be determined accurately and there is also a growing social concern for accident victims regardless of the role they played in causing the accident."[233]

In the RABS policy paper dealing with the potential legislative intervention in the law of delict in the context of motor vehicle accidents, the Minister states that this requirement may lead to a delay in providing victim compensation, because it is often necessary to resort to litigation to obtain clarity on the question of fault.[234] This, in turn, results in extensive legal costs for both the accident victim and the RAF.[235] During the delay, victims have to pay for medical and other expenses themselves and, if they are disabled, they are not in a position to pursue gainful employment, which means that their families could also suffer.[236] In a developing country, such as South Africa, "a significant proportion of road users have not had the financial means to pay for appropriate healthcare and rehabilitation themselves while waiting for the legal

[232] RAFC *Report of the Road Accident Fund Commission* 1.
[233] 119.
[234] Department of Transport *Policy Paper for the RABS* 13.
[235] 1-7.
[236] 1-7.

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process to be finalised."[237] For these reasons, the fault-based system of liability under the RAF Act has been described as "unreasonable, inequitable, unaffordable and unsustainable."[238]

In response to these difficulties, the RABS has been proposed. The preamble of the proposed legislation for motor vehicle accidents therefore states that "there is a need to expand and facilitate access to benefits by providing them on a no-fault basis". The suggested no-fault model under the RABS will potentially ease the "administrative load […] and speed up service delivery. Long delays in the settlement of claims will be eliminated by the fact that possible disputes over the fault requirement and which frequently required legal intervention will be removed and by the resulting streamlined administrative process."[239]

The introduction of a no-fault liability model under the proposed RABS provides an example of where the evidentiary difficulties in proving fault (in the form of negligence) has been used as a justifiable policy reason for legislative reform of the law of delict.[240] It is envisaged that the proposed no-fault model will ease the administrative load regarding the process of statutory claims, increase the speed with which those claims are processed and prevent lengthy, costly legal disputes concerning the existence of negligence.

3.2.3.3.2 The evidentiary difficulty in proving fault in the context of occupational injuries and diseases

The introduction of a strict liability regime in the context of occupational injuries and diseases was similarly motivated by the desire to assist the victims of occupational injuries and diseases so that they are not required to prove fault.[241] Upon tabling the COIDA to the extended public committee in parliament, the Minister of Manpower aptly remarked:[242]

> "Under common law an injured employee or the dependents of a deceased employee may get compensation from his employer if it can be proved that the injury or death was due to the

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[237] 7.
[238] 6.
[239] Minister of Transport *Policy Paper* 5.
[240] See *Law Society of South Africa v Minister for Transport* 2011 (1) SA 400 (CC) para 45; Minister of Transport *Policy Paper* (2011) 5.
[241] Markesinis & Unberath *The German Law of Torts* 727-731.
[242] Proceedings of the Extended Public Committee *Debates of Parliament 1993-1994* (1994) 12305.

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> negligence of the employer, but in a modern industrial set-up in which, for example, a number of employees jointly use sophisticated machinery, it may be virtually impossible for an injured employee to prove negligence."

With the introduction of the COIDA and by doing away with proving fault within this context, the employee is therefore able to obtain compensation much easier and quicker from a solvent entity.[243] It may therefore be argued that the compensation fund more effectively compensates victims than a delict/tort system that requires proof of fault.[244]

3.2.3.3.3 The evidentiary difficulty in proving fault in the context of defective consumer products

Proving fault, especially negligence, is difficult and places a burden on the plaintiff that is often hard or impossible to discharge.[245] This evidentiary difficulty has been a major policy consideration in favour of statutory intervention in the field of product liability, where the consumer is usually unable to analyse or scrutinise the products for safety.[246] In *Wagener,* the SCA was requested to develop the rules of the common law of delict so that it was no longer required for victims of defective products to prove that the manufacturer had been culpable (in this case, negligent) in manufacturing the product in question. Although the court ultimately opted to leave the development of this branch of the law to the legislature, it took cognisance of the difficulty in proving fault:[247]

> "A plaintiff has no knowledge of, or access to the manufacturing process, either to determine its workings generally or, more particularly, to establish negligence in relation to the making of the item or substance which has apparently caused the injury complained of. And, contrary to what some writers suggest, it was urged that it is insufficient to overcome the problem that the fact of the injury, consequent upon use of the product as prescribed or directed, brings the maxim *res ipsa loquitur* into play and casts on the defendant a duty to lead evidence or risk having judgment given against it. The submission is that resort to the maxim is but a hypocritical ruse to justify (unwarranted) adherence to the fault requirement."

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[243] For a German perspective on this point, see Markesinis & Unberath *The German Law of Torts* 727.
[244] See also Stapleton *Disease and the Compensation Debate* (1986) 12, who writes about English legislation that provides an occupational injuries scheme: "The principal advantage the scheme has over tort […] is that fault in an identifiable wrongdoer need not be shown, nor, in most cases, need the claimant affirmatively prove medical causation, as he or she can take advantages of presumptions to this effect."
[245] Loubser & Reid *Product Liability* 4.
[246] 4.
[247] 2003 (4) SA 285 (SCA) para 10.

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A by-product of a strict liability regime in this context is the fact that it assist in promoting consumer safety and deterring the manufacturing of dangerous products. In the product liability context, the abolition of the fault requirement appears to perform the instrumental function of creating safety incentives.[248] Imposing strict liability on manufacturers for harm caused by manufacturing defects encourages greater investment in product safety than does a regime of fault-based liability under which sellers may escape their appropriate share of responsibility.[249] In its 1985 directive, the European Union also emphasised the fact that the imposition of a strict liability regime relating to defective products is the "sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production".[250]

These considerations have prompted the South African legislature to shift the harm suffered by consumers as a result of defective products onto the risk creator which directly stands to benefit from the risk-taking.[251] The introduction by the South African legislature of the strict liability regime for defective products under section 61(1) of the CPA assists consumers practically in protecting their legal interests in cases involving complex products and where it would otherwise have been difficult or impossible to attain expert evidence to prove the defendant's fault.[252]

3.2.3.4 Conclusion

The argument against fault (especially in the form of negligence) has been successful in both South Africa and foreign jurisdictions in spurring legislative development of the law of delict/tort law in a variety of contexts, notably harm resulting from defective consumer products, workplace-related injuries and diseases and motor vehicle accidents.[253] It is submitted that the requirement to prove fault, especially negligence, in some instances may place a burden on victims of harm that is very difficult, or

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[248] Loubser & Reid *Product Liability* 5.
[249] 5.
[250] 5.
[251] See also Stapleton *Disease and the Compensation Debate* 92.
[252] Loubser & Reid *Product Liability* 4.
[253] See also S Sugarman "Serious Tort Law Reform" (1987) Vol. 24 *San Diego Law Review* 795 804-805.

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potentially impossible to satisfy, thereby potentially leaving them without compensation.

3.3 General legal and public policy considerations that have justified the statutory reform of the South African law of delict

The previous three sections concentrated on specific considerations that have justified the statutory development of the law of delict: the need to combat the risk of harm, the need to promote the constitutional right to social security and evidentiary problems relating to the application of the common-law fault requirement. In the following three sections, the focus will shift to three general considerations that may be said to have supported the legislative reform within the highlighted areas of the law of delict. These include the general dissatisfaction with the nature of the civil procedural system in claiming damages, the preference for statutory reform (as opposed to judicial development) and the need to avoid arbitrary outcomes.

3.3.1 The nature of the civil litigation process: under-compensation and high transaction costs

From a comparative perspective, the common law of tort has been criticised as being ineffective in its principal aim of compensating harm resulting from especially personal injury, disease and death.[254] Dissatisfaction with the operation of the tort system received widespread academic attention during the 1960s and 1970s.[255] During the same time, mass tort litigation drew public attention to the clumsy, time-consuming and costly nature of obtaining compensation by instituting civil proceedings.[256]

The vigorous academic and public debates in the UK about the shortcomings of the tort system as a compensation mechanism was further buoyed by the enactment of the Accident Compensation Act in New Zealand in 1972.[257] The Act abolished the tort system insofar as the compensation for harm resulting from personal injuries is

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[254] Cane *Atiyah's Accidents, Compensation and the Law* 7 ed (2006) 461-499; Deakin et al *Tort Law* 51-59.
[255] T Ison *The Forensic Lottery* (1967); DW Elliot and H Street *Road Accidents* (1968); P Atiyah *Accidents, Compensation and the Law* 1 ed (1970).
[256] Cane *Atiyah's Accidents* 459.
[257] This Act has since been replaced by the Accident Compensation Act of 2001.

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concerned, and replaced it with a general compensation scheme which provided compensation for harm resulting from all accidents and some diseases.[258] It was argued that such a legislative development would, *inter alia*, alleviate the concerns relating to the high transaction costs of the civil litigation system. Within this framework the UK government established the Royal Commission on Civil Liability and Compensation for Personal Injury to investigate the need for reform of the common law of tort ("**Pearson Report**").[259]

The Pearson Report revealed that out of the total number of some 3 million persons estimated to have suffered from personal injury each year, only approximately 1,7 million received financial assistance from any source, with some of the victims receiving compensation from more than one source.[260] Significantly, it was found that:[261]

> "[out of the] estimated 3 million persons suffering some injury in each year, only some 125,000 (approximately 7 per cent) received any compensation in the form of tort damages. However, the total value of the damages paid to this 7 per cent was almost half of the total value of the social security payments made to the 1.5 million recipients of those payments. When account is taken of the administrative costs of the differing compensation systems, the position is even more striking, because the tort system is much more expensive to administer […] of the total cost of compensation paid (on average in each of the years 1971-1976) some £1 billion, the tort system accounted for no less than £377 million. *Thus, 7 per cent of the accident victims accounted for perhaps 37 per cent of the total cost (payments plus administration) of the compensation paid out (making some allowance for the estimated administrative costs).*"

The Pearson Report indicated the high costs associated with the tort system which, in relation to other sources of compensation, seemed "less significant if its importance is assessed not in relation to accident victims alone, but in relation to the tentimes larger group of people who are disabled from all causes, these predominantly being illness and disease."[262]

Although there are no up-to-date statistics to put alongside those provided in the Pearson Commission's report, it has been argued that "there is little reason to think that the basic picture is significantly different now".[263] In addition, it has been stated

[258] Cane *Atiyah's Accidents* 459.
[259] The Pearson Report was published in 1978.
[260] 19-21.
[261] 19-21.
[262] R Lewis "Recovery of State Benefits from Tort Damages: Legislating For and Against the Welfare State" in Arvind & Steele (eds) *Tort Law and the Legislature* (2013) 288.
[263] Cane *Atiyah's Accidents* 19-21.

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that, although "[f]igures for South Africa are not known, they are likely to show similar trends."[264]

In the South African context, it may be argued that, similar to the position in England[265] and elsewhere,[266] civil litigation is expensive[267] and only a limited number of plaintiffs can afford the accompanying legal transaction costs,[268] thereby restricting the right of general access to justice.[269] Legal costs and fees in South Africa are substantial, leading some to argue that "the major barrier to access to justice in South Africa remains the high cost of legal services."[270] It is therefore unsurprising that in *EFF v Speaker of the National Assembly; DA v Speaker of the National Assembly,*[271] Mogoeng CJ recently emphasised the fact that "[l]itigation is prohibitively expensive and therefore not an easily exercisable constitutional option for an average citizen".

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[264] MM Loubser & JR Midgley (eds) *The Law of Delict in South Africa* 1 ed (2010) 9.

[265] Lord Justice Jackson was appointed to carry out a fundamental review of the costs in civil litigation in England and Wales. He published his final report in 2010, in which he found that the costs relating to civil litigation (especially in respect of personal injuries) are excessive and has recommended substantial changes in this regard. See Lord Justice Jackson *Report: Review of Civil Litigation Costs* (2010) 14-18; Lord Justice Jackson "Reform of the Costs Regime" (2011) *Advocate* 37 37-42. In their comparative study, analysing data from Australia, Austria, Belgium, Bulgaria, Canada, China, Czech Republic, Denmark, England and Wales, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Ireland, Italy, Japan, Latvia, Lithuania, the Netherlands, Norway, Poland, Portugal, Romania, Russia, Scotland, Singapore, Spain, Sweden, Switzerland, Taiwan, the USA, Hodges, Vogenauer and Tulibacka note that, generally speaking, litigation costs are expensive and time-consuming and encourages further reform so as to improve access to justice: C Hodges, S Vogenauer & M Tulibacka "Costs and Funding in Civil Litigation: A Comparative Study" (2009) *University of Oxford Legal Research Paper Series* (55/2009) 3-9.

[266] Hodges et al *University of Oxford Legal Research Paper Series* 3-9; Sugarman (1987) *San Diego Law Review* (1987) 795: Tort law is "an intolerably expensive and unfair system of compensating victims."

[267] See M Wallis "Reform of the Costs Regime – A South African Perspective" (2011) *Advocate* 33 33-37; J Klaaren "The Cost of Justice" (2014) *Briefing Paper for Public Positions Theme Event, 24 March 2014 WiSER, History Workshop & Wits Political Studies Department* 1 1-6.

[268] In other words, costs relating to the investigation of claims and the overall litigious process. See Wallis *Advocate* 33-37; Klaaren *Briefing Paper for Public Positions Theme Event* 1-6. For a comparative perspective see also Deakin et al *Tort Law* 53; Hodges et al *University of Oxford Legal Research Paper Series* 3-9. See also Sugarman *San Diego Law Review* 798: "The money available for compensation is paid into insurance companies as liability insurance premiums finds its way into the pockets of victims. The rest is ground up in lawyers' fees and the associated costs that litigation generates. The money also is consumed in the marketing, general overhead and claims administration costs of the insurers, as well as their profits in years when they make profits. Furthermore, there are public costs to the judicial system that the tort system imposes, both financial and through delay in the handling of other cases."

[269] See SALRC *A Compensation fund for victims of crime* 236. See Wallis (2011) *Advocate* 33-37; Klaaren *Briefing Paper for Public Positions Theme Event* 1-6; Cane *Atiyah's Accidents* 461-499; Cane *The Anatomy of Tort Law* 231-237; S Sugarman "Doing Away with Tort Law" (1985) 73 *California Law Review.* 555 558-622.

[270] AfriMAP and the Open Society Foundation for South Africa *South Africa: Justice Sector and the Rule of Law* (2005) 2, 108.

[271] 2016 (5) BCLR 618 (CC) para 52.

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To illustrate, in 2005 the average South African household would have had to use a week's income to afford a one-hour consultation with an average attorney.[272] More recently, in 2013, it was recorded that "clients with a monthly income of R600 […] are frequently charged fees in the region of R1,500 […] just for an initial consultation."[273] In accordance with the Rules Board for Courts of Law Act 107 of 1985, a 15-minute consultation may cost anything between R144,50 and R235,50 while the cost of drafting one page of a legal document may be charged at R50.[274] It also restricts access to justice for the poor, especially civil justice which is largely not available from Legal Aid South Africa.[275] These fees restrict access to justice across the board for the not-so-poor, for instance persons in a household earning over R6000 a month and thus not qualifying for Legal Aid.[276]

There are additional factors that may contribute towards the high cost of instituting a civil claim in a South African court. There are approximately 26,000 legal practitioners in South Africa, serving at least 53 million people.[277] However, around 2,500 of these practitioners are advocates who rarely have direct interaction with clients, especially poor ones. Furthermore, the vast majority of these practitioners are situated in the urban areas, with relatively few practising in small towns or rural areas which means that "the cost and distance required to physically access lawyers makes pursuing litigation an overwhelmingly impractical option."[278]

Although the number of legal practitioners continues to grow, it has not led to greater competition, lower fees, more affordable legal assistance and greater access to justice.[279] In addition, as noted above, the civil litigation process is very time-consuming, resulting in many plaintiffs electing not to institute their claims at all.[280] As

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[272] Klaaren *Briefing Paper for Public Positions Theme Event* 2.
[273] J Dugard & K Drage, "To Whom Do The People Take Their Issues?" *Justice and Development Working Paper Series* (2013) 2.
[274] See also D Holness "Recent Developments in the Provision of Pro Bono Legal Services by Attorneys in South Africa" (2013) *Potchefstroom Electronic Law Journal* 16(4) 129 129-130.
[275] Legal Aid "Who Qualifies for Legal Aid?" available at <http://www.legal-aid.co.za/?p=956> (accessed on 24 March 2016); Klaaren *Briefing Paper for Public Positions Theme Event* 2.
[276] Klaaren *Briefing Paper for Public Positions Theme Event* 2.
[277] Law Society of South Africa *Statistics for Legal Education and Development (LEAD) and the Legal Profession (2014/2015)* (2015) 25, 49.
[278] Dugard & Drage *Justice and Development Working Paper Series* 2.
[279] Wallis *Advocate* 33-37.
[280] Sugarman (1985) *California Law Review* 558-622. See also Sugarman (1987) *San Diego Law Review* 796: "When someone now makes a tort claim, rather than obtaining swift justice, he often will wind up waiting years before his suit is resolved. Moreover, he frequently will come away from the experience far more frustrated than satisfied. A victim today rarely can expect to recover directly from

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a result, taking into account the high cost and time-consuming nature of litigation in this regard, private insurance has assumed an increasingly important role, relieving victims of loss of their financial burden.[281] However, considering the levels of poverty in South Africa, the vast majority of citizens are probably not in a position to afford insurance.

The concern over the costly and time-consuming nature of civil proceedings is not new to the South African legal landscape. In its Report on Compensation to Workmen in 1904, the Select Committee already took note of the problems raised by employees that the litigation process "has undoubtedly lengthened the time between the occurring of the accident and the receiving of the compensation"[282] and that the proposed Workmen's Compensation Act of 1905 had to provide compensation "to poor men quickly, and as cheaply as possible."[283] The same sentiment was echoed when the legislature decided to introduce a no-fault based compensatory system for occupational injuries and diseases *via* the COIDA: "In exchange for [forfeiting his common-law claim against his employer, the employee] gets an immediate remedy in the form of a statutory right to compensation without having to prove negligence on the part of the employer."[284]

In its judgment relating to the constitutionality of the abolition of the motor vehicle accident victim's common-law claim against a wrongdoer in *Law Society of South Africa v Minister for Transport,*[285] the CC commented on the nature of the civil litigation process:

> "The right of recourse under the common law proved to be of limited avail. The system of recovery was individualistic, slow, expensive and often led to uncertain outcomes. In many instances, successful claimants were unable to receive compensation from wrongdoers who had no means to make good their debts. On the other hand, it exposed drivers of motor vehicles to grave financial risk."

The legislature has aimed to remedy this concern by, among other things, introducing a no-fault basis for compensation of harm arising from motor vehicle accidents.

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the individual who injured him. Instead, he will recover from an insurance company or a large impersonal enterprise, such as a corporation or a government entity."

[281] Cane *Atiyah's Accidents* 461-499; Deakin et al *Tort Law* 51-59; Hedley "Tort and Personal Injuries, 1850 to present" in *Tort Law and the Legislature* 235 249.

[282] Select Committee *Report of the Select Committee on Compensation to Workmen* 12.

[283] 2.

[284] Proceedings of the Extended Public Committee *Debates of Parliament 1993-1994* (1994) 12306.

[285] 2011 (1) SA 400 (CC) para 17.

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Furthermore, as the preamble to the proposed RABS indicates, the legislature has identified the "need to simplify claims procedures, reduce disputes and create certainty by providing defined and structured benefits [...] and there is a need to establish administrative procedures for the expeditious resolution of disputes that may arise and to alleviate the burden on the courts."

Lastly, the time-consuming nature and high transaction costs characteristic of the civil litigation process was also taken into account when drafting the provisions of the CPA that relate to its regulatory framework and access of justice.[286] With the introduction of the CPA, the legislature has changed not only the substantive law relating to defective consumer products, but it also effected changes to the administration of justice insofar as the adjudication of consumer rights and disputes involving consumers and business are concerned. For example, under the new regulatory framework, the National Consumer Tribunal ("**NCT**") and the National Consumer Commission ("**NCC**") have important roles.[287] While the NCT is an adjudicative body, empowered to adjudicate on applications and allegations of prohibited practice,[288] the NCC is primarily an investigative body that aims to enforce the provisions by the Consumer Protection Act ("**CPA**").[289] The establishment of these bodies, as well as consumer courts, may be regarded as a response to the need for a cheaper, quicker, speedier, more flexible and informal regulatory system.[290]

It is argued that the nature of the civil litigation process, notably its potential under-compensation of harm and the accompanying high transaction costs, has played a significant role in justifying the legislative reform of the law of delict, in the areas where the need for this type of reform is most pressing and the effect of reform can be most widespread and cost effective.

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[286] Van Eeden *Consumer Law* 93-105; 387-447.
[287] See section 69 of the CPA.
[288] The NCT can make the following orders: grant interim relief, declare conduct to be prohibited, issue an interdict for prohibited conduct, impose administrative fines, confirm consent orders, condone non-compliance with its rules and procedures, confirm an order against an unregistered person to cease engaging in certain activities, cancel or suspend a registrant's registration, require payment to the consumer of any excess amount charged, together with interest at the rate set out in the agreement and any order required to give effect to a right set out in the Act.
[289] It seeks to initiate and receive complaints, refer complaints for dispute resolution, investigate and evaluate alleged prohibited conduct and offences, conduct interrogations, issue and enforce compliant notices and make referrals to the NCC. In practice, however, many of these functions are now fulfilled by the industry ombuds.
[290] Van Eeden *Consumer Law* 98-99.

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3.3.2 The ability of the legislature to regulate liability more comprehensively than the judiciary

Another further consideration that have justified the statutory development of the law of delict is the ability of the legislature to regulate liability more comprehensively than the judiciary.

In *Wagener,* the SCA took account of the debate surrounding the potential introduction of a strict liability regime for harm caused by defective consumer products. The court noted that product liability reform in foreign jurisdictions had largely been achieved through legislation and ultimately concluded that South Africa should adopt the same route: "[i]f strict liability is to be imposed, it is the Legislature that must do it."[291] In its judgment it held that the legislature was better equipped to investigate the variety of questions that would have to be answered prior to introducing a strict liability regime in the context of defective products:[292]

> "1. What products should be included […] when it comes to determining the extent of the liability? 2. Is a manufacturer to include X, the maker of a component that is part of the whole article manufactured by Y; and which is liable if the component is defective? 3. Does defect mean defect in the making process only or, in the case of a designed article, also a defect of design? Should it include the failure, adequately or at all, to warn of possible harmful results? 4. Should the liability be confined to products intended for marketing without inspection or extend even to cases where the manufacturer does, or is legally obliged to, exercise strict quality control? 5. What relevance should the packaging have - should liability, for example, be limited to cases where the packaging precludes intermediate examination or extend to cases where the manufacturer stipulates that a right such as a guarantee would be forfeited if intermediate examination were made? 6. Is a product defective if used innocuously on its own, but which causes damage when used in combination with another's product? 7. What defences should be available? […] 8. Should the damages recoverable be exactly the same as in the case of the Aquilian claim or should they be limited, as in some jurisdictions, by excluding pure economic loss or by limiting them to personal injury?"

The court held that single instances of litigation could not provide the opportunity for conducting the thorough investigation, analysis and determination that was necessary to produce a cohesive and effective structure by which to impose strict liability.[293] The court's recommendation was ultimately heeded and the legislature, with the benefit of more empirical data, time and product liability expertise, enacted the CPA.[294]

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[291] 2003 (4) SA 285 (SCA) paras 30-36.
[292] Paras 30-36.
[293] Paras 30-36.
[294] From a comparative perspective, see also *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 305: "I incline to the opinion that, as a general rule, it is more appropriate for strict liability in respect of operations of high risk to be imposed by Parliament, than by the courts."

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In addition to the CPA, the COIDA and the RAF Act are further examples of where the legislature reformed major areas of the law of delict. The enactment of these statutes enabled major legislative reform of the law of delict, as opposed to incremental judicial development of an element of delictual liability. It is submitted that, whenever large-scale development of a specific area within the law of delict may be required by specific policy-based considerations as those discussed in paragraph 3.2 above, it appears more appropriate to follow the legislative route. Indeed, this much was also recognised by the CC, which stated as follows:[295]

> "In exercising their powers to develop the common law, Judges should be mindful of the fact that the major engine for law reform should be the Legislature and not the Judiciary. In this regard it is worth repeating the following *dictum* […] 'Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the Judiciary to change the law […] In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform […] The Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.'"

3.3.3 The need to avoid arbitrary outcomes

In *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd*,[296] Brand JA reaffirmed the fact that any "legal system in which the outcome of litigation cannot be predicted with some measure of certainty would fail in its purpose […] We therefore strive for certainty." This section prompts us to consider how the need to avoid arbitrary outcomes in litigation, and thus to ensure legal certainty, could motivate legislatures to develop the law of delict (or in common law parlance, tort law).

Scholars have argued that the tort system is essentially a "lottery"[297] and that it "produces arbitrary outcomes."[298] Sugarman summarises this argument as follows:

> "[W]hat count considerably are: the talents of the lawyer one happens to have; the tenacity of the defendant (or insurance adjuster) one happens to be up against; whether the defendant happens to be a motorist, a company, or a governmental entity; how attractive (but not too attractive) and how well spoken (but perhaps not too well spoken) the claimant happens to be; what race the claimant is; what state and community the victim lives in; how well one is able to hold out for a larger settlement; the whim of the jury if the case gets that far; and whether one is lucky enough to have available the right sort of witnesses or other evidence of the injury and the defendant's wrongdoing. In short, our current tort system is not a system of justice; it is a lottery."

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[295] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 36 (references omitted).
[296] 2009 (2) SA 150 (SCA) paras 16-17.
[297] Sugarman (1987) *San Diego Law Review* 796.
[298] MA Franklin "Replacing the Negligence Lottery: Compensation and Selective Reimbursement" (1967) 53 *Virginia Law Review* 774: "[T]he fault system is little more than an immoral lottery for both plaintiffs and defendants." See also Atiyah *The Damages Lottery* 143.

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From this perspective, the imposition of tortious (or in our case, delictual) liability and the payment of damages are impacted on by considerations unrelated to what the parties deserve.[299] The outcome of litigation may be substantially determined by contingent factors, including the availability of evidence, the quality of counsel, the limits of insurance coverage, the financing of litigation, the whims of judges and juries, and many other factors that are not conducive to the consistent and principled application of law.[300]

The argument that the tort system is unfair and unpredictable has been advanced to justify reform proposals in some way or the other. For example, in New Zealand these arguments eventually won the day and secured the development of the law relating to the compensation of personal injuries arising from accidents. In its 1967 report, the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand asserted that "[t]he toll of personal injury is one of the disastrous incidents of social progress".[301] The commission identified a number of weaknesses with the mechanisms available for dealing with personal injury, including particular problems with tort law. One of the problems with tort law in cases of personal injury included "the difficulty of establishing liability for loss and of attaching a monetary value to that loss, resulting in the law being seen as, at best, uncertain and in some cases arbitrary and capricious."[302] Eventually, as indicated in paragraph 3.3.1, the legislature introduced the Accident Compensation Act in New Zealand in 1972, thereby abolishing the tort claim for harm arising from accidents.

Arguably, the statutory development of the law of delict by the CPA, the COIDA and the RAF Act has been motivated by similar considerations. For instance, with regard to the introduction of a strict liability regime for defective consumer products, the SCA implied that such a development should be driven by the legislature, because it could provide a more principled, logical and fair solution for the particular problem.[303]

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[299] TD Lytton, RL Rabin & PH Schuck "Tort as litigation lottery: a misconceived lottery" *Boston College Review* Vol. 52 (2010) 267 269.
[300] Lytton, Rabin & Schuck *Boston College Review* (2010) 268-269.
[301] New Zealand Law Commission Report *Compensating Crime Victims* (2008) 3.
[302] 3.
[303] *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* 2003 (4) SA 285 (SCA) paras 28-31.

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Furthermore, in line with the arguments raised in foreign jurisdictions, the statutory development of the COIDA and the RAF Act (and the proposed RABS) appears to be motivated by the general consideration to ensure that the outcome of litigation is not influenced by the contingent factors mentioned above. After all, the likelihood of a victim receiving compensation under those statutes is not dependent on the quality of counsel, the limits of insurance coverage, the financing of litigation, or the whims of a particular judge.

3.4 Conclusion

The previous chapter investigated the legal position of South African crime victims insofar as the compensation of their harm is concerned and concluded that the *status quo* is unsatisfactory. It was therefore proposed that an alternative method should be investigated to provide compensation for crime victims.

One particular alternative that has been adopted in a variety of foreign jurisdictions is the establishment of a statutory compensation fund for crime victims. Should such an alternative be adopted by the South African legislature, it will amount to the statutory development of the law of delict insofar as the compensation of a specific group of victims is concerned. However, for the reasons mentioned in the introduction to this chapter, the adoption of such an alternative and subsequent development of the common law requires a justifiable theoretical framework.

To establish such a framework, this chapter has examined the historical backgrounds of important statutory developments within the law of delict. This investigation has identified legal and public policy considerations which have justified the earlier instances of legislative reform. It is proposed that these considerations may also aid in providing the necessary theoretical framework on the basis of which the law of delict may justifiably be developed in the future, at least insofar as the issue of compensation is concerned.

The first consideration that was highlighted was the role played by the increased risk of harm and the associated risk of no recovery of compensation. This consideration was paramount in developing the law of delict’s compensatory response to victims of motor vehicle accidents, defective consumer products and occupational injuries and

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diseases. Although there is an undeniable utility associated with motor vehicle transportation, enlarged labour forces and a growing manufacturing sector, these benefits were accompanied by a substantial increase in the risk of harm arising from those sectors. This required the South African legislature to produce a solution in which these activities were permitted, but only on the condition that the most appropriate enterprise were saddled with the cost of the risks they produced. Ultimately, it decided that, in order to more effectively secure the compensation of a victim's harm, the compensatory mechanism would have to be reconfigured within a statutory context.

The decision to do so was informed also by the significant desire to promote social security. Prior to the advent of the Constitution, the achievement of greater social security was already identified as a clearly pronounced goal that justified the statutory interference with the common law of delict. The legislature's desire to provide a variety of accident victims with remedies that gave quicker and more cost-effective access to compensation and to distribute the risk of certain risk-related activities throughout society may therefore be regarded as an important consideration that have justified the development of the law of delict in a variety of contexts.

With the enactment of the Constitution, and the entrenchment of the right to social security as a fundamental human right, the legislature has openly committed itself towards the notion of spreading risk to promote social inclusion and social solidarity. The statutory establishment of compensation funds in respect of motor vehicle accidents and occupational injuries and diseases – arguably two spheres in which most individuals are most frequently exposed to the risk of harm – achieves these goals.

Furthermore, the evidentiary difficulties involved in satisfying the common-law requirement of fault, specifically in the form of negligence, has been criticised as imposing a significant stumbling block on the pathway to obtaining compensation. Otherwise deserving victims of harm have been struggling to satisfy this requirement and, where the matter has been argued in court, a clear preference has been given for the reform to be driven by a legislative process. Statutory reform provides an advantage that single instances of litigation do not: it enables all the relevant stake-holders to partake in the thorough processes of investigation, analysis and

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determination that are required to produce a cohesive and effective structure for the development of the law of delict.

By removing fault as a requirement for obtaining compensation, victims of workplace injuries and diseases and defective consumers now have a greater theoretical chance in succeeding with finding redress for the harm they have suffered. Similarly, as indicated above, the proposed RABS will provide comparable opportunities. In addition to achieving greater compensation levels than the fault-based system of delictual liability, the statutory development of the law of delict have clearly been informed by considerations of time and money.

Other general considerations that have been used to justify the statutory development of the law of delict has also been considered justified where it has enabled a more time-efficient and cost-effective route to compensation and where it has succeeded in providing a principled, consistent approach to compensation.

It is proposed that the legal and public policy considerations identified in this chapter aid in providing a justifiable theoretical framework for the statutory development of the law of delict insofar as compensation of victims is generally concerned. However, by itself it does not yet justify why crime victims should be singled out as a specific category of victims that may come into consideration for statutory compensation (as opposed to any other category of victim). Indeed, as alluded to in the introduction of this chapter, where statutory compensation funds for crime victims have been enacted, some concern has been expressed about the singling out this specific group of victims for preferential treatment.

In the following chapter, attention will be given to the question whether the specific development of the law of delict through the enactment of a statutory compensation fund for crime victims can be justified on the basis of the considerations identified in this chapter.

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CHAPTER 4: JUSTIFYING THE LEGISLATIVE DEVELOPMENT OF THE LAW OF DELICT BY ESTABLISHING A STATUTORY COMPENSATION FUND FOR CRIME VICTIMS

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CHAPTER 4: JUSTIFYING THE LEGISLATIVE DEVELOPMENT OF THE LAW OF DELICT BY ESTABLISHING A STATUTORY COMPENSATION FUND FOR CRIME VICTIMS

4.1 Introduction

Thus far it has been argued that the position of crime victims under the current South African legal regime is unsatisfactory as far as their compensation is concerned and that it may be worthwhile to consider an alternative solution.

To improve the legal position of crime victims regarding their compensation, various other jurisdictions have enacted statutory compensation funds.[1] Notwithstanding its wide use in these jurisdictions, it cannot be assumed that this solution would also work in a South African context. Statutory development of this kind requires justification.

Chapter 3 alluded to the "fundamental problem"[2] that confronts reformers of the law of delict/tort law in this context, which is that "it is difficult to find a satisfactory rationale for singling out violent-crime victims from other groups of unfortunates for special treatment by the state."[3] Some authors have gone so far as to argue that "[o]ften the rationale behind the setting up of a compensation scheme is, in itself, weak and unsubstantiated".[4] Brooks summarises the central issue as follows:[5]

> "When one first confronts a proposal to alleviate the suffering of victims of crimes of violence, all his humanitarian instincts are aroused. Reflection, however, forces him to ask: 'Why alleviate the suffering of victims of crimes of violence and not, for instance, that of the farmer who while working in his field, is struck by ligtening [sic] and rendered a helpless invalid?' This question is not an easy one to answer. It is not enough to say 'First things first,' or "One thing at a time.' By what criterion may we justify the priority implicit in such a response?"

One of the central aims of this dissertation is to consider whether it is justifiable to single out crime victims for preferential treatment as far as compensation is concerned. To do so, the approach is as follows. First a general theoretical framework to constitute

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[1] See D Greer (ed) *Compensating Crime Victims: a European Survey* (1996); footnote 59 in paragraph 1.5 in chapter 1.
[2] South African Law Reform Commission ("**SALRC**") Project 82: *Sentencing (A Compensation Fund for Victims of Crime)* (2004) 182-183. See also RE Scott "Compensation for Victims of Violent Crimes: An Analysis" (1967) 8(2) *William & Mary Law Review* 277 281; P Cane *Atiyah's Accidents, Compensation and the Law* 8 ed (2013) 303-308.
[3] SALRC *A Compensation Fund for Victims of Crime* 182. See also Scott (1967) *William & Mary Law Review* 281; Cane *Atiyah's Accidents* 303-308.
[4] SALRC *A Compensation Fund for Victims of Crime* 318; Cane *Atiyah's Accidents* 30.
[5] J Brooks "The Case for Creating Compensation Programs to Aid Victims of Violent Crimes" (1976) 11(4) *Tulsa Law Journal* 487.

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a tenable basis for the potential statutory development of the law of delict in the future (regarding compensation of victims generally) was developed in chapter 3. This was done by examining the historical background of arguably the three most significant statutes that have influenced the compensation of victims in the context of the law of delict[6] and identifying policy considerations that have justified the legislative reform of the law of delict in the past and which may justify future statutory development. What remains to be determined is whether the proposed statutory development of the law of delict (*via* the establishment of a statutory crime victim compensation fund) can fit within this general theoretical framework.[7]

This will be done by referring to the considerations identified in chapter 3, establishing whether those considerations are also applicable in the context of harm suffered by crime victims and whether they could consequently be used to provide the necessary justification for the proposed development of the law of delict. In the process, the potential merits and some of the problems with the suggested reform of the law will be discussed.

Before commencing, a final introductory remark may be made. As noted, most foreign jurisdictions electing to develop the law in relation to crime victim compensation have done so by enacting legislation and establishing compensation funds. This dissertation considers whether similar reform of the South African law relating to the compensation of crime victims is justifiable. For the sake of clarity, it is emphasised that the approach adopted in this chapter is to describe and evaluate various policy considerations that could potentially justify statutory development of the law (see paragraphs 4.2.3.1 to 4.2.3.6 below) as well as considerations that could potentially stand in the way of this reform (see paragraphs 4.2.4.1 to 4.2.4.3 below). These considerations will be weighed and balanced against each other before a conclusion as to the justifiability of a potential statutory compensation fund will be made in paragraph 4.4.

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[6] The Compensation of Occupational Injuries and Diseases Act 130 of 1993, the Road Accident Fund Act 56 of 1996 ("**RAF Act**") and the Consumer Protection Act 68 of 2008.

[7] As noted in paragraph 3.1 above, a distinction may be drawn between the reasons advanced for the justification of the proposed statutory crime victim compensation scheme and its scope. In this regard, it should be noted that, while chapters 3 and 4 deal with the issue of justification of the scheme, chapter 5 deals with the specific issues related its scope (should it be enacted). Therefore, chapters 3 and 4 deal mainly with legal and public policy considerations justifying statutory reform of the law of delict in South Africa, whereas chapter 5 refer to issues of policy and administrative convenience.

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However, it may be asked whether it has not been assumed that an alternative solution to the problem must be steered by the legislature as opposed to the judiciary. The reasons briefly mentioned below deal with this concern.

First, as the Supreme Court of Appeal ("**SCA**") remarked in *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd*,[8] the judiciary may be better placed to develop the law of delict on an incremental basis, but, generally speaking, the legislature is better placed to develop a significant area within the law. Indeed, for the reasons outlined in paragraph 3.3.2 in chapter 3, the legislature is the more appropriate vehicle to deal with comprehensive, large-scale development of the law of delict because it may better use empirical data and research expertise to develop a framework for the potential development of the law. Secondly, as explained in chapter 2, the common law of delict provides an unsatisfactory response to the issue of crime victim compensation. As explained, for predominantly financial reasons, crime victims choose not to institute common-law delictual claims against the criminal, but instead aim to hold the state vicariously liable on the basis that their employees wrongfully and culpably caused the victim's harm. However, as illustrated, the judicial expansion of state delictual liability may be considered theoretically unsound while, from a practical and financial perspective, it arguably undermines the effort to combat crime.[9] In other words, the common law of delict has already developed an alternative response to holding the actual perpetrator of the crime delictually liable, but for the reasons set out in chapter 2 it may be doubted whether this solution is desirable.

Therefore, it is proposed that the law relating to crime victim compensation should follow the same route that was taken in the cases of harm arising through motor vehicle accidents, occupational injuries and diseases and defective consumer products, i.e. statutory reform.

[8] 2003 (4) SA 285 (SCA) para 10.
[9] See paragraph 2.2.1 in chapter 2.

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4.2 The justifiability of establishing a statutory compensation fund for crime victims

Chapter 3 provided a general theoretical framework that may provide a basis for future statutory development of the law of delict. In this part of the chapter, that framework of considerations will be used to determine whether the development of the law through the enactment of a crime victim compensation fund is justifiable. Before doing so, however, the following section will provide a brief historical background relating to the potential statutory development of a crime victim compensation fund in South Africa.

4.2.1 Historical background: the SALRC Report

The SALRC set out to investigate the viability of developing the law of delict by enacting a statutory compensation fund in 2004.[10] It is worthwhile to take note of this attempt because it provides further evidence of the need for a justification for this act of legislative intervention.

The examination of this issue was undertaken within a broader framework that related to the general treatment of crime victims by the criminal justice system. It therefore focused not only on the compensation of crime victims, but also on issues pertaining to restorative justice and victim empowerment.[11] Nevertheless, the report of the SALRC included a synopsis of crime victim compensation under South African law, a comparative overview of the legal position of crime victims in the United States of America and the United Kingdom ("**UK**"), a summary of the merits of a statutory compensation scheme for crime victims in South Africa as well as other victim empowerment issues ("**SALRC Report**").

The commission confirmed that various jurisdictions have adopted strategies that extend the right to access compensation for crime victims beyond the realm of the common law of delict/tort law.[12] Their view is in line with academic writing inasmuch as it demonstrates that the development of the law of delict through legislation that

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[10] SALRC *A Compensation Fund for Victims of Crime*.
[11] 1-7.
[12] 11.

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deals specifically with the compensation of crime victims appears to be the most popular method by which reform of this branch of the law has occurred.[13]

Taking into account some of the arguments that may be raised for and against the establishment of a statutory compensation fund for crime victims, the SALRC concluded that, although "there seemed to be substantial support for the creation of a compensation fund"[14] the establishment of the fund was not a viable option.[15] This conclusion was reached primarily on the basis that a fund could not be afforded in the financial climate of the time and because certain prerequisites required for the effective and efficient administration of a crime victim compensation fund were absent at the time.[16] As a result, the SALRC came to the conclusion that a "compensation scheme should rather be seen as an additional component of a comprehensive victim empowerment programme."[17]

The SALRC also considered the "possibility of incrementally developing a compensation scheme."[18] Briefly stated, it considered that, as opposed to enacting a fully-fledged compensation fund for all crimes, a fund may be established which provided compensation only in respect of certain crimes; and that other crimes may be added on an incremental basis. Despite the fact that there was support for this view, "the reality of the lack of funds, the problem of justifying a limitation of eligibility for payments from the fund, the problems relating to the administration of the fund and the problems with regard to the risks of fraud"[19] forced the commission to conclude that this too was not a viable option.

The SALRC criticised the existing crime victim initiatives undertaken by the South African government for being inefficient and lacking the ability to deal adequately with the needs of crime victims.[20] In its view new legislation had to be adopted to provide

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[13] 48-98. See also Greer *Compensating Crime Victims*; D Miers "Offender and state compensation for victims of crime: Two decades of development and change" (2014) 20(1) *International Review of Victimology* 145 146-160.
[14] SALRC *A Compensation Fund for Victims of Crime* 321.
[15] 111-118, 321-326.
[16] 111-118.
[17] 321.
[18] 196, 322.
[19] 322.
[20] 323. See paragraph 4.3.1 below for a discussion of the existing policies and programmes relating to crime victim compensation.

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for a comprehensive framework that would ensure a better deal for victims of crime.[21] Referring to Canada and Australia as providing an example of the way forward for the South African legislature in relation to crime victim compensation,[22] the commission formulated its ultimate proposal as follows:[23]

> "[T]he Commission was of the view that […] legislation should, as a minimum, provide for: (a) the creation of a permanent structure, like an office for Victims of Crime within government structures, to take care of the needs of victims on a permanent basis; (b) the creation of a permanent body or institution (like an Advisory Council) to advise government on policy issues and legislative amendments to meet the needs of victims of crime; (c) the introduction of legislative […] principles to guide the treatment of victims of crime; and (d) the creation of a dedicated fund to facilitate and develop the establishment of victim services. The above principles are supported by all commentators to the Commission's discussion documents."

However, at present, no comprehensive legislation has been enacted. Furthermore, it is contended that the mere fact that the SALRC rejected the creation of a statutory compensation fund on the basis of predominantly financial reasons does not prevent a further study of whether the enactment of this kind of statutory compensation fund may be justified. Indeed, as the SALRC noted, "the establishment of a compensation fund should not be abandoned but developed over time as a long term project within the broader objective of improved services for victims of crime."[24]

Very important for the purpose of this dissertation, the commission also stated that "developing a motivation for the establishment of a [statutory compensation fund] in SA remains incomplete, and must be completed if legislation is to be drafted, since no law should be passed without its objectives being clearly defined and costed."[25]

The remainder of this section will focus on the gap identified by the SALRC and shift its attention to the justifiability of establishing a crime victim compensation fund in South Africa. Before examining some of the policy considerations that may apply in this context, attention will be paid to two competing rationales for the establishment of a crime victim compensation fund.

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[21] 323.
[22] 334-335.
[23] 334. The commission pointed out that the Probation Services Act 11 of 1986 provided a legislative basis for establishing victim-centred programmes aimed at the compensation of crime victims.
[24] 322.
[25] 318-319.

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4.2.2 The two rationales suggested for the establishment of a statutory compensation fund for crime victims

There is a view that the state owes a legal obligation to its citizens to maintain law and order and when it fails to prevent crime, it has a legal duty to compensate the victims. This can be called the "legal duty rationale". By contrast, it has also been suggested that a legal duty rationale is not justifiable, and that the state's duty to compensate crime victims is a moral one, which can only be explained on the basis of welfare, sympathy and humanitarian reasons. This "moral duty rationale" is aimed at providing "practical social security assistance to the victim."[26] These rationales will now be considered.

4.2.2.1 The legal duty rationale

In the run-up to the establishment of the first statutory compensation schemes in New Zealand and the UK in the early 1960s, Fry reasoned that there is a legal duty on the state to compensate crime victims because the state denied measures that "might be thought of [as] self-protective, and then fail[ed] to halt crimes of violence."[27] She argued that, because the state "forbids our going armed in self-defence[, it] cannot disown responsibility for its occasional failure to protect."[28] The idea was supported by Supreme Court Associate Justice Goldberg, who contended that "[t]he victim of a robbery or an assault has been denied the 'protection' of the laws in a very real sense, and society should assume some responsibility for making him whole."[29]

This argument may be criticised on the following bases. First, it seems to carry weight only in relation to those jurisdictions where it would be prohibited to arm oneself for purposes of self-defence. Contrary to the society to which Fry relates her argument, South African citizens are generally allowed to arm themselves and to protect

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[26] 282.

[27] Brooks (1976) *Tulsa Law Journal* 479. See also M Fry "Justice for Victims" *The Observer* (7 July 1957) 8; Williams "The adoption of Criminal Injuries Compensation Scheme: Chronology" 5 available at <https://www.open.ac.uk/Arts/history/downloads/pdfs/Williams_Compensation.pdf> (accessed on 9 August 2016).

[28] Fry *The Observer* (1957) 8. See also Scott (1967) *William and Mary Law Review* 280; D McGills & P Smith *United States Department of Justice: Compensating Victims of Crime – An Analysis of American Programs* (1983) 2-6.

[29] AJ Goldberg "Equality and Government" (1964) *New York University Law Review* 39 205 224; P Burns *Criminal Injuries Compensation* (1980) 99-103.

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themselves against criminal attacks in a manner that is lawful.[30] Within this framework, the idea that the state's failure to prevent harm must necessarily attract legal liability loses its appeal.

Furthermore, the argument seems to suggest that the state's legal liability for harm arising from crime derives from its prohibition of carrying weapons and defending oneself. However, there appears to be no convincing evidence in support of the argument that owning, possessing or having regular access to weapons would result in the decrease of criminal attacks or the scope of harm that may arise from crime. Indeed, it is arguable that the use, possession or access to weapons will not only allow self-defence against criminal attacks, but may just as likely be used to further such attacks.[31]

In addition, Fry's argument assumes that, "if left alone by the state, the individual could protect himself."[32] However, as Brooks pointed out: "That the individual was ever able to do this seems to be denied by the contentions that governments were established, for one reason, to better protect the individual."[33]

Another argument in favour of imposing a legal duty to compensate crime victims on the state is that it "makes it harder for [crime victims] to secure reparation by incarcerating the offender, making it virtually impossible for him to honour any civil judgment that might be rendered against him."[34] The implication is that if the offender is not incarcerated he would be able to earn income, which could be used to compensate the victim. This argument, however, may be dismissed if we consider that, even if the state did not take any action against crime victims, it is improbable that the offender would be in a position to compensate the crime victim for the harm he caused, because of his probable impecuniosity.[35]

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[30] JM Burchell *Principles of Criminal Law 3* ed (2005) 226-256.
[31] Civilian Secretariat for Police *White Paper on Safety and Security* (2016) 12-15.
[32] Brooks (1976) *Tulsa Law Journal* 479-480.
[33] 479-480.
[34] Brooks (1976) *Tulsa Law Journal* 480-481; J Goodey *Compensating Victims of Violent Crime in the European Union* (2003) 11-12. See also AM Linden *The Report of the Osgoode Hall Study on Compensation for Victims of Crime* (1968) 5; Burns *Criminal Injuries Compensation* 103-113; Fry *Arms of the Law* (1951) 125.
[35] Burns *Criminal Injuries Compensation* 111; SALRC *A Compensation Fund for Victims of Crime* 315. For a comparative perspective see also LJ McQuillan & H Abramyan, "The Tort Law Tax" (2007) *Wall Street Journal* 1 available at <http://www.wsj.com/articles/SB117496524456750056> (accessed on 2 February 2015); Miers (2014) *International Review of Victimology* 148-154.

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In conclusion, it is compelling to note that none of the jurisdictions that have elected to enact a statutory compensation fund for victims of crime appear to have based the legislative development on the argument that the state has a legal duty to compensate the crime victim.[36] Essentially, we may conclude that this view "is too broad to receive widespread support."[37]

4.2.2.2 The moral duty rationale

The "most widely accepted"[38] rationale justifying the legislative enactment of a statutory compensation scheme for crime victims is centred on the notion that the state has a moral duty to compensate victims of crime.[39] In its distilled form, this argument is based on the idea that the compensation of crime victims by a state-funded compensation scheme is the "right thing to do" from a moral point of view.[40]

Brooks explains that the moral duty of the state stems from an "inclination toward a certain philosophical disposition"[41] in terms of which the state's failure to prevent harm arising from crime constitutes a moral "wrong"[42] and compensation "by the state is the curative [moral] 'right.'"[43] Writing about the rationale underlying the adoption of the Criminal Injuries Compensation Scheme in the UK in 1964, Miers sheds light on this moral duty:[44]

> "Compensation is given to victims of violent crime in recognition of a sense of public sympathy for the pain and suffering of the victim. In an earlier consultation, the Home Office asserted that a financial award is society's way of acknowledging the harm that has been done to the victim as a representative of the community."

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[36] See SALRC *A Compensation Fund for Victims of Crime* 282 for reference to a review conducted for the criminal compensation scheme in Northern Ireland: "Neither in the United Kingdom, nor in any other jurisdiction of which we have knowledge, does the State regard itself as a kind of surrogate offender."
[37] Burns *Criminal Injuries Compensation* 115.
[38] 116.
[39] See Burns *Criminal Injuries Compensation* 116-120; Miers (2014) *International Review of Victimology* 154-156; Cane *Atiyah's Accidents* 299-308.
[40] Miers (2014) *International Review of Victimology* 155. See also D Miers "Compensating deserving victims of violent crime: the Criminal Injuries Compensation Scheme 2012" (2014) 34 *Legal Studies* 242 247.
[41] Brooks (1976) *Tulsa Law Journal* 483.
[42] 483.
[43] 483.
[44] Miers (2014) *International Review of Victimology* (references omitted) 155. See also the Ministry of Justice *Getting it Right for Victims and Witnesses* (2012) 49; Home Office *Rebuilding Lives: Supporting Victims of Crime* Home Office (2005) 21.

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Support for this wording is to be found in the 1964 White Paper,[45] which emphasised the fact that it cannot be accepted that "the State is liable for injuries caused to people by the acts of others,"[46] and that "the public does, however, feel a sense of responsibility for and sympathy with the innocent victim, and it is right that this feeling should find practical expression in the provision of compensation on behalf of the community."[47]

In a comparative overview of statutory compensation schemes, Miers reiterates that this rationale refers to the "public sense of responsibility for and sympathy with the innocent victim, which makes it right for that feeling to be given practical expression."[48] Similarly, Goodey argues that the establishment of various state compensation schemes in many European jurisdictions reflect "the development of the welfare state across large parts of Europe"[49] and that it may be regarded as a form of social assistance to the most vulnerable members of society.[50]

In its report, the SALRC rejected the argument that the state should attract legal liability for the harm which citizens may suffer as a result of crime. The commission noted that compensation "should not be understood as a reward, but rather monetary assistance which can aid people in dealing with the impact of a violent crime, and with some of the costs associated with a crime".[51] In line with the moral duty rationale, the SALRC therefore envisaged that, through the establishment of a compensation fund for crime victims, the state may therefore assist citizens in regaining their status as active members of society more quickly so that they may contribute towards their own well-being and that of others sooner than would otherwise be the case.[52]

It may therefore be more convincing to argue that the enactment of a statutory compensation fund for crime victims is justified by the state's moral duty to injured victims of crime, as opposed to suggesting that the state has a legal duty to

[45] White Paper "Compensation of Victims of Crimes of Violence" (1964) (cmnd 2323).
[46] Williams *The adoption of the Criminal Injuries Compensation Scheme: Chronology* (no date provided) 6.
[47] White Paper "Compensation of Victims of Crimes of Violence" (1964) (cmnd 2323). See also Burns *Criminal Injuries Compensation* 116; Miers (2014) *Legal Studies* 246-247.
[48] Miers (2014) *Legal Studies* 247 (references omitted).
[49] Goodey *Discussion Paper of the National Centre for Victims of Crime* 11. See also SALRC *A Compensation Fund for Victims of Crime* 284; Brooks *Tulsa Law Journal* (1976) 478-479.
[50] See also Scott (1967) *William and Mary Law Review* 280.
[51] SALRC *A Compensation Fund for Victims of Crime* 298.
[52] 298.

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compensate victims for the harm they suffer arising from crime. Nevertheless, to suggest that there is a moral duty on the state to assist and alleviate the plight of crime victims does not go far enough to justify why they, but not other categories of victims, should receive statutory compensation for the harm they suffer as a result of the conduct of others. The question therefore still remains: are there valid reasons that could justify the singling out of crime victims for preferential treatment in South Africa?

To answer this question, attention will now be given to the policy considerations identified in chapter 3 with the view to determining if they could justify the proposed statutory reform of the law relating to crime victims through the establishment of a crime victim compensation fund.

4.2.3 Policy considerations that may potentially justify a statutory compensation scheme for crime victims

4.2.3.1 The need to combat the risk of falling victim to crime

In chapter 3, it was argued that the existence and extent of a risk of harm has played a key role in the South African legislature's decision to develop the law of delict in the context of motor vehicle accidents, occupational injuries and diseases and defective consumer products. Here it will be argued that the risk of falling victim to crime may potentially justify the establishment of a crime victim compensation fund in a similar way.

Some of the central national statistics in respect of crimes against the person can be summarised as follows:[53]

[53] The statistics are available on the South African Police Services' website, available at: <http://www.saps.gov.za/resource_centre/publications/statistics/crimestats/2015/crime_stats.php> (accessed on 31 May 2016). See also: ISS Crime Hub "Fact Sheet: Explaining the official crime statistics for 2013/2014" available at <http://www.issafrica.org/uploads/ISS-crime-statistics-factsheet-2013-2014.pdf> (accessed on 9 February 2015).

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CRIME CATEGORY	2006 - 2007	2007 - 2008	2008 - 2009	2009 - 2010	2010 - 2011	2011 - 2012	2012 - 2013	2013 - 2014	2014 - 2015	2015 - 2016
Murder	19 106	18 400	18 084	16 767	15 893	15 554	16 213	17 023	17 805	18 673
Total Sexual Offences	64 071	62 484	69 197	66 992	64 921	60 539	60 888	56 680	53 617	51 895
Attempted murder	19 957	18 643	18 140	17 247	15 360	14 730	16 236	16 989	17 537	18 127
Assault with the intent to inflict grievous bodily harm	216 754	208 705	202 328	203 807	197 470	191 612	185 050	182 333	182 556	182 933
Common assault	207 869	195 885	190 709	194 922	184 103	180 165	171 653	166 081	161 486	164 958
Common robbery	70 598	64 417	58 764	56 993	54 442	52 566	53 196	53 505	54 927	54 110
Robbery with aggravating circumstances	126 038	117 760	120 920	113 200	101 039	100 769	105 488	118 963	129 045	132 527
Total Crimes Against The Person	**724 393**	**686 294**	**678 142**	**669 928**	**633 228**	**615 935**	**608 724**	**611 574**	**616 973**	**623 223**

These statistics confirm that South Africa is overwhelmed by violent crime. It is particularly alarming to realise that the murder rate is approximately five times higher than the 2013 global average of 6,2 per 100 000.[54] The murder rate increased from 32,9 per 100 000 in 2014/2015 to 33,9 per 100 000 in 2015/2016. To put it differently, in 2015/2016 a murder was recorded on average 51 times per day.[55] Statistics provided by the European Institute for Crime Prevention and Control International Statistics on Crime and Justice in 2011 indicate that, with around 1 188 assaults being recorded for every 100 000 people,[56] South Africa has one of the highest assault rates in the world. To make matter worse, the official assault statistics of the South African Police Services ("**SAPS**"), as tabled above, may be doubted if it is taken into account

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[54] Africa Check "Factsheet: South Africa's 2014/2015 murder and robbery crime statistics" available at <https://africacheck.org/factsheets/factsheet-south-africas-201415-murder-and-robbery-crime-statistics/> (accessed on 26 August 2016).
[55] Africa Check "Factsheet: South Africa's 2015/2016 crime statistics" available at <https://africa check.org/factsheets/factsheet- south-africas-201516-crime-statistics/> (accessed on 2 June 2017).
[56] European Institute for Crime Prevention and Control International Statistics on Crime and Justice "Countries Compared by Crime > Assault rate. International Statistics at NationMaster.com" available at <http://www.nationmaster.com/country-info/stats/Crime/Assault-rate> (accessed on 26 August 2016).

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that the "tendency among victims to report assault incidents to the police is declining."[57] With this in mind, the incidence of these crimes may be much higher than what is asserted by the SAPS.

The SAPS statistics indicate that there has been a slight decrease in the number or rapes from 47 588 in 2008/2009 to 46 253 in 2013/14.[58] However, the rape statistics must be understood against the background of research done by the Medical Research Council, which suggests that only one out of every nine rapes is actually reported to the police and that this number is therefore inaccurate. In fact, the council alleges that the number of rapes for 2013 was closer to a staggering 416 277.[59] Not taking into account unreported instances of rape, the European Institute for Crime Prevention and Control's International Statistics on Crime and Justice nevertheless indicate that 132 per 100 000 South African citizens are rape victims, which is considered as one of the highest rates in the world.[60]

These statistics demonstrate that, arguably, with the possible exceptions of poverty, unemployment and the struggling economy, "no single issue of governance comes close to the levels of attention and concern associated with the problems of crime, criminality and victimisation."[61] Although such a high crime rate has social, political and psychological effects on victims and the broader society alike, the economic consequences have been emphasised as proving especially significant. For instance, the report published by the SALRC pointed out that the "sheer volume of crime, as well as the proportion of violent crime, ensures that crime in South Africa is inordinately expensive to the society and individuals."[62] To get a sense of the economic

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[57] Africa Check "Fact Sheet: South Africa's 2014/2015 assault and sexual crime statistics" available at <https://africacheck.org/factsheets/factsheet-south-africas-201415-assault-and-sexual-crime-statistics/> (accessed on 1 June 2016).
[58] ISS Crime Hub "Fact Sheet: Explaining the official crime statistics for 2013/2014" available at <http://www.issafrica.org/uploads/ISS-crime-statistics-factsheet-2013-2014.pdf> (accessed on 9 February 2015). Statistics provided to Africa Check by the South African Police Service reveal that 42,596 rapes were reported in 2015/16 – see Africa Check "GUIDE: Rape Statistics in South Africa" available at <https://africacheck.org/factsheets/guide-rape-statistics-in-south-africa/> (accessed on 2 June 2017).
[59] The Independent Police Investigative Directorate *Annual Report 2012/2013* (2013) 15-16.
[60] Rape Crisis "Prevalence of Rape" available at <http://rapecrisis.org.za/rape-in-south-africa/#prevalence> (accessed on 23 June 2016). According to NationMaster, which compared the various rape rates of several countries, South Africa has the highest rape rate in the world since 2004: "Countries Compared by Crime>Rape rate. International Statistics at NationMaster.com" (available at <http://www.nationmaster.com/country-info/stats/Crime/Rape-rate>) (accessed on 23 June 2016).
[61] SALRC *A Compensation Fund for Victims of Crime* 9.
[62] 24.

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consequences for an individual crime victim, consider the following set of costs to which he may be exposed:[63]

> "[P]roductive years lost by victims who are killed or seriously injured[,] working days lost during convalescence[,] reduced productivity following violent victimisation[,] working days lost assisting the investigating officer and attending court[,] working days lost replacing lost and damaged property[,] taxes used to pay for the provision of the services of the criminal justice system[,] insurance premiums and payments for private security[,] lost and damaged property[,] medical costs[,] lost investments and economic opportunities flowing from the increased costs of doing business in a high crime environment [and the] reductions in pleasure derived when activities are avoided as a result of a fear of crime."

In comparison with the statistics provided in chapter 3 in relation to fatalities that result from motor vehicle accidents (for example, 13 967 in 2010) or the number of people being injured in motor vehicle accidents (for example, 159 704 in 2000), it becomes apparent that the risk which South African citizens face of falling victim to especially violent crime (for example, 18 673 murders in 2015-2016 and 182 933 assaults with the intent to do grievous bodily harm in 2015-2016) is a very significant one. In fact, based on the statistics set out in this dissertation, it appears as though the risk that a South African will fall victim to a violent crime is much higher than the risk that he would suffer from a motor vehicle accident.

Similar to victims of motor vehicle accidents, defective consumer products and occupational injuries and diseases, crime victims, are exposed to the further risk of receiving no compensation if the initial risk of harm materialises. Reference has already been made of research indicating the likely impecuniosity of criminals.[64]

Of course, a victim who has suffered harm as a result of the culpable conduct of a state employee might be successful in holding the state vicariously liable – if the victim has the funds to afford private litigation, the luxury to live without compensation for a considerable period of time and the means to prove all of the requisite elements of delictual liability. However, this option will conceivably not be available to most South African crime victims, which means that, without a remedy, they will likely be forced to shoulder the burden of the harm by themselves.

In summary, South African citizens are exposed to the substantial risk of falling victim to harm from crime and are equally exposed to a risk of receiving limited or no

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[63] 24-25. See also National Planning Commission *National Development Plan* (2011) 349-361.
[64] See paragraph 1.3 in chapter 1; SALRC *A Compensation Fund for Victims of Crime* 74.

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compensation. This means that the need to combat the risk of harm that operated to justify the enactment of the COIDA, the RAF Act and the CPA is also applicable here.[65] Brooks summarised the legislative development of tort law on the basis of this risk as follows:[66]

> "Compensation to victims of crime is a new suggestion in the sense that it represents a recent and still current attempt to meet what is felt to be a societal need. [It] represent[s] an attempt to secure mutual protection against a risk which is reasonably certain for the large group though uncertain for the individual, through the pooling of fixed contributions so that the cost of the average risk applies to each member of the group."

This extract brings into focus the following related question: who should bear the risk of harm? In the case of the COIDA and the CPA, the notion of enterprise liability provides an adequate explanation for why the employer and the manufacturer may be made to shoulder the financial cost of the risks created by employment and manufactured goods, respectively.[67] Essentially, the employer and manufacturer creates the risk of harm which may materialise while also potentially benefiting the most from the respective enterprise and must therefore carry the harm that results therefrom.

In the case of harm arising from motor vehicle accidents, however, the notion of enterprise liability fails to explain why innocent road users are asked to make a financial contribution towards the RAF in the form of fuel levies.[68] Nevertheless, although they do not stand to benefit from the use of roads in the same way that a manufacturer stands to benefit financially from the manufacture or consumer products, the financial contribution that innocent road users are obliged to make is arguably justifiable on the basis that they contribute towards the creation of a significant risk of harm through their use of motor vehicles.

Similarly, enterprise liability does not appear to find application in the context of crime victim compensation. Most crime victim compensation funds appear to be tax-funded, i.e. innocent tax-payers' monies are used to compensate victims of crime although

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[65] See paragraph 3.2.1 in chapter 3.
[66] Brooks *Tulsa Law Journal* (1976) 478.
[67] See paragraphs 3.2.1.3 and 3.2.1.4 in chapter 3.
[68] See Road Accident Fund "Fuel Levy" available at <http://www.raf.co.za/about-us/pages/fuel-levy.aspx> (accessed on 26 June 2017).

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they did not create, or stand to benefit from, the risk of harm.[69] Therefore, on this point they apparently differ from the COIDA or the strict liability regime under the CPA. They also differ from the RAF insofar as it may be argued that all road users contribute towards the creation of a risk of harm by making use of motor vehicles on roads whereas not all South African citizens may be said to contribute towards the risk of harm arising from crime.

In response to the above, it requires emphasis that the need to combat the risk of harm arising from crime must be separated from the issue of responsibility for that risk. Important as it is to determine who should ultimately take responsibility for the risk of falling victim to crime, it remains a valid consideration that, in principle, the existence and extent of the risk of harm arising from crime could justify the statutory development in the law of delict.

Furthermore, it is submitted that the following statement by Miers, who writes about the justification of a crime victim compensation fund from a comparative perspective, also applies in the South African context:[70]

> "It is an incontestable fact that each one of us has a statistically determinable risk of victimization. Where schemes are funded by general taxation we may accept that it is levied for the purpose of insuring us against the risk when it eventuates. In that sense, a victim is, on the occasion of the victimization, a representative of this actuarially constructed group. This argument for public insurance against criminal victimization resonates with some conceptions of the functions of tort law that it is socially more just and economically more sensible to distribute losses occasioned by criminal activity at large, rather than let them fall on the particular victim."

In other words, the enactment of a crime victim compensation fund – and requiring innocent members of the public to make financial contributions towards such a fund – arguably relies on "the general proposition that crime losses are endemic to the entire society and that [those] endemic losses should be spread throughout the entire group."[71] Scholars have correctly pointed out that an "obvious analogy"[72] may be drawn between such risk and the "statistically determinable risk of being injured in a

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[69] SALRC *A Compensation Fund for Victims of Crime* 119-122. However, in the United States of America, legislation has been created to direct the revenue generated through the payment of fines or forfeited bail monies towards victim compensation.
[70] Miers (2014) *International Review of Victimology* 155 (references omitted).
[71] Scott (1967) *William and Mary Law Review* 282.
[72] Miers (2014) *International Review of Victimology* 155.

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road accident […] which, like criminal victimization, falls unevenly across the population."[73]

In addition, the fund, if it were to be enacted, may also be financed by the proceeds paid into the Criminal Asset Recovery Account, set up under the Prevention of Organised Crime Act 121 of 1998, which was discussed in paragraph 2.3.3 in chapter 2. If this were to be done, it would not only be innocent tax-payers that would contribute to the fund, but also those who have benefited from unlawful activities.[74]

Lastly, it should be remembered that, under the current regime of expanded state delictual liability for harm arising from crime, where the state has been held vicariously liable for a series of crimes committed in a divergent range of circumstances, the innocent taxpayer is in any event ultimately responsible for the compensation of the crime victim. As such, a statutory compensation fund, which would require at least a certain category of citizens to contribute towards such a fund, will not be different in principle to the current legal regime.

4.2.3.2 The role of the Constitution and the need to promote the constitutional right to social security

In paragraph 3.2.2 of chapter 3, attention was given to the role which the Constitution has played in justifying earlier statutory development of the law of delict. Indeed, the COIDA, the RAF Act and the proposed RABS has been justified on the basis that it seeks to give effect to the constitutional right to reasonable access to social security.[75]

The establishment of a statutory compensation fund for crime victims could be used to give effect to the constitutional right to social security. This could potentially be done because, as the experience with the RAF Act and the COIDA has illustrated, the route

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[73] Miers (2014) *International Review of Victimology* 155. See also Scott (1967) *William and Mary Law Review* (1967) 284-286. See further paragraph 3.2.1.2 in chapter 3 above for the statistics relating to motor vehicle accidents. See also the concluding remarks made in this regard in paragraph 6.3.2 in chapter 6.

[74] Of course, as will be discussed in more detail in paragraph 5.5.1 in chapter 5, it should be emphasised that none of the above should mean that the perpetrator of a crime will be absolved from his common-law delictual liability.

[75] MP Olivier, JF Khoza, L Jansen van Rensburg & E Klinck "Constitutional Issues" in MP Oliver, N Smit & E Kalula (eds) *Social Security: A Legal Analysis* (2003) 49-119; *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC).

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to compensation is arguably more cost-effective and quicker if a victim institutes a claim against a statutory fund, when compared to instituting a common-law delictual claim against the perpetrator of the crime or, alternatively, the state.[76]

As indicated above, falling victim to crime may bring about severe financial and accompanying social consequences.[77] Setting up a more cost-effective route to obtain compensation would arguably mean that more crime victims could in this way be compensated, thereby alleviating the socio-economic consequences of being a crime victim. Doing so along a cheaper, more time-efficient route could assist in the empowerment of the historically disadvantaged, promoting fundamental human rights (particularly human dignity), addressing past injuries and seeking to provide an adequate standard of life to all individuals – all of which constitute part of the right to social security.

As discussed in chapter 2, the judgments of the CC in *K v Minister of Safety and Security*[78] and *F v Minister of Safety and Security*[79] show the significant role which the court assigns to the Constitution in the development of the vicarious liability doctrine. It was argued in chapter 2 that in both cases the CC applies human rights contained in the Bill of Rights to justify the conclusion that the crime of rape was committed by police officers during the course and within the scope of their employment. The role which these rights play in expanding the state's delictual liability for harm arising from crime was critically evaluated in that chapter and will not be repeated here. It is sufficient to reiterate that the reasoning adopted in those cases, especially insofar as the application of human rights, is arguably contentious.

It is therefore proposed that, instead of relying on the Constitution to achieve the judicial expansion of the state's delictual liability, it may rather be used to justify the establishment of a compensation scheme of general application, enabling the victims of harm to receive compensation without having to litigate and without having to

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[76] See paragraph 3.3.1 in chapter 3.
[77] See also KPMG *Too costly to ignore – the economic impact of gender-based violence in South Africa* (2014) 2 which states that "the economic impact of that violence is between at least R28.4 billion and R42.4 billion for the year 2012/2013, representing 0.9% and 1.3% of GDP respectively."
[78] 2005 (6) SA 419 (CC).
[79] 2012 (1) SA 536 (CC).

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expose future litigants to the potential uncertainty that may accompany the constitutional development of the law of delict.[80]

In doing so, the Constitution would not be given a lesser role to play with the development of the law of delict. Rather, it will continue to shape the law insofar as it could potentially justify the introduction of a statutory compensation fund specifically aimed at compensating crime victims. However, it will do so in a manner that is arguably less confined and arbitrary and which may ultimately provide compensation to a greater number of crime victims.

4.2.3.3 Evidentiary problems with applying the common-law requirement of fault

In chapter 3 it was explained how the common-law requirement to prove fault (in the form of negligence) may present evidentiary problems to the plaintiff when instituting a delictual claim for harm arising from crime.[81] This requirement may in some instances place a burden on victims of harm that is very difficult to satisfy, thereby rendering them without compensation. As a result, this consideration has justified the legislative development of the law of delict in a variety of contexts, notably harm resulting from defective consumer products, workplace-related injuries and diseases and motor vehicle accidents.[82]

Some of the difficulties experienced by crime victims in proving fault (in the form of negligence) to establish a delictual claim against an alleged wrongdoer were canvassed in paragraph 2.2.2 in chapter 2. The evaluation of the judgments in *Shabalala v Metrorail*[83] and *Mashongwa v Passenger Rail Agency of South Africa*[84] indicated that, where a crime victim's delictual claim against the state is based on so-called systemic negligence, he may particularly struggle to prove that the harm he suffered, if foreseeable, was indeed preventable. The analysis will not be repeated here and it will suffice to reaffirm that the institution of common-law delictual claims for harm arising from crime may likely present a formidable evidentiary burden of having

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[80] See paragraphs 2.2.1.2.4 (a) and 2.2.1.2.4 (c) in chapter 2.
[81] Paragraph 3.2.3 in chapter 3.
[82] See paragraph 3.2.3 in chapter 3.
[83] 2008 (3) SA 142 (SCA).
[84] 2016 (3) SA 528 (CC).

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to prove that the state could and should have undertaken a system of effective and affordable measures which would have prevented the crime – a challenge which may very difficult, if not impossible, for most crime victims.

Obviously, it may be argued that, as is the case with the proposed statutory reform of the law in the context of motor vehicle accidents[85] and the COIDA in respect of occupational injuries and diseases, the establishment of a no-fault based statutory compensation fund could provide a viable alternative that is also less time-consuming and costly. Most crime victim compensation funds seek to compensate harm arising from intentionally-committed violent crimes.[86] As will be indicated in paragraph 5.8 in chapter 5, these funds do not require crime victims to prove intention in the same way that a victim would have to prove it (on a balance of probabilities) to satisfy the fault requirement for delictual liability, or in the manner in which the state would have to prove this element (beyond reasonable doubt) for the purposes of the criminal law. Instead, victims are typically asked to place enough information in front of the administrative entity responsible for handling the statutory claim (as well as the police) so as to allow them to conclude that, on a balance of probabilities, the person was indeed a victim of a violent crime, i.e. that the victim's harm arose from an intentionally-committed crime.[87]

For example, a rape victim would not have to prove that the perpetrator of the crime had the requisite intention to cause her harm, but merely that harm had been suffered as a result of being raped. Conceivably, this may be easier for the crime victim than what it would otherwise have been to prove all of the elements of delictual liability in a civil trial. The reason for this is that, at the very least, it is not necessary to find the perpetrator and prove fault for the purposes of delictual liability. Similarly, it would also

[85] See the discussion of the proposed Road Accident Benefit Scheme Bill of 2014 in paragraph 3.2.1.2 in chapter 3.
[86] See paragraph 5.8 in chapter 5.
[87] See paragraph 5.8 in chapter 5.

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be easier than what it would be for the state to prove, beyond a reasonable doubt, that the perpetrator had the requisite intention to rape the victim of crime.

4.2.3.4 Avoiding legal unpredictability and promoting legal certainty

It may be recalled that, in chapter 2 it was argued that the judicial expansion of state delictual liability for crimes that were intentionally caused by state employees may produce arbitrary outcomes.[88] As argued there, it is conceivable that this development may expose future litigants to an element of unpredictability and thereby undermine the constitutional principle of the rule of law, which demands not only that everyone should be treated equally under the law, but also that future litigants should not be taken by surprise by any uncertainty or vagueness regarding specific aspects of the law of delict. In this regard, Gardner's argument is worth quoting in full:[89]

> "The ideal of the rule of law is the ideal according to which the law should be capable of guiding those who are subject to it. People should not be ambushed by the law; it should be possible for them reliably to anticipate the legal consequences of their actions and reliably to obtain or to avoid those consequences by following the law. So understood, the ideal sets a wide range of disparate standards for all legal systems to live up to. The ones that mainly concern us here are standards for legal *norms* to live up to. Legal norms should not, according to the ideal of the rule of law, be secret, retroactive, unclear, impossible to conform to, or forever in a state of flux; and particular legal norms (rulings) should be applications of general legal norms (rules)."

If future litigants are uncertain about the application of a foundational legal rule, they are likely to be taken by surprise which, in turn, will result in unnecessary litigation with the corresponding financial losses and time wastage. This line of development not only introduces ambiguity regarding legal doctrine, but consequently diminishes future litigants' right to access to justice.

It is proposed that the establishment of a statutory compensation fund could provide a "clearer 'road map' towards obtaining suitable redress"[90] in the context of harm arising from crime. This could be done by enacting a specific statute that clearly stipulates the eligibility criteria for instituting a claim against a compensation fund, in much the same way as the RAF Act and the COIDA has done.

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[88] See paragraph 2.2.1.2.4 (a) in chapter 2 above.
[89] Gardner "Some Rule-of-Law Anxieties About Strict Liability in Private Law" in LM Austin & D Klimchuk (eds) *Private Law and the Rule of Law* (2014) 207-224 211.
[90] Scottish Government Social Research *No-Fault Compensation Schemes For Medical Injury: A Review* (2010) 9.

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4.2.3.5 Higher compensation and lower transaction costs

One of the main arguments employed by the proponents of compensation schemes generally is that the law of delict provides a time-consuming, expensive and cumbersome route by which victims of harm may be compensated through the civil procedure system.[91] As argued in chapter 3, the civil procedural system is accompanied by high legal transaction costs[92] and provides a significant barrier to access to justice, especially in a country where the majority of people cannot afford the services of legal practitioners.[93]

As an alternative to the civil procedure system, sections 297 and 300 of the Criminal Procedure Act provide procedural assistance in obtaining compensation or restitution from the perpetrator. However, as was argued in chapter 2, the Act affords very little support in practice.[94] The SALRC Report recorded that, at the time of writing that report, only 5,4% of crimes reported to the police resulted in a conviction, which indicates the practical insignificance of the statutory mechanisms discussed in chapter 2.[95]

Further, as was mentioned earlier, even if a crime is reported to the police and culminates in a successful prosecution and sentencing, the majority of accused persons are unlikely to have the means to compensate their victims, rendering the compensatory provisions under the Act without much of a practical effect.[96]

Ultimately, this means that the majority of South African crime victims are left un- or undercompensated for the harm which they have suffered as a result of crime.[97] Against this background, it may be argued that the establishment of a statutory

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[91] Cane *Atiyah's Accidents* (2006) 461-499; Deakin et al *Tort Law* 51-59; Hedley "Tort and Personal Injuries, 1850 to the Present" in *Tort Law and the Legislature* 249.

[92] For example, costs relating to investigating of claims and costs relating to litigation – see Deakin et al *Tort Law* 53. See also paragraph 3.3.1 in chapter 3.

[93] See paragraph 3.3.1 in chapter 3.

[94] See paragraph 2.3 in chapter 2.

[95] SALRC *A Compensation Fund for Victims of Crime* 18, 281-282; Miers (2014) *International Review of Victimology* 148-154.

[96] SALRC *A Compensation Fund for Victims of Crime* 74.

[97] For a comparative perspective see S Shapiro "Overcoming Under-Compensation and Under-Deterrence in Intentional Tort Cases: Are Statutory Multiple Damages the Best Remedy?" (2011) 62 (2) *Mercer Law Review* 449 449-499; M Faure et al *Tort Law and Economics* (2009) 14.

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compensation fund would be a practical manner to improve on these shortcomings in the same way that, for example, the COIDA fund provides quicker and cheaper access to compensation to victims of occupational injuries and diseases.[98]

Furthermore, seeking compensation from a statutory fund may not only increase efficiency in terms of both the time and costs spent on compensating crime victims, but it may also result in the reduction of the right to take legal action in the courts, thus lessening the cost and administrative burden on the courts and interested parties.

As referred to in chapters 2 and 3, it should be kept in mind that the overwhelming majority of delictual claims based on harm arising from crime are instituted by crime victims against some or other organ of the state, which is in a stronger financial position to compensate harm when compared to impecunious perpetrators. As is illustrated below, if the state chooses to defend its employees' conduct, it may very likely have severe financial consequences for the state's resources.

In this regard we may take note of a report regarding the extent and impact of civil claims against the SAPS, in which it is stated that, in recent years, the SAPS have "reported a substantial annual increase in civil claims filed for damages as a result of actions or omissions by its officials, and an even larger increase in claims pending. The 2014/2015 SAPS annual report showed that pending claims stood at over R26 billion, which is equivalent to over a third of the SAPS budget."[99] The report alleges that between 2007/08 and 2014/15, "claims made annually against the SAPS increased by 533% if considering the original rand valued, or 313% if adjusted to the same rand value".[100] Lastly, the report records that, in a parliamentary reply, the Minister of Police indicated that "just under R570 million had been spent by the SAPS on legal costs relating to civil claims between 2011/12 and 2013/14."[101]

Dereymaeker's report alleges that the "principal reason for the increasing pending claims is the length of court proceedings",[102] which, as indicated in chapter 3, are

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[98] See the reasonably effective compensation of injured and diseased employees: Department of Labor *The Annual Report of the Compensation Fund* 2014/2015 (2015) 11, 21-35.
[99] G Dereymaeker "Making sense of the numbers: civil claims against the SAPS" (2015) *SA Crime Quarterly* (54) 29 29.
[100] 31.
[101] 34.
[102] 32.

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cumbersome and expensive. Without going into any further detail, it is conceivable that the institution of civil claims against the state has significant financial implications on the financial resources of the SAPS. In turn, this may significantly prejudice the operation of the SAPS and their ability to effectively prevent crime and promote safety and security, thereby potentially resulting in further claims being instituted and an even greater need for victim compensation.

The establishment of a statutory compensation fund may potentially result in limiting the state's exposure to protracted litigation, thereby allowing for state funds to be spent on resources and enabling the state to combat the risk of crime more effectively, e.g. by employing more police officers, purchasing more police vehicles, etc. This, in turn, may decrease the likelihood of harm manifesting through the culpable conduct of the state's employees.[103]

It may be noted that if the proposed fund will be funded by using monies allocated to the budget of the SAPS, the latter would arguably have less financial resources available to combat crime and to promote safety and security, thereby undermining the previous argument. However, in this regard, it should be noted that "[i]n general, the bulk of funds for compensation schemes internationally are sourced through the relevant budgetary authority at national, state/provincial or local level." It is therefore also proposed that, if the South African legislature elect to enact a crime victim compensation scheme, it should be funded by monies received from the national budget and not by using the funds available to the SAPS for the purposes of promoting safety and security. After all, crime victim compensation is not the responsibility of the SAPS and bestowing on it such a financial onerous burden, could potentially undermine the national crime prevention strategy.

4.2.3.6 Improving the status of the criminal justice system

The discussion in paragraphs 4.2.3.1 to 4.2.3.5 illustrates that the policy considerations that have justified the legislative reform of the law relating to motor vehicle accidents, occupational injuries and diseases and defective consumer products may potentially also justify legislative reform of the law of delict in relation to

[103] See SALRC *A Compensation Fund for Victims of Crime* 119. See further paragraph 4.2.4.1 below.

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harm arising from crime. In this section, attention is given to additional considerations that further serve to justify the proposal.

The SALRC Report records that crime victims have "certain emotional and practical needs, including trauma counselling, advice and referral, information on court procedure, and compensation."[104] Furthermore, it notes that, if these needs are not met, and "the victim's position in the criminal justice system is not drastically reformed, it will further contribute to [a] legitimacy crisis of the criminal justice system in South Africa."[105]

Therefore, another motivation for the legislature's interference with the *status quo* is that it could contribute towards addressing the concern highlighted in the SALRC Report insofar as it will ensure that crime victims may receive some form of compensation. After all, as the report argues, "a compensation scheme could build confidence in the criminal justice system by demonstrating that it is a system that is sensitive to the needs of victims. This could encourage victims to form a partnership with the State to combat crime and would clearly enhance reporting rates."[106]

It is therefore submitted that the establishment of a statutory compensation fund for crime victims will enhance the legitimacy and status of the criminal justice system. This has also been a reason used to justify the establishment of similar funds in other jurisdictions.[107]

Furthermore, as was stated above, the moral duty rationale, broadly speaking, entails that the state is morally obligated to assist crime victims in some way, e.g. by compensating them for the harm they have suffered. In the process of conducting its research, the SALRC maintained that this argument is:[108]

> "commensurate with the victim empowerment approach, which stresses that those victimised by violent crime should be treated with dignity and assisted in whatever way possible. In this respect, comprehensive victim empowerment would include not only assistance through the provision of service and assistance, but, in some cases, financial compensation for losses endured."

[104] SALRC *A Compensation Fund for Victims of Crime* (2004) 27.
[105] 310: "At the very least, compensation has to be seen as a complementary component of victim support that is vital to ensuring the efficacy of the whole criminal justice system."
[106] 281.
[107] SALRC *A Compensation Fund for Victims of Crime* 308-311; Burns *Criminal Injuries Compensation* 120-129.
[108] SALRC *A Compensation Fund for Victims of Crime* 281.

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Providing more victims with compensation, in a quick and relatively cost-efficient manner presents a practical way in which crime victims may be assisted by the state, contributing thereby to the notion of victim empowerment.[109]

4.2.4 Considerations that potentially count against a statutory compensation scheme

4.2.4.1 Financial considerations that relate to the establishment of a statutory compensation fund for crime victims

This section notes the financial concern related to the establishment of a statutory compensation fund for crime victims and will attempt to determine whether there are convincing reasons why the SALRC's final recommendation against the establishment of a statutory compensation fund for the victims of crime should be reconsidered. For the sake of clarity it may be noted at the outset that, as the conclusion of this section emphasises, it is not yet clear whether or not the establishment of a statutory crime victim compensation scheme is affordable or not and this section should not be understood as making a conclusive statement in this regard.

In its report, the SALRC recorded the concern of the National Council of Women of South Africa who recognised that a state-funded compensation scheme for crime victims seems "ideal",[110] but argued that the potential funding of such a scheme through public taxation would cast a "further burden on the taxpayer"[111] and that it should therefore be avoided. Similarly, the "fiscal constraints"[112] led the Lawyers for Human Rights to state its reservations about a potential scheme because its establishment would mean "that the amounts paid would have to be limited."[113] They further argued that a "system which would work like the Workmen's Compensation Fund, where it takes years for the matter to be set down for a hearing, will only exacerbate the frustration of victims."[114]

[109] 285-286, 308-310, 333.
[110] 159.
[111] 159.
[112] 161.
[113] 161.
[114] 161.

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The commission also referred to the argument that, although compensation for harm that results from a rape or violent robbery makes "moral sense, [it is] difficult to justify in a context of limited resources, where poverty alleviation, combating Aids and providing employment all demand increased resourcing."[115] For these reasons, the SALRC concluded that, at the time, the scheme was "something South Africa cannot afford."[116]

For the following reasons it is argued that the SALRC's final recommendation against the establishment of a statutory compensation fund for the victims of crime should be reconsidered.

First, as the SALRC itself emphasises, the determination of the financial implications regarding the establishment of a statutory compensation fund proved to be extremely difficult, since "an accurate estimate depended on a number of variables, too difficult to verify or to define with certainty".[117] We should further note that the attempt to determine the cost implications was based on "[e]stimates and assumptions"[118] and done "in spite of much of the necessary data being unavailable."[119] Therefore, any conclusions reached about affordability would be premature until an authoritative financial analysis has been completed on this issue.

It should also be remembered that the cost implications of violent crime to the state are "enormous in terms of the loss of productive human resources and other costs such as providing health care for victims."[120] Therefore, it is arguable that the payment of compensation to a crime victim may allow them to contribute towards the generation of wealth by re-entering the market-place.

In addition, as was pointed out above, the cost implications of the current judicial expansion of the state's vicarious liability in delict is significant and could provide fresh *impetus* for a reconsideration of the financial implications of establishing a compensation fund for crime victims.

[115] 188.
[116] 29.
[117] 2.
[118] 118.
[119] 118.
[120] SALRC *A Compensation Fund for Victims of Crime* 303.

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The conclusion reached in the SALRC Report that a compensation fund is financially unaffordable was based on a model fund which sought to provide full compensation for victims of violent crime, which included murder, attempted murder, rape, assault with the intent do grievous bodily harm, indecent assault and aggravated robbery.[121] The commission determined that, at the time, it would require R4,7 billion to sustain such a fund.[122]

However, the SALRC did not adequately investigate the possibility of lower levels of compensation, e.g. limiting the type of injuries or harm in respect of which a statutory claim may be instituted against the fund or limiting the amount of compensation claimable against such a fund. It also failed to determine whether it would be financially viable to adopt more limited eligibility criteria, e.g. recognising only those claims brought by victims of intentionally-committed violent crimes who have suffered serious bodily or psychiatric injuries. Indeed, considering the fact that most crime victim compensation funds provide a capped amount of compensation and generally only in respect of intentionally-committed violent crimes, this may have a significant impact on the affordability of the proposed fund.

Recent amendments introduced by the Road Accident Fund Amendment Act 19 of 2005 provides an example of where the legislature has intervened to limit the amount of compensation payable by a statutory compensation fund. The amendments introduced a limitation with regards to claims for loss of income and a dependant's loss of support arising from the bodily injury or death of a victim of a motor accident.[123] It also abolished the victim's common-law right to claim compensation from a wrongdoer for losses which are not compensable under the RAF Act.[124] In *Law Society of South Africa v Minister for Transport,*[125] the CC rejected the applicant's constitutional challenge in respect of the above amendments and remarked:[126]

> "It became necessary to amend the legislation in order to give effect to the constitutional requirements regarding (a) expenditure which is efficient, effective and economical; (b) prohibition of irrational differentiation; and (c) reasonable access to social security and health

[121] SALRC *A Compensation Fund for Victims of Crime* 111-114: it culminates to an amount of R4.7 billion, calculated for the year 1998.
[122] Taking inflation into account, this amounts to approximately R10 billion in 2017: see Inflation Calculation available at <http://www.inflationcalc.co.za/> (accessed on 26 June 2017).
[123] See section 17(4)(c) of the RAF Act. See further paragraphs 5.5 and 5.6 in chapter 5.
[124] See section 21 of the RAF Act.
[125] 2011 (1) SA 400 (CC).
[126] Paras 44-45.

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> care [... while] the economic viability of the Fund and the removal of unfair differentiation were important goals, the ultimate vision is that the new system of compensation for road accident victims must be integrated into a comprehensive social security system that offers life, disability and health insurance cover for all accidents and diseases. [The Minister of Transport] acknowledges that a fault-based common-law system of compensation for road accident victims would be at odds with a comprehensive social security model."

Against this background, it is arguable that the proposed crime victim compensation fund could be more cost-efficient than the current liability system, which continues to expand insofar as the state is concerned. However, as emphasised in the opening paragraph of this section, the affordability of the proposed scheme is a matter for later determination and the previous statement about the fund's cost-efficiency is therefore not conclusive, but merely an opinion based on the reasons set out in this section.

Lastly, if the legislature were to enact the proposed crime victim compensation scheme, it is proposed that the fund would be well-advised to approach the Criminal Assets Recovery Account, as set up under chapter 7 of the Prevention of Organised Crime Act 121 of 1998, with a request to make available monies to the scheme for the purpose of funding crime victim compensation.[127]

From the above, we may conclude that it has not yet been clearly established that the establishment of a fund will be unaffordable. However, it has also not been proven that the creation of such a fund will be affordable. As the SALRC Report indicates, without a thorough financial investigation into this matter, it is not possible to indicate with sufficient finality whether the fund may be a viable option in the current financial climate. Such financial analysis falls outside the scope of this dissertation, but further investigation into this matter in future would be a worthwhile project in its own right. For the sake of clarity, it may be emphasised that the aim here is not to provide an economic analysis of the cost implications of establishing a statutory compensation fund, but, rather, to determine whether there are convincing policy considerations that may justify the enactment of a crime victim compensation scheme.

[127] See further paragraph 2.3.3 in chapter 2.

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4.2.4.2 Administrative problems with the establishment of a statutory compensation fund for crime victims

The SALRC Report recorded several problems with the administration of a statutory compensation fund that weigh against the proposal to establish such a fund for crime victims. The commission notes that, given "the current infrastructural situation in South Africa's public service, it is likely that the establishment of a compensation scheme could be hampered by the lack of effective inter-sectoral co-operation and co-ordination, as well as by the underdeveloped administrative systems in some government departments."[128]

Based on the protracted nature and difficulties involved in handling "18 000 Truth and Reconciliation urgent reparation claims",[129] the report states that "there may be little realistic prospect for setting up a new bureaucracy with the purpose of compensating thousands of potential victims."[130] Highlighting fraudulent claims and ineffective reporting of crimes as further reasons weighing against the success of a statutory compensation fund, the SALRC Report concludes that the necessary prerequisites of the effective and efficient administration of such a fund is absent.[131]

The commission also documented its concerns that the creation of a statutory compensation scheme may "encourage criminals to further their actions and it may lead to fraud and corruption by the community with a resultant increase in workload on the functionaries in the criminal justice system."[132] Although the compensation scheme for crime victims would find support in principle, "it would of necessity lead to actions being instituted on false charges for the sole purpose of financial gain."[133] It is argued that it would be "very difficult to identify such cases prior to the eventual hearing

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[128] SALRC *A Compensation Fund for Victims of Crime* 354.
[129] 354.
[130] 355..
[131] 354-355.
[132] SALRC *A Compensation Fund for Victims of Crime* 160. See also Brooks (1976) *Tulsa Law Journal* 501.
[133] SALRC *A Compensation Fund for Victims of Crime* 161.

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and it would have a definite effect on court roles [sic] and could well lead to a significant number of additional courts having to be established to handle the extra work."[134]

Notwithstanding the above, this dissertation argues that the SALRC's conclusion on this matter does not by itself dictate against the creation of a statutory compensation fund for crime victims. Brooks points out that "establishing an efficient machinery of investigation"[135] and "stringent requirements of proof"[136] could go some way in addressing the concerns raised above. Finally, it is worth remembering that:[137]

> "[It is] not as though governments have never undertaken programs which involved monetary payments upon a showing of injury. There are multitudes of activities where the potential for fraud exists. It is most desirable to prevent fraud and to punish fraud when it occurs, but this has been the business of government for centuries. It is germane to note that problems of fraud or attempted fraud have occasioned no mention of difficulties for those jurisdictions that presently administer crime compensation programs."

4.2.4.3 Concerns that the establishment of a statutory compensation fund raises about the function of the law of delict

It is generally agreed that the law of delict is primarily concerned with the compensation of harm.[138] Nonetheless, compensation might be the primary function, but it is "not the sole function of the law of delict."[139] Other functions which it is said to fulfil include the protection of certain interests, the promotion of social order and cohesion, the education and reinforcement of values, providing socially-acceptable compromises between conflicting moral views, deterring the injurer from behaving similarly in future and reallocating and spreading losses.[140] Arguably, the law of delict,

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[134] SALRC *A Compensation Fund for Victims of Crime* 161. See also Scott (1967) *William and Mary Law Review* 286-287.
[135] Brooks (1976) *Tulsa Law Journal* 502. See also SALRC *A Compensation Fund for Victims of Crime* 160.
[136] Brooks (1976) *Tulsa Law Journal* 502.
[137] 502.
[138] For overviews of the function of the law of delict, see JC Macintosh *Negligence in Delict* 1 ed (1926) 1; FP van den Heever *Aquilian Damages in South African Law* (1944) 3; RG McKerron *The Law of Delict: a Treatise on the Principles of Liability for Civil Wrongs in the Law of South Africa* 7 ed (1971); NJ van der Merwe & PJJ Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* 3 ed (1976) 1-3; J Neethling & JM Potgieter *Neethling-Visser-Potgieter Law of Delict* 7 ed (2015) 3-17; JC van der Walt & JR Midgley *Principles of Delict* 4 ed (2016); MM Loubser & JR Midgley (eds) *The Law of Delict in South Africa* 2 ed (2012) 8-11.
[139] Loubser & Midgley (eds) *The Law of Delict* 8.
[140] 8-11.

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as a fault-based system of liability, is founded on the central moral notion of personal responsibility.

The question that requires answering is whether the establishment of a crime victim compensation fund would undermine any of these functions. From a comparative perspective, most of the attention that focus on this question concentrate specifically on whether a compensation scheme might undermine the function of deterrence or the notion of personal responsibility.[141] This dissertation will also focus on these two issues.

Regarding the potential undermining of personal responsibility, the following should be considered. First, as described in chapter 2, without a statutory compensation fund, a crime victim is entitled to institute a delictual claim against the criminal or, if the harm was wrongfully caused by the culpable conduct of a state employee, a state organ may be held vicariously liable. In the case of the former, research and practical experience provides evidence that delictual claims are seldom successfully instituted because the criminal is not in a position to pay damages.[142] In other words, in these circumstances the law of delict is incapable of ensuring that criminals are held personally responsible for their wrongdoing.

If a crime victim decides to rather institute his delictual claim against the state, and where he succeeds in holding the state vicariously liable, the criminal is also not held personally responsible for the harm that he caused to the victim.[143] In this type of case, the tax-payer ultimately provides the funds for the payment of damages by the state.

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[141] See also Scott (1967) *William and Mary Law Review* 281.

[142] See paragraph 2.2 in chapter 2. From a comparative perspective, see FP Hubbard "The Nature and Impact of the 'Tort Reform' Movement" (2006) *Hofstra Law Review* (35) 437 441: "[T]he system does not provide compensation where a wrongdoer has no insurance or no personal assets to pay compensation, or where the amount of loss is too small to be worth the cost of litigation. Even where a wrongdoer has assets or insurance, the tort system will not provide recovery for injury unless the victim brings a claim."

[143] This statement accurately reflects the legal position under South African law. However, it has also been noted in foreign jurisdictions. For example, J Schwarz "How Governments Pay: Lawsuits, Budgets, and Police Reform" (2016) *UCLA L. Rev.* (63) 1144 1147 states: "In prior research, I found that police officers in eighty-one law enforcement agencies across the country are virtually always indemnified. Officers personally satisfied just 0.02 percent of the more than $735 million awarded to plaintiffs over a six-year period in suits alleging constitutional violations and corresponding state tort claims, including assault, battery, false imprisonment, and intentional infliction of emotional distress. Officers were even more likely to be indemnified in cases involving auto accidents, property damage, and employment-related disputes. Accordingly, when a plaintiff sues a police officer, any amount she recovers is almost certain not to come from the pocket of that officer."

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Again, it may be argued that, in this situation, the law of delict does little to give effect to the notion of personal responsibility for causing harm.

Against this background it is arguable that the establishment of a statutory compensation fund would conceivably do little to undermine the principle of personal responsibility.

The argument that, unlike a compensation fund, delictual liability will promote socially desirable behaviour and deter dangerous conduct may be summarised as follows:[144]

> "It is first assumed that, absent tort law [or the law of delict], people would selfishly pursue their own interests, putting their personal desires ahead of the safety of others. As a result, people (and property) would be unreasonably damaged. By contrast, since tort law [or the law of delict] threatens people with having to pay for the harms they cause, it is seen to force them to take the interests of others into account. In other words, it is assumed that in order to avoid tort liability [or delictual liability], people will alter their behavior in a socially desirable, less injury-producing way."

In New Zealand it was argued that the establishment of a general accident compensation fund for harm arising from personal injuries and the abolishment of tort actions in respect of personal injuries would produce an increase in the number and severity of accidents giving rise to personal injury. However, in a study dated 1985, Brown found that the available statistics at the time suggested the opposite, namely that "no significant increase in motoring activity […] occurred; and (2) no noticeable increase in accident rates."[145]

More recently, Schuck pointed out that "the empirical evidence documenting the effect of liability rules and compensation practices on deterrence remains inconclusive [and that all] systems, therefore, have had to adopt auxiliary measures - information, education, administrative regulation, instinct for self-preservation, technology, market effects (including reputation), professional discipline, and other behavioral influences - to augment the call for accident prevention."[146]

In a study conducted by Cardi, Penfield and Yoon,[147] the authors refer to the attention that has been given to the potential deterrent effects of the common law of tort and set

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[144] Sugarman (1985) *California Law Review* 560. See also C Brown, "Deterrence in Tort and No-Fault: The New Zealand Experience" (1985) *California Law Review* 73(3) 976-1002.
[145] Brown (1985) *California Law Review* 1002.
[146] P Schuck, "Tort Reform, Kiwi-Style" (2008) 27 *Yale Law and Policy Review* 187 200.
[147] W Cardi, R Penfield and AH Yoon "Does Tort Law Deter?" (2011) *Wake Forest University Legal Studies Paper No. 1851383* 1 1. See also MJ Moore & WK Viscusi *Compensation Mechanisms For Job*

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out to test the validity of the assumption that tort liability deters tortious conduct. They explain that the "study's most surprising and provocative finding"[148] is the failure of tort liability to deter. Similarly, McEwin notes:[149] "Accident law does not deter, it is argued, because any deterrent effect is swamped by imperfect insurance that does not properly penalize careless or unsafe behaviour […] Instead, deterrence is better achieved by safety regulation. No-fault schemes re-allocate costs away from lawyers to accident."

The potential of delictual liability to deter people from risky conduct is premised on the assumption that people behave rationally, i.e. that they know what the legal consequences of their risky conduct would be and, further, that they consider such consequences (delictual liability) prior to engaging in their conduct. As Cardi, Penfield and Yoon demonstrate, there is little evidence to substantiate such an assumption.[150]

There are further intuitive reasons to question the law of delict's ability to act as deterrent: "if negligent behavior consists of an actor's accidental disregard of moral imperatives to take reasonable care, perhaps legal incentives are superfluous. Moreover, even if people might be influenced by threat of tort liability [or delictual liability] were they aware of the law's mandates, evidence shows that people are typically ignorant of the law – and even if aware of law's content, people commonly discount the chance of being held liable."[151]

Fleming refers to a further convincing reason why deterrence plays little role in tort law (or again, the law of delict):[152]

> "[T]he admonitory effect of an adverse judgment is today largely diffused by liability insurance which protects the injurer from having to pay the accident cost and instead distributes it among a large pool of premium payers and thereby socializes the loss. In many countries the victim no longer even in form addresses his claim to the injurer but proceeds directly against the latter's insurance carrier or compensation fund, thereby eliminating even the symbolic tokens of individual blame."

Risks (1990) 133; JR Chelius, "Liability for Industrial Accidents: A Comparison of Negligence and Strict Liability Systems" (1976) *J. Leg. Stud.* (5) 293 303-306.

[148] Cardi, Penfield & Yoon (2011) *Wake Forest University Legal Studies Paper No. 1851383* 24.

[149] RI McEwin "No-fault compensation schemes" in *Encyclopedia of Law and Economics* (2000) 736-737. See also Fleming "The Role of Negligence in Modern Tort Law" (1967) 52 *Virginia Law Review* 815 823.

[150] Cardi, Penfield & Yoon (2011) *Wake Forest University Legal Studies Paper No. 1851383* 3-4.

[151] 3-4.

[152] Fleming "Is There a Future for Tort?" (1984) 44 *Louisiana Law Review* 1193 1197 (references omitted).

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From the above, we may conclude that deterrence plays a marginal role as a function of the law of delict. In reality, it seems like "government regulation, criminal sanctions and ordinary economic pressures"[153] would be the best way to educate and deter. Therefore, it is suggested that the question whether deterrence would be undermined by the establishment of a statutory compensation fund for crime victims "should play a minor role in determining whether to abolish or modify tort law and replace it with a no-fault compensation system."[154]

In conclusion, in this section it has therefore been argued that, in principle, the establishment of a statutory compensation fund could be justified. Assuming that the proposed statutory intervention is justifiable in principle, a final issue will be given attention, namely whether the potential statutory reform of the law of delict should take place by adapting existing statutes or policies or whether new, stand-alone legislation should be enacted.

4.3 Should the statutory reform of the law relating to crime victim compensation take place by adapting existing statutes or policies or should a new, stand-alone statute be enacted?

Most of the foreign jurisdictions that have elected to develop the law relating to the compensation of crime victims have done so through the establishment of a statutory compensation fund for crime victims.[155] These funds have generally been enacted in new, stand-alone statutes. Of course, it does not automatically follow that the same solution should be adopted for the South African legal system. The following section involves a discussion on what may be the best strategy for the proposed statutory reform of the South African law relating to crime victim compensation.

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[153] 1198: "Regulations can play an educational role in prescribing clear procedures designed to avoid accidents. Negligence law by contrast condemns people after it is too late. Also, while regulatory standards are established by experts, tort law leaves to inexpert juries or judges the bewildering task of resolving disputes between partisan expert witnesses. While tort law has come to take advantage of statutory standards by sometimes although quite erratically) treating their violation as fault without more *(per se),* it is unwilling to treat compliance with prescribed standards as conclusively."
[154] Brown (1985) *California Law Review* 979.
[155] See Greer *Compensating Crime Victims* for an overview of the European jurisdictions that have enacted state-funded compensation schemes for crime victims: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Spain, Sweden, the United Kingdom and Northern Ireland. Other jurisdictions that followed this route include the United States of America and certain states and territories in Australia and Canada, respectively.

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4.3.1 The existing policies and programmes that have a bearing on the position of crime victims

In response to the serious threat imposed by significant levels of violent crime, the National Crime Prevention Strategy ("**NCPS**"), which articulated a new approach to the issue of crime and the position of crime victims, was approved in 1996. The NCPS may be described as a strategic policy document rather than an operational programme[156] and its adoption displays the shift in the government's general response to the increasing levels of crime from a retributive justice approach[157] to one that is aimed at achieving restorative justice.[158]

The NCPS identified the establishment of the Victim Empowerment Programme ("**VEP**") as one of the key programmes aimed at making the criminal justice system more "efficient and effective",[159] deterring future criminals and providing a source of relief and support to crime victims.[160] The Department of Social Development ("**DSD**") describes the VEP as follows:[161]

> "It is a multi-faceted and inter-sectoral [programme…] based on a partnership between national, provincial and local government departments and civil society organisations, volunteers, business, religious sector, institutions of higher learning and research institutions. The programme focuses on promoting a victim centred-approach to crime prevention."

The VEP identifies a wide range of objectives; these include: enhancing victim empowerment, improving the access of disempowered groups to the criminal justice system, redesigning the criminal justice system to empower victims, providing a greater and more meaningful role for victims in the criminal justice system, improving

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[156] AM Singh "Changing the soul of the nation? South Africa's National Crime Prevention Strategy" (1997) 2 *The British Criminology Conference: Selected Proceedings* 1 1.

[157] In broad terms, retributive justice theories may be regarded as centred on the notion that "persons who have caused harm should themselves suffer harm". See J Burchell *Principles of Criminal law* 3 ed (2005) 69.

[158] SALRC *A Compensation Fund for Victims of Crime* 215-219; Department of Social Development (DSD) *Integrated Victim Empowerment Policy (4th draft)* (2007) 3. Broadly speaking, this approach may be described as involving "an essentially non-punitive resolution of disputes arising from the infliction of harm, through a process involving the victim, the offender and members of the community. The process is directed at restoring the parties to the condition that was disturbed by the criminal conduct". See Burchell *Principles of Criminal law* 7.

[159] South African Government "National Crime Prevention Strategy: A Summary" available at <http://www.gov.za/documents/national-CRIME-prevention-strategy-summary#6> (accessed on 7 June 2016).

[160] DSD *Victim Empowerment Policy* (2007) 17.

[161] 17.

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the service delivered by the criminal justice process to victims of crime, and dealing with the damage arising from criminal acts by providing remedial interventions for victims.[162]

In 1998 the Department of Justice developed the first draft of the Service Charter for Victims of Crime in South Africa ("**Victim Charter**"), which was based on international standards of victims' rights and focused on promoting justice for crime victims.[163] The Victim Charter is regarded as constituting part of the government's holistic policy on victim empowerment and is aimed at reducing incidents of secondary victimisation, experienced by victims within the criminal justice system.[164]

The Victim Charter states that the following rights of crime victims, "as contained in the Constitution and relevant legislation,"[165] will be upheld during their interaction with the criminal justice system: the right to be treated with fairness, respect and dignity, the right to offer information and to be heard, the right to receive and offer information, the right to legal advice and timely processing of criminal proceedings following the arrest of an accused, within reasonable bounds and the right to protection.[166]

In terms of the right to compensation, which is defined as "an amount of money that a criminal court awards the victim who has suffered loss or damage to property, including money, as a result of a criminal act or omission by the person convicted of committing the crime",[167] the charter reaffirms crime victims' current rights under the Criminal Procedure Act: "You can request to be present at court on the date of sentencing of the accused and request the prosecutor to apply to court for a compensation order in terms of section 297 and 300 of the Criminal Procedure Act".[168]

Similarly, the charter notes the crime victim's right to restitution, which refers to the right granted to crime victims in terms of section 301 of the Act, i.e. those cases where "the court, after conviction, orders the accused to return your property or goods that have been taken from you unlawfully, or to repair the property or goods that have been

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[162] SALRC *A Compensation Fund for Victims of Crime* 215-219.
[163] Department of Justice and Constitutional Development ("**DJCD**") *Service Charter of Victims of Crime in South Africa* (1998) 3.
[164] DJCD *Victim Charter* 4-5.
[165] 6.
[166] 6-9.
[167] 8.
[168] 8.

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unlawfully damaged, in order to restore the position you were in prior to the commission of the offence."[169]

Sections 297, 300 and 301 of the Criminal Procedure Act were discussed in paragraphs 2.3.1-2.3.2 in chapter 2 and for present purposes it will suffice to emphasise the point that the charter does not envisage further rights for victims in addition to existing rights under the Criminal Procedure Act and the common law of delict.[170] Further, as pointed out in chapter 2, the assistance offered by the Act may be regarded as inadequate in compensating crime victims because, generally, the perpetrators of criminal activities are not in a financial position to repair the harm which they have caused their victims.[171]

With regard to compensation by way of a "civil action",[172] the Victim Charter merely states that this can be instituted against the accused "where the criminal court did not grant a compensation order",[173] which will "usually happen where the damages are not easily quantifiable in financial terms, for example, in the case of psychological damages or pain and suffering."[174] Therefore, although reference is made to the crime victim's rights to compensation and restitution, it is important to note that it "does not include a broad right to compensation, i.e. a unilateral right to compensation from the state if one is a victim of crime. At this stage the right to compensation […] only exists in so far as the victim has a right to receive [money] from the offender, with the court having discretion about whether or not to grant a compensation order to this effect."[175]

In 1998 the government set out a policy framework for general safety and security in its White Paper on Safety and Security. In its foreword, the Paper states that "[a]t the heart of the White Paper lies the challenge of enhancing the transformation of the police so that they are able to function effectively within the new democracy; and

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[169] 9.
[170] JC von Bonde *Redress for Victims of Crime in South Africa: A comparison with Selected Commonwealth Jurisdictions* Unpublished LLD thesis Nelson Mandela Metropolitan University (2007)148.
[171] SALRC *A Compensation Fund for Victims of Crime* 315. For a comparative perspective see LJ McQuillan & H Abramyan, "The Tort Law Tax" *Wall Street Journal* 1 available at <http://www.wsj.com/articles/SB117496524456750056> (accessed on 2 February 2015); Miers (2014) 20(1) *International Review of Victimology* 148-154.
[172] DJCD *Victim Charter* 8.
[173] 8.
[174] 8.
[175] SALRC *A Compensation Fund for Victims of Crime* 30.

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enhancing social crime prevention activities to reduce the occurrence of crime."[176] The objectives of the 1998 White Paper were to define the strategic priorities to deal with crime, articulate the roles and responsibilities of various role-players in the safety and security sphere, clarify the role of the DSS within a constitutional framework and consider institutional reform of the SAPS.[177] However, it failed to consider the issue of crime victim compensation.

The NCPS was replaced by the Justice Crime Prevention Strategy ("**JCPS**") in 1999, which intended to further broaden the NCPS's scope to cover issues beyond the criminal justice system.[178] The JCPS's main objectives are to focus the state's efforts and resources jointly in addressing the incidents of crime, public disorder, inefficiencies in the justice system and "all those aspects of society with the most negative effects on development."[179]

In 2007, the DSD stated that there was no policy that informs, guides, regulates and co-ordinates the services rendered to victims of crime and violence and which promotes a common understanding and participation of all relevant state departments and civil society in victim empowerment initiatives.[180] As a result, it formulated and published a draft victim empowerment policy aimed at guiding and facilitating the provision of services to victims of crime.[181] The DSD's draft policy specifically emphasised the need to provide a framework to integrate the multi-disciplinary services offered to crime victims at the time and to co-ordinate future activities and efforts offered by the state and civil society.

The draft policy identified a variety of stakeholders and service providers that are to play an important role in empowering victims,[182] but failed to provide any details as to how these services were to be practically co-ordinated or implemented. It did, however, provide the basis for a subsequent policy document issued by the DSD in

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[176] Department of Safety and Security ("**DSS**") *White Paper on Safety and Security* (1998) 2.
[177] DSS *White Paper on Safety and Security*; Civilian Secretariat for Police *White Paper on Safety and Security* (2016) 34.
[178] DSD *Victim Empowerment Policy* 5.
[179] 10.
[180] 18. This may be seen as part of the government's "criminal justice system revamp" - see Civilian Secretariat for Police *White Paper on Safety and Security* 32.
[181] I.e. the DSD *Victim Empowerment Policy*.
[182] 22-23.

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2009, namely the National Policy Guidelines for Victim Empowerment ("**Policy Guidelines**").

The Policy Guidelines criticised the earlier attempts of the police, the judiciary, the private sector, government and civil society to address victim empowerment as "arbitrary"[183] and "not prioritised"[184] and stipulates that it failed to provide a "structured plan to manage and coordinate policy development and implementation."[185] As a result it sets out to provide:[186]

> "[A] framework for sound inter-departmental and intesectoral [sic] collaboration and for the integration of effective institutional arrangements for a multi-pronged approach in managing victim empowerment [, which it defines as] an approach [that] facilitates the establishment of partnerships in the victim empowerment sector to effectively address the diverse and sensitive needs of victims holistically."

The establishment of Victim Empowerment Management Forums at national, provincial and local levels that will be tasked with providing "strategic direction to the programme" is envisaged in the Policy Guidelines.[187] These forums' functions and responsibilities are broadly formulated and wide-ranging.[188]

The guidelines further refer to certain "core intervention strategies",[189] which include the "development of plans for the implementation"[190] of certain policies and legislation. In this regard, the document refers to the Victim Charter, the Domestic Violence Act 116 of 1998, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and the management protocol and legislation for the management of victims of human trafficking.[191] However, no mention is made of legislation specifically aimed at compensating crime victims.

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[183] DSD *Policy Guidelines* (2009) 4.
[184] 4.
[185] 4.
[186] 6.
[187] 13.
[188] For example, they include the following: "co-ordination and management", "providing inter-departmental solution to challenges", "ensuring an effective information flow", "monitoring of VEP processes", "sharing of information, for example best practices", "networking, encouragement and mutual support" and "other functions as and when appropriate". Furthermore, they are given a variety of mandatory managerial responsibilities such as, for example, managing the "development, monitoring and evaluation of the implementation of a comprehensive, integrated legislative and policy framework related to the empowerment of victims." See further DSD *Policy Guidelines* 14-16.
[189] 16.
[190] 16.
[191] 16.

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The Policy Guidelines provide a vague indication of how the DSD, which is described as the "lead department"[192] responsible for ensuring the successful implementation of the VEP, should go about in formulating, co-ordinating and managing the comprehensive new VEP. The document reflects the vast range of services, functions and responsibilities of all the relevant stake-holders, which will not be further discussed in this dissertation.[193]

Lastly, the National Development Plan ("**NDP**") was published in 2011 and accepted by the National Cabinet in 2012. It "proposes an integrated approach to resolving the root causes of crime that involves an active citizenry as well as inter-related responsibilities and co-ordinated service delivery from state and non-state actors."[194] It formulates the following vision for South Africa in respect of safety and security:[195]

> "In 2030 people living in South Africa feel safe and have no fear of crime. They feel safe at home, at school and at work, and they enjoy an active community life free of fear. Women can walk freely in the street and the children can play safely outside. The police service is a well-resourced professional institution staffed by highly skilled officers who value their works, serve the community, safeguard lives and property without discrimination, protect the peaceful against violence, and respect the rights of all to equality and justice."

The NDP articulates a vision for a safe and secure South Africa, and identifies building safer communities as central in achieving an integrated and developmental approach to safety and security, which involves all government departments and tiers of government.[196]

To give effect to this vision, the Civilian Secretariat for Police developed a White Paper on Safety and Security in 2016 ("**White Paper**").[197] The White Paper is the culmination of a series of policy documentation that seeks to give effect to the vision developed in the NDP.[198] It reaffirms that it is the collective responsibility of the state and its citizens to construct safer communities and to ensure that safety and security is "located within

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[192] 18.
[193] 17-21.
[194] Civilian Secretariat for Police *White Paper on Safety and Security* 30-31.
[195] National Planning Commission *National Development Plan* 349.
[196] National Planning Commission *National Development Plan* 349-361; Civilian Secretariat for Police *White Paper on Safety and Security.*
[197] Civilian Secretariat for Police *White Paper on Safety and Security.*
[198] For instance, it refers to the National Security Strategy (2012), the Rural Safety Strategy (2010), the Integrated Social Crime Prevention Strategy (2011), the Community Safety Forums Policy (2011), the Early Childhood Development Policy (2015), the White Paper on Families (2012) and the Draft Integrated Urban Development Framework (2015).

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the broader developmental agenda of government".[199] The White Paper affirms the need for "an active citizenry, civil society, and private sector to contribute to the on-going efforts of government in safety, crime and violence prevention".[200]

It identifies the following objectives. First, to provide an overarching policy for safety, crime and violence prevention that will be articulated in a clear legislative and administrative framework to facilitate synergy and alignment of policies on safety and security.[201] Secondly, to facilitate the creation of a sustainable, well-resourced implementation and oversight mechanism, which will co-ordinate, monitor, evaluate and report on implementation of crime prevention priorities across all sectors.[202]

The White Paper notes that there has been "an over-reliance on criminal justice approaches [which] risks [the] prioritisation of increasingly repressive and punitive responses to crime that are ultimately reactive and limited in their ability to achieve longer term results."[203] It notes the reactive nature of the criminal justice system and emphasises that it needs to be "complemented by long-term developmental strategies to reduce incidents of people in conflict with the law and to increase levels of safety in communities."[204] The focus of the White Paper is "crime and violence prevention"[205] and to further this goal, it seeks to intervene in the individual, familial, community and structural domains in order to build resilience against crime and violence, putting in place protective measures, implementing broad structural and environmental change to the South African socio-economic landscape and involving a wide range of stake-holders to construct and promote safer communities. [206]

An evaluation of these policies and programmes is set out in the next section.

[199] Civilian Secretariat for Police *White Paper on Safety and Security* 9.
[200] 9.
[201] 7.
[202] 7.
[203] 8.
[204] 8. See also 9-17.
[205] 9.
[206] 9.

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4.3.2 The shortcomings of the existing policies and programmes as well as further reasons that support the enactment of a stand-alone statute that deals with the compensation of crime victims

The NCPS, JCPS, the VEP, the Victim Charter, the Policy Guidelines, the NDP and the White Paper are overly broad with regard to the formulation of their goals. It may be argued that the various governmental agencies responsible for drafting these documents have been too ambitious in identifying the wide range of objectives. Not only do the documents present a multitude of goals to achieve, but their successful implementation requires that several role-players co-ordinate their isolated attempts in fulfilling these goals without a clear outline of the procedure for doing so. All in all, the existing policies and programmes confront the state and other entities with an overwhelming responsibility that is vaguely formulated and impractical to implement.

It may be said that the existing policy documentation has a single or definite goal, insofar as it indicates a shift in the government's approach from retribution to restorative justice, and it thereby introduced a victim-centred attitude towards the criminal justice system generally. However, the identification of a shift in the stance toward the criminal justice system is hardly sufficient to ensure the successful formulation and implementation of the multitude of goals referred to above.

In pursuit of achieving restorative justice, the policies are, among other things, focused on empowering victims in a variety of ways. One way in which victims are to be empowered is apparently by compensating them for the harm they suffer. Accordingly, the Victim Charter refers to victim's rights in relation to compensation and restitution. However, as referred to above, the Charter does not provide crime victims with any rights other than those which already exist at common law or in legislation.

In its report, the SALRC identified the following concerns with the VEP and Victim Charter. First, it is argued that victim support service delivery under the policies for certain groups and in certain areas would remain limited:[207]

> "The majority of the projects funded by the government are concentrated in the urban, peri-urban and semi-rural areas; the rural areas still remain under-resourced […] There is a serious gap in the provision of professional services and those that do exist are based in major cities. Rural and outlying areas do not have access to such services."

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[207] SALRC *A Compensation Fund for Victims of Crime* 31.

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Another problem with the existing policy documentation is that the victim support services that it envisages fail "to evaluate levels of service delivery" and to define the standards of the services that are required to be provided.[208] The SALRC correctly pointed out that this makes it difficult to determine whether existing services are adequate or not.[209] Related to this point is the significant concern that state service providers such as the SAPS, social workers and primary health care practitioners are "expected to include victim empowerment as part of their day-to-day job function, in addition to their other responsibilities. Most frontline workers are already overstretched and under-resourced without this additional responsibility."[210]

The SALRC Report also notes that the inter-sectorial co-operation that appears to be a crucial element of the proposed strategy remains "an ongoing problem"[211] and that an "imbalance exists between various departments in their engagement with providing victim support services."[212] We may therefore state that a significant gap persists between the policy-making on the one hand and the implementation of the various policies, programmes and strategies on the other hand.

It is arguable that legislative intervention which is more specific in its scope, and which focuses solely on the compensation of crime victims by establishing a statutory compensation fund may be a more practicable, albeit less ambitious solution than the policy documentation referred to above. If the statutory reform of the law of delict is to follow this route, it may hold the following advantages.

Considering the narrow, focused objective of such a statute, it is conceivable that it will require considerably fewer stake-holders and participants to implement. In theory, this will require less co-ordination and correlation between various state departments and civic organisations. It is therefore probable that the administration and costs involved in operating a compensation fund may be more achievable in practice than the implementation of all the objectives identified in the policy documentation.

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[208] 31.
[209] 31.
[210] 32.
[211] 32.
[212] 32.

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A more modest objective of enacting a stand-alone statute that concentrates solely on setting out the provisions relating to a statutory compensation scheme will not require the SAPS, social workers and primary health care practitioners to include victim empowerment as part of their daily functions. As such, it will not interfere or impose an additional burden on any of these entities.

The existing policies and programmes do not provide any practical assistance to crime victims insofar as the compensation for harm is concerned and a statute aimed at achieving this specific purpose appears to be the only practical solution to meet this need.

Further, the following critique of the VEP and Victim Charter that was set out in the SALRC still remains true and provides a succinct summary of the current policies and programmes:[213]

> "[T]he Commission questions the justification for locating the VEP programme in the Department of Social Services. While the Department can take responsibility for the development of services to victims of crime, it cannot take full responsibility for an improved deal for victims of crime in the criminal justice system. Victims of crime are connected to the criminal justice process and they do not think of themselves as clients of the Department of Social Development. Secondly, in foreign jurisdictions either the Department of Justice or the prosecution takes responsibility for victim services. Therefore, in the Commission's view, building on the VEP programme alone is not the solution to the problem. *Appropriate legislative provisions should be developed to strengthen existing provisions to ensure a better deal for victims of crime.*"

In addition, it may be worth emphasising that a statutory compensation fund may nevertheless be regarded as constituting a part of the broader objectives of the NCPS, JCPS and VEP, but falling outside its immediate scope, extent and administration. In other words, it may still contribute towards the goals identified by these documents in a practical and achievable manner.

An overview of the policy documentation discussed above reflects a scatter-shot approach towards solving a multiplicity of crime-related problems. It identifies various concerns arising from the central issue of a soaring crime rate and the high prevalence of violent crime. In response, a wide assortment of solutions to those problems was proposed and various parties were targeted to assume responsibility for a great number of tasks for which none of them necessarily have the capacity or expertise. Enacting specific legislation to deal with a specific purpose and limited scope (in the

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[213] 323 (own emphasis).

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case of crime victim compensation, a statutory fund established for this purpose) may contribute to improve this situation.

It is unsurprising that the Policy Guidelines criticised the efforts of the role players as "arbitrary"[214] and "not prioritised"[215] and emphasised the "lack of a structured plan to manage and coordinate policy development and implementation."[216] However, the Policy Guidelines seem to suffer from the same deficiencies as it is also formulated in unclear language and intent on simultaneously achieving several unrelated goals.

Further, it may be worthwhile to emphasise that none of the more recent crime-related policy documentation seeks to provide the victim with compensation. For instance, the White Paper focuses on crime prevention[217] while the National Rural Safety Strategy places its attention on providing "direction and guidelines to achieve safety and security within the rural environment".[218] The policy documentation is therefore inadequate from a crime victim compensation point of view.

Lastly, it may be considered whether the legislature should consider amending the existing Criminal Procedure Act to improve the position of crime victims insofar as their compensation is concerned, or whether it would be better to enact a specific, stand-alone statute. The provisions of the Act that relate to the compensation of crime victims have been set out and evaluated in paragraph 2.3 in chapter 2 and will not be repeated here. It was concluded that, from a crime victim compensation perspective, these provisions are unsatisfactory. Therefore, if this Act were to be used to house the statutory reform of the law relating to crime victim compensation, it would have to undergo significant amendment. In addition to the benefits mentioned above, there are further advantages relating to the enactment of a stand-alone statute that focuses specifically on the issue of crime victim compensation. These benefits will be discussed in paragraph 5.11 in chapter 5 and will not be canvassed here.

Various reasons have already been highlighted as to why a new, stand-alone statute would be a better solution than merely adopting policies or programmes. Similarly, it

[214] DSD *Policy Guidelines* 4.
[215] 4.
[216] 4.
[217] Civilian Secretariat for Police *White Paper on Safety and Security* 2-9.
[218] South African Police Services *The National Rural Safety Strategy* (2010) 6.

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is suggested that it would be better to draft specific legislation that deals pertinently with the ring-fenced issue of crime victim compensation.

This section of the chapter has described the shortcomings and the failures of the existing policies and programmes insofar as crime victim compensation is concerned. Against this background, it may be concluded that they are inadequate for the purpose of compensating crime victims for the harm they have suffered and that it would be a better option to enact new, stand-alone legislation that deals with the issue.

4.4 Conclusion

Chapter 2 concluded that the current legal position relating to crime victim compensation is unsatisfactory. Against this background it was considered whether there is a potential alternative for crime victim compensation. It was noted that many foreign jurisdictions have elected to enact a statutory compensation fund. In its report on the viability of enacting a similar type of fund for crime victims in South Africa, the SALRC stated that "developing a motivation for the establishment of a [statutory compensation fund] in SA remains incomplete, and must be completed if legislation is to be drafted, since no law should be passed without its objectives being clearly defined and costed."[219]

To determine whether such a fund could be established in the South African context, the following approach was adopted. In chapter 3 a general theoretical framework was advanced on the basis of which future statutory reform of the law of delict may be justified. This was done by identifying policy considerations which the legislature have used to reform specific areas within the law of delict.

This chapter sought to respond to the particular gap left open in the SALRC Report,[220] namely the identification of considerations that may justify the legislature's development of the law of delict relating to crime victim compensation through the enactment of a statutory fund. It was argued that the significant risk of falling victim to crime, and the accompanying risk of receiving no compensation in respect of harm suffered, may justify the enactment of a fund in a similar way that the risk of harm

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[219] SALRC *A Compensation Fund for Victims of Crime* 318-319.
[220] 318-319.

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justified the development of compensation funds in the context of motor vehicle accidents and occupational injuries and diseases. Similarly, the proposed development of the law in this context also fits within the framework identified in chapter 3 inasmuch as it could promote the constitutional right to social security and potentially assist victims in bridging an evidentiary obstacle which they may face when instituting common-law delictual claims.

It was further argued that considerations that thus far have counted against the introduction of the fund, namely problems with affordability and administration, as well as potential subversion of the deterrence function of the law of delict, do not present conclusive arguments against its implementation.

To conclude, it is submitted that, when compared to the common-law development of the law of delict and amending existing legislation, in principle, a statutory compensation fund seems a more desirable solution to improve the legal position of crime victims insofar as their compensation is concerned. However, it should also be noted that, whether such a proposal should ultimately be endorsed, would depend on how such a fund would practically work.

For instance, what would the eligibility criteria be? What type of harm should be recoverable? What should be the relationship between a statutory compensation fund and the common law of delict? Should the victim's claim against the compensation fund be limited? Should the compensation fund be no-fault based or should victims be required to prove fault? Should the crime be proven, and according to what standard of proof? Should benefits received under a statutory compensation fund be deducted from compensation received under a residual common-law delictual claim?

In the following chapter, attention will therefore be given to practical considerations related to the enactment of a statutory crime victim compensation fund.

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CHAPTER 5: PRACTICAL CONSIDERATIONS THAT ARE RELEVANT WHEN DEVELOPING A STATUTORY COMPENSATION FUND FOR CRIME VICTIMS

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CHAPTER 5: PRACTICAL CONSIDERATIONS THAT ARE RELEVANT WHEN DEVELOPING A STATUTORY COMPENSATION FUND FOR CRIME VICTIMS

5.1 Introduction

5.1.1 General outline of chapter

Broadly speaking, the aim of this chapter is to answer the following question: if it is in principle desirable and justifiable to adopt a statutory compensation fund for certain categories of crime victims, what practical considerations should the legislature take into account when implementing this proposal?[1]

The chapter will commence with a discussion on what may be considered to be the first issue that any legislature must logically approach once it has decided that it should enact a crime victim compensation scheme, namely: who should be eligible for compensation? In other words, it will first be investigated who may be regarded as crime victims for purposes of the proposed fund. Once this fundamental issue has been dealt with, the chapter will consider the next question facing a legislature that have elected to establish a compensation fund, namely: what type of harm should be recoverable from the proposed statutory fund? Patrimonial harm only, or should the fund also provide compensation for non-patrimonial harm?

Once these central issues relating to eligibility have been discussed, the net will be cast somewhat wider and it will be considered what potential impact the availability of a statutory claim against the proposed fund would have on a victim's common-law delictual claim against the perpetrator. Specifically, having regard to the legal position under other South African compensation funds, the major issue for consideration will be whether the crime victim's common-law claim against the wrongdoer should be abolished.

[1] As noted in paragraphs 3.1 and 4.1 above, a distinction may be drawn between the reasons advanced for the justification of the proposed statutory crime victim compensation scheme and its scope. While chapters 3 and 4 dealt with the issue of justification of the scheme, this chapter deals with the specific issues related its scope (should it be enacted). Therefore, chapters 3 and 4 deal mainly with legal and public policy considerations justifying statutory reform of the law of delict in South Africa, whereas chapter 5 refer to issues of policy and administrative convenience.

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The remainder of the chapter will focus on several important practical matters pertaining to the enactment of the proposed fund. For example, it will be discussed whether it is preferable for a legislature to cap an eligible victim's claim and, on a related point, whether benefits received from other sources should be taken into account when the compensation fund makes an award to the victim. As will become clearer from the examination below, these matters have been selected for discussion because they have enjoyed considerable attention from foreign legislatures that have already enacted compensation schemes for crime victims. These concerns include the role which the perpetrator's state of mind should play in deciding whether the victim may claim compensation as well as an assortment of considerations that may influence the everyday functioning of the proposed fund.

As the following section indicates, this chapter involves comparative legal scholarship in attempting to answer some of the questions outlined above. However, this dissertation will not focus afresh on the question as to whether the principles applicable in foreign legal jurisdictions are compatible with current South Africa law. Nevertheless, it may be recalled that chapter 3 identified various legal and public policy considerations underlying the establishment of South African statutes relating to motor vehicle accidents, occupational injuries and diseases as well as defective consumer products. In chapter 4, it was examined whether the establishment of a statutory crime victim compensation fund could similarly be justified by the considerations identified and discussed in chapter 3. In the process, principles and considerations applicable in foreign jurisdictions were considered. Therefore, the question whether the principles applicable in foreign legal jurisdictions are compatible with current South Africa law has received consideration. Furthermore, it may be emphasised that the aim of this chapter is to discuss various potential practical concerns which a legislature might have to consider if it indeed chose to enact the proposed scheme and not to focus on the issue of exactly how these practical proposals will fit into the existing South African legal framework.

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5.1.2 Comparative legal methodology

It should be noted that throughout this chapter comparisons will be made with the legal positions in foreign jurisdictions. Comparative legal scholarship may enlarge the "supply of solutions"[2] that a South African legislature could apply if it decides to create a statutory compensation scheme.[3] Indeed, giving consideration to foreign solutions and applying comparative legal reasoning may hold great practical value for the legislature, if it indeed decides to enact a crime victim compensation scheme.[4]

The jurisdictions that have been chosen to illuminate the questions listed above are the United Kingdom ("**UK**") and the Netherlands. Although New Zealand introduced the first state-funded statutory scheme to compensate crime victims for personal injury when it enacted the Criminal Injuries Compensation Act of 1963,[5] that scheme was later subsumed within the accident compensation regime, which was established in 1975 under the Accident Compensation Act of 1972 ("**1972 ACA**"). In the process, the 1972 ACA also abolished the common law tort claim for compensation arising from personal injuries. Under the current compensation system, victims of crime, like all other accident victims, seek refuge in the general no-fault based compensation scheme as opposed to a specific fund set up to compensate harm arising from crime. For this reason, New Zealand will not be the focus of attention in this chapter.

One year after the enactment of the New Zealand compensation scheme, the UK adopted and introduced the Criminal Injuries Compensation Scheme in 1964. The 1964 non-statutory scheme was amended multiple times and eventually placed on a statutory footing in 1995, under the title of the Criminal Injuries Compensation Act of 1995 (the "**CIC Act**"). The initial scheme was updated in 2001 ("**UK 2001 Scheme**"),

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[2] HP Glenn "The Aims of Comparative Law" in J Smits (ed) *Elgar Encyclopedia of Comparative Law* 2 ed (2012) 57-66; M van Hoecke "Methodology of Comparative Legal Research" (2015) *Law and Method* 1 1-3; K Schadbach "The Benefits of Comparative Law: A Continental European View" (1998) 16 *Boston University International Law Journal* 331 350.
[3] Schadbach (1998) 387. See also Glenn "The Aims of Comparative Law" in *Comparative Law* 57-66.
[4] Glenn "The Aims of Comparative Law" in *Comparative Law* 61.
[5] See S Todd "Forty Years of Accident Compensation in New Zealand" (2011) 28(2) *Thomas M Cooley Law Review* 189 189-193; New Zealand Law Commission Report *Compensating Crime Victims* (2008) 2; G Palmer "New Zealand's Accident Compensation: 20 Years On" (1994) 44 *University of Toronto Law Journal* 223 223-230; BJ Cameron "The New Zealand Criminal Compensation Act, 1963" (1964) 16(1) *The University of Toronto Law Journal* 177 177-178.

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after which it was amended in 2008 ("**UK 2008 Scheme**") and once more in 2012 ("**UK 2012 Scheme**").

There are convincing reasons that justify using the UK as a comparative jurisdiction for the purposes of this chapter. First, it is the jurisdiction that has operated a compensatory scheme for crime victims for the longest period. During this time, the scheme received considerable legislative attention. The developments in the UK may therefore provide fertile ground for analysis and a useful background against which to examine practical issues pertaining to the establishment of a potential South African compensation fund. Secondly, the fact that this compensation scheme has been described as "the most creative"[6] in its approach to potential applicants and appears to be a far more generous scheme when compared to those established in Europe,[7] makes it a suitable jurisdiction for investigation.

As an example of a civilian jurisdiction that established a statutory compensation fund for crime victims, attention will be paid to the Netherlands, where the Criminal Injuries Compensation Fund Act of 1975 ("**Dutch Act**") established the Dutch Compensation Fund for Violent Crimes in 1976 ("**Dutch Fund**").[8] The Netherlands may be regarded as representative of a series of European jurisdictions which sought to enact statutory compensation schemes following the adoption of the European Convention on the Compensation of Victims of Violent Crimes in 1983.[9]

It seems appropriate to consider the developments reached in this jurisdiction. Not only was it one of the first European jurisdictions to establish a compensation scheme for crime victims,[10] but it also adopts a "narrow view"[11] regarding the eligibility criteria for compensation which provides a fitting contrast to the approach adopted in the UK. A final reason for electing these jurisdictions is the important role which English and

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[6] South African Law Reform Commission ("**SALRC**") Project 82: *Sentencing (A Compensation Fund for Victims of Crime)* (2004) 87.
[7] D Miers "Compensating deserving victims of violent crime: the Criminal Injuries Compensation Scheme 2012" (2014) 34 *Legal Studies* 242 273; House of Commons Committee of Public Accounts *Compensating Victims of Violent Crime* 2007-2008 HC 251 (2008) 9; New Zealand Law Commission Report *Compensating Crime Victims* (2008) 32-36.
[8] *Het Schadenfonds Geweldsmisdrijven* ("**HSG**") available at <https://schadefonds.nl/> (accessed on 10 April 2017).
[9] See D Greer "The European Convention on the Compensation of Victims of Violent Crimes" in D Greer (ed) *Compensating Crime Victims: A European Survey* (1996) 3-6.
[10] The Netherlands set up its scheme in 1975, prior to the adoption of the European Convention on the Compensation of Victims of Violent Crime (1983). See Greer *Compensating Crime Victims* 3-6.
[11] SALRC *A Compensation Fund for Victims of Crime* 81.

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Roman-Dutch civil law has played within the South African legal historical framework.[12]

While the legislature may therefore make use of comparative analysis to consider the practical considerations outlined in the introduction to this chapter, it should also be cognisant of South Africa's unique social context in comparison with those of the elected foreign jurisdictions. For example, the different crime levels, standards of policing and available state resources could be relevant when drawing on experiences in the UK and the Netherlands and may have an impact on whether foreign approaches could be adopted by the South African legislature.

5.1.3 Relevant previous studies dealing with the establishment of a South African statutory compensation fund for crime victims

The SALRC's report on the creation of a compensation fund for crime victims ("**SALRC Report**")[13] as well as a dissertation completed in 2007 by Von Bonde[14] deal with some of the practical questions raised in paragraph 5.1.1 above. However, for the reasons briefly discussed below, these studies still leave a number of issues open for further investigation.

First, not all of the practical issues listed above receive attention in the documentation. For example, neither the SALRC Report nor Von Bonde's dissertation concentrate on the relationship between a statutory compensation fund and the common law of delict. In addition, neither of these studies explain what role the state of the perpetrator's mind should play in deciding whether the victim may claim compensation. Also, neither document makes it clear whether the compensation fund should be no-fault based.

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[12] RG McKerron *The Law of Delict: a Treatise on the Principles of Liability for Civil Wrongs in the Law of South Africa* 7 ed (1971) 6-11; NJ van der Merwe & PJJ Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* 1 ed (1966) 1-16; Neethling & Potgieter *The Law of Delict* 7 ed (2015) 3-17; A van Aswegen "Aquilian Liability I (Nineteenth Century)" in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 559-595; D Hutchison "Aquilian Liability II (Twentieth Century)" in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 595-637.

[13] SALRC *A Compensation Fund for Victims of Crime*.

[14] JC von Bonde *Redress for Victims of Crime in South Africa: A comparison with Selected Commonwealth Jurisdictions* Unpublished LLD thesis Nelson Mandela Metropolitan University (2007).

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Secondly, where the documents do address the questions raised above, they have not been finally determined and require further investigation. For instance, Von Bonde's dissertation summarises the UK 2001 Scheme's requirements as follows: "Compensation is paid in the event of *criminal injuries* sustained in Great Britain and directly attributable to: [c]rimes of violence; or [o]ffences of trespass on a railway; or [t]he (attempted) apprehension of (suspected) offenders, the (attempted) prevention of offences, or the giving of help to any constable engaged in such activity."[15] With regard to the first category (crimes of violence), it is reaffirmed that "[w]hat *is* required, is proof that the injuries were caused by a crime of violence and not merely an accident."[16]

However, this still calls for an explanation of the meaning of a "crime of violence" or the scope of the UK 2001 Scheme's application. Instead, the study refers to the judgment by the Court of Appeal in *R v Criminal Injuries Compensation Appeals Panel, ex parte August and Brown*,[17] where it was held that the correct approach to determining whether an incident may be regarded as a crime of violence is not to ask whether it may be so classified as "a *question of law*, but to treat the inquiry whether a crime of violence has been perpetrated as a *question of fact*, the answer depending on 'a reasonable and literate man's understanding of the circumstances in which he could under the scheme be paid compensation for personal injury caused by a crime of violence.'"[18]

The SALRC Report pays barely more attention to the eligibility criteria of the UK 2001 Scheme and focuses on the eligibility criteria for compensation schemes in general. Therefore, it provides brief statements of the legal position adopted by a variety of jurisdictions on multiple practical issues, e.g. violent crime versus other crime, intentional versus non-intentional violence, damages for injury or death versus damage to property, etc.[19]

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[15] Von Bonde *Redress for Victims of Crime in South Africa* (2007) 212.
[16] 213-214.
[17] [2001] 2 All ER 874 paras 22-24.
[18] Von Bonde *Redress for Victims of Crime in South Africa* 214.
[19] These matters are only briefly dealt with in SALRC *A Compensation Fund for Victims of Crime* 80-90.

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Thirdly, the references to comparative jurisdictions in those documents are outdated, which undermines their practical value for the purposes of future reform. For instance, both documents briefly refer to the eligibility criteria used by the UK 2001 Scheme.[20] However, that scheme was replaced by the UK 2008 Scheme which itself was substituted by the UK 2012 Scheme.

Taking all of the above into consideration, it therefore may be desirable to examine these questions afresh and to make specific recommendations for the potential legislative project.[21] The first practical consideration which will receive attention for purposes of making these recommendations is the particularly important one of determining whom the legislature should designate as eligible for support under such a scheme.

5.2 Categories of victims eligible to institute a statutory claim against the proposed compensation fund

If the legislature were to enact a compensation scheme, it would allow crime victims to institute statutory claims against a potentially publicly-funded scheme. Given the variety of crimes committed and their prevalence, it becomes vitally important to carefully examine the scope of eligibility for compensation by the proposed fund. After all, in terms of the common law of delict, plaintiffs are required to prove five basic elements of delictual liability: harm, conduct, causation, wrongfulness and fault. The question considered in this part of the chapter is what set of criteria should be used to ensure that the law relating to crime victim compensation is not merely improved, but that it is done in a manner that maintains legal certainty and allows for its consistent application.

The issue of eligibility is further significant if one considers the potential financial implications of the proposal. As indicated in chapter 4, the SALRC ultimately rejected the notion of a crime victim compensation fund that covers a seemingly unlimited

[20] SALRC *A Compensation Fund for Victims of Crime* 62-73. Von Bonde *Redress for Victims of Crime in South Africa* 212-218.
[21] See the general recommendations made in Von Bonde *Redress for Victims of Crime in South Africa* 287-294.

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amount of harm suffered by the crime victim.[22] Obviously, South Africa does not have an unrestricted access to financial resources and, as pointed out elsewhere, there are several important socio-economic issues that require the legislature's and treasury's attention.[23] Therefore, should the legislature indeed decide to enact a compensation fund, then the issue of eligibility provides a strategic opportunity to determine the scope of the proposed fund's financial exposure and to limit it in a manner that contributes towards its viability, while ensuring at the same time that the position of crime victims – and the law relating to their compensation – will indeed be improved in an effective and practical manner.

In this section it will be illustrated that both the UK and Dutch legislatures have elected to compensate victims of intentionally-caused violent crimes, witnesses of these crimes, and relatives of deceased victims.[24] In addition, the UK 2012 Scheme regards certain risk-takers as compensable. With the eye on the potential enactment of a South African compensation scheme, the categorisation of eligible crime victims requires further investigation. Specifically, it must be considered what qualifies as a violent crime, what relatives of deceased victims should be allowed to claim compensation and under what circumstances a witness of a crime should be entitled to approach the proposed fund for statutory relief.

5.2.1 Victims of violent crimes caused intentionally

5.2.1.1 The UK 2012 Scheme

5.2.1.1.1 Giving meaning to the term "a crime of violence"

In the White Paper *Compensation for Victims of Crimes of Violence* that preceded the creation of the first non-statutory based compensation scheme in the UK, it was acknowledged that "personal injury might arise from a great variety of offences"[25] but it did not provide a comprehensive list of crimes whose victims might apply for

[22] See paragraph 4.2.4.1 in chapter 4.
[23] See paragraph 1.1 in chapter 1 and paragraph 4.2.3.1 in chapter 4.
[24] See paragraphs 4-6 of the UK 2012 Scheme and section 3 of the Dutch Act.
[25] "Crimes of violence (compensation for victims)" *HC Deb 05 May 1964 vol 694 cc1127-243* available at <http://hansard.millbanksystems.com/commons/1964/may/05/crimes-of-violence-compensation-for> (accessed on 13 April 2017).

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compensation.[26] Predictably, the non-statutory scheme created thereafter did not set out such a list either.

However, amendments to the 1964 scheme saw the introduction of the words "crime of violence" in 1969.[27] As amended, the scheme sought to provide compensation in circumstances where someone had sustained "personal injury directly attributable to a crime of violence (including arson and poisoning)."[28] The first statutory scheme that was created in 1996, as well as the subsequent schemes have used similar wording. Paragraph 8 of both the UK 2001 Scheme and UK 2008 Scheme stated that, for the purposes of the respective schemes, a "criminal injury" referred to an injury sustained in the UK which was directly attributable to

> "(a) a crime of violence (including arson, fire-raising or an act of poisoning); or
>
> (b) an offence of trespass on a railway; or
>
> (c) the apprehension or attempted apprehension of an offender or a suspected offender, the prevention or attempted prevention of an offence, or the giving of help to any constable who is engaged in any such activity."

The term "crime of violence" was not defined by either of the earlier schemes. This approach presented considerable difficulty to the authorities responsible for determining whether compensation may be awarded.[29] As a result, various attempts were made to define what is meant by the phrase for the purposes of the earlier schemes.[30] In *R v Criminal Injuries Compensation Board, ex p Clowes*,[31] Wien J held that "a crime of violence means some crime which by definition as applied to the particular facts of a case involves the possibility of violence to another person."[32] Widgery J stated that a "crime of violence is a crime which is accompanied by violence"[33] and agreed with counsel for the Criminal Injuries Board that it "should mean a crime of which violence is an essential ingredient."[34]

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[26] *R (on the application of Jones) v First-tier Tribunal* [2013] 2 All ER 625; [2013] UKSC 19 para 7.
[27] Para 7.
[28] Para 7.
[29] See P Duff "Criminal Injuries Compensation: The Scope of the New Scheme" (1989) 52(4) *Modern Law Review* 518 526. See also P Duff "The Measure of Criminal Injuries Compensation: Political Pragmatism or Dog's Dinner?" (1998) 18(1) *Oxford Journal of Legal Studies* 105 105-142.
[30] *R (on the application of Jones) v First-tier Tribunal* [2013] 2 All ER 625; [2013] UKSC 19 para 12.
[31] [1977] 3 All ER 854 at 859.
[32] 862.
[33] 864.
[34] 864.

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In *R v Criminal Injuries Compensation Board, ex p Warner,*[35] the court rejected Wien J's view as being too wide and because "the possibility of violence arising out of a criminal offence is not sufficient by itself to make that offence a crime of violence". The court instead endorsed the approach of Widgery J, i.e. the view that a crime of violence is one where the "definition of the crime itself involves either direct infliction of force on the victim, or at least a hostile act directed towards the victim or class of victims."[36] On appeal, the Court of Appeal held that, because the UK government made funds available for the payment of compensation without being under a statutory duty to do so, it followed that "the court should not construe the scheme as if it were a statute but as a public announcement of what the government was willing to do. This entails the court deciding what would be a reasonable and literate man's understanding of the circumstances in which he could under the scheme be paid compensation for personal injury caused by a crime of violence."[37] What mattered most, the court continued, was to determine the nature of the crime, not its likely consequences:[38]

> "Most crimes of violence will involve the infliction or threat of force but some may not. I do not think it prudent to attempt a definition of words of ordinary usage in English which the board, as a fact finding body, have to apply to the case before them. They will recognise a crime of violence when they hear about it, even though as a matter of semantics it may be difficult to produce a definition which is not too narrow or so wide as to produce absurd consequences".

The same point was made in *C, Petitioner*,[39] where it was added that the actual or probable consequences of the criminal act may be relevant only insofar as they cast light on the nature of the criminal act, but that for their own sake the consequences will not be determinative. This line of reasoning was adopted in a subsequent judgment[40] as the "leading authority on the construction of 'crime of violence'".[41]

More recently, considering the meaning of "crime of violence" under the UK 2001 Scheme, the Supreme Court noted that it is for the tribunal[42] who decides a case to

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[35] [1985] 2 All ER 1069 at 1073; [1986] QB 184 at 195.
[36] [1977] 3 All ER 854 at 195.
[37] *R v Criminal Injuries Compensation Board, ex parte Warner* [1986] 2 All ER 478 at 480.
[38] 482.
[39] 1999 SC 551 at 557.
[40] See *R v Criminal Injuries Compensation Appeals Panel, ex p August, R v Criminal Injuries Compensation Appeals Panel, ex p Brown* [2001] 2 All ER 874, [2001] QB 774.
[41] *R (on the application of Jones) v First-tier Tribunal* [2013] 2 All ER 625, [2013] UKSC 19 para 15.
[42] The First-Tier Tribunal (Criminal Injuries Compensation) is responsible for handling appeals by victims of violent crime where they disagree with a decision by a claims officer of the CICA about compensation: see <https://www.gov.uk/courts-tribunals/first-tier-tribunal-criminal-injuries-compensation> (accessed on 11 April 2017).

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determine whether the words "a crime of violence" applies to the facts which have been proved:[43]

> "Built into that phrase, there are two questions that the tribunal must consider. The first is whether, having regard to the facts which have been proved, a criminal offence has been committed. The second is whether, having regard to the nature of the criminal act, the offence that was committed was a crime of violence. I agree […] that it is primarily for the tribunals, not the appellate courts, to develop a consistent approach to these issues, bearing in mind that they are peculiarly well fitted to determine them. A pragmatic approach should be taken to the dividing line between law and fact […] An appeal court should not venture too readily into this area by classifying issues as issues of law which are really best left for determination by the specialist appellate tribunals. The question whether a criminal offence has been committed is a question for the tribunal, having informed itself as to what the law requires for proof of that offence, to determine as a matter of fact. The question whether the nature of the criminal act amounted to a crime of violence may or may not raise an issue of fact for the tribunal to determine. This will depend on what the law requires for proof of the offence. […] The range of acts that fall within the broad definition may vary quite widely, so the question whether there was a crime of violence will have to be determined by looking at the nature of what was done."

The UK 2012 Scheme sought to provide more guidance on this issue. Paragraph 4 of the scheme states that persons may be eligible for compensation "if they sustain a criminal injury which is directly attributable to their being a direct victim of a crime of violence committed in a relevant place." Although the Criminal Injuries Compensation Authority ("**CICA**") states in its guide to the UK 2012 Scheme ("**UK 2012 Scheme Guide**") that there is "no legal definition of the term 'a crime of violence'",[44] paragraph 2(1) of Annexure B to the scheme states that:

> "a 'crime of violence' is a crime which involves: (a) a physical attack; (b) any other act or omission of a violent nature which causes physical injury to a person; (c) a threat against a person, causing fear of immediate violence in circumstances which would cause a person of reasonable firmness to be put in such fear; (d) a sexual assault to which a person did not in fact consent; or (e) arson or fire-raising."

Paragraph 2(2) immediately adds that an act or omission "will not constitute a crime of violence unless it is done either intentionally or recklessly." The issue of the offender's state of mind will be discussed as a separate matter in paragraph 5.4 below.

By giving content to the term in this way, the UK 2012 Scheme deviates from the approach adopted by its predecessors. The attempt by the legislature to provide a more precise description of the term may be understood against the background of the courts experiencing difficulty in giving a consistent interpretation to a relatively wide

[43] *R (on the application of Jones) v First-tier Tribunal* [2013] 2 All ER 625, [2013] UKSC 19 paras 16-18.
[44] CICA *A Guide to the Criminal Injuries Compensation Scheme 2012* ("**UK 2012 Scheme Guide**") (2012) 7.

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concept, and should be viewed as a legislative effort to give guidance to the claims officers and specialist tribunals who must decide on the issue of eligibility.[45]

Arguably, a clearer explanation of the term also provides potential applicants with more certainty regarding the success of their claim. It might therefore be said that it improves the consistency in adjudication and contributes toward improved access to justice, certainty and transparency. These are valuable lessons that should be heeded by the South African legislature if it decides to enact a compensation scheme.

In a consultation document, the Ministry of Justice states that this definition of a crime of violence will give effect to the legislature's core purpose, namely to give priority to the following serious crimes: "Murder and manslaughter, rape, sexual violence, terrorism, and violent crimes such as wounding or causing grievous bodily harm with intent".[46]

The scheme's scope is limited insofar as sexual assault may only be considered as a violent crime if the victim "did not in fact consent".[47] In this regard, the scheme therefore excludes those victims who, although they cannot be said to have consented in law, had consented in fact to the sexual activity which caused their injuries.[48] This issue will be discussed further in the recommendation that is set out in paragraph 5.2.1.3 below.

Against the above background and when compared to compensation schemes in other jurisdictions, the inclusion of arson or fire-raising may appear anomalous. However, the UK legislature takes the view that these should always be considered to be a crime of violence because they "in almost all cases are nonetheless very likely to cause, or create a very serious risk of, bodily injury."[49] Although consistent with previous schemes,[50] it is not in line with the other examples of a crime of violence listed in the paragraph and incompatible with the judicial approach endorsed by the Supreme

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[45] See generally Miers (2014) *Legal Studies* 242-258; Ministry of Justice *Getting it Right for Victims and Witnesses* (2012) 50-55; Ministry of Justice *Getting it Right for Victims and Witnesses: the Government Response* (2012) 39-48.
[46] Ministry of Justice *Getting it Right for Victims and Witnesses* 11.
[47] Paragraph 2(1)(d) of Annexure B of the UK 2012 Scheme.
[48] Miers (2014) *Legal Studies* 258-259.
[49] Ministry of Justice *Getting it Right for Victims and Witnesses* 53.
[50] For instance, see the UK 2001 Scheme and the UK 2008 Scheme.

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Court, which focuses not on the consequences of an act, but rather on its nature to establish its criminality.[51]

The term "crime of violence" is further given meaning by the remainder of Annexure B, which contains a series of incidents that will not be regarded as crimes of violence under the UK 2012 Scheme. For example, where an injury results from suicide or attempted suicide, the use of a vehicle or an animal attack, they are excluded from the scheme's cover.[52] The current scheme does, however, provide that it may be a crime of violence where the suicidal person intended to cause injury. This is a departure from earlier schemes which did not deal with this issue in express terms. It has arguably been included because it will provide certainty and contribute in avoiding unnecessary applications or litigation.

Furthermore, the scheme expressly excludes conduct that gives rise to injuries sustained in the usual course of sporting or other activities to which a person may have voluntarily consented.[53] Also, injuries which are sustained *in utero* as a result of harmful substances willingly ingested by the mother during pregnancy will not be regarded as a crime of violence for the purposes of the scheme.[54]

A proposal regarding the meaning of the term "crime of violence" for a potential South African compensation scheme will be made in paragraph 5.2.5 once all of the eligibility criteria of the UK 2012 Scheme and the Dutch Fund have been discussed.

5.2.1.1.2 The meaning of "direct victim" and "directly attributable"

Paragraph 4 of the UK 2012 Scheme states that only those individuals who suffer criminal injuries that are "directly attributable to their being a direct victim of a crime of violence committed in a relevant place" will be eligible for compensation. This differs from earlier schemes,[55] in terms of which a criminal injury is regarded as a personal injury, being "an injury sustained in and directly attributable to an act occurring in Great

[51] See *R (on the application of Jones) v First-tier Tribunal* [2013] 2 All ER 625, [2013] UKSC 19.
[52] Paragraph 4 of Annexure B of the UK 2012 Scheme.
[53] Paragraph 4(1)(d) of Annexure B of the UK 2012 Scheme.
[54] Paragraph 4(1)(e) of Annexure B of the UK 2012 Scheme.
[55] See paragraphs 8-9 of the UK 2001 Scheme and the UK 2008 Scheme.

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Britain". In *R v CICB, ex parte Williams*,[56] the court held that "directly attributable" implies an approach that is narrower than the concept of causation in the common law of negligence.[57] It has been understood to mean something narrower than foreseeability.[58]

A "direct victim" is described as "someone who was directly injured by an assailant"[59] and therefore seems to repeat what is meant with directly attributable. Whether or not this additional emphasis on the "directness" of the *nexus* that is required to exist between the victim's harm and the perpetrator's conduct will make a practical difference may be doubted. At the very least, however, the fact that the new scheme contains two references to the nature of the injury's aetiology ("directly attributable" and "direct victim") highlights the intention to constrain the scope of the UK 2012 Scheme's cover to a certain class of victim.

5.2.1.1.3 The focus on blameless victims

A significant feature of the UK 2012 Scheme is that it "is intended to compensate blameless victims of crimes of violence"[60] who co-operate with the criminal justice process.[61] Like its predecessors, the UK 2012 Scheme contains a series of circumstances in which an award will be withheld or reduced on the basis that the victim of the crime is for some or other reason wholly or partly to blame for their harm.[62]

For example, an award may be withheld where the incident giving rise to the criminal injury has not been reported to the police "as soon as reasonably practicable."[63] When deciding whether something has been so reported, the CICA may consider whether the victim was too young to report the incident, lacked the mental capacity to report it,

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[56] [2000] PIQR Q339 para 40.
[57] Miers (2014) *Legal Studies* 249.
[58] 249.
[59] CICA *UK 2012 Scheme Guide* 7.
[60] 30.
[61] Ministry of Justice *Getting it Right for Victims and Witnesses* 50. See also Miers (2014) *Legal Studies* 258.
[62] See paragraphs 22-29 read together with Annexure D of the UK 2012 Scheme.
[63] See paragraphs 22(a) and (b) of the UK 2012 Scheme.

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or if the effect of their injuries meant that they were unable to provide a full report to the police immediately.[64]

Similarly, an award may be withheld unless the applicant has co-operated as far as reasonably practicably in bringing the assailant to justice.[65] In this regard, it is unnecessary for the offender to be identified or convicted for the victim to receive compensation.[66] However, the CICA requires victims to have done "everything possible"[67] to help the police apprehend the assailant, and "bring them to justice."[68] As justification for such a high level of co-operation, the compensation authority refers to the publicly funded nature of the scheme, which implies that victims must be willing to cooperate fully with the investigation of crime before receiving money that ultimately, albeit indirectly, comes from innocent, tax-paying members of the public.[69]

Furthermore, the CICA may withhold or reduce awards where the victims failed to take all reasonable steps to assist a claims officer in the consideration of their application.[70] Although the scheme does not provide an indication of what is meant with reasonable steps, the UK 2012 Scheme Guide, states that, if the victim failed to inform the CICA of a change in address or circumstances, or repeatedly and without reasonable excuse failed to respond to CICA communications, or failed to inform the CICA of "something that could affect [their] claim",[71] it may justify withholding or reducing their compensation award.

Lastly, awards may be withheld or reduced where the victim provides false or exaggerated details about their injuries or if they fail to attend a medical examination aimed at a verification of their injuries.[72]

The above provisions are rational and could be used to reinforce the criminal justice system.[73] Indeed, it is conceivable that the incentive of receiving compensation may

[64] CICA *UK 2012 Scheme Guide* 29; paragraph 22 of the UK 2012 Scheme.
[65] See paragraph 23 of the UK 2012 Scheme.
[66] CICA *UK 2012 Scheme Guide* 29.
[67] 29.
[68] 29.
[69] 29.
[70] Paragraph 24 of the UK 2012 Scheme.
[71] CICA *UK 2012 Scheme Guide* 29-30.
[72] 30.
[73] See also SALRC *A Compensation Fund for Victims of Crime* 88-89.

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actually increase the rate of reporting and co-operation with the police.[74] It will be proposed that they be included in a South African compensation fund, if it were to be established. Of course, the incorporation of this approach by the South African legislature should also pay heed to the particular challenges faced by the South African context, e.g. numerous crime victims who live in rural areas may find it difficult to approach police and to immediately report crimes to the police. This is only one example and the legislature would be well advised to examine similar challenges posed by South African conditions prior to the enactment of the proposed fund.

A different ground for reduction or withholding is mentioned in paragraph 25 of the scheme. It refers to situations where the conduct of the applicant "before, during or after the incident giving rise to the criminal injury makes it inappropriate to make an award."[75] A conclusive list is not provided, but the UK 2012 Scheme Guide provides the following examples: where the victim acted in an aggressive or threatening way and provoked the incident in question, where he intended to provoke an assault or fight, or where he willingly took part in a fight or sought revenge.[76] The CICA will not accept intoxication as an excuse for such conduct[77] but at the same time will not reduce or withhold a compensation award solely because the victim consumed alcohol or used drugs, which made them more vulnerable to being harmed.[78]

Significantly, if an applicant has a criminal record, even under circumstances where he is blameless in the incident that gave rise to his injury, his application may be refused or reduced.[79] The current scheme identifies the circumstances in which an award will be withheld or reduced and deals with the situation where the applicant has "unspent convictions."[80] Broadly speaking, an award will be refused to someone who on the date of their application has an unspent conviction which resulted in either a custodial sentence or a community order.[81] It should be noted, however that an applicant with an unspent conviction, who did not receive a custodial sentence or a

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[74] 88-89.
[75] See paragraph 25 of the UK 2012 Scheme.
[76] CICA *UK 2012 Scheme Guide* 30.
[77] Paragraph 25 of the UK 2012 Scheme.
[78] CICA *UK 2012 Scheme Guide* 30.
[79] Paragraph 26 of the UK 2012 Scheme.
[80] Paragraph 26 of the UK 2012 Scheme. See also Annexure D to the UK 2012 Scheme for a full list of such circumstances; CICA *UK 2012 Scheme Guide* 49.
[81] Ministry of Justice *Getting it Right for Victims and Witnesses* 46. See further paragraph 3 of Annexure D of the UK 2012 Scheme.

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community order, may receive compensation from the scheme in exceptional circumstances and compensation authorities are given a degree of discretion to make the necessary decision.[82]

It is therefore clear that the scheme focuses on compensating "blameless victims of crimes of violence."[83] This differentiation between deserving and undeserving victims is also characteristic of earlier UK schemes and is justified as follows:[84]

> "We acknowledge that our proposals in relation to the Scheme rules on unspent convictions […] could impact […] on those who have on their record relatively minor unspent convictions. However, we consider that tougher rules are warranted. The Scheme is a taxpayer-funded expression of public sympathy and it is reasonable that there should be strict criteria around who is deemed 'blameless' for the purpose of determining who should receive a share of its limited funds. We consider that, in principle, awards should only be made to those who have themselves obeyed the law and not cost society money through their offending behaviour."

5.2.1.2 The Dutch Fund

5.2.1.2.1 Giving meaning to the term "a crime of violence"

Sections 3(1)(a) and (b) of the Dutch Act states that the fund will compensate the victims of violent crimes caused intentionally within the Netherlands and who suffer serious bodily or psychiatric injuries, as well as the victims of intentionally-caused violent crime that occurred on board a Dutch ship or aeroplane outside the Netherlands and who have suffered serious bodily or psychiatric injuries.

The fund's accompanying policy document, the *Beleidsbundel Schadenfonds Geweldsmisdrijven* ("***Beleidsbundel***"),[85] provides greater clarity regarding the scheme's eligibility criteria. It states that the term "violent crime" refers to a punishable crime, or criminal attempt, as understood in terms of the Dutch Criminal Code, where violence is used, or threatened to be used, against the victim.[86] Therefore, if an incident is not punishable as a crime in terms of the Criminal Code, it cannot give rise

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[82] Ministry of Justice *Getting it Right for Victims and Witnesses* 46. See also paragraph 4 of Annexure D of the UK 2012 Scheme.
[83] CICA *UK 2012 Scheme Guide* 29.
[84] Ministry of Justice *Getting it Right for Victims and Witnesses* 59.
[85] HSG *Beleidsbundel* (2017).
[86] HSG *Beleidsbundel* (2017) 5; HSG *Beleidsbundel* (2016) 5.

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to a violent crime for purposes of compensation under the scheme.[87] Violence may consist of bodily[88] or psychiatric violence.[89]

This approach seems to be clearer and simpler than the one adopted by the UK 2012 Scheme and, as indicated below, it is suggested that the South African legislature adopt a similar position, if a compensation scheme were to be enacted.

Nevertheless, the *Beleidsbundel* identifies crimes that will always be classified as violent crime: assault, public violence, threats of violence, trafficking, harassment, rape, violent robbery and murder.[90] Unlike the UK 2012 Scheme, arson will only be regarded as a violent crime if the fire was started intentionally and then posed danger to life or a risk of serious injury to a potential victim.[91] Placing a victim under severe psychiatric pressure may also amount to a violent crime.[92] No definition is given as to what would constitute extreme pressure, but the *Beleidsbundel* expressly states that it may include sexual crimes.[93] Lastly, violent acts committed against property, theft and insult are expressly excluded as violent crimes.[94]

Similar to the UK 2012 Scheme, the Dutch Fund also emphasises that conduct may only qualify as a violent crime if it was caused intentionally.[95] As stated earlier, attention will be paid to this topic in paragraph 5.4 below.

5.2.1.2.2 Causation

A notable difference between the Dutch Fund and its UK counterpart is the fact that neither the Dutch Act nor the *Beleidsbundel* indicate the nature of the causal link that is required to exist between the perpetrator's conduct and the victim's injury. It is therefore unclear whether a victim is expected to prove, in the same way as under the UK 2012 Scheme, that he was a "direct victim" of a violent crime or whether his injury

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[87] HSG *Beleidsbundel* (2017) 5. See also HSG *Beleidsbundel* (2016).
[88] "Lichamelijk geweld" – see HSG *Beleidsbundel* (2017) 5. See also HSG *Beleidsbundel* (2016).
[89] "Psychische geweld" – see HSG *Beleidsbundel* (2017) 5. See also HSG *Beleidsbundel* (2016).
[90] HSG *Beleidsbundel* (2017) 5; HSG *Beleidsbundel* (2016) 5.
[91] HSG *Beleidsbundel* (2017) 5; HSG *Beleidsbundel* (2016) 5.
[92] HSG *Beleidsbundel* (2017) 5; HSG *Beleidsbundel* (2016) 5.
[93] HSG *Beleidsbundel* (2017) 5; HSG *Beleidsbundel* (2016) 5.
[94] HSG *Beleidsbundel* (2017) 5; HSG *Beleidsbundel* (2016) 5.
[95] HSG *Beleidsbundel* (2017) 5. See also HSG *Beleidsbundel* (2016) 5.

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was "directly attributable" to the violent crime. Indeed, it is not clear whether another causal measure, e.g. reasonable foreseeability, may suffice for the purposes of the Dutch scheme. In this regard, as indicated below, the approach adopted by the UK Scheme 2012 appears to be preferable.

5.2.1.2.3 Focus on the blameless victim

When compared to the UK 2012 Scheme, the Dutch Fund does not have the same exaggerated focus on blameless victims. For example, the *Beleidsbundel* states that reporting a violent crime is not a requirement when applying for compensation.[96] However, practically speaking, a victim's statement to the police, as well as the ensuing criminal investigation provides the evidentiary basis upon which the Dutch Fund determines the plausibility of the incident.[97] Therefore, the Dutch Fund advises potential victims to report the incident to the police as soon as possible. Unlike the UK 2012 Scheme, however, it is not a formal ground for potential reduction or withholding of an award. Similarly, the Dutch Fund and the Dutch Act is silent on the matter of prior convictions.

Notwithstanding the above, section 5 of the Dutch Act stipulates that compensation may be withheld or reduced if the victim's injury is the result of circumstances for which the victim or the relative may be held partly responsible. As in the UK, the underlying purpose in this context is to compensate those who, through no fault of their own, fall victim to violent crime.[98] The *Beleidsbundel* therefore similarly explains that paying the maximum amount of compensation to someone who partly contributed towards his own harm is inappropriate, considering the fact that damages are paid with money funded from other innocent, tax-paying members of the public.[99]

To determine whether the applicant contributed towards his own harm, the Dutch Fund will consider whether he could, and should, have foreseen the harm arising and whether he could, and should, have taken steps to avoid it.[100] Essentially, this appears

[96] HSG *Beleidsbundel* (2017) 6. See also HSG *Beleidsbundel* (2016) 5-6
[97] HSG *Beleidsbundel* (2017) 6. See also HSG *Beleidsbundel* (2016) 5-6
[98] HSG *Beleidsbundel* (2017) 11.
[99] 11.
[100] 11.

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to be a guideline that aims to establish whether the victim was negligent and whether such negligent conduct contributed towards the victim's harm. To provide further guidance on the issue, the *Beleidsbundel* describes a number of situations where it may be held that the victim contributed to his own harm and how compensation may be calculated in such circumstances.[101]

The approach adopted by the Dutch Fund as well as the UK 2012 Scheme corresponds with the position in the South African law of delict, insofar as it may be said that, broadly speaking, the latter also takes note of victims' culpable contribution towards their own harm when assessing the amount of damages that is ultimately payable by a wrongdoer to the victim.[102] Generally, the South African legislature, if it decides to set up a statutory compensation fund, should consider following a similar approach.

Before elaborating on this suggestion, it should be noted, however, that there is some debate as to whether a victim's contributory negligence should be considered where the wrongdoer's harm-causing conduct was intentional.[103] More specifically, should a person who acted intentionally in causing harm to another be allowed to rely on the other person's negligence in order to reduce the amount of compensation payable to the victim? In this context, Neethling and Potgieter take the view that "a defendant who has intentionally caused harm to the plaintiff will not be able to ask for a reduction of damages because of contributory negligence [on the part of the plaintiff]".[104] However, there is some debate on this topic and it has been suggested that, "in instances of voluntary assumption of risk where consent is invalid, contributory intent could be an applicable defence leading to the exclusion of liability."[105] A thorough analysis of this debate falls outside the scope of this dissertation, but the suggestion made below should be informed by this debate and the legislature, if it indeed decides to enact a compensation scheme, should consider it before making a final suggestion.[106]

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[101] See HSG *Beleidsbundel* (2017) 11-12 for these circumstances.

[102] Section 1(1)(a) of the Apportionment of Damages Act 34 of 1956 allows for the reduction of the damages payable by a defendant if the plaintiff's culpable conduct contributed towards his own harm See further MM Loubser & JR Midgley (eds) 2 ed (2012) *The Law of Delict in South Africa* 436.

[103] See Neethling & Potgieter *The Law of Delict* 169; R Ahmed *Contributory Intent as a Defence Limiting or Excluding Delictual Liability* (2011) Unpublished LLM thesis University of South Africa.

[104] Neethling & Potgieter *The Law of Delict* 169; PQR Boberg *The Law of Delict Volume One: Aquilian Liability* (1989) 741.

[105] Ahmed *Contributory Intent* 150.

[106] For a full discussion of this debate, see generally Ahmed *Contributory Intent.*

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It is suggested that, if the legislature were to enact the proposed scheme, it should provide for discretion to decide whether compensation may be withheld or reduced in the event that the victim's injury is the result of circumstances for which he was partly responsible. To decide whether the victim was so responsible, the proposed fund should refer to the common-law tests for intention and negligence. It is further proposed that, similar to the UK 2012 Scheme and Dutch Fund, the proposed scheme should ultimately make its decision based on the nature and severity of the victim's injuries, the circumstances under which it was inflicted and the degree to which it may be said that the victim's culpability contributed to his harm. To help it make assessments, the legislature may further consider providing the fund with a list of guiding principles and scenarios in the same way in which the *Beleidsbundel* offers some policy-based guidance to the compensation authorities responsible for the Dutch Fund.[107] This proposal would allow the proposed fund with flexibility in its decision-making, which it could implement to ensure the financial viability of the fund and to give effect to the notion of protecting innocent tax-payers as well as crime victims.

5.2.1.3 Conclusion: victims of violent crimes caused intentionally

The Dutch Fund applies the established criminal law meaning to the term "crime of violence". Making use of settled legal concepts and terminology has the following advantages. It provides prospective applicants with legal certainty and in doing so also promotes the right to access to justice. Furthermore, it is arguably more likely that the Dutch Fund would apply settled terminology in a consistent manner than terminology that must be given content during its application. In addition, it may provide compensation authorities and applicants with certainty about the eligibility of claims on this point and thereby decrease the possibility of unnecessary applications or potential litigation.

The Dutch approach seems simpler and clearer than the one adopted in the UK, where the tradition seems to be not to define the concept precisely. Although the UK 2012 Scheme seeks to provide content to the term when compared to earlier schemes, it

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[107] HSG *Beleidsbundel* (2017).

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may still be regarded as a relatively wide concept and it may therefore continue to present difficulties insofar as its consistent application is concerned.

It is therefore recommended that the proposed scheme aligns the meaning of the term "crime of violence" with the meaning which may be ascribed to that term under South African criminal law. This means that a prospective applicant should be asked to provide the compensation authorities with sufficient evidence so as to allow the latter to conclude, on a balance of probabilities, that he has suffered harm arising from a violent crime – as that term is understood in criminal law. The policy outcome achieved in this regard is in line with the UK 2012 Scheme and the Dutch Fund as well as most other statutory crime victim compensation schemes.[108] Furthermore, similar to the proposal made below regarding causation, this outcome would enhance the fund's financial viability, while at the same time improving the compensatory regime relating to a substantial category of crime victims in South Africa. In this way, a balance might be achieved between the interests of crime victims, the financial position of the proposed fund as well as the innocent taxpayers who might be indirectly involved in the set-up of the compensatory scheme.

In the South African context, it is suggested that the following crimes should specifically be recorded as violent crimes: crimes against life (murder); crimes against the person (assault, including common assault and assault with the intention to do grievous bodily harm); rape (as defined in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007); and other sexual offences (as the term is defined in the Criminal Law (Sexual Offences and Related Matters) Amendment Act). Furthermore, in line with both foreign compensation schemes, it is recommended that the proposed fund should expressly exclude property damage and theft as a form of violent crime.

Under the UK 2012 Scheme, it is generally stated that a person who has consented in fact to a sexual assault may not claim compensation from the fund. It is proposed that the South African legislature adopt a similar position regarding consent. In this context, concern may be noted about the well-being of children, and other vulnerable categories of people, who factually consented to sexual offences.[109] Therefore, it is

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[108] See generally Greer *Compensating Crime Victims.*
[109] See also J Burchell *Principles of Criminal Law* 4 ed (2013) 614-618.

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proposed that the legislature adopt a similar strategy to the one formulated by the UK 2012 Scheme on this point:[110]

> "Current practice assumes that a child under 13 who is the victim of sexual assault will be eligible for compensation if an offence is reported to the police and the child co-operates so far as reasonably practical with the CJS. Between 13 and 15 a more difficult assessment must be made in each case. Consensual sexual activity between young people in this age group who are of similar age and circumstances should not attract criminal injuries compensation. However, the more unbalanced a sexual relationship involving a young person becomes, the more likely it is that he or she will suffer harm such that they should be compensated (whether they in fact consented or not). Factors that claims officers consider in assessing this include age and emotional maturity (and the disparity in either), vulnerability, the reality of consent in all the circumstances, and the nature of the relationship between the parties."

Under the UK 2012 Scheme, injuries arising from the use of a vehicle is not regarded as a crime of violence, unless the vehicle was used with the intent to cause an injury.[111] In this context, it is proposed that, where an injury arises as a result of the driving of a motor vehicle, the victim, or his relatives, should have regard to the Road Accident Fund Act 56 of 1996 ("**RAF Act**") as it already provides cover for harm arising from motor vehicle accidents.[112] Furthermore, it is recommended that the proposed fund adopt the UK 2012's Scheme in relation to harm that arises from a suicide.[113]

With regards to the question of causation, it is arguable that the degree of strictness with which the standard of causation is formulated influences the extent of a compensation fund's exposure, and hence its viability. As a result, setting a stricter standard may further the fund's viability and provide a clear guideline for prospective victims. As indicated, the Dutch Act is silent on the question, whereas the UK 2012 Scheme insists on a direct causal connection between the victim's injuries and the perpetrator's conduct. In the interest of financial viability, clarity and consistent application, it is recommended that the legislature adopt a similar approach to the one set out in the UK 2012 Scheme. It may be noted that this proposal would mean that there is a difference between the approaches adopted by the statutory compensation

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[110] Ministry of Justice *Getting it Right for Victims and Witnesses* 54.
[111] Paragraph 4(1)(b) of Annexure B of the UK 2012 Scheme.
[112] If legislation for establishment of the fund is enacted, the legislature should consider whether a person may claim against the proposed fund where another person has used a motor vehicle as a weapon to commit an intentionally-committed crime. If the legislature decides to allow such a claim, it must be ensured that the same victim does not receive further compensation under the RAF so as to avoid double compensation.
[113] Paragraph 4(1)(a) of Annexure B of the UK 2012 Scheme.

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scheme and the common law of delict.[114] For the reasons mentioned above, it is contended that such difference may be justified.

Both schemes focus on the compensation of innocent victims insofar as it may be said that compensation awards may be reduced or withheld where the victim's culpable conduct contributed towards his injury. This approach is commendable, considering also that it is in line with section 1(1)(a) of the Apportionment of Damages Act, which regulates this topic in other cases. As stated above, the proposed scheme should have sufficient discretion to reduce or withhold compensation in the event that the victim is partly responsible for his own harm, with attention being paid to the circumstances of the case, the nature and degree of his injury and the degree of the victim's culpable contribution to his own injury. In addition, it is proposed that the UK 2012 Scheme's stricter stance on criminal convictions be adopted, insofar as the proposed fund should be entitled to take any spent or unspent convictions into account when determining whether a compensation award should be withheld or reduced. As explained above, the differentiation between deserving and undeserving victims may be justified on the basis that tough rules are required. Indeed, the justification offered by the UK's Ministry of Justice for the stricter rules introduced into the UK 2012 Scheme is also applicable in this context:[115]

> "The Scheme is a taxpayer-funded expression of public sympathy and it is reasonable that there should be strict criteria around who is deemed 'blameless' for the purpose of determining who should receive a share of its limited funds. [Broadly speaking, it is proposed] that, in principle, awards should only be made to those who have themselves obeyed the law and not cost society money through their offending behaviour."

Lastly, the legislature should consider providing discretionary powers to the administrative authority responsible for assessing applications so that it would be possible for an applicant with a criminal record who suffered harm arising from crime to receive statutory compensation under exceptional circumstances.[116]

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[114] For a discussion of the principles relating to causation in the common law of delict, see MM Loubser & JR Midgley (eds) *The Law of Delict in South Africa* 2 ed (2012) 69-102; J Neethling & J Potgieter *The Law of Delict* 7 ed (2015) 183-219.
[115] Ministry of Justice *Getting it Right for Victims and Witnesses* 59.
[116] See Ministry of Justice *Getting it Right for Victims and Witnesses* 46. See also paragraph 4 of Annexure D of the UK 2012 Scheme.

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5.2.2 Witnesses of violent crimes who sustain mental injuries

5.2.2.1 The UK 2012 Scheme

The UK 2012 Scheme allows a claim for mental injury if it is directly attributable to a person witnessing, and being present at, an incident in which a loved one sustained a criminal injury in the circumstances described in paragraph 5.2.1 above or paragraph 5.2.4 below.[117] Similarly, persons may be eligible for compensation if the mental injury they suffer from is directly attributable to witnessing the immediate aftermath of an incident in which a loved one was criminally injured in those circumstances.[118]

It should not be too difficult to determine whether someone was present and witnessed an intentionally-caused violent crime. However, it may be more difficult to give content to "immediate aftermath". In accordance with the UK 2012 Scheme Guide it refers to "the period of time immediately following the incident in which a loved one was injured and not where someone is later told about the incident either by the victim or another person."[119] The CICA states that it "will be taken to mean arriving at the scene of the incident before the victim is moved to another location,"[120] and expressly excludes harm that may befall one as a result of "dealing with the police and medical authorities".[121]

In this context, "loved one" refers to a person with whom the applicant had a close relationship of love and affection at the time of the incident and if the loved one is alive at the date of the application, continues to have such a relationship.[122]

Miers notes that under a comparable provision of the UK 2001 Scheme[123] compensation could be awarded to victims who suffered mental injuries in the UK when witnessing, in real time, the deaths of their loved ones during the terrorist attack on the World Trade Centre in New York on 11 September 2001.[124] Applicants in that case were "involved" in the "immediate aftermath" and therefore satisfied the

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[117] Paragraph 6 of the UK 2012 Scheme; CICA *UK 2012 Scheme Guide* 9.
[118] Paragraph 6 of the UK 2012 Scheme; CICA *UK 2012 Scheme Guide* 9.
[119] UK 2012 Scheme Guide available at <https://www.gov.uk/guidance/criminal-injuries-compensation-a-guide> (accessed on 10 April 2017).
[120] CICA *UK 2012 Scheme Guide* 9.
[121] 9.
[122] See Paragraph 6 of the UK 2012 Scheme.
[123] See paragraph 9(b)(ii) of the UK 2001 Scheme.
[124] Miers (2014) *Legal Studies* 253.

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requirements under the UK 2001 Scheme.[125] However, this will not be possible under the UK 2012 Scheme, which requires the violent crime to have been committed in the UK or a "relevant place".[126]

Lastly, as indicated in the UK 2012 Scheme Guide, if an applicant institutes a claim because he witnessed a violent crime or its immediate aftermath, he must have suffered a mental injury as a result and he will be required to provide the compensation authorities with medical evidence from a psychiatrist or a clinical psychologist confirming that this is indeed the case.[127]

5.2.2.2 The Dutch Fund

The Dutch Fund may regard those who have witnessed a violent crime or who have been directly confronted with the consequences of a violent crime as victims of a violent crime for the purposes of section 3(1) of the Act and therefore award them compensation for the psychiatric injuries which they obtain.[128]

The *Beleidsbundel* expressly deal with the following two categories of witnesses: those who have witnessed a violent crime in which a "*naaste*"[129] has been seriously wounded[130] or killed, and where a child is the witness of systematic domestic violence.[131]

Concerning the first category, the Dutch Fund will presume that the victim has suffered a compensable psychiatric injury and the witness will therefore not be required to advance any medical information in this regard.[132] It may therefore be significant to determine whether the primary victim may be described as a "*naaste*". The fund recognises a "*naaste*" as married or unmarried life partners, children, parents, siblings and those individuals who play such an important role within the family of the witness

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[125] Miers (2014) *Legal Studies* 253.
[126] See Miers (2014) *Legal Studies* 253. See paragraph 5.10.2 below for a discussion of what a "relevant place" means for the purposes of the scheme.
[127] CICA *UK 2012 Scheme Guide* 10.
[128] HSG *Beleidsbundel* (2017) 10.
[129] A "naaste" may be translated to a "loved one".
[130] According to the HSG *Beleidsbundel* (2017) this means a category 4 injury: see HSG *Letsellijst* (2016).
[131] HSG *Beleidsbundel* (2017) 10.
[132] 10.

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that their relationship may be equated to that of family members.[133] In all other cases, i.e. where the witness does not stand in the aforementioned relationship with the primary victim of the violent crime, it will not be presumed that the witness suffered a psychiatric injury. The victim will accordingly be required to provide sufficient evidence of an affective relationship that is worthy of legal protection in the form of compensation being paid by the fund, as well as medical information that a psychiatric injury was indeed suffered by the witness.[134]

Significantly, in relation to this category of witness, it should be noted that compensation will only be awarded if the primary victim has also applied for compensation under section 3(1) of the Act for the injuries which he sustained as victim of an intentionally-caused violent crime. This limitation is justified on the basis that it ensures that the latter has indeed been wounded.[135]

In the context of a child's exposure to systematic domestic violence, the Dutch Fund distinguishes between children under 12 years and children between the ages of 12 and 18. With regard to the former, the fund presumes a psychiatric injury, whereas children in the latter category are required to prove a serious psychiatric injury for the purposes of receiving compensation under the Fund.[136]

Neither the Act nor the *Beleidsbundel* provide a clear indication of when a victim would have been directly confronted with the consequences of a violent crime and in this regard the clarity provided under the UK 2012 Scheme is to be preferred.

5.2.2.3 Conclusion: witnesses of violent crimes who sustain mental injuries

Both schemes aim to compensate witnesses of violent crimes as well as those who are directly confronted with the consequences or immediate aftermath of violent crimes. It is recommended that the proposed fund, if it were to be enacted, should follow suit. This would mean that a person who has suffered psychiatric harm due to

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[133] 10.
[134] 10.
[135] HSG *Beleidsbundel* (2017) 10. In this context, this means that the Dutch Fund would want to ascertain that the primary victim did obtain a category 4 injury: see HSG *Letsellijst* (2016).
[136] HSG *Beleidsbundel* (2016) 8

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witnessing the immediate aftermath of a violent crime would be allowed a statutory claim against the proposed fund whereas the common law of delict does not recognise a remedy under similar circumstances. This difference in approach between the proposed scheme and the common law may nevertheless be justified on the basis that, as the Dutch Fund suggests, these people may rightly be regarded as victims of violent crimes themselves.

As indicated in paragraph 5.2.2.1 above, it may be difficult to determine the meaning of "immediate aftermath". In this regard, the UK 2012 Scheme Guide refers to "the period of time immediately following the incident in which a loved one was injured and not where someone is later told about the incident either by the victim or another person."[137] The CICA states that it "will be taken to mean arriving at the scene of the incident before the victim is moved to another location,"[138] and expressly excludes harm that may befall one as a result of "dealing with the police and medical authorities".[139] Should the legislature elect to award a claim to people other than those who actually witnessed the violent crime, the approach adopted in the UK is preferred to the one adopted in the Netherlands, because neither the Dutch Act nor the *Beleidsbundel* provide a clear indication of when a victim would have been directly confronted with the consequences of a violent crime.

To ensure the fund's financial sustainability, it is suggested that it should also seek to place a limit on the category of people eligible to institute statutory claims in this category.[140] Therefore, it would be necessary to state the relationship between the witness and the primary victim of the violent crime. As a result, a definition of "loved one" should be provided by the proposed fund. In this context, the approach adopted by the UK 2012 Scheme is advisable, especially considering the fact that it would be in line with the judicial stance that is taken regarding delictual claims instituted by victims of so-called emotional shock.[141] By thus stating that a "loved one" is deemed

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[137] UK 2012 Scheme Guide available at <https://www.gov.uk/guidance/criminal-injuries-compensation-a-guide> (accessed on 10 April 2017).
[138] CICA *UK 2012 Scheme Guide* 9.
[139] 9.
[140] See the HSG *Letsellijst* (2016) 8-10 and Annexure E of the UK 2012 Scheme for the categories of mental injury victims recognised by the two foreign schemes. See Ministry of Justice *Getting it Right for Victims and Witnesses* (2012) 3, where the Secretary of State emphasises the importance to provide financial stability by "focusing resources on the most compelling cases."
[141] See *Road Accident Fund v Sauls* 2002 (2) SA 55 (SCA), where it was held that in cases dealing with the negligent causation of emotional shock and resultant detectable psychiatric injury, it would not be

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to refer to a person with whom the applicant had a close relationship of love and affection at the time of the incident, the proposed fund would potentially cover the specific categories of individuals identified by the Dutch Fund (married or unmarried life partners, children, parents, siblings and those individuals who play a significant role within the family of the witness), while also remaining open to further potential categories of victims being recognised.

In order to further limit the proposed fund's exposure, these additional recommendations may be made. First, it is suggested that, if the proposed fund were to compensate people other than those who actually witnessed the violent crime (e.g. those who witnessed its immediate aftermath), it should clarify under what conditions such a victim would be eligible. In this regard, the approach adopted by the UK 2012 Scheme is preferred. This means that the victim must have suffered a detectable psychiatric injury and would be required to provide the compensation authorities with medical evidence from a psychiatrist to confirm that this is indeed the case.[142]

It could also be considered, in line with the judicial stance taken in delictual cases, to extend the category so as to include those who were later told about the incident by the victim or another person.[143] The fear of exposing the fund to unlimited liability in this way could be tempered by ensuring that the victim proves a recognisable psychiatric injury.[144] Indeed, it is recommended that, unlike the position that obtains in the Netherlands, victims should always be required to do so and that the fund should not incorporate a presumption in favour of any category of victim.

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justifiable to limit such a claim to a defined relationship between the primary and secondary victims, such as parent and child, husband and wife, etc.

[142] This would also be in line with the legal position in the South African common law of delict relating to compensation for non-patrimonial harm arising from emotional shock insofar as, in that context, "the only relevant question should be whether the plaintiff sustained a recognisable psychological lesion". See Loubser & Midgley (eds) *The Law of Delict* 307. See also *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA).

[143] See *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA).

[144] See *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA).

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5.2.3 Relatives of the deceased victims of violent crime

5.2.3.1 The UK 2012 Scheme

The scheme awards compensation to the dependants or close bereaved relatives of victims who die as a result of the injuries which they sustained in circumstances described in paragraphs 5.2.1 above and 5.2.4 below.[145] Paragraphs 57-77 of the scheme regulate compensation under these circumstances and hold that a dependent or a relative may be awarded a bereavement payment,[146] a child's payment,[147] a dependency payment[148] and/or a funeral payment if they fall within the definition of a "qualifying relative."

A "qualifying relative" is defined in paragraph 59 of the UK 2012 Scheme and refers to the spouse or civil partner[149] of the deceased who was living with the deceased in the same household;[150] the unmarried partner of the deceased (other than a spouse or civil partner) who was living with them in the same household and had done so for a continuous period of at least two years immediately before the deceased's date of death, the former spouse or civil partner of the deceased who was financially dependent on the deceased, as well as a parent[151] or a child[152] of the deceased.

In terms of paragraphs 61-62 of the scheme, bereavement payments of up to £11,000 may be made to qualifying relatives. This amount may be less (typically £5,500) where the CICA is satisfied that more than one person may be eligible for a bereavement payment in respect of the deceased.[153] Paragraph 61 of the UK 2012 Scheme expressly excludes such a payment from being made to former spouses or partners

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[145] Paragraph 7 of the UK 2012 Scheme.
[146] Paragraphs 61-62.
[147] Paragraphs 63-66.
[148] Paragraphs 67-74.
[149] As understood under the Civil Partnership Act of 2004.
[150] If they did not live in the same household, this must have been because of ill-health or infirmity. See CICA *UK 2012 Scheme Guide* 10.
[151] According to the CICA, this includes the natural or adoptive parents of the deceased, or a person the deceased accepted in the role of parent and who provided the deceased with parental services. See CICA *UK 2012 Scheme Guide* 10.
[152] The definition of "child" is not limited to a person below the age of 18. It includes adult children, unborn children of the deceased (who were conceived before the deceased's death and born alive after they died), or a person who the deceased accepted as their child and who was dependent on the deceased for parental services. See CICA *UK 2012 Scheme Guide* 10.
[153] See paragraph 62 of the UK 2012 Scheme.

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of the deceased, or if the person was estranged from the deceased at the time of death.[154]

A child's payment may be made to a qualifying relative in terms of paragraph 59(f) of the UK 2012 Scheme ("a child of the deceased") who was under 18 at the time of death and dependent on the deceased for parental services.[155] The period to which a child's payment will relate begins on the date of death and ends on the day before the child's 18th birthday.[156] The child's payment is £2,000 for each full year of the period to which the payment relates, proportionally reduced for part years and is calculated as a lump sum.[157] In addition, the CICA may also award an amount for the expenses incurred by a child as a direct result of the "loss of parental services as a claims officer considers reasonable."[158]

In this context, it may be noted that the UK 2012 Scheme Guide is silent on the issue as to what impact this award may have on the dependent's action for loss of support as a result of the death of a breadwinner.[159] However, taken into account that the UK 2012 Scheme adopts an approach in terms of which the scheme is seen as a last resort for compensation, it could be argued that, where a dependent has received compensation after instituting the dependent's claim, the CICA may withhold or reduce an award of compensation.[160]

Qualifying relatives who were financially or physically dependent on the deceased at the time of their death may also claim a so-called dependency payment if they are able to show the CICA that the deceased was their "main carer"[161] or if they can provide evidence to show that the deceased was making a material financial contribution to their upkeep.[162]

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[154] See CICA *UK 2012 Scheme Guide*.
[155] See also paragraph 63 of the UK 2012 Scheme.
[156] Paragraph 64 of the UK 2012 Scheme.
[157] See paragraphs 65-66 of the UK 2012 Scheme.
[158] See paragraph 65(b) of the UK 2012 Scheme.
[159] See the Fatal Accidents Act of 1976.
[160] CICA *The UK 2012 Scheme Guide* 2; see para 98(b) of the UK 2012 Scheme.
[161] See CICA *UK 2012 Scheme Guide* 25: "We define a main carer as the person who met the majority of your care needs."
[162] See paragraph 67 of the UK 2012 Scheme.

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To qualify as financially dependent, the deceased victim must have met the conditions of paragraph 43 of the UK 2012 Scheme on the date of death.[163] This means that, at the time of the incident, the deceased must have been in paid work, or, if he was not, he must have been in regular paid work for a period of at least three years before the incident. If he was not in paid work, he must have had good reasons, e.g. reasons relating to his age or caring responsibilities.[164] A financial dependency payment will not be made if the deceased relied on social security benefits as their main income.[165] The eligible period of payment begins on the date of death, and may end on one of the dates set out in paragraph 69 of the UK 2012 Scheme.

Lastly, in accordance with paragraphs 75-77 of the scheme, the CICA will award funeral payments if someone has died after sustaining criminal injuries in the circumstances described in paragraph 5.2.1 above or paragraph 5.2.4 below.

Generally, awards of £2,500 are made in this regard and further payment will only be made “where receipts or other satisfactory evidence is provided for the costs incurred and where those costs are reasonable.”[166]

As indicated earlier, the concept of the innocent victim is central to the scheme’s effort to narrow eligibility. Therefore, and in accordance with paragraph 28 of the scheme, if the behaviour of the victim “led or contributed to the incident in which they were fatally injured [the CICA] will not normally make a payment” in any of the above fatal injury cases.[167] Furthermore, prior criminal convictions may also be taken into account and, where the deceased’s convictions or crimes were so serious that to pay for their funeral, or to make other payments, would be an inappropriate use of public funds, the CICA may refuse payment.[168]

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[163] See paragraph 70 and 43 of the UK 2012 Scheme. Paragraph 43(2) requires that the applicant: “(a) was in paid work on the date of the incident giving rise to the injury, or, in the case of a series of incidents, at any time during the series; (b) had been in regular paid work for a period of at least three years immediately before the date of the incident giving rise to the injury; or (c) had a good reason for not having been in regular paid work for the period mentioned in paragraph (b).”
[164] Paragraph 43 of the UK 2012 Scheme.
[165] Paragraph 70 of the UK 2012 Scheme.
[166] CICA *UK 2012 Scheme Guide* 27.
[167] 11.
[168] 11.

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5.2.3.2 The Dutch Fund

In accordance with section 3(1)(c) of the Act, the relatives of a victim who suffered an intentionally-caused violent criminal attack in the Netherlands, as well as the victim of an intentionally-caused violent crime aboard a Dutch aeroplane or ship outside the borders of the Netherlands and who dies as the result of that crime, are eligible for compensation. The Dutch Fund determined that these relatives are entitled to compensation for patrimonial as well as non-patrimonial harm.[169] Unlike the position in the South African law of delict, a relative may also claim damages for non-patrimonial loss in the form of grief arising from the death of a relative.[170]

Section 3(1)(c) of the Act was amended in 2016 so as to expand the scope of potential applicants in this category.[171] The amended section now provides relief also to the relatives of someone who has died as the result of a contravention of section 6 of the Dutch Road Traffic Act of 1994 or section 307 of the Dutch Criminal Code. The former prohibits road traffic users from causing another person's death through their negligent conduct, while the latter states that any person who, through their own negligence, causes the death of another person, shall be liable to imprisonment.

In justification of this development, reference is made to those "harrowing cases" that falls just outside the ambit of the old section 3(1)(c) of the Act, i.e. where the death was held to be caused through negligent conduct as opposed to intentional conduct.[172] The Dutch legislature has taken the view that the non-patrimonial harm which the relatives suffer in the case of intentional causation of death is comparable to the non-patrimonial harm suffered when a relative was negligently killed. In an accompanying policy document, the Dutch Fund confirms that it will now be tasked to determine negligence.[173] Senior officials from the Dutch Fund subsequently indicated that in determining negligence, regard must be had to the approach adopted in Dutch criminal law.[174]

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[169] HSG *Beleidsbundel* (2017) 10-11.

[170] *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA): "The appellant's 'grief' for her son mentioned in that question was clearly not a psychiatric injury […] The appellant's counsel correctly conceded that no damages could be recoverable in respect of such grief."

[171] The amendment became effective on 1 July 2016.

[172] MM Olman, JCD Van de Weerd & M Zoethout "Dood door schuld en het Schadefonds Geweldsmisdrijven" (2016) *Verkeersrecht* 449 450.

[173] HSG *Bijlage bij Beleidsbundel Schadefonds Geweldsmisdrijven: dood door schuld* (2016) 2-6.

[174] Olman, Van de Weerd & Zoethout (2016) *Verkeersrecht* 449-451.

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Section 3(2) of the Act indicates who may qualify as "relatives" in this context: the non-legally separated spouse and registered partner of the deceased; the deceased's relatives by blood or marriage (provided that, at the time of the deceased's death, he or she wholly or partly provided maintenance to the applicant); those who lived with the deceased within a family context and to whose maintenance the deceased contributed through the maintenance of a shared household; blood relatives of the deceased in the first degree and in the second degree of consanguinity (parents, children, half-brothers and half-sisters).[175]

5.2.3.3 Conclusion: relatives of the deceased victims of violent crime

Both schemes compensate the relatives of deceased victims of intentionally-caused violent crimes. In this regard, the UK 2012 Scheme provides a much more thorough account of the conditions that are required to be met as well as the amounts payable. In addition, the UK 2012 Scheme appears to be much more generous in the compensation it provides in this context: whereas the Dutch Fund offers up to €5,000, the UK 2012 Scheme provides up to £11,000 for fatal criminal injury payments.[176] However, the recent expansion of the fund's liability with regard to the negligent causation of a relative's death may hold considerable financial implications for the Dutch Fund.

It is suggested that the proposed fund should also compensate the close relatives of deceased victims of intentionally-caused violent crimes. It is recommended that the definition of a "close relative" should be similar to the definition of a "qualifying relative", as defined in paragraph 59 of the UK 2012 Scheme.

The purpose behind compensation within this context should be to provide financial support where the death of a breadwinner has caused a loss of that support. Put differently, the proposed fund should aim to provide compensation in situations similar to the ones where the UK 2012 Scheme makes dependency and child payments. This would also be in line with financial protection offered through the common-law claim for loss of support, with the major difference being the fund's insistence on the

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[175] HSG *Beleidsbundel* (2017) 11.
[176] See HSG *Letsellijst* (2016) 1, 8; Annexure E of the UK 2012 Scheme.

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intentional causation of the breadwinner's death. In addition, the common-law requirements for establishing a common-law claim for the loss of support suffered as a result of the death of a breadwinner – i.e. a legal duty of support on the part of the deceased breadwinner and a reciprocal right to such support on the side of the victim – may also be used by the fund to determine the eligibility of a prospective victim's claim in circumstances where such a victim does not fall within the definition of "close relative".

It is suggested that the proposed fund should not follow the direction of the Dutch Fund regarding the cover provided in case of the negligent causation of a relative's death and should focus solely on instances where relatives were intentionally killed as the result of a violent crime. In the first place, the relatives of people who were killed as a result of negligently-caused motor vehicle accidents are currently provided compensation under the RAF Act and will also be provided cover under the proposed RABS, if it were to be enacted. Furthermore, if the legislature were to recognise compensation for the victims of negligently-caused accidents generally, it would be in conflict with the ultimate purpose of the compensation, namely compensating the victims of intentionally-caused violent crimes and the question may therefore arise whether the fund should not provide cover to the victims of all negligently-caused crimes. However, such a potential expanded liability of the proposed fund would be undesirable from a financial perspective.

5.2.4 People who sustain injuries as a result of taking risks

5.2.4.1 The UK 2012 Scheme

The UK 2012 Scheme compensates those who sustain a criminal injury which is directly attributable to their taking an exceptional and justified risk in apprehending an offender, preventing a crime, containing or remedying the consequences of a crime, or assisting a constable who is acting for one or more of the aforementioned purposes.[177] Broadly stated, the purpose behind this paragraph is to compensate those who are accidentally injured while taking an exceptional and justified risk to

[177] See paragraph 5(1) of the UK 2012 Scheme.

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prevent crime.[178] These would typically include individuals who engage in law enforcement who take exceptional risks, but the provision may also apply to other members of the public.[179]

The scope of protection offered is limited by paragraph 5(2), which stipulates that, if a risk has been taken "in the course of a person's work", it will not be considered to be exceptional if it would "normally be expected of them in the course of that work." The CICA provides some assistance in interpreting the meaning of "exceptional" and "justified":[180] "[W]e will consider if the risk taken was unusual and was not something which you had been trained to deal with. When considering if the risk was justified we will consider all the circumstances, including the seriousness of the situation, and whether there was an immediate threat to those involved."

This paragraph therefore limits the number of claims that may be instituted by police officers.[181] Greer remarks that this is a unique feature of the UK schemes and that it "has no equivalent in the European Convention".[182] The Dutch Fund, for instance, does not make express provision for this category of victim. Greer explains the history and purposes behind this provision as follows:[183]

> "[D]uring the 1970's it was found that many claims were being made under this part of the Scheme by police officers for what were not really 'criminal' injuries. As a result the Scheme was amended in 1979 to provide that when the injury arose accidentally out of an act of law enforcement, compensation would not be paid 'unless the Board are satisfied that the applicant was at the time taking an exceptional risk which was justified in all the circumstances' […] This, too, is not an easy test to apply. But its effect has been that police officers are now much less likely to obtain compensation under the Scheme for injuries sustained in the process of law enforcement. The impact on an ordinary member of the public who attempts to prevent a crime or arrest an offender is much less significant, since it will not normally be difficult to persuade the Board that he or she was taking an 'exceptional' risk."

5.2.4.2 Conclusion: people who sustain injuries as a result of taking risks

Arguably, it would not be essential to provide cover for this category of victims if the South African legislature does decide to enact a compensation scheme for crime

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[178] Ministry of Justice *Getting it Right for Victims and Witnesses* 53.
[179] Miers (2014) *Legal Studies* 251.
[180] See the UK 2012 Scheme Guide available at <https://www.gov.uk/guidance/criminal-injuries-compensation-a-guide> (accessed on 10 April 2017).
[181] Miers (2014) *Legal Studies* 252.
[182] Greer *Compensating Crime Victims* 596.
[183] 597.

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victims. It is true that police officers, who by virtue of their employment are required to take risks, are not eligible for compensation from the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ("**COIDA**") in the event that they suffer injuries as a result of taking a risk in the pursuit of an offender or the prevention of a crime.[184] However, they nevertheless receive compensation from their employer in such event: "Claims for patients that have been injured on duty are paid by the South African Police Service (SAPS) and not the Compensation Commissioner. [The employee] will therefore not experience problems with the payment of [their] accounts if you submit them to SAPS."[185]

Furthermore, other members of the public who take risks in preventing crime and who as a result fall victim to intentionally-caused violent crime, will in any event be eligible to receive compensation under the general proposed eligibility criteria discussed in paragraph 5.2.1 above.

If the category is not included in the proposed fund, it might be that a small number of crime victims may not be compensated. For instance, suppose X burgles Y's home and Z (Y's neighbour) attempts to capture X, only to sustain bodily injuries while accidentally stumbling in his attempt to do so. Without an "exceptional and justified risk" category, Z will likely not be eligible for compensation from the proposed fund, because, arguably, his injuries were not intentionally caused by X and/or his injuries were not "directly attributable" to a violent crime.

Nevertheless, such an exclusion may be justified on the basis of financial constraints. Indeed, by including such a category, the UK 2012 Scheme seeks to award the behaviour of certain people, i.e. those who voluntarily engage in risky conduct for the benefit of a third party. However admirable that may be, it is subordinate to what should perhaps be regarded as the primary goal of the proposed fund (if it were to be enacted), namely the compensation of victims of intentionally-caused violent crimes.

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[184] Section 1(xix)(iii) of the COIDA excludes cover in respect of a member of the South African Police Force while employed in terms of section 7 of the Police Act 7 of 1958 who is on "service in defence of the Republic" as defined in section 1 of the Defence Act 44 of 1957.

[185] Polmed "Attention Service Providers" available at <http://www.polmed.co.za/injury-on-duty-claims/> (accessed on 27 June 2017). The process followed by the SAPS to determine whether a police officer's injury took place during the course and scope of their employment will be similar to the process followed by the COIDA.

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If the proposed fund were to be enacted, the legislature should aim to ensure that it is sustainable and that it offers compensation to crime victims over the long-term. This will not be possible if the proposed fund were made to compensate an extended variety of categories of claimants who are victims of accidents. Furthermore, it may be argued that the harm suffered by this category of risk-takers are simply too far removed from the actual criminal conduct so that it may be said that, taking into account the proposed goal of the fund, it would be unreasonable to hold the fund liable for the voluntary decision of the risk-taker to assist his neighbour. In other words, it may be argued that this category of claimant should not be compensated by the proposed fund on the basis of remoteness, or legal causation.

5.2.5 Conclusion: categories of victims eligible to institute a statutory claim against the proposed compensation fund

In both the UK and the Netherlands, the legislature has enacted publicly-funded compensation schemes aimed at recompensing the victims of intentionally-caused violent crimes, the relatives of such deceased victims and those who witness a violent crime. In the UK a further category is recognised (those who take exceptional risks in preventing crime), while the Dutch Fund has looked to compensate a limited class of victims whose harm has been brought about in a negligent manner.

In this section, the approaches adopted by the different schemes have been set out and an attempt was made to provide practical suggestions for the legislature, if it indeed decides to develop the law of delict by enacting a statutory compensation fund for victims of violent crime.

In summary, it is suggested that the proposed fund should focus primarily on the compensation of victims of intentionally-caused violent crimes that were committed in South Africa (see further paragraph 5.10.2 below); the close relatives of victims who die as a result of such crimes and those who have witnessed violent crimes, or experienced its immediate aftermath. As indicated above, it should exclude from its cover the category of risk-takers recognised by the UK 2012 Scheme.

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The fund should expressly state that some acts will be regarded as violent crimes and for further guidance, regard must be had to the approach adopted in criminal law. The focus of the proposed scheme should be on the compensation of innocent victims who did not contribute to their own harm. Lastly, the fund should insist on a direct causal relationship between injury and conduct.

A concluding remark may be made about the UK 2012 Scheme. Ever since the first compensation scheme was created in 1964, the UK legislature has struggled to delineate the exact scope of eligibility.[186] It commences without any clear definition and later provided a rather vague definition (a "crime of violence (including arson and poisoning"),[187] which the compensation authorities and courts apparently struggled to apply in a consistent manner.

When compared to earlier schemes, the UK 2012 Scheme displays the legislature's intention to tighten eligibility criteria[188] so that payments are not made in situations that fall outside parameters of the scheme's core purpose, namely to compensate those who suffer serious physical or mental injury as the direct result of deliberate violent crime of which they are the innocent victim.[189] It also gives a clearer indication of what the eligibility criteria is, e.g. for the first time providing a definition of a "crime of violence".

Although such a narrowing of the scheme's scope may be regarded as harsh because it will exclude certain victims of other crimes, it may arguably be justified on the basis of the scheme's financial position and the availability of economic resources.[190] Ultimately, because financial resources are limited and South Africa faces many other

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[186] Duff (1989) *Modern Law Review* 518-519.
[187] Duff (1989) *Modern Law Review* 526.
[188] For another example of where the eligibility criteria has been narrowed, see paragraph 2(1)(c) of Annexure B as read against the background to paragraph 4 of the UK 2012 Scheme. It seems that conduct may amount to a crime of violence if it involves a threat of violence against the direct victim and causes that person fear of immediate violence in circumstances which would cause a person of reasonable firmness to be put in such fear. This is a notable departure from earlier schemes, which "provided that applicants who suffered mental but no physical injury could be compensable where they were 'put in reasonable fear of immediate harm' by the commission of a crime of violence, whether or not they were personally threatened." See Miers (2014) *Legal Studies* 250.
[189] Ministry of Justice *Getting it Right for Victims and Witnesses* 50-52; Ministry of Justice *Getting it Right for Victims and Witnesses: Government Response* 40-41; Miers (2014) *Legal Studies* 242-245.
[190] Miers (2014) *Legal Studies* 243.

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socio-economic challenges,[191] the proposed fund cannot sustain a potentially unlimited class of eligible claimants.

In paragraph 2.2.1.2.3 in chapter 2 above, the judicial development of the vicarious liability doctrine by the Constitutional Court ("**CC**") was criticised insofar as it was argued that making the standard test for vicarious liability dependent upon the nature of the legal interest at stake could potentially produce arbitrary outcomes. Against that background, it may be asked whether the same criticism could be levelled against the suggested exclusion of non-violent crimes, non-intentional crimes and property-related crimes from the scope of the proposed scheme.

In this regard, it is argued that the proposed narrow eligibility criteria, and consequential exclusions of certain crimes from the ambit of the proposed scheme, are not susceptible to the same criticism. This is because the eligibility criteria and concomitant exclusion of certain categories of crime may be justified on the basis of policy-based reasons, not the least of which include the socio-economic challenges mentioned above (particularly the fact that the limited financial resources in South Africa are supposed to be used in respect of a series of socio-economic challenges) as well as the fiscal constraints that may be applicable in connection with the proposed scheme.[192]

Indeed, as a comparative overview of foreign crime victim compensation schemes indicates,[193] statutory compensation funds generally limit their attention to specific categories of crime (e.g. intentionally-committed violent crimes), because it would simply be unaffordable to provide compensation to all types of crimes.

It is advised that the South African legislature should heed the lessons learned by the UK legislature: it appears to be advisable to have a more constrained approach regarding a scheme's scope of application and, when setting out eligibility criteria for a fund, it would be recommendable to provide as much clarity as possible for the sake of consistency and certainty when it comes to its application.

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[191] See chapter 1.
[192] This suggestion is also in line with the recommendations made in respect of the approach that the proposed fund should adopt in focusing on blameless victims – see further paragraph 5.2.1.2.3 above.
[193] See generally Greer *Compensating Crime Victims;* Miers (2014) *International Review of Victimology.*

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5.3 The nature of the harm recoverable from a statutory compensation fund for crime victims

An important issue to be considered by any legislature contemplating the enactment of a compensation fund for crime victims is the nature of the harm that ought to be compensated by the fund. Should it compensate only patrimonial harm or should it also provide cover for non-patrimonial harm?

5.3.1 The UK 2012 Scheme

The type of harm recoverable under the UK 2012 Scheme is determined by the tariff of injuries set out in the scheme's Annexure E. Part A focuses on bodily and mental injuries and Part B contains a series of injuries arising from sexual and physical abuse and which are compensable under the compensation scheme. Broadly speaking, the scheme provides compensation for both patrimonial and non-patrimonial harm. It recognises the following categories of patrimonial harm: loss of earnings, the financial costs associated with the bodily injury, as well as certain payments made in respect of the death of a relative (bereavement payment, dependency payments, child payments and funeral payments).[194] The fund also compensates non-patrimonial harm in the form of a mental injury arising from the violent crime.[195]

Annexure E of the UK 2012 Scheme first sets out different levels of compensation that may be awarded: from A1 (£1 000) to A20 (£250 000) for physical and mental injuries and from B1 (£1 000) to B15 (£44 000) for injuries arising from sexual and physical abuse.[196] Part A of the tariff of injuries consists of a table that provides a description of the injury, the level of compensation that it merits and the standard amount of compensation in that regard. It deals with bodily injuries (e.g. injuries to the head and neck, upper limbs, torso and lower limbs) as well as mental injuries. Part B focuses

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[194] Paragraphs 57-77 of the UK 2012 Scheme.
[195] See paragraphs 4-9 of the UK 2012 Scheme; Annexure E of the UK 2012 Scheme.
[196] Paragraph 31 of the UK 2012 Scheme states that the "maximum award which may be made under this Scheme to a person sustaining one or more criminal injuries directly attributable to an incident, before any reduction under paragraphs 24 to 28, is £500,000."

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specifically on sexual abuse injuries and has a similar structure. It deals with fatal criminal injuries, physical abuse of adults and children, general sexual abuse and sexual offences where the victim is a child.

5.3.2 The Dutch Fund

The Dutch Fund similarly provides compensation for patrimonial and non-patrimonial harm for the bodily and psychiatric injuries which victims of an intentionally-caused violent crime have suffered. Section 3 of the Dutch Act states that compensation may be awarded for the serious bodily or psychiatric injuries which they have suffered as the result of violent criminal conduct. The Act itself, however, provides no indication as to which injuries would be regarded as serious and therefore compensable. Instead, the fund has developed a list that provides this information ("***Letsellijst***").[197] The *Letsellijst* sets out the list of compensable injuries and amounts claimable under the scheme. Broadly speaking, the Dutch Fund compensates the following instances of patrimonial harm: financial costs arising from bodily injuries and loss of support.[198] The fund also compensates non-patrimonial harm in the form of a psychiatric injury that arises from the violent crime.[199]

More specifically, the *Letsellijst* identifies six categories of injuries, with each category being linked to a fixed amount receivable from the fund.[200] The seriousness of the crime, as well as the circumstances under which the crime has been committed will determine into which category the relevant crime will be placed.[201] An injury that falls in the lowest category (category 1) will entitle the victim to €1 000, while victims of the highest category (category 6) may receive €35 000, which represents the highest amount receivable under the Act.[202]

The *Letsellijst* consists of two parts. The first concentrates on bodily injuries while the second focuses on psychiatric injuries. The bodily injuries section provides guidelines

[197] HSG *Letsellijst* (2016). See also HSG *Letsellijst* (2015).
[198] HSG *Letsellijst* (2016) 2-7.
[199] 8-10.
[200] HSG *Letsellijst* (2016) 1; HSG *Beleidsbundel* (2016) 8.
[201] HSG *Letsellijst* (2016) 1; HSG *Beleidsbundel* (2016) 8.
[202] See further the HSG *Letsellijst* (2016) 1.

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to establish whether an injury may be regarded as serious enough to merit compensation under the Act and, if it is indeed serious, into which of the six categories of compensation the injury should be allocated.[203] After stating the guidelines, the *Letsellijst* provides a detailed list of bodily injuries that are expressly recognised by the Dutch Fund together with an indication of the category into which they fall.[204] The guidelines will therefore only be used if the victim's bodily injury does not appear on this second part of the bodily injury list.

The second part of the *Letsellijst* follows a different pattern. First, the Dutch Fund sets out a list of violent crimes in respect of which the fund will presume psychiatric injuries from being suffered by the victim and in respect of which an applicant will not be required to give medical information to the fund prior to being awarded any compensation.[205] An indication is also given of the category of compensation that may be ascribed to these presumed psychiatric injuries.

For the assessment of psychiatric injuries in all other cases, the fund requires medical information on the basis of which it will establish whether the injury is serious enough to merit compensation.[206] In this regard, the *Letsellijst* sets out broad guidelines to determine when psychiatric injuries would be serious enough to receive compensation, and also provides a general outline of the category of compensation into which the injury will fall.

5.3.3 Harm covered under the RAF Act and the COIDA

Section 17(1) of the RAF Act states that compensation may be claimed for "any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person caused by or arising

[203] HSG *Letsellijst* (2016) 1. For example, the guidelines for injuries that may typically be regarded as category 1 injury maintain that they are bodily injuries requiring treatment and which are accompanied by temporary dependency, or bodily injures in which 24-hour hospitalisation is required or which are accompanied with permanent disfigurations A category 3 injury is a bodily injury, however, that creates a permanent limiting obstacle to performing one's daily professional or business function whereas a category 4 bodily injury is an injury similar to a category 4 injury, but where the nature and the consequences are more serious than in category 3.
[204] See HSG *Letsellijst* (2016) 3-7 for the full list.
[205] See HSG *Letsellijst* (2016) 8-9 for the full schedule.
[206] HSG *Letsellijst* (2016) 10.

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from the driving of a motor vehicle". Case law illustrates that harm caused by bodily injury refers to both patrimonial and non-patrimonial harm.[207] The following heads of damages is generally regarded as recoverable instances of patrimonial harm which may result from a bodily injury in the context of a motor vehicle accident: medical and hospital costs, loss of income, loss of earning capacity, travelling and transport costs and the costs of a medical assistant, servant, helper or manager.[208] A claim may also be instituted against the RAF for the loss of support which a dependent has suffered arising from the negligent and wrongful death of the breadwinner in a motor vehicle accident.[209] The RAF's liability for patrimonial harm is limited, which will be discussed in paragraphs 5.5.1.1 and 5.7 below.

With regard to non-patrimonial harm, a motor vehicle accident victim may also claim compensation for the pain and suffering arising from a bodily injury caused by a motor vehicle accident. This refers, on the one hand, to compensation for the physical pain, discomfort and suffering on account of a physical impairment of the body or the causing of emotional shock.[210] On the other hand, a motor vehicle accident victim may also claim compensation from the RAF for loss in the amenities of life.[211] The RAF's liability for non-patrimonial harm is limited and will be discussed in paragraphs 5.5.1.1 and 5.7 below. It is important to note that the proposed Road Accident Benefit Scheme ("**RABS**") will not cover non-patrimonial harm.[212]

Unlike the RAF, but similar to the proposed RABS, the COIDA only provides cover for patrimonial harm and excludes liability for non-patrimonial harm.[213] The patrimonial

[207] Loubser & Midgley (eds) *The Law of Delict* (2012) 52-54, 296, 303-310; RAF "The Road Accident compensates for the following" available at <http://www.raf.co.za/Product-and-Services/Pages/Compensate.aspx> (accessed on 11 April 2017).
[208] HB Klopper *Road Accident Fund: The Practitioner's Guide* (2009) paras 3.3.1-3.3.5.
[209] *Paixão v Road Accident Fund* 2012 (6) SA 377 (SCA). There is some uncertainty as to whether a dependant has the same right where a breadwinner is only injured and not killed. See Loubser & Midgley (eds) *The Law of Delict* 292-293; *Brooks v Minister of Safety and Security* 2009 (2) SA 94 (SCA); *De Vaal v Messing* 1938 TPD 34. However, a discussion of this matter falls outside the scope of this dissertation.
[210] JM Potgieter, L Steynberg & TB Floyd *Law of Damages* (2012) 506-509.
[211] See generally Potgieter et al *Damages* 510-512; Loubser & Midgley (eds) *The Law of Delict* (2012) 52-54, 296, 303-310; RAF "The Road Accident compensates for the following" available at <http://www.raf.co.za/Product-and-Services/Pages/Compensate.aspx> (accessed on 11 April 2017).
[212] Minister of Transport *Policy Paper* (2011) 10.
[213] See the COIDA generally; MP Olivier "Social Security: Core Elements" in WA Joubert & JA Faris (eds) *LAWSA* 13(3) second edition (2007); JJ Jansen van Vuuren *A Legal Comparison between South African, Canadian and Australian Workmen's Compensation Law* Unpublished LLM thesis University of South Africa (2013) 78; *Jooste v Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC) paras 13-15.

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harm which the COIDA covers includes predominantly financial loss arising from bodily injuries or diseases and the pure economic loss which a dependant suffers after a breadwinner died as a result of an accident that occurred during the course and scope of his employment.[214]

5.3.4 Conclusion: recommendation in respect of the nature of the harm that should be recoverable from the proposed fund

Both foreign schemes aim to compensate patrimonial and non-patrimonial harm. However, the scope of those schemes is nevertheless limited by providing a tariff of specific injuries that is compensable.[215] Furthermore, the scope of the compensation fund's coverage is sought to be limited through establishing a narrow eligibility criteria (in the case of the Dutch Fund) and tightening the criteria (in the case of the UK 2012 Scheme). Also, as we shall see in paragraphs 5.5.1.1 and 5.7 below, the schemes place a limit on the amounts recoverable. It is recommended that the proposed fund should compensate both patrimonial and non-patrimonial harm, provided that the fund adopts similar strategies in establishing narrow eligibility criteria and limitations regarding its liability. The proposed fund should cover both forms of harm so as to bring it in line with the trends adopted by foreign compensation schemes and because this will give recognition to the scope of the crime victim's injury. The reasons for the suggested limitations revolve around the financial viability of the proposed fund and will be discussed in further detail in especially paragraph 5.7 below.

5.4 Nature of the perpetrator's state of mind and conduct

Another question which ought to be considered with regards to establishing a statutory compensation fund for crime victims is whether it should cover only injuries arising from intentional criminal conduct, or also harm arising from negligent criminal conduct.

[214] See section 54 of the COIDA. See Schedule 2-4 for a list of the injuries and diseases that may be compensated and the method of calculation of the compensation.
[215] See further paragraphs 5.5.1.1 and 5.7 below.

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5.4.1 The UK 2012 Scheme

Paragraph 2(2) of Annexure B of the scheme gives meaning to the term "crime of violence" by stating that an act or omission will not constitute a crime of violence unless it is done either "intentionally or recklessly." This requirement was not stated expressly in either the UK 2001 Scheme or the UK 2008 Scheme.[216] According to Miers, this means that an applicant is therefore required to provide evidence to show that the assailant intended or was reckless as to the elements of a crime of violence.[217] However, the CICA states that what is essentially required is that it must be satisfied that there is sufficient evidence "to warrant a finding that the injury was caused by a crime of violence, rather than being an accident."[218]

The UK 2012 Scheme does not expressly state whether the same meaning should be ascribed to intent and recklessness as under English criminal law. The UK 2012 Scheme Guide, however, states that an act would "constitute a crime of violence if there was intention on the part of the assailant to cause you harm, or if the injury sustained was because of the intentional or reckless behaviour of an individual who was likely to have foreseen that their actions could cause significant injury to another, and proceeded to act regardless of this outcome."[219]

Arguably, the reference to intention includes both direct intention[220] and oblique intention.[221] The exact meaning of recklessness for the purpose of English criminal law has been the centre of academic debate and falls outside the scope of this dissertation.[222] Based on the extract above, it is submitted that recklessness seems to correspond with the form of intent that is labelled *dolus eventualis* in South African criminal law, i.e. it exists where the perpetrator, in executing a plan to cause harm,

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[216] Paragraph 12 of both the UK 2001 Scheme and the UK 2008 Scheme.
[217] Miers (2014) *Legal Studies* 253.
[218] 253.
[219] CICA *UK 2012 Scheme Guide* 8.
[220] This refers to the scenario where the defendant is desirous in bringing about the consequences of his actions. See *R v Mohan* [1] [1976] QB 1; [1975] 2 All ER 193; D Ormerod, JC Smith & B Hogan *Smith and Hogan's Criminal Law* 14 ed (2015).
[221] This deals with the scenario where the defendant foresees the consequences of his actions as certain, although it is not desired for its own sake, and nevertheless goes ahead with his actions. See also Ormerod et al *Criminal Law*.
[222] See *R v Cunningham* [1957] 2 QB 396; *Metropolitan Police Commissioner v Caldwell* [1982] AC 341; *R v G* [2003] UKHL 50; S Cunningham "Recklessness: being reckless and acting recklessly" (2010) 21(3) *King's Law Journal* 445-467; Ormerod et al *Criminal Law*.

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foresees a wrongful consequence that is not desired, but nevertheless reconciles himself with the possibility that it might arise and continues to act.[223]

It may also be noted that the UK 2012 Scheme will exceptionally treat something as a crime of violence, regardless of the fact that the assailant is "not capable of forming the necessary mental element due to insanity"[224] or if the latter is a "child below the age of criminal responsibility who in fact understood the consequences of their actions."[225] In other words, in exceptional cases, the capacity of the alleged criminal to be at fault will not be taken into account and compensation may nevertheless be paid. Thus, the scheme may therefore award compensation on what appears to be a strict liability basis, although it is not clear in what circumstances (other than those expressly stated) this would be competent.

5.4.2 The Dutch Fund

As indicated above, section 3(1) of the Dutch Act refers to intentionally-caused violent crimes. The *Beleidsbundel* confirms that, for the purposes of compensation under the Act, intention has the same legal meaning as under Dutch criminal law. This, briefly, means that the perpetrator must have desired to bring about the criminal injury wilfully while conscious of the wrongfulness of his conduct.[226] Furthermore, Dutch criminal law appears to draw the same distinction that South African criminal law does between *dolus directus* ("opzet met bedoeling"), *dolus indirectus* ("opzet met noodzakelijkheidsbewustzijn") and *dolus eventualis* ("voorwaardelijke opzet").[227] The fund specifically states that *dolus eventualis* would also satisfy the requirement set out in section 3 of the Dutch Act.[228]

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[223] Loubser & Midgley (eds) *The Law of Delict* 110-111; Burchell *Criminal Law* 346-347.
[224] Paragraph 3(1) of Annexure B of the 2012 Scheme.
[225] Paragraph 3(1).
[226] HSG *Beleidsbundel* (2017) 5.
[227] See Burchell *Criminal Law* 346-347; Loubser & Midgley (eds) *The Law of Delict* 110-111. *Dolus directus* is where the perpetrator meant to bring about the specific prohibited consequences in question. *Dolus indirectus* refers to the situation where, in effecting a specific consequence, the perpetrator foresees another harmful consequence that will inevitably also be realised by his conduct. Lastly, *dolus eventualis* describes the scenario where the perpetrator, in executing a plan to cause harm, foresees a wrongful consequence that is not desired, but nevertheless reconciles himself with the possibility that it might arise and continues to act.
[228] HSG *Beleidsbundel* (2017) 5.

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In its *Beleidsbundel*, the fund states that harm arising from a game between children, traffic accidents and injuries suffered by voluntarily taking part in a sporting activity will not ordinarily be regarded as having been intentionally caused.[229] The fund also confirms that injuries brought about as the result of negligent conduct will not be awarded compensation.[230] However, as discussed in paragraph 5.2.3.2 above, the relatives of deceased victims, who have been killed as the result of negligent conduct that contravenes section 6 of the Road Traffic Act or section 307 of the Dutch Criminal Code, will be allowed to institute a claim for compensation.

5.4.3 Conclusion: recommendation regarding the nature of the perpetrator's state of mind and conduct

It would appear as though the majority of the crime victim compensation schemes limit compensation to criminal injuries that were caused through intentional conduct.[231] The predominant reason for the exclusion of criminal injuries caused by negligence would be the financial interest in limiting the scope of the fund's exposure, while the exclusion of such claims may also be explained by the fact that "the effects of accidental injury and death are well covered by other forms of social insurance".[232] For example, in the South African context, those who suffer harm arising from the negligent causation of another person's death through the driving of a motor vehicle may approach the RAF for compensation.

For these reasons, it is proposed that the availability of a statutory claim be limited so as to ensure that the proposed fund will compensate only the victims of intentionally-caused violent crimes.

[229] 5.
[230] 5.
[231] SALRC *A Compensation Fund for Victims of Crime* 80-81; European Council Directive 2004/80/EC of 29 April 2004 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex: 32004L0080> (accessed on 11 April 2017); Greer *Compensating Crime Victims*.
[232] SALRC *A Compensation Fund for Victims of Crime* 80.

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5.5 The potential impact of awarding a statutory claim against a compensation fund on liability under the common law of delict

If a statutory compensation fund is established from which crime victims are allowed to claim compensation, what should the role of the common law of delict be in this context? Should a crime victim retain his common-law right to claim damages in delict from the actual wrongdoer for the remainder of the harm not covered under the proposed fund, or should the victim's common-law claim against the wrongdoer be abolished?

In answering this question and before setting out the position under the Dutch Fund and the UK 2012 Scheme, regard may be had to the approaches adopted in existing South African statutes that have developed the law of delict by the establishment of a statutory compensation fund.

5.5.1 South African statutes that have developed the law of delict

5.5.1.1 The RAF Act

The RAF Act was amended by the Road Accident Fund Amendment Act 15 of 2005. Before its amendment, section 21 of the RAF Act essentially provided that, "where no claim lay against the Fund or an agent, a third party retained the common-law residual claim to recover losses not recompensable under the RAF Act from a wrongdoer."[233] However, the amended section 21 abolishes this common-law right. The Constitutional Court ("**CC**") explained the effect of the amendment as follows: "In plain language it provides that no claim for compensation arising from the driving of a motor vehicle shall lie against the owner or driver of a motor vehicle or against an employer of the driver."[234]

Although the limitation of claims will be discussed in further detail in paragraph 5.7 below, it should be noted that, prior to its amendment, section 17 of the RAF Act obliged the RAF to compensate a motor vehicle accident victim in full.[235] In contrast,

[233] *Law Society of South Africa v Minister for Transport* 2011 (1) SA 400 (CC) para 26.
[234] Para 26.
[235] Para 27.

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claims instituted by passengers who were injured due to the negligent driving of a motor vehicle in which they were being conveyed were limited.

The amended section 17 limits the obligation of the RAF to compensate a victim in various important ways that are connected to the CC's finding on the abolition of the victim's common-law claim for residual harm. First, it limits damages for non-patrimonial harm to cases where the victim suffers a "serious injury".[236] Secondly, damages for patrimonial harm are restricted insofar as the compensation for loss of earnings or support falls to be calculated, irrespective of actual loss, on the basis of a maximum annual income.[237] Lastly, the limitations on passenger claims, a prominent exception to the uncapped liability under the old RAF regime, were repealed.[238] Of course, this means that passengers whose claims were limited in the past now stand to be recompensed on the same basis as all other victims.[239]

In *Law Society of South Africa v Minister for Transport* ("***Law Society***"),[240] the CC had to consider a constitutional challenge in respect of the amended sections 17 and 21 of the RAF Act. With regard to the latter, the applicants argued that the abolition of the victim's common-law claim failed to comply with the constitutional principle of rationality. They argued that, by abolishing the residual common-law claim, the new scheme would fail to provide the fullest possible protection to victims of road accidents.[241] The new scheme, they argued, would confer immunity on negligent drivers against all residual common-law claims by their innocent victims, while the latter would be left under-compensated because the new scheme capped their claims.[242]

The Minister of Transport countered that the abolition was rational on the basis of the following reasons. He first argued that the legislative change was made necessary "by an ever-growing funding deficit of accident claims".[243] Despite the removal of a cap on passengers' claims, the new scheme would enable financial sustainability because all

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[236] Para 27.
[237] Para 27.
[238] Para 27.
[239] Paras 27-28.
[240] 2011 (1) SA 400 (CC).
[241] Para 40. See also paragraph 3.3 in chapter 3 above, where the need to provide social security was discussed as a justificatory motivation for the enactment of motor vehicle legislation.
[242] Para 40.
[243] Para 41.

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victims' claims were significantly limited by the amended section 17.[244] Secondly, he contended that the amendments were rational because there was a "constitutional obligation to remove arbitrary forms of differentiation in the compensation of accident victims"[245] and that it was therefore necessary to remove the limitation on passenger claims. However, this could only be financially possible if the section 17 limitations were introduced.

Thirdly, it was argued that the new system of compensation for road accident victims "must be integrated into a comprehensive social security system that offers life, disability and health insurance cover for all accidents and diseases."[246] In the Minister's view, a fault-based common-law system of compensation for road accident victims "would be at odds with a comprehensive social security model."[247] It was argued that the amendments to sections 17 and 21 were the first step towards the reform that was required,[248] i.e. "an interim measure towards the restructuring of the Fund's scheme into one which pays compensation on a no-fault basis."[249] To achieve this, the Minister argued, the common-law claim had to be abolished: "the retention of the common-law claim does not sit well with a social security compensation system that aims to provide equitable compensation (as distinct from the right to sue for compensation) for all people, regardless of their financial ability."[250]

The applicants objected to the respondent's attempt to rationalise the abolition on the basis that its continued existence did not influence the financial viability of the scheme whatsoever.[251] Abolishing the claim did not further the basic needs of every victim because it did not contribute towards the funding of the RAF. Indeed, the applicants contended that there was "no proper relation between the objects of the scheme and the means it invokes."[252] The CC seemed to agree with this argument insofar it could not be denied that the abolition of the residual common-law claim did not worsen or

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[244] Paras 42-44.
[245] Para 41.
[246] Para 45.
[247] Para 45. See also Minister of Transport *Policy Paper* (2011) and paragraph 3.4 in chapter 3 above, where the difficulties in proving fault was discussed as a justification for the development of the law of delict.
[248] Para 46.
[249] Para 46.
[250] Para 50.
[251] Para 47.
[252] Para 47.

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improve the financial standing of the RAF.[253] Indeed, damages recoverable through the residual common-law claim, and the costs related to its pursuit, fall outside the funding remit of the RAF.[254]

Notwithstanding this argument, Moseneke DCJ held that the abolition of the claim was indeed justifiable and rational. The court emphasised that it was important to see the abolition of the common-law claim against the broader background of reform of the entire scheme.[255] It had to be remembered that a cap was placed on various heads of damages and that all claims for non-patrimonial damages that do not arise from "serious injury" were now to be excluded.[256] However, without legislative immunity provided for negligent motorists, the victims of motor vehicle accidents would be able to claim from them the damages which the RAF now excluded or limited. In other words, "negligent motorists would have to bear the risk of substantially increased residual claims from accident victims."[257] The CC held as follows:[258]

> "The colossal risk to which the new cap exposes all drivers (from which the Fund would previously have protected them by paying full compensation), as against the relatively small inattentiveness or oversight that could give rise to the risk, lends further support to the abolition of the common-law action. What is more, the retention of the common-law claim does not sit well with a social security compensation system that aims to provide equitable compensation (as distinct from the right to sue for compensation) for all people, regardless of their financial ability. There are two aspects to this incongruity. The first is that the common-law claim would be actually recovered only from those drivers or owners who are capable of in fact paying compensation or who are able to afford the required insurance. In my view, the number of drivers and owners who would be able to pay would be very small. It would be pointless for any person to sue in circumstances where actual recovery would not result. The second consideration is that the right to sue would be available only to those who can afford to pay legal fees or who are granted legal aid. And it is unlikely that legal aid would be granted to people who have claims that are in fact irrecoverable because of the inability of the driver or owner to pay. These two factors would have a negative effect on an equitable compensation system if the common-law right of action were to be retained."

The CC reminded the parties that it should not lose sight of the "primary and ultimate vision of the Fund",[259] which was to "render a fair, self-funding, viable and more effective social security service to victims of motor accidents."[260] It concluded that the interim scheme was a necessary step in that direction and that the "abolition of the

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253 Para 48.
254 Paras 48-49.
255 Para 49.
256 Para 49.
257 Para 49.
258 Para 50.
259 Para 54.
260 Para 54.

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common-law claim is a necessary and rational part of an interim scheme whose primary thrust is to achieve financial viability and a more effective and equitable platform for delivery of social security services."[261]

A detailed, critical analysis of this judgment, and of the impact that it may have on victims of motor vehicle accidents, falls outside the ambit of this dissertation. However, some of the aspects of the CC's reasoning will be discussed in paragraph 5.5.4 below, where a recommendation is made for the route which the legislature may take, if it elects to enact a statutory compensation fund for crime victims.

5.5.1.2 The COIDA

As discussed in chapter 3, the COIDA effectively replaced the employer's common-law liability with the limited liability of a no-fault based statutory compensation fund to which the employer contributes, in circumstances that make it unnecessary to prove fault on the part of the employer.[262] Section 35(1) of the Act stipulates as follows:

> "No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death."

This section has a twofold purpose: it expunges the common-law claims of employees against their employer and it limits an employer's liability to pay compensation.[263] In *Jooste v Score Supermarket Trading (Pty) Ltd* ("***Jooste***"),[264] the CC confirmed the section's constitutionality. In this case the applicant argued that it infringed sections 9(1) and 9(3) of the Constitution.[265] The argument was based on the contention that, by being deprived of their common-law right to claim damages against their employers,

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[261] 2011 (1) SA 400 (CC) para 54.
[262] See *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC); *MEC for Health v DN* 2015 (1) SA 182 (SCA); Olivier "Social Security: Framework" in *LAWSA* 13(2).
[263] *Mankayi v Anglogold Ashanti Ltd* 2011 (3) SA 237 (CC).
[264] 1999 (2) SA 1 (CC).
[265] Section 9(1): "Everyone is equal before the law and has the right to equal protection and benefit of the law." Section 9(3): "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

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employees are placed at a disadvantage in relation to people who are not employees and who retain that right.[266]

The court found that the only issue of relevance to the equality challenge was whether the impugned section was rationally connected to a legitimate government purpose.[267] To answer this, the CC had to consider the COIDA's purpose. To do so, the court highlighted the features of the common-law system which it sought to replace. To institute a common-law claim for damages, an employee would be required to prove negligence, which could be difficult and expensive to achieve. A further disadvantage of the delictual route was the prospect of a proportional reduction of damages based on the employee's own contributory negligence. Further, if an employee instituted his delictual claim successfully, he may not receive compensation on account of the employer's impecuniosity. Pursuing a remedy in this way was also expensive and time-consuming. However, one advantage under the common-law regime was the prospect of recovering non-patrimonial harm.[268]

By way of contrast, the COIDA provides a speedy and cost-effective administrative process through which to claim payment for patrimonial harm to the amount established by the Act.[269] Payment of compensation is not dependent on the employer's negligence or ability to pay, nor is the amount susceptible to reduction by reason of the employee's contributory negligence.[270]

Similar to the argument later raised in *Law Society* the applicant argued that the nature of the balance achieved by the legislature through the COIDA tilts somewhat in favour of the employer.[271] It was contended that the object of the Act is to provide compensation for employees, not to benefit employers and that, because the abolition of the common-law claim benefited only employers, it was not rationally related to the purpose of the legislation.[272] The court rejected this argument because it misconceived the rationality review as an opportunity to persuade the court that the scheme created by the legislature could be improved, while the court was only

[266] 1999 (2) SA 1 (CC) para 10.
[267] Para 12.
[268] Para 13.
[269] Para 14.
[270] Para s14-15.
[271] Para 16.
[272] Para 16.

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interested in determining whether the differentiation between employees and other individuals were arbitrary or irrational. The court concluded as follows:[273]

> "Whether an employee ought to have retained the common-law right to claim damages, either over and above or as an alternative to the advantages conferred by the Compensation Act, represents a highly debatable, controversial and complex matter of policy. It involves a policy choice which the Legislature and not a court must make. The contention represents an invitation to this Court to make a policy choice under the guise of rationality review; an invitation which is firmly declined. The Legislature clearly considered that it was appropriate to grant to employees certain benefits not available at common law. The scheme is financed through contributions from employers. No doubt for these reasons the employee's common-law right against an employer is excluded. Section 35(1) of the Compensation Act is therefore logically and rationally connected the legitimate purpose of the Compensation Act, namely a comprehensive regulation of compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment."

It should be noted, however, that, while employers enjoy protection against common-law delictual claims by their employees for harm suffered as a result of occupational injuries and diseases, section 36(1)(a) of the COIDA provides that an employee may recover damages from a third party who has caused an accident or occupational disease.

5.5.2 The UK 2012 Scheme

The UK 2012 Scheme is intended to be the crime victim's last resort.[274] If the victim therefore has an opportunity to pursue compensation *via* other routes, he is encouraged, although not required, to do so.[275] Briefly, the CICA does not abolish the common-law right to claim compensation from the perpetrator.[276] The CICA states that, where there is an opportunity for the crime victim to pursue compensation "elsewhere",[277] he should do so. Further, it expressly states that it "expect[s the crime victim] to take all reasonable steps to obtain any social security benefits, insurance payments, damages or compensation to which you may be entitled as a result of your injuries."[278] In fact, the CICA may require a crime victim to provide evidence that indicates that he considered whether it was "possible to claim compensation from [the

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[273] Para 17.
[274] CICA *The UK 2012 Scheme Guide* 2; see para 98(b) of the UK 2012 Scheme.
[275] CICA & Ministry of Justice "Criminal Injuries Compensation: A Guide" available at <https://www.gov.uk/guidance/criminal-injuries-compensation-a-guide> (accessed on 12 April 2017).
[276] CICA *The UK 2012 Scheme Guide* 2; CICA and Ministry of Justice "Criminal Injuries Compensation: A Guide".
[277] CICA & Ministry of Justice "Criminal Injuries Compensation: A Guide".
[278] CICA & Ministry of Justice "Criminal Injuries Compensation: A Guide".

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perpetrator] and pursued this if there was a chance of success[,] asked [his] employer about damages or insurance entitlements[,] and applied for all benefits to which [he] may be entitled."[279] Indeed, the CICA may delay making a final decision as to whether the crime victim should receive compensation "until such times as we are satisfied that you are eligible and you could not get compensation from any other sources."[280]

Interestingly, the UK 2012 Scheme Guide states that a victim is apparently also entitled "to claim from someone who was *indirectly* responsible for your injury."[281] More will be said about adopting this approach in South Africa in paragraph 5.5.4 below.

Where a victim intends to claim compensation elsewhere, he is required to inform the CICA when he applies for statutory compensation from the fund and keep the compensation authorities updated.[282]

5.5.3 The Dutch Fund

Section 6 of the Dutch Act states that the fund may have regard to the damages a crime victim has succeeded in recovering from a wrongdoer when making payment to the crime victim. In its *Beleidsbundel*, the fund interprets section 6 of the Act as expecting a crime victim to attempt to recover as much as possible from the perpetrator, if the latter is known and in a position to compensate the victim.[283] However, it expressly states that it is not required to seek damages from the wrongdoer in order to be eligible for compensation under the fund.[284]

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[279] CICA & Ministry of Justice "Criminal Injuries Compensation: A Guide".
[280] CICA & Ministry of Justice "Criminal Injuries Compensation: A Guide".
[281] CICA *The UK 2012 Scheme Guide* 2 (own emphasis).
[282] 2.
[283] HSG *Beleidsbundel* (2017) 14.
[284] 14.

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5.5.4 Conclusion: recommendations regarding the relationship between a statutory compensation fund and the common law of delict

Whereas the RAF Act[285] and the COIDA[286] has abolished the victim's common-law right to claim damages from the wrongdoer (in the case of the COIDA, this refers to the employer) in delict, neither the UK 2012 Scheme nor the Dutch Fund does the same.

From the wording of the foreign statutes and accompanying policy documentation, it appears that, although the victim is not required to institute a civil claim against the wrongdoer before he might be considered eligible for compensation from the respective funds, he is nonetheless strongly encouraged to do so.

It is recommended that the proposed fund, if it were to be created by the legislature, should follow the same route as these foreign compensation schemes, i.e. it should not abolish the common-law delictual claim against criminals. For the following reasons, the fund should allow, but not require, crime victims to attempt obtaining compensation from the criminal.

First, retaining the common-law claim, and appropriately reducing or withholding the claimant's statutory claim against the fund if the common-law claim has been instituted successfully (see paragraph 5.6 below), would improve the financial position and sustainability of the proposed fund.

Secondly, it requires emphasis that the scheme, if established, would to a large extent be funded by innocent citizens' taxes.[287] It may be recalled that the Criminal Assets Recovery Account ("**CARA**") is established under the Prevention of Organised Crime Act 121 of 1998. However, as indicated in paragraph 2.3.3 in chapter 2, the Act does not state that the funds in the CARA should be used to compensate crime victims and, in fact, does not contain any reference to the compensation of crime victims. It may further be noted that, although the POCA's purpose is not crime victim compensation, once the proceeds from confiscation and forfeiture orders have been paid into the

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[285] The RAF Act may be said to abolish the claim completely.
[286] The COIDA may be said to abolish the claim only partially, with the injured or diseased employee still entitled to institute a common-law delictual claim against a third party – i.e. someone other than the employer – who culpably and wrongfully caused the victim's harm.
[287] See paragraph 2.3.3 in chapter 2 above.

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CARA, it could potentially be used for the purpose of crime victim compensation if the CARA committee were to advise Cabinet to advance the funds to a specific institution, organisation or fund which, in turn, uses the funds to compensate certain crime victims. However, as indicated in chapter 2, this appears not to have been the practice up to date. Therefore, it is conceivable that the proposed scheme, if it were to be enacted, would receive much of its funds from innocent taxpayers. Insisting on their contributions, while denying those same tax-paying citizens an opportunity to pursue the criminal for the remainder of the harm that may potentially not be covered by the fund, seems indefensible.

It might be argued, as the CC did in *Law Society,* that retaining the common-law delictual claim in this context does not fit within the social security framework that aims to provide equitable compensation for all people, regardless of their financial ability.[288] The court held as follows:[289]

> There are two aspects to this incongruity. The first is that the common-law claim would be actually recovered only from those drivers or owners who are capable of in fact paying compensation or who are able to afford the required insurance. In my view, the number of drivers and owners who would be able to pay would be very small. It would be pointless for any person to sue in circumstances where actual recovery would not result. The second consideration is that the right to sue would be available only to those who can afford to pay legal fees or who are granted legal aid. And it is unlikely that legal aid would be granted to people who have claims that are in fact irrecoverable because of the inability of the driver or owner to pay. These two factors would have a negative effect on an equitable compensation system if the common-law right of action were to be retained.

The first aspect highlighted by the court does very little to justify the abolition of the common-law action in any context. Rather, the financial inability of the wrongdoer – whether it is a culpable motorist or a criminal – may contribute towards justifying legislative intervention *via* the establishment of a statutory compensation fund. As Miers' comparative overview of statutory compensation schemes illustrates, one of the predominant motivations for the establishment of these schemes has been "the commonplace fact of the offender's limited means."[290] Furthermore, allowing the crime victim to institute a common-law claim in this context would not undermine the goal behind a compensation fund; in fact, because both claims intend to compensate the victim of harm, they arguably complement each other.

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[288] Para 50.
[289] Para 50.
[290] D Miers "Offender and state compensation for victims of crime: Two decades of development and change" (2014) 20(1) *International Review of Victimology* 145 150.

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The second consideration which the court highlighted in *Law Society* to justify the abolition of common-law claims in the context of motor vehicle accidents is factually accurate, i.e. some people in South Africa are in a position to pay for legal fees while others are not. Again, however, this consideration – the high transaction costs associated with civil litigation – has been used to justify statutory reform in the past and may potentially also be used to justify the enactment of a crime victim fund, but does very little to explain why a crime victim – who is in a position to afford legal fees – should be denied the opportunity to pursue the criminal for compensation. Indeed, allowing a crime victim the possibility to institute a common-law claim against the perpetrator would reaffirm the importance of the notion of personal responsibility, which underpins the law of delict.[291]

As illustrated by the CC in its judgment in *Jooste,* the abolition or retention of a common-law delictual claim may be dependent upon the question as to whether the specific statute is rationally connected to a legitimate government purpose.[292] To make a ruling on the issue of rationality, any court would have to consider the proposed crime victim compensation scheme's purpose. In this regard, it requires emphasis that the aim of such a scheme would be the improvement of the compensatory regime relating to crime victims. It is argued that retaining the common-law delictual claim is rationally connected to such purpose because it improves the likelihood of compensation in some cases. At the same time, it does so without infringing upon any rights of the criminal. Therefore, it may be said that, if the legislature accepts as the scheme's purpose the improvement of the crime victim's position insofar as compensation goes, it would be rational and prudent to retain the victim's common-law delictual claim.

The CC also implied in *Law Society* that, in that context, "negligent motorists would have to bear the risk of substantially increased residual claims from accident victims"[293] if the legislature does not provide motorists with immunity. This statement will not be analysed in further detail. However, with the eye on the establishment of a crime victim compensation fund, it is proposed that there are no convincing policy-

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[291] See also paragraphs 2.2.1.3 (b) and 2.2.1.2.5 in chapter 2 as well as paragraph 4.2.4.3 in chapter 4.
[292] *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC) para 12.
[293] Para 49.

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based reasons to offer immunity to the category of people who intentionally commit crimes of violence. In fact, it is submitted that there are important public policy reasons, as informed by constitutional rights pertaining to freedom of safety and security, that points in exactly the opposite direction and would support the notion that, where possible, those electing to pursue such crimes, should be held personally liable. Expecting innocent members to make financial contributions *via* their taxes to the proposed fund while offering such immunity arguably offends the moral fibre underlying the constitutional rights to dignity as well as safety and security.

Ultimately, as the CC noted in its judgment concerning the constitutionality of section 35(1) of the COIDA, the decision as to whether the common-law right to claim damages, either over and above or as an alternative to the advantages conferred by legislation, represents "a highly debatable, controversial and complex matter of policy."[294] For the policy-based reasons outlined above, this dissertation proposes that the proposed compensation scheme should be implemented with retention of the common-law delictual claim for compensation. This proposal would also be in line with approach adopted in the UK 2012 Scheme as well as the Dutch Fund, where the aim is first and foremost on improving the position of crime victims. A final remark in this context relates to a statement that was made regarding the UK 2012 Scheme, namely that a victim is also entitled "to claim from someone who was *indirectly* responsible for your injury."[295] It might be argued that, if this approach were to be adopted by the South African legislature in respect of the proposed fund, it could allow a crime victim to hold the state, as the employer of police officers, vicariously liable for the harm caused by the negligent and wrongful failure of its employee to prevent crime during the course and scope of his employment.[296]

This would be possible because, in the context of vicarious liability, the state, as employer, may be regarded as being indirectly responsible for the crime victim's injury. Of course, if allowed, this could mean that victims of crime would continue to institute common-law claims against the state for the harm they suffered as a result of the wrongdoing of their employees. It is therefore conceivable that, if a similar route were to be taken by the South African legislature, it would arguably be ineffective in

[294] Para 17.
[295] CICA *The UK 2012 Scheme Guide* 2 (own emphasis).
[296] See paragraph 2.2.1.1 in chapter 2.

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combating the widening of the state's delictual liability. For the reasons outlined in chapter 2, the continued expansion of state liability is, however, undesirable and unsatisfactory from a crime victim compensation perspective.

It therefore requires emphasis that, if the legislature does elect to retain the crime victim's common-law right to claim damages for the harm that is not covered by the proposed fund, then it is suggested that the victim should only be allowed to claim from someone who was the *direct* cause of his injuries and not from someone who may be regarded as being *indirectly* responsible for their harm. This means that the crime victim ought to be able to hold the perpetrator liable in delict for harm not covered under the proposed compensation scheme, but should not be allowed to institute a delictual claim for the remainder of his harm in a vicarious liability suit against the state. In essence, when establishing the proposed fund, the legislature should pay careful attention to prevent the continued expansion of state delictual liability.

In summary, it is recommended that, although it should not be made a requirement for eligibility under the proposed fund, crime victims should be encouraged and expected to claim from the perpetrator who is directly responsible for the victim's harm, if that person is known to the victim and in a financial position to compensate.

5.6 Should benefits received under a statutory compensation fund be deducted from compensation received under a residual common-law claim of delict?

It may happen that a person who suffers harm as a result of violent crime receives some benefit from a third party to mitigate the harm.[297] For example, a friend of the victim may donate a sum of money to cover the cost of medical expenses incurred as a result of the crime.[298] In this type of scenario, the question is often asked what effect, if any, the receipt of the donation, which is characterised as a collateral benefit, should have on the damages that the wrongdoer must pay the victim. In this section it is considered to what extent, if any, collateral benefits should affect the quantum of

[297] Neethling & Potgieter *The Law of Delict* 238; Loubser & Midgley (eds) *The Law of Delict* 408-410.
[298] Neethling & Potgieter *The Law of Delict* 238; Loubser & Midgley (eds) *The Law of Delict* 408-410; Boberg *The Law of Delict* 479-494, 539-540, 557-563, 603-615.

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compensation received from the proposed statutory compensation scheme (if it were to be enacted).

As Neethling and Potgieter explain, there are two possible ways to approach this problem relating to collateral benefits: the law may hold the wrongdoer liable for all of the harm he caused, or the law may hold him liable only for the harm ultimately sustained by the victim.[299] In the case of the former, the donation of the family member in the abovementioned example (i.e. the collateral benefit) will not be taken into account when calculating the damages payable by the wrongdoer, which means that the victim will ultimately be in a better financial position than he would have been if there had been no delict because he will receive the donation as well as damages in delict (on the assumption that the delictual claim is successful). This approach, however, is at odds with the primary function of the law of delict, i.e. compensation of harm (as opposed to enriching a victim of harm).

On the other hand, if the second approach is adopted and the donation received from the family member is to be taken into account, it will mean that the victim will simply be restored to his position prior to the delict. However, while it may be said that the function of compensation is fulfilled, this approach also means that the wrongdoer is not required to make good all of the harm that he has caused and that he therefore gains from someone else's generosity and is partly absolved from liability.[300]

Loubser and Midgley state as follows: "Benefits that courts do not deduct from the damages claim are regarded as collateral sources and therefore *res inter alios acta*. This phrase literally means that something that happens between two parties does not concern anyone else."[301] Furthermore, although it has been noted that, whether a benefit is deducted might be dependent on the source and the nature of the benefit,[302] there appears to be "no general principle that our courts can use to decide which benefits they should account for and which benefits they should regard as *res inter*

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[299] Neethling & Potgieter *The Law of Delict* 238; Loubser & Midgley (eds) *The Law of Delict* 408-410. See also Potgieter, Steynberg & Floyd *Law of Damages* (2012) 229-273.
[300] Loubser & Midgley (eds) *The Law of Delict* 408-410.
[301] 408.
[302] 408. See also Neethling & Potgieter *The Law of Delict* 239-241 for list of practical guidelines on which benefits have been taken into account in particular circumstances in reducing the damages to which the victim is entitled and which benefits have been regarded as *res inter alios acta*.

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alios acta. South African courts deal with each benefit on a case by case basis, based on policy considerations."[303]

Against this background, and assuming that a crime victim's common-law right to claim compensation from a wrongdoer is not abolished, and assuming further that the victim successfully pursue his common-law delictual claims for recovery against a deep-pocketed perpetrator,[304] should the compensation awarded to a crime victim from the proposed fund be taken into account when the victim's common-law damages is calculated or should it be regarded as *res alios inter acta*?[305]

It is suggested that any benefit received from the proposed compensation fund at the stage of calculating the victim's delictual damages should not be taken into account when calculating the final damages awarded to a crime victim. This is because, from a public policy perspective it is preferable that, where possible, a perpetrator should compensate the victim of his violent crime as opposed to the compensation scheme that is funded by innocent tax-payers.[306] For this reason, it is also strongly recommended that the victim of crime should be obligated to notify the proposed fund about the prospects of receiving delictual damages when he submits his initial application for compensation to the fund. If the victim indeed receives damages in delict, the fund should also be informed. It is therefore the proposal that, in this scenario, the fund should be allowed a right to recover any payment that was made to the victim and that the victim must have a corresponding duty to repay the compensation fund the amount awarded to him under the fund.[307] The fund should aim to ensure that, where possible, the perpetrator should compensate the victim before the tax-funded scheme's resources is used to do so.

If the abovementioned approach is adopted, it would also mean that the potential double compensation of the crime victim will be avoided, while the victim's harm would

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[303] 410. See also Neethling & Potgieter *The Law of Delict* 242-243; Boberg *The Law of Delict* 479.
[304] It may be recalled that, in paragraph 5.5.4 it was proposed that, although it should not be made a requirement for eligibility under the proposed fund, victims should be encouraged and expected to approach the perpetrator who is directly responsible for the victim's harm, if that person is known to the victim and in a position to compensate.
[305] See Loubser & Midgley (eds) *The Law of Delict* 407-411; Potgieter et al *Damages* 229-270; M Devaney "A Comparative perspective of Personal Injuries Compensation Schemes: Lessons for Tort Reform" (2009) *EJCL* 1 1-9.
[306] See Neethling & Potgieter *The Law of Delict* 243: "Questions regarding collateral benefits are normative in nature: they have to be approached and solved in terms of policy principles and equity."
[307] See CICA *The UK 2012 Scheme Guide* 36.

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be fully compensated for. This would therefore give effect to the primary goal of the law of delict, i.e. compensation of harm (as opposed to enriching the victim or punishing the wrongdoer), which, from a policy point of view, seems to be the most suitable approach for the legislature to adopt.

It may further be asked what should occur where a victim first institutes a common-law delictual claim (if it is retained) and thereafter approaches the proposed fund for compensation. In this context, it may be noted that paragraph 85 of the UK 2012 Scheme, for example, states that an award under the scheme may be withheld or reduced if the victim has received a payment similar to criminal injuries compensation, damages from a civil court, money under a settlement of damages claim or where he received a compensation order in his favour during the criminal proceedings. The position is similar in the Netherlands. Section 6(1) of the Dutch Act states that the Dutch Fund may take into account whether the victim has received any monies in respect of his relevant injury (albeit from a civil claim or another source) before payment is made to the victim in terms of the Act.[308]

It is suggested that the South African legislature should adopt a similar approach in this context. This will contribute towards the proposed scheme's financial viability as well as promoting the principle of personal responsibility, i.e. holding the perpetrator responsible for the harm arising from his crime (where possible). Furthermore, to allow the crime victim to claim compensation from the proposed fund where he has already received compensation after successfully instituting a common-law delictual claim, would amount to double compensation which, as indicated above, does not accord with the aims of the proposed scheme. Indeed, this would place the crime victim in a better position than he would have been in if there had been no delict.

In summary, it may therefore be suggested that the proposed scheme's position should be as follows:[309]

> "In general, therefore, State compensation programmes internationally are 'payers of last resort' in the sense that compensation will not be paid in respect of any loss or expense covered by a collateral source such as medical insurance, pension schemes, insurance arrangements, payments made by the offender, employer wage-continuation programmes, social security and so on."

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[308] HSG *Beleidsbundel* (2017) 14.

[309] SALRC *A Compensation Fund for Victims of Crime* 87.

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This would mean that all benefits received by the crime victim - not only damages in delict, but also private insurance, a pension scheme or social security - should be taken into account when calculating the compensation awarded under the proposed fund. This will ensure that, in line with the approach adopted under the UK 2012 Scheme, the proposed fund will be a final resort for compensation which, in turn, may improve its financial viability.

5.7 Limitation of the victim's claim against the compensation fund

Another practical question which the South African legislature would be confronted with if it elects to enact a compensation scheme is whether a crime victim's claim against the fund should be limited to a capped amount.

Generally, statutory compensation schemes limit the victims' claim and do not offer compensation that is similar to what is payable under the common law. Indeed, schemes aim "rather to contribute towards the compensation of a blameless victim, acting as a social safety net and compensating actual loss as opposed to claims in respect of pain and suffering. In practice therefore, state compensation is usually well below comparable awards arising from civil claims."[310]

5.7.1 South African statutes that have developed the law of delict: the RAF Act and the COIDA

As stated in paragraph 5.5.1.1, the Road Accident Fund Amendment Act introduced a variety of limitations on claims for patrimonial and non-patrimonial harm being instituted against the RAF.[311] For example, the introduction of section 19(g) excludes liability for claims for emotional shock by secondary claimants who were not actually involved in the accident.[312] Furthermore, limitation is provided by section 17(1) of the RAF Act, which provides that damages for non-patrimonial harm will only be

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[310] 76.
[311] See "Legal Framework of the RAF" available at <http://www.raf.co.za/About-us/pages/Legal-framework.aspx> (accessed on 3 February 2015).
[312] See *Fourie v Road Accident Fund* 2014 (2) SA 88 (GNP) para 36.

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recoverable in respect of "serious injuries". An additional significant limitation of the RAF's liability is provided in terms of section 17(4)(c)(i) and (ii) of the Act, which state that, where a claim for the loss of income or a claim for loss of support is successful, the annual loss awarded to a victim will be capped. Section 17(4A), read together with a Board Notice issued in July 2017, limits both these claims to R262 366, with effect from 31 July 2017.[313] Section 18(4) further limits the liability of the RAF in respect of funeral expenses to "the necessary actual costs to cremate the deceased or to inter him or her in a grave." As recorded in *Law Society,* these limitations were introduced to ensure the financial sustainability of the RAF.[314]

Similarly, compensation awarded under the COIDA may also be less than an employee would otherwise be entitled to in the case of a delictual claim for damages. While the COIDA claim is based on a fixed percentage of earnings, a claim for damages in the civil courts could include a total loss of earnings. Section 63 of the Act contains rules as to how the compensation should be calculated.

5.7.2 The UK 2012 Scheme and the Dutch Fund

As discussed in paragraph 5.3, both compensation schemes contain set lists of specified injuries recognised by the respective scheme as well as limited amount of damages compensable in respect of each injury.[315]

5.7.3 Conclusion: suggestions relating to the limitation of the victim's claim against the proposed fund

Compensation funds generally develop upper and lower limits for compensation. Lower limits are set to prevent small or negligible claims from being instituted against a fund, which may therefore increase the administrative workload of the fund

[313] See Government Gazette (28 July 2017) No. 41013 "Adjustment of Statutory Limit in respect of Claims for Loss of Income and Loss of Support" available at <https://archive.opengazettes.org.za/archive/ZA/2017/government-gazette-ZA-vol-625-no-41013-dated-2017-07-28.pdf> (accessed on 28 July 2017.

[314] See also "Legal Framework of the RAF" available at <http://www.raf.co.za/About-us/pages/Legal-framework.aspx> (accessed on 3 February 2015).

[315] See the UK 2012 Scheme and the HSG *Letsellijst* (2016).

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administrators. Higher limits are introduced to ensure the fund's financial viability. It is recommended that the proposed fund should introduce both a lower and upper limit with regards to the compensation that it will award crime victims.

It is argued that the apparent financial disadvantage to which such (upper) limitation may expose future applicants is a necessary trade-off in order to secure a source of funding through a relatively cost-effective and time-efficient administrative procedure. As the comments made in *Law Society* and *Jooste* illustrate, such a goal is in line with promoting the right to social security and it would therefore be rationally connected to a legitimate government purpose. The financial calculation of each specific limit would require extensive statistical analysis and falls outside the ambit of this dissertation.

5.8 Should the compensation fund require victims to prove fault?

The COIDA introduced a form of no-fault statutory liability and a victim of occupational injuries or diseases may institute a claim regardless of the reasonableness of his employer's conduct in preventing the mishap. In contrast, the RAF Act, which caters for the compensation of motor vehicle accidents, requires prospective plaintiffs to prove fault. However, as we have seen, the legislature is intent on doing away with a fault-based system of liability under the proposed RABS. As such, it seems as though the major compensation funds operative within the delictual context will both be footed on a no-fault basis. If serious about the possibility of enacting a compensation fund for crime victims, the legislature will therefore have to consider the basis of the fund's liability. It might be thought that, because it has been proposed that the legislature should consider the enactment of a compensation scheme for victims of intentionally-committed violent crime, the scheme will be fault-based because it would require crime victims to require fault (in the form of intention). However, as indicated elsewhere,[316] and as discussed further below, this is not the case. For the sake of completeness, therefore, the basis of the proposed fund's liability should be briefly considered.

[316] See paragraph 4.2.2.3 in chapter 4 as well as paragraph 5.2.1.3 above.

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5.8.1 South African statutes that have developed the law of delict: the RAF Act, the Consumer Protection Act 68 of 2008 ("CPA") and the COIDA

The COIDA provides compensation in respect of patrimonial harm which a victim suffers as a result of an occupational injury of disease contracted in the course of employment, regardless of the fault on the side of the employer. Similarly, section 61(1) of the CPA provides that producers, importers, distributors or retailers of goods are strictly liable for any harm caused to the consumer as a consequence of (a) the supply of unsafe goods; (b) a product failure, defect or hazard in goods; or (c) inadequate instructions or warnings provided with goods. Although the RAF Act still requires victims to prove fault, the proposed RABS aims to implement a no-fault based compensation scheme. In *Law Society,* the Minister for Transport gave evidence that the amendments introduced by the RAF Amendment Act of 2005 were the "first step to greater reform".[317] It was considered "an interim measure towards the restructuring of the Fund's scheme into one which pays compensation on a no-fault basis."[318]

The advantages which the no-fault approach may hold in this context were discussed in chapter 3 and 4 and will not be repeated here.

5.8.2 The UK 2012 Scheme and the Dutch Fund

The majority of compensation funds that have been established for crime victims, only compensate victims of intentionally-caused violent crimes.[319] Compensation funds for crime victims generally require applicants to prove that they suffered harm arising from a violent crime that was intentionally committed. The exclusion of victims of negligently caused crimes from the scope of compensation funds is generally justified on financial grounds and because the effects of those victims' injuries are often covered by other forms of social insurance. For the sake of clarity, it may therefore be said that these compensation funds are not based on fault, because applicants are not required to prove fault (in the form of intention), but merely to prove that their harm had arisen from an intentionally-committed crime.

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[317] Para 46.
[318] Para 46.
[319] See the SALRC *A Compensation Fund for Victims of Crime* 80.

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5.8.3 Conclusion: recommendation as to whether the proposed fund should be a fault-based compensation scheme

On this issue, the SALRC Report is unclear. Neither of the draft bills it attached to the report give any indication as to whether the victim is required to prove fault on the part of the perpetrator in order to be eligible for compensation and, if so, whether negligence or intention ought to be proven.[320] Von Bonde refers to the SALRC's Discussion Paper, which preceded its 2004 report, and merely proposes that a "*prima facie* intentional criminal act should have occurred. This means that a successful prosecution need not be required in all cases, for example where the perpetrator has died."[321] The Discussion Paper, as well as the SALRC's eventual report, however, is not clear on the issue of whether intention is required. It merely states, in general terms that, where intention is required,

> "the notion of intentional crime should involve a wide definition of intentionality. It would be unjust if, for instance, a claim were turned down because the injury suffered was the result of being injured by a stray bullet fired negligently by the offender without the offender's having formed the specific intention to kill or injure the actual (or any) victim. The reasonable possibility of injury/death to some person must merely have been foreseeable to qualify the victim for making a claim [...] It is not, in general, necessary for the victim to have been the intended victim of the act of the offender. In some cases, therefore, even the dependants of a victim of a culpable homicide might well qualify for compensation."[322]

It is suggested that the proposed fund, if it were to be established, should follow the approach adopted by the UK 2012 Scheme. In line with this scheme and indeed most of the compensation schemes operative in this context, a victim is not required to prove fault (in the form of intention), but should be required to place sufficient evidence in front of the compensation authority to prove, on a balance of probabilities, that he is eligible for a payment under the fund, i.e. that he suffered harm arising from an *intentionally*-committed crime. This will require a victim to provide medical evidence that supports the claim that the victim indeed obtained an injury recognised under the fund, confirmation that the incident (an *intentionally*-caused violent crime) has been reported to the police and a report from the police indicating whether the victim's conduct contributed to their injury. In this sense only could it be said that the proposed

[320] SALRC *A Compensation Fund for Victims of Crime* 353-386.
[321] Von Bonde *Redress for Victims of Crime in South Africa* 291.
[322] SALRC *A Compensation Fund for Victims of Crime* 81.

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fund scheme would take fault into account. As indicated in paragraph 4.2.2.3 in chapter 4, from a policy perspective, this proposal may be justified on the basis that it may be much more time-efficient and therefore also cheaper than would be the case if the victim would be required to prove fault (in the form of intention) on the part of the perpetrator. In turn, this promotes the crime victim's constitutional right to access to justice. This proposal improves the victim's likelihood of being compensated for harm arising from crime, and therefore serves to further the goal of enacting the proposed fund.

5.9 Relevance of the perpetrator's identity

In *K v Minister of Safety and Security*,[323] the Supreme Court of Appeal denied the plaintiff a delictual remedy, but alluded to the possibility of legislative intervention.[324] In criticising the CC's judgment in *K,* Fagan implied that it would have been more reasonable to compel the legislature to create a statutory compensation fund for all victims of police rapes.[325] For the reasons set out below, limiting the scope of eligibility of a proposed fund in this manner is not recommended.

The establishment of a statutory compensation fund specifically for victims of police rapes would obviously limit the availability of compensation from the proposed fund in various ways. First, it would limit compensation to those instances where the intentional infringement upon bodily integrity has occurred in a very specific way, i.e. in the form of rape. Secondly, it would limit compensation to situations where the victim's intentional infringement of bodily integrity in the form of rape was perpetrated by a specific wrongdoer, namely a police officer.

Arguably, these limitations would not be justifiable. The nature of the crime of violence that should be compensated under the proposed fund has been discussed in paragraph 5.2 above. With regard to the relevance of the wrongdoer's identity, it may be argued that, when a police officer rapes an innocent member of the public, there is a reproachable betrayal of trust by a person tasked with the legal duty to promote

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[323] 2005 (3) SA 179 (SCA).
[324] Fagan (2009) *SALJ* 204.
[325] Fagan (2009) *SALJ* 204; *K v Minister of Safety and Security* 2005 (3) SA 179 (SCA).

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safety and security. The betrayal of such trust by itself, however, does not provide a justifiable basis upon which to deny a remedy to innocent victims raped by other categories of wrongdoers, especially considering the fact that those categories of wrongdoers may equally consist of people in whom the victims placed their trust.

There is a further jurisprudential problem with opting to award a statutory remedy only in the case where the wrongdoer is a member of the police: taxpayers' monies are allocated to the budget of the Minister of Police (previously the Minister of Safety and Security) and indirectly employed to recompense police officers to provide safety and security. When they breach that duty and rape innocent members of the public, the latter will be awarded a statutory claim against a compensation fund which is likely also to be funded with the taxpayer's money. Awarding a statutory claim to victims of police rapes only, thereby indirectly forcing the taxpayer to pay in respect of the provision of safety and security of the general public, and simultaneously denying those tax-payers who may be raped by someone other than members of the police, seem morally indefensible.

However, considering the fact that the police may be seen as the vanguard of public safety, it may be considered whether a victim of a crime intentionally committed by a police officer should be awarded a higher amount of compensation. In other words, perhaps the abuse of trust that accompanies the victim's physical injuries should be addressed by a higher compensation award. This could be in line with the standard of practice under the COIDA, where the employee is allowed increased compensation if his employer culpably caused the employee's harm.[326]

To conclude, it is suggested that the perpetrator's identity is irrelevant for the purposes of applying for compensation under the proposed fund.

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[326] See sections 56 and 66 of the COIDA.

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5.10 Miscellaneous practical considerations to be taken into account when enacting a statutory compensation fund for crime victims

5.10.1 The time frame for instituting a statutory claim

Most of the compensation schemes enacted in foreign jurisdictions require the applicant to report the crime to the police and to lodge a claim within a specified period, and also to get proper police verification of the incident or medical records.[327] Failure to meet such deadlines may mean that an applicant's award is reduced or withheld. The UK 2012 Scheme generally requires an applicant to send his application to the CICA as soon as reasonably practicable after the incident giving rise to the criminal injury to which it relates, and within two years after the date of that incident.[328] Similarly, section 7 of the Dutch Act states that a claim for compensation must be submitted to the Dutch Fund within ten years from the day on which the crime was committed.

Requiring a time limit within which to bring a claim against the proposed fund would be an administratively sound practice that would be in line with the general trend in other foreign jurisdictions.[329] Taking into account that delictual claims must generally be instituted within three years after the cause of action arose, and that applicants claiming compensation from the RAF and the COIDA fund are expected to institute their claims within specific time periods, it is proposed that victims under the scheme as envisaged should bring their claims within three years of the date on which the incident occurred.[330]

It is proposed that crime victims should be encouraged to pursue their common-law delictual remedies to claim compensation from the perpetrator of the crime. To prevent prescription of a claim against the proposed fund taking effect while a common-law claim against the perpetrator is in process, it is suggested that it be enacted as part of the scheme that, while a debt owed by the perpetrator to the crime victim is the object of a claim instituted by legal process by the victim against the perpetrator, an

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[327] See SALRC *A Compensation Fund for Victims of Crime* 83-84.
[328] See paragraph 87 of the UK 2012 Scheme; CICA *UK 2012 Scheme Guide* 2.
[329] SALRC *A Compensation Fund for Victims of Crime* 83-84.
[330] See section 11(d) of the Prescription Act 68 of 1969.

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"impediment" delaying the completion of prescription under section 13 of the Prescription Act 68 of 1969 will operate in respect of the claim against the fund.

5.10.2 Place where the crime must have been committed

All of the criminal injuries recognised under the UK 2012 Scheme must have been sustained as a result of a crime that occurred in "a relevant place".[331] According to paragraph 8 of the scheme, this means Great Britain or any other place specified in Annexure C. Annexure C expands on this term and sets out a list of places that may qualify for the purposes of compensation.[332] According to section 3(1) of the Dutch Act compensation may be awarded if the intentional violent crime was committed in the Netherlands or on board a Dutch ship or aeroplane outside the Netherlands.

It should be noted that the European Council adopted a directive in April 2004 which required all European Union ("**EU**") countries to have a compensation scheme for victims of intentionally-caused violent crimes and established formal co-operation between member states to ensure that victims may receive compensation, regardless of where in the EU the crime was committed.[333] As a result, victims of intentionally-caused violent crimes in an EU country other than the one in which they usually live may apply for compensation in that different country.[334]

As a point of departure, it is proposed that the South African legislature adopts a strategy similar to the one adopted in the UK 2012 Scheme and stipulate clearly the list of places that may qualify as a so-called "relevant place" for purposes of compensation. More specifically, it is proposed that compensation should be paid only to victims who have suffered harm as a result of intentional violent crimes that occurred in South Africa. This would be in line with the approach adopted in the RAF Act, where

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[331] Paragraphs 4-6, 8 of the UK 2012 Scheme.
[332] See paragraphs 1-3 of Annexure C of the 2012 Scheme for the entire list.
[333] See European Council Directive 2004/80/EC of 29 April 2004 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32004L0080> (accessed on 11 April 2017); CICA *UK 2012 Scheme Guide* 5; section 18(a) of the Dutch Act.
[334] See European Council Directive 2004/80/EC of 29 April 2004 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32004L0080> (accessed on 11 April 2017); CICA *UK 2012 Scheme Guide* 5; section 18(a) of the Dutch Act.

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the RAF is only liable in respect of harm arising from motor vehicle accidents that occurred within the borders of South Africa.[335]

Because there are no directives similar to the one adopted by the EU in the African context, it would not be possible for South Africa to enter into a comparable regional agreement with other African jurisdictions. However, the government of South Africa may consider approaching some or all of the countries that are signatories to the abovementioned EU directive to determine the possibility of reaching an agreement that could allow foreign nationals to apply for compensation under the proposed South African compensation fund (if it were to be enacted) and allow South African citizens to claim compensation from the various European jurisdictions' funds. However, if this were to be done, the legislature should ensure that such an agreement is aligned with the residency requirements referred to in paragraph 5.10.3 below.

In the event that a prospective applicant is not in a position to satisfy the necessary requirement, it is proposed that the fund should deny the claim and the victim would consequently have to rely on the common law of delict to find compensation for his harm (as proposed, the legislature should not abolish the common-law delictual remedies for residual harm).

5.10.3 Nationality of applicant

Most foreign schemes require prospective applicants to have a connection to the relevant jurisdiction that is more than temporary.[336] For instance, the UK 2012 Scheme requires that potential applicants should comply with nationality and residency requirements, which means that the victim must have been ordinarily resident in the UK on the date of the incident while an additional condition must also have been met

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[335] Section 17(1) of the RAF Act.

[336] Ministry of Justice *Getting it Right for Victims and Witnesses: the Government Response* 41. It should be noted that the European Council adopted a directive in April 2004 which required all EU countries to have a compensation scheme for victims of intentionally caused violent crimes and established formal co-operation between member states to ensure that victims may receive compensation, regardless of where in the EU the crime was committed. As a result, victims of intentionally caused violent crimes in an EU country other than the one in which they usually live may apply for compensation in that different country. See European Council Directive 2004/80/EC of 29 April 2004 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32004L0080> (accessed on 11 April 2017); CICA *UK 2012 Scheme Guide* 5; section 18(a) of the Dutch Act.

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by the victim, e.g. the victim must have been a British citizen, "a close relative of a British citizen", a national of a member state of the EU or the European Economic Area ("**EEA**"), a family member of an EU/EEA national who has a right to be in the UK, a national of a State party to the Council of Europe Convention on the Compensation of Victims of Violent Crimes,[337] a member of Her Majesty's armed forces, or an accompanying close relative of an armed forces member, or have been identified as a potential victim of human trafficking or made an application for asylum to remain in the UK on or before the day of your application for an award.[338]

In contrast, the Dutch Fund merely states that if you have suffered harm as a result of an intentionally-committed violent crime in the Netherlands, you are eligible for compensation and therefore does not follow the same approach as the UK 2012 Scheme by setting out a list of nationality and residency requirements.[339]

Therefore, it seems as though the two examined schemes do not cater only for national citizens, but would also compensate other individuals. Whereas the Dutch Fund seemingly allows anyone who suffers harm from a violent crime committed intentionally in the Netherlands (assuming that the other eligibility criteria have been met), the UK 2012 Scheme seemingly provides for a higher eligibility threshold. As a result it is conceivable that a holiday-goer who suffers harm arising from an intentionally-committed crime in the Netherlands will potentially be eligible for compensation, he will not succeed with a claim under the UK 2012 Scheme unless he also complies with one of the residency requirements.

It is proposed that, if the South African legislature decides to enact a crime victim compensation fund, it should follow the approach adopted by the UK 2012 Scheme. In other words, the legislature should adapt similar residency requirements as those set out in the UK 2012 Scheme, taking into account the South African context. It is suggested that this may contribute towards the financial sustainability of the proposed fund, which, as pointed out above, is a practically significant consideration to take into account.

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[337] CETS 116 of 1983.
[338] CICA *UK 2012 Scheme Guide* 12-13.
[339] Schadenfonds Geweldsmisdrijven "Veel gestelde vragen" available at <https://schadefonds.nl/veel-gestelde-vragen/> (accessed on 27 June 2017).

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5.10.4 What is practically expected of prospective applicants?

Neither the UK 2012 Scheme nor the Dutch Fund requires an applicant to prove the existence of a violent crime in the same way that it must be proven, for example, beyond reasonable doubt, in a criminal court. For the sake of clarity, it might be emphasised once more that these schemes do not require a prospective applicant to prove fault (in the form of intention) in the same way that a victim is required to do so under the common law of delict. Instead, as indicated above, it is proposed that an applicant should be required to place evidence in front of the fund's authorities to make it plausible to find that such a crime indeed occurred and that the victim did suffer the relevant injuries for which he claims compensation. It is recommended that the proposed fund, if enacted, adopt a similar approach. In the event that a prospective applicant is not in a position to provide the compensation authorities with evidence that he suffered harm arising from an intentionally-committed crime, the fund should deny the claim and the victim would consequently have to rely on the common law of delict to find compensation for the harm he suffered (as proposed, the legislature should not abolish the common-law delictual claim available to the victim.)

5.11 Conclusion

The aim of this chapter was to identify practical questions which the South African legislature should answer if it accepts the proposal to develop the law of delict by enacting a compensation fund for crime victims. In canvassing the various matters, attention was paid to the legislative solutions advanced to the problem of crime victim compensation in the UK and the Netherlands. Drawing from the approaches and solutions adopted in those jurisdictions, specific recommendations were made, which may be summarised below.

It is suggested that the proposed fund should be established in a concise statute that deals with salient matters, while policy documentation may be developed to provide an interpretation of the eligibility criteria set out in the statute, the administrative procedure by means of which compensation may be claimed, and a more detailed

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discussion of the questions which crime victims may typically require answering. Both of the foreign schemes examined in this chapter follow this approach, providing a relatively brief statute which is then accompanied by more detailed policy documentation that contains lists of the compensable injuries, the amounts claimable, the procedures to be followed as well as a variety of related matters.

The policy documentation, produced by the compensation authority responsible for the administration of the scheme expands on the statute and explains its working in simple terms. In this regard, these schemes differ from the compensation schemes set up under the COIDA and the RAF Act, which consist of a single, lengthier and more complex statute to deal with all matters pertaining to compensation for harm arising from motor vehicle accidents and occupational injuries and diseases.

The advantage of the approach adopted by the foreign crime victim compensation schemes is that the statute remains simple, brief and clear, arguably making it more accessible to members of the public. The interpretation of the statute, the eligibility criteria, the harm compensable under the scheme, its practical mechanics and the various questions that may be raised by injured crime victims are set out in the policy documentation. If, for example, it is necessary to provide further information, or to set out a new procedure to be followed, amend the list of compensable injuries or the amounts claimable in relation to those injuries, it can easily be set out in the policy documentation, without further statutory procedures having to be followed. Arguably, this means that the statute continues to provide certainty about its core objectives, while providing a degree of flexibility to the administrative body regarding its practical functioning.

With regard to the core features of the proposed statute, it was suggested that, generally speaking, the fund should aim to develop narrow eligibility criteria, placing its core focus on the compensation of victims of intentionally-caused violent crimes. Furthermore, relatives of deceased victims of crime and witnesses of such crimes should also be compensated. As indicated above, it is not suggested that the proposed fund should also compensate the category of risk-takers recognised by the UK 2012 Scheme.

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In line with the compensation schemes in the UK and the Netherlands, the proposed fund should aim to compensate both patrimonial as well as non-patrimonial harm, provided that the fund adopts strategies to establish narrow eligibility criteria and limitations regarding the scope of its liability. One readily achievable method to limit the proposed fund's liability would be to cap the amount of compensation claimable from the fund. Indeed, this is the accepted strategy followed by foreign compensation funds as well as the RAF and the COIDA, which statutes could assist in formulating the necessary limitations.

It was also suggested that the crime victim's common-law claim against the perpetrator should not be abolished. Although not a formal eligibility requirement, the proposed fund should clearly encourage victims to pursue this route where the perpetrator is known and in a financial position to compensate the victim. This arrangement will be in the financial interest of the proposed fund (by improving its sustainability) as well as crime victims (by allowing victims to claim full compensation).

Furthermore, if a common-law claim is successful, compensation received from the fund, should not be taken into account when calculating the perpetrator's common-law liability. In such a scenario, the fund should also be allowed a right to reclaim whatever monies it has already paid over to the victim.

Of course, for reasons highlighted in chapters 3 and 4, it is unlikely that the victim would be successful in recovering damages by means of a common-law claim against the perpetrator and the victim would therefore in all likelihood turn towards the proposed fund for compensation. Under these circumstances, the fund should be entitled to take into account any other monies which the victim has received (from sources other than a civil claim, e.g. insurance payments) at the time of application for compensation.

Unlike the COIDA, the CPA and the RABS, the proposed fund will be fault-based insofar as a victim will be required to provide evidence to the compensation authority that he has suffered harm arising from an intentionally-caused violent crime. The focus is on securing a limited amount of compensation to victims of violent crimes caused intentionally. Victims, however, are not required to prove intention beyond reasonable doubt in the same way that the state is required to do in a criminal trial. Rather, the

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victim should be required to place evidence in front of the compensation authority to allow them to reasonably conclude that an intentionally-caused violent crime was indeed committed.

Lastly, the following remarks may be made about the nature of the statutory development of the South African law of delict and the relationship between the common law of delict and statutes relevant to this branch of the law.

This dissertation has examined comparable instances of large-scale reform which occurred in the past. The proposal to potentially develop an area which falls within the terrain covered by the law of delict has brought to the fore questions relating to the nature of statutory reform. Writing from an Australian perspective about statutory reform of English tort law, James Goudkamp stated as follows:[340]

> "The rise of legislation has profoundly affected all areas of the law in the major common law jurisdictions. Tort law was arguably the last major stronghold of judge-made law. […] Unsurprisingly, the extent of statutory alterations to tort law vary very considerably from jurisdiction to jurisdiction. New Zealand famously underwent by far the most far-reaching legislative changes […] that provided for a comprehensive accident compensation scheme. This scheme […] leaves tort law with a relatively minor role to play. Tort law throughout Australia has also been changed very extensively by statute. […] These changes did not go as far as those made in New Zealand. The essence of the tort system was retained […] The United Kingdom lacks tort reform legislation that is comparable to that which exists in Australia and New Zealand."

The South African law of delict, like English tort law, has not experienced the same radical reform which New Zealand underwent when it enacted a general accident compensation scheme. In fact, no other jurisdiction has done so.

Rather than introducing comprehensive statutory reform of the law of delict, the South African legislature's development of this branch of the law, like its English counterpart, has occurred on an *ad hoc* basis, with the major instances of statutory development justified by legal and public policy considerations[341] and enacted with the view to solving very specific practical problems relating to the compensation of specific categories of victims. Compared to the alternative, i.e. introducing a complete overhaul of the law of delict *via* the introduction of a general accident compensation scheme in the same way as New Zealand has done, the current approach to statutory reform appears to be a sensible one.

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[340] J Goudkamp "Reforming English Tort Law: Lessons from Australia" in E Quill & RJ Friel (eds) *Damages and Compensation Culture: Comparative Perspectives* (2016) 75-95 75-76.
[341] See paragraph 3.2 in chapter 3.

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This dissertation is not the first research project to consider statutory reform of the law of delict to compensate victims of crime. It will be recalled that Von Bonde has made the radical proposal of the creation of "a unified Compensation Scheme to compensate victims of crime, as well as victims of traffic and industrial injuries."[342] However, for the reasons briefly set out below, this solution cannot be supported.

Von Bonde suggests that there is an "equality argument"[343] which dictates that "victims of crime should not be treated differently from victims of other kinds of misfortune."[344] Of course, it may be argued that this argument is undermined by the very fact that certain categories of victims have been singled out for preferential treatment in the past (e.g. motor vehicle accident victims and victims of occupational injuries and diseases are treated differently from victims of drought). However, this kind of differentiation has been justified on the policy bases examined in chapter 3. Similarly, if crime victims were to receive statutory compensation (either through a general accident fund or a fund specifically enacted for this purpose), it would also be differentiated and receive different treatment.

Furthermore, if the proposal set out in this chapter were to be accepted by a legislature, the relative positions of crime victims and victims of motor vehicle accidents, defective consumer products and occupational injuries and diseases would be equal insofar as that they would all receive statutory assistance in their effort to claim compensation. Nonetheless, there are notable differences between the different categories of accidents which may conceivably justify a differentiated approach. In truth, the argument could be made that the existence of tailor-made legislation that focuses on a specific practical problem could better alleviate the plights of a specific category of victim, which could assist in achieving equality among the various categories of victims.

Von Bonde's proposal is further premised on the notion that "separate compensation schemes for various categories of victims leads to unnecessary complications when a decision has to be made regarding the causation of a particular injury in order to direct the claim to the appropriate fund".[345] However, these difficulties have been statutorily

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[342] Von Bonde *Redress for Victims of Crime in South Africa* iv.
[343] 387.
[344] 387.
[345] 387.

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regulated and arguably have been settled. For example, section 18 of the RAF Act provides that, where compensation is recoverable under COIDA, the amount of this compensation is deducted from damages that are recoverable from the RAF.

The argument that the "distinction between occupational and other injuries is obsolete as it dates from an era when workers' compensation was the only social insurance and welfare programme in operation"[346] does not do much to justify the radical kind of statutory reform which Von Bonde contemplates. At any rate, it is suggested that there may be different reasons why an innocent victim of an assault and rape attack should be compensated when compared to the reasons for compensating someone who is injured while performing a voluntarily elected employment duty – reasons which may be relevant for determining, for example, the levels of compensation payable to different categories of victims.

Von Bonde further argues that "[m]odern society should have a system of compensation based on the financial consequences of an injury rather than its causation"[347] and that "victims of injury have the same financial needs irrespective of the cause of their injuries."[348] Once again, it is suggested that there may be different reasons for compensating a crime victim, when compared to a motor vehicle accident victim, especially if the one has not elected to partake in any kind of risky behaviour. The legislature may want to give effect to these reasons by catering for different compensation tariffs, procedures and further statutory assistance provided. Von Bonde's argument does little to justify the wide-ranging changes which he seeks to introduce by amalgamating the RAF and the COIDA together with a fund aimed at compensating crime victims.

Von Bonde points out the danger of a "proliferation of benefits available to victims of misfortune"[349] which could lead to "overcompensation of some victims of misfortune at the expense of others and the state."[350] As indicated in this chapter, the issue of collateral benefits will have to be dealt with in the proposed legislative scheme, in the same way that it has been dealt with in comparable statutes. In other words, this matter

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[346] 388.
[347] 388.
[348] 388.
[349] 388.
[350] 388.

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may be dealt with through statutory craftsmanship and cannot justify the comprehensive scheme which Von Bonde contemplates.

Von Bonde provides no evidence for asserting that a "single system allows for a more equitable dispensation than a number of systems paying benefits on varying scales from public funds."[351] In addition, his statement that a "single scheme administered by one bureau of officials will be more cost effective to administer than separate systems because a duplication of functions is avoided"[352] is not substantiated and therefore cannot be used in justifying the overhaul which he proposes.

Lastly, the argument that the COIDA and the RAF are not "functioning optimally"[353] does not justify the proposal to introduce a more comprehensive scheme which will conceivably entail much more administration and financial management, because it would receive a larger amount of applications for compensation from a greater group of victims.

While it may be true that the South African legislature remains the major engine for law reform, this dissertation has argued that it would be better to enact specific legislation that is tailor-made for the existence and extent of a particular problem (in this case, the high levels of crime).[354] Large-scale statutory reform seems impractical from an administrative point of view: enacting a general, unified scheme along the lines proposed by Von Bonde would necessitate a thorough analysis regarding the wide series of role players that are currently involved with the administration and management of the existing compensation funds. The idea that, following such an analysis, these entities should be realigned, given a different name and ascribed more or less the same functions may likely result in an unwarranted waste of time, money and effort.

The existing statutes, funds and entities that manage those funds possess a ring-fenced expertise, specific to a particular area within the law, and it is not obvious what the advantage would be in having them merged with an altogether different entity, with unrelated objectives and functions.

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[351] 388.
[352] 388.
[353] 388.
[354] See also paragraph 3.2 in chapter 3 and paragraph 4.3 in chapter 4.

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From a drafting point of view, the kind of statutory reform which Von Bonde has in mind would require an immense effort to ensure that all of the definitions, procedures, rights and obligations which are currently encapsulated by the various statutes would also be included in a general statutory scheme of that nature. For example, how would an "accident" be defined? Would it merely refer to motor vehicle accidents as well as occupational injuries and diseases? If referring merely to both, what is the point of just merging them into one definition? It is conceivable that there would be a multiplicity of similar definitional problems.

Further, there are specific theoretical questions relating to each existing statute, e.g. what is a "vehicle" for the purpose of road accident compensation under the RAF Act and when do you act "in the course and within scope of employment" for the purposes of occupational compensation under the COIDA? A comprehensive compensation fund, set up by enacting a new all-encompassing statute, would in any event still be required to provide answers to these questions. To what degree will such a statute not merely result in a compilation of the existing COIDA and the RAF Act to answer these questions? If so, the advantage in doing so is not clear at all.

Each of the COIDA, the RAF Act and the CPA are tailor-made statutes, informed by context-sensitive factors and catering for specific problems. Each statute has devised (through case law, regulation or practice) solutions for problems that arose in a specific area (and which may very well be inherently related to a key feature within the field that is legislated). Against this background, it is therefore argued that, rather than introducing the radical kind of reform which occurred in New Zealand or which Von Bonde proposes, the existing approach to statutory development of the South African law of delict, i.e. enacting specific statutes aimed at solving particular practical problems on an *ad hoc* basis, should remain the preferred approach.

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CHAPTER 6: CONCLUSIONS

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CHAPTER 6: CONCLUSIONS

6.1 Introduction

This dissertation has identified three main research questions for analysis.[1] To respond to these questions, a broad range of issues relating to crime victim compensation has been explored and a series of arguments and recommendations has been considered. The purpose of this final chapter is to recount the factors that provided the *impetus* for this research project, and to set out its main argument. Concluding remarks will also be made concerning the relationship between the common law of delict and related statutes as well as the function of the South African law of delict, issues which have received some attention in passing during the course of the dissertation.

As indicated throughout, compelling evidence exists that South Africa struggles with exceedingly high levels of crime.[2] Quite understandably, its citizens are filled with resentment and anger, and are deeply concerned about this problem.[3] So much so that, when asked to identify the two most serious problems not yet resolved since 1994 in a national poll survey,[4] people identified the top two issues as crime and unemployment.[5]

As stated earlier, there are different ways to react to this problem.[6] On the one hand, the state may introduce various policies and programmes to stem the tide and to further crime prevention efforts.[7] Obviously, the best possible response to the high levels of crime would be the successful implementation of these preventative strategies and the significant reduction of existing crime rates. However, the prospects of this happening are remote, and this makes it vital for South African law also to respond appropriately to crime that has already taken place.

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[1] See paragraph 1.6 in chapter 1.
[2] See paragraph 1.1 in chapter 1 and paragraph 4.2.3.1 in chapter 4.
[3] *Minister of Safety and Security v Van der Merwe* 2011 (2) SACR 301 (CC) para 35.
[4] South African Institute for Race Relations *Race Relations in South Africa: Reasons for Hope* (2016) 2.
[5] 2.
[6] See paragraph 1.1 in chapter 1.
[7] See paragraph 1.1 in chapter 1; *S v SMM* 2013 (2) SACR 292 (SCA) para 14.

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Once a crime has been committed, the South African legal system could respond in one of the following ways. First, criminal law provides the possibility for the state to investigate crimes, apprehend the accused individuals and prosecute them in a criminal court.[8] Secondly, the law of delict reacts to the harm arising from crime by providing the victim with the opportunity to obtain compensation from the perpetrator. A crime victim interested in taking up this opportunity to claim damages from the actual perpetrator of the crime may institute a common-law delictual claim against the latter and would have to prove all of the elements of delictual liability on a balance of probabilities. A further, very limited option is to make use of the procedural assistance offered in the Criminal Procedure Act 51 of 1977.

6.2 Summary of the main argument presented in this dissertation

The point of departure for this dissertation was to evaluate the compensatory response offered under the South African legal system to determine whether it is satisfactory and, if not, to consider whether an alternative method exists to secure compensation for the hundreds of thousands of South Africans who fall victim to crime each year.

Attention was first paid to the South African law of delict as the branch of the law that takes on the compensation of harm as its primary function.[9] A crime victim who seeks compensation through the law of delict may institute a common-law delictual claim against the actual perpetrator if it can be proven that the latter culpably and wrongfully caused the victim's harm.

However, as argued in chapter 2, it may be said that the compensatory response currently provided by the law of delict is unsatisfactory for the following reasons. First, the actual perpetrator of the crime is most probably not in a financial position to compensate the victim's harm. Secondly, crime victims who seek to hold the state vicariously liable in delict for harm arising from crime may be successful, but the theoretical and practical consequences of expanding state delictual liability are

[8] See generally JM Burchell *Principles of Criminal Law* 5 ed (2016); JJ Joubert, M Basdeo, T Geldenhuys, MG Karels, GP Kemp, JP Swanepoel, SS Terblanche & SE van der Merwe *The Criminal Procedure Handbook* 12 ed (2017).
[9] See paragraph 2.1 in chapter 2.

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undesirable. Thirdly, crime victims who seek to hold the state directly liable, may find it very difficult, if not impossible, to prove systemic negligence. Lastly, for the reasons set out in chapter 2, the compensatory mechanisms contained in the Criminal Procedure Act do not provide an adequate statutory avenue for relief to crime victims, while the Prevention of Crime Act 121 of 1998 focuses on the prevention and deterrence of organised crime and not on the issue of crime victim compensation.

From the critical overview of the manner in which crime victims are currently compensated under the South African legal system, the dissertation considered whether there is an alternative way to award compensation to certain categories of crime victims. One particular alternative that has been adopted in a variety of foreign jurisdictions is the establishment of a statutory compensation fund for crime victims.[10] Funds have been adopted in the United Kingdom, a series of other European jurisdictions, the United States of America, as well as certain Canadian territories and Australian states. Fundamentally, these crime victim compensation schemes are generally funded by tax-payer money and, in most cases, seek to provide easier, quicker and more cost-efficient access to compensation instead of instituting lengthy, expensive delictual claims as part of civil litigious proceedings.

Considering the pervasiveness and popularity of this method, the question was raised whether the South African law of delict may be developed by the enactment of a crime victim compensation scheme for certain categories of crime victims. Because such a legislative step would entail a large-scale reform project, it would be necessary to justify the basis upon which crime victims could be singled out from other groups of unfortunates for special treatment. As indicated in chapter 1, earlier research that relates to the establishment of a South African crime victim compensation scheme failed to provide a justification for its creation.

Against this background, this dissertation adopted the following approach. First, chapter three attempted to develop a theoretical framework for the future statutory development of the South African law of delict as far as the general issue of compensation is concerned.[11] This was done by conducting an investigation into the policy backgrounds of arguably the three most important statutes that have developed

[10] See also chapter 5.
[11] See chapter 3.

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the law of delict in the past: the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ("**COIDA**"), the Road Accident Fund Act 56 of 1996 ("**RAF Act**"), as amended by the Road Accident Fund Amendment Act 15 of 2005 ("**RAFA Act**") and the Consumer Protection Act 68 of 2008 ("**CPA**").

It was argued that these statutes share common considerations that have acted as justifiable motivation for the legislature to intervene. First, the need to combat the significant risk of harm arising from motor vehicle accidents, occupational injuries and diseases and defective manufactured products as well as the accompanying risk of receiving no compensation when the relevant risk of harm materialises. Secondly, it was argued that, in addition to alleviating these risks, these statutes were also justified by a related, but independent consideration, namely the promotion of the constitutional right to social security. A third shared consideration that was identified was the need to lessen the significant evidentiary burden provided by the common-law delictual requirement to prove fault (specifically negligence). In some contexts it is incredibly difficult, if not impossible, for an ordinary person to find the time, money, expertise and information that is necessary to prove that the defendant acted unreasonably.

Further general considerations that have been used to justify earlier statutory development of the law of delict in the past include the inordinate costs involved in pursuing compensation along the delictual route as well as the likely under-compensation which accompanies the latter, the convincing preference for statutory as opposed to judicial reform (especially when it comes to a profound development within the law), and the need to avoid arbitrary outcomes that may be the product of claiming compensation by means of a civil trial.

The second part of the approach was to establish whether the proposed statutory development of the law of delict could fit within the theoretical framework outlined in chapter 3.[12] It therefore fell to be determined if the considerations justifying earlier legislative reform could also provide a justifiable basis for the specific legislative project proposed in this dissertation, i.e. the establishment of a statutory compensation fund for crime victims.

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[12] See chapter 4.

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Ultimately, the dissertation concludes that, similar to earlier developments, there is a significant risk of falling victim to crime as well as an accompanying risk of receiving no compensation where such a risk materialises. In truth, this risk of falling victim to violent crime in South African appeared to be statistically higher than the risk of being harmed as a result of a motor vehicle accident. It may therefore be argued that the notion of risk of harm, and the accompanying risk of having to shoulder costs personally if that risk materialises, operates much more forcefully in the context of harm arising from crime.

The enactment of a statutory crime victim compensation scheme could also promote the constitutional right to social security in ways comparable to the COIDA, securing victims with compensation, allowing for quicker, easier and more cost-effective access to a legal remedy, and focusing on providing a more equitable compensation dispensation. Furthermore, it was argued that crime victims, like victims of motor vehicle accidents, occupational injuries and diseases and defective manufactured products are confronted with a similar evidentiary obstacle in claiming compensation if they institute common-law delictual claims. Developing a statutory compensation fund could contribute to alleviating this burden. It was suggested that crime victims who wish to claim compensation from the proposed fund should not be required to prove that the perpetrator acted negligently or had the requisite intention in the same way that it may be required in a criminal or civil trial. Instead, victims would be required to place sufficient evidence before the compensation authorities to prove that they suffered harm arising from an intentionally-committed violent crime.

The dissertation also adopted the view that, as was the case with motor vehicle accident victims, victims of occupational injuries and diseases and defective consumer product victims prior to the enactment of the RAF Act, the COIDA and the CPA, victims of harm arising from crime are currently required to incur excessive legal costs in pursuing a time-consuming litigious route to compensation – which may only be an option to crime victims if they can identify a solvent entity that may to some extent be said to have caused their harm arising from crime. If they cannot, it is likely that the institution of a common-law delictual claim may leave them under-compensated. High transaction costs and potential under-compensation may therefore also act as justifying considerations in the context of harm arising from crime.

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Furthermore, the judicial expansion of state delictual liability provided the possibility of arbitrary outcomes and uncertainty for future litigants (in certain cases), which may be side-stepped by instituting a statutory crime victim compensation scheme. Lastly, it was suggested that the establishment of a crime victim compensation fund is a fitting example of where it is preferable to develop the law through statutory processes as opposed to judicial reform.

Chapter 4 concluded by submitting that the proposed fund is therefore justifiable and, when compared to the solutions offered by the current developments within the common law of delict and existing legislation, a statutory compensation fund seems, in principle, to be a more desirable solution to improve the legal position of crime victims insofar as their compensation is concerned.

Whether the proposal to enact a statutory compensation scheme should ultimately be endorsed, would depend on the fund's practical application. Therefore, chapter 5 focused on several practical considerations which the South African legislature should take into account if it were indeed to enact such a scheme.[13] Generally speaking, it was proposed that the fund should aim to develop narrow eligibility criteria, placing its core focus on the compensation of victims of intentionally-caused violent crimes. Furthermore, relatives of deceased victims of crime and witnesses of such crimes should also be compensated. In addition, the fund should aim to compensate both patrimonial as well as non-patrimonial harm, provided that strategies be adopted to establish narrow eligibility criteria and limitations regarding the scope of its liability. One readily achievable method to limit the proposed fund's liability would be to cap the amount of compensation claimable from the fund.

It is further suggested that the crime victim's common-law claim against the perpetrator should not be abolished. It was also argued that the proposed fund should not require the victim to prove fault on the part of the perpetrator, but merely to provide evidence of an intentionally-caused violent crime. In other words, the victim should be required to place evidence in front of the compensation authority to allow them to conclude that, on a balance of probability, he suffered harm arising from an intentionally-caused

[13] See chapter 5.

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violent crime. Lastly, it was proposed that the fund's focus should be on securing a limited amount of compensation to victims of violent crimes caused intentionally.

6.3 Concluding remarks and final recommendations

6.3.1 The relationship between the common law of delict and statute

This dissertation has brought to the fore the relationship that exists between the common law of delict and legislation operative within the context of compensation. It has focused on the nature of the statutory development of the law of delict and made several recommendations in this context. This prompts the question why the relationship between the common law of delict and statutory law of delict has been so under-researched.

Throughout the process of conducting research in respect of the questions identified in chapter 1, it has become apparent that the relationship between the law of delict and statute – which forms the backdrop for this dissertation – has not received much attention from South African delict scholars in the past. This is perhaps similar to the position under English law, where, as Burrows has remarked, the relationship between common law and statute "has traditionally been woefully underexplored by commentators."[14]

It is suggested that some of the reasons for this state of affairs which Burrows highlights may also apply to the South African context. They include "the perception […] that legislation is comparatively 'unexciting'; the sense that it is an intruder on foundational judge-made law; […] concerns about the necessary separation of reasoning derived from the two sources of law; appreciation that the piecemeal and limited operation of many statutes make them ill-suited to inform debates concerning broader legal issues; and, finally, the view that legislation is often the poorly drafted outcome of political expediency, rather than reflective of legal principle."[15]

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[14] A Burrows "The relationship between common law and statute in the law of obligations" (2012) 128 *Law Quarterly Review* 232 232.
[15] E Bant "Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence" (2015) 38(1) *UNSW Law Journal* 367 369.

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This dissertation has aimed to make a contribution in this context by attempting to provide a general theoretical framework for potential statutory reform of the law of delict in the future and by emphasising the fact that specific instances of legislative development of the law of delict may be justified by having regard to such a framework.

6.3.2 The function and role of the South African law of delict

This dissertation has focused on evaluating the compensatory regime relating to crime victims, and investigating a potential alternative method to compensate crime victims, i.e. through the establishment of a crime victim compensation scheme. In the process, however, the role and function of the South African law of delict has received consideration. Although a detailed and thorough analysis of this issue falls outside the scope of this dissertation, the following remarks may be appropriate, especially with the view to making a contribution to future research projects within this area of the law.

Compared to the attention that it receives in other jurisdictions, the function and role of the South African law of delict is not a topic that is frequently discussed or an area that has received much attention from legal scholars. It appears as though most academics accept that its primary function is compensation.[16] Only one standard textbook expressly deals with the matter and concludes that, although it may not be the sole function of this branch of the law, it is the primary one.[17] In an authoritative judgment on the matter,[18] the Constitutional Court ("**CC**") seemingly confirmed this position and it has not been challenged since.[19]

As indicated elsewhere, this dissertation agrees with the view that the primary function of this branch of the law is compensation. The ultimate proposal, aimed at ensuring a more satisfactory compensatory response to crime victims than what is currently the

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[16] For overviews of the function of the law of delict, see JC Macintosh *Negligence in Delict* 1 ed (1926) 1; FP van den Heever *Aquilian Damages in South African Law* (1944) 3; RG McKerron *The Law of Delict: a Treatise on the Principles of Liability for Civil Wrongs in the Law of South Africa* 7 ed (1971); NJ van der Merwe & PJJ Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* 3 ed (1976) 1-3; J Neethling & JM Potgieter *Neethling-Visser-Potgieter Law of Delict* 7 ed (2015) 3-17; JC van der Walt & JR Midgley *Principles of Delict* 4 ed (2016); MM Loubser & JR Midgley (eds) *The Law of Delict in South Africa* 2 ed (2012) 8-11.

[17] Loubser & Midgley (eds) (2012) 8. See the discussion of the other functions at 8-11.

[18] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).

[19] The CC did, however, noted, *obiter,* that the law of delict also has a deterrent role to play: see *Loureiro v iMvula Quality Protection (Pty) Ltd* 2014 (3) SA (CC) 394 para 56.

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case under South African law, does not undermine this position. If anything, it further supports the focus on the effective compensation of harm, with the attention in this case being on crime victim compensation. The proposal, nonetheless, requires a fresh consideration of the following question: who should compensate harm?

Legal philosophers and delict/tort law scholars have identified two competing accounts or frameworks within which that question may be answered, namely corrective justice and distributive justice.[20]

Essentially, the corrective justice account of the law of delict proposes that someone who wrongfully and culpably injures another must make reparation to the injured party by paying the victim compensation.[21] In other words, a corrective justice explanation for the South African law of delict would maintain that, because it was the wrongdoer who disturbed the existing equilibrium by culpably and wrongfully causing the victim's harm, he bears a duty to restore the *status quo* and correct his wrong, which he may do by paying compensation to the wrongdoer.

Whereas corrective justice focuses on the injustice committed by one party and suffered by another, distributive justice, on the other hand, deals with the distribution of whatever is divisible among the members of a community.[22] Distributive justice divides a benefit or burden in accordance with some criterion that compares the relative merits of the participants. Further, where corrective justice links the victim and wrongdoer with each other in a strictly bipolar relationship, distributive justice deals

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[20] *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) footnote 86; A Fagan "The right to personal security" in E Reid & D Visser (eds) *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (2013) 130-156; C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 103-164; J Gardner "What is Tort Law For? Part 1. The Place of Corrective Justice" (2011) 30 *Law and Philosophy* 1-50; J Gardner "What is Tort Law for? Part 2. The Place of Distributive Justice" in J Oberdiek (ed) *The Philosophical Foundations of the Law of Torts* (2014) 335-354; A Beever *Rediscovering the Law of Negligence* (2009); T Keren-Paz *Torts, Egalitarianism and Distributive Justice* (2007). See also paragraph 1.1 in chapter 1, paragraph 2.1 in chapter 2, paragraph 3.1 in chapter 3, and paragraph 4.2.4.3 in chapter 4.

[21] E Weinrib *The Idea of Private Law* (1995); E Weinrib "Corrective Justice in a Nutshell" (2002) 52 *University of Toronto Law Journal* 349-356; G Fletcher "Fairness and Utility in Tort Theory" (1972) 85 *Harvard Law Review* 537. See also J Coleman "Corrective Justice And Wrongful Gain" (1982) 11 *Journal of Legal Studies* 421–40; J Coleman "Property, Wrongfulness, and the Duty to Compensate" (1987) 63 *Chicago-Kent Law Review*451-70; J Coleman "The Mixed Conception Of Corrective Justice" (1992a) 77 *Iowa Law Review* 427–44; J Coleman "The Practice of Corrective Justice" in DG Owen (ed) *Philosophical Foundations of Tort Law* (1995).

[22] See also paragraph 3.2.3.2 of chapter 3; E Weinrib *The University of Toronto Law Journal* 2002 354-355.

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with the sharing of a benefit or burden; it involves comparing the potential parties to the distribution in terms of a distributive criterion.[23]

A statutory compensation fund – which may be said to substitute the wrongdoer insofar as it assumes responsibility for the compensation of the victim's harm – may therefore be regarded as an instrument aimed at achieving distributive justice rather than corrective justice. A compensation fund does not require the person who culpably and wrongfully caused the victim's harm to correct his wrong, but is rather concerned with the allocation of resources (in this case money which is paid from a tax-funded pool) throughout society in accordance with an established set of criteria (i.e. the eligibility criteria applicable in respect of the fund).

If it is argued that the South African law of delict is grounded in corrective justice and that "the law cannot adequately give effect to the right to personal security unless it achieves corrective justice in respect of bodily injuries",[24] it would apparently follow that a statutory compensation fund of the type that is proposed in this dissertation does not constitute a part of the law of delict, and that compensation provided by such a fund to crime victims would not give sufficient protection to the victim's right to safety and security.

In fact, if it is to be accepted that the South African law of delict aims only to achieve corrective justice,[25] it would mean that only those instances where the wrongdoer who culpably caused the victim's harm and subsequently compensates the victim may be regarded as falling within the perimeters of the law of delict. Maintaining this view would imply that other cases, e.g. where a motor vehicle accident victim is awarded compensation by the Road Accident Fund, cannot be viewed as forming a part of the delictual framework.

In response to this argument, it may first be said that, [i]f corrective justice ever has a place in law, it is here",[26] i.e. in the law of delict.[27] The institution of common-law delictual claims strives to achieve individualised justice between two parties, holding

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[23] See also paragraph 3.2.3.2 of chapter 3; E Weinrib *The University of Toronto Law Journal* 2002 354-355.
[24] Fagan "The right to personal security" in *Private Law and Human Rights* 131.
[25] See 143-149.
[26] Smits *Introduction to Private Law* 45.
[27] See also Mbazira *Litigating Socio-Economic Rights in South Africa* 130.

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the wrongdoer personally responsible for his wrongdoing and may continue to fulfil this role in the future. The proposal contained in this dissertation should not be regarded as negating this function of this branch of the law.

However, if the law of delict is characterised as aiming solely to ensure that victims receive compensation from wrongdoers who, in the process, are said to correct wrongs, it may be regarded as being a particularly ineffective legal instrument, because it requires individual victims to resort to a slow, expensive justice system to get compensated.[28] Of course, that could only occur if the victim has the necessary means and time to institute proceedings. Where a victim is indeed in a position to do so, and decides to institute a delictual claim, the wrongdoer may, however, turn out to be the proverbial man of straw, leaving the wrong uncorrected and the harm where it has fallen. Compared to this alternative, private insurance, social security and statutory compensation are both cheaper and quicker and may therefore be preferred.[29] Therefore, while it may be “a powerful image”[30] that the law of delict is solely concerned with achieving corrective justice, in reality, this branch of the law “is swamped with policy questions both legislators and courts have to answer and that are necessarily informed by considerations of distributive justice as well.”[31]

Indeed, there are many potential ways to compensate a victim of harm other than through insisting that the wrongdoer should be made to pay compensation so as to achieve corrective justice. This realisation has convinced the South African legislature to introduce legislation aimed at compensating motor vehicle accident victims, victims of occupational injuries and diseases as well as those who suffer harm arising from defective consumer products. For the reasons outlined in this dissertation, the compensatory mechanisms created through statutory reform arguably give effect to the right to personal security in a way that is much more efficient when compared to the possibility of successfully instituting a common-law delictual claim for compensation.[32]

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[28] 45. See also the arguments raised in paragraph 3.3.1 in chapter 3.
[29] 45. See also the arguments raised in paragraph 3.3.1 in chapter 3.
[30] 55.
[31] 55.
[32] See paragraph 3.3.1 in chapter 3.

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As the CC pointed out in *H v Fetal Assessment Centre*,[33] the distinction between corrective and distributive justice has certainly not featured prominently in judgments of the courts. Neither has the contention that the South African law of delict solely focuses on promoting corrective justice. In line with the court's statement, it is argued that the South African law of delict seeks to compensate victims and does so through the institution of the common law of delict (which achieves corrective justice) as well as through statutes like the RAF Act and the COIDA (which may be seen as examples of distributive justice). Indeed, "distributive justice and public purposes do not *have* to be pursued by public law means. Private law can be, and sometimes *is*, used to pursue such purposes".[34]

In conclusion, it may be said that the South African law of delict's function remains to compensate victims of harm. In some cases this will give rise to the institution of common-law delictual claims which are instituted against the person who culpably and wrongfully caused the victim's harm. If successful, this will mean that the wrongdoer corrects his wrong by compensating the victim.

However, given the socio-economic realities of South Africa, it is very likely that a wrongdoer may be impecunious and unable to provide compensation. If this is the case, as it is in the context of harm arising from crime, the law should respond. An example of a potential response would be the statutory development of the law by way of the enactment of a statutory crime victim compensation scheme, which may be seen as representative of distributive justice.

It is suggested that the law of delict – which is focused on the compensation of harm – may be regarded as being able to achieve and promote both distributive and corrective justice. It would be important, however, to ensure that, where the legislature elects to develop the law through statutory reform, it should be justifiable. In this regard, this dissertation has set out a theoretical framework that may be useful for future legislative endeavours.

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[33] 2015 (2) SA 193 (CC).
[34] F du Bois "Private Law in the Age of Rights" in Reid and Visser (eds) *Private Law and Human Rights* 12-36 25.

Stellenbosch University https://scholar.sun.ac.za

BIBLIOGRAPHY

Books, Chapters in Books, Journal Articles and Dissertations

- Arvind TT & Steele J "Legislation and the Shape of Tort Law" in Arvind, TT and Steele, J (eds) *Tort Law and the Legislature* (2013), Hart Publishing.
- Arvind TT & Steele J *Tort Law and the Legislature* (2013), Hart Publishing.
- Atiyah P *Accidents, Compensation and the Law* 1 ed (1970), Cambridge University Press.
- Atiyah P *The Damages Lottery* (1996), Hart Publishing.
- Bartrip P "No-Fault Compensation on the Roads in Twentieth Century Britain" (2010) 69(2) *Cambridge Law Journal* 263.
- Bartrip P "Pedestrians, Motorists, and No-Fault Compensation for Road Accidents in 1930s Britain" (2010) *Journal of Legal History* 45.
- Boberg PQR *The law of delict. Volume one: Aquilian liability* (1989), Juta.
- Boonzaier "State Liability in South Africa: A More Direct Approach" (2013) 130 *South African Law Journal* 330.
- Brand FDJ "Influence of the Constitution on the Law of Delict" (2014) *Advocate* 42.
- Brodie D *Enterprise Liability and the Common Law* (2010), Cambridge University Press.
- Brooks J "The Case for Creating Compensation Programs to Aid Victims of Violent Crimes" (1976) 11(4) *Tulsa Law Journal* 487.
- Brown C "Deterrence in Tort and No-Fault: The New Zealand Experience" (1985) 73(3) *California Law Review* 976.
- Budlender D "The Workmen's Compensation Act" (1984) 9(4) *South African Labour Bulletin* 22.
- Burchell JM *Principles of Criminal Law* 5 ed (2016), Juta.
- Burchell JM *Principles of Criminal Law* 3 ed (2005), Juta.
- Burns P *Criminal Injuries Compensation* (1980), Butterworths.

Stellenbosch University https://scholar.sun.ac.za

- Cameron BJ "Compensation for Victims of Crime, The New Zealand Experiment" (1963) 12 *Journal of Public Law* 368.
- Cameron BJ "The New Zealand Criminal Compensation Act, 1963" (1964) 16(1) *The University of Toronto Law Journal* 177.
- Cane P "Accountability and the Public/Private Distinction" in N Bamforth & P Leyland (eds) *Public Law in a Multi-Layered Constitution* (2003), Oxford University Press.
- Cane P *Atiyah's Accidents, Compensation and the Law* 8 ed (2013), Cambridge University Press.
- Cane P *Atiyah's Accidents, Compensation and the Law* 7 ed (2006), Cambridge University Press.
- Cane P *The Anatomy of Tort Law* (1997), Hart Publishing.
- Cardi W, R Penfield & AH Yoon "Does Tort Law Deter?" (2011) *Wake Forest University Legal Studies Paper No. 1851383* 1.
- Chelius JR "Liability for Industrial Accidents: A Comparison of Negligence and Strict Liability Systems" (1976) 5 *Journal of Legal Studies* 293.
- Coleman J "Corrective Justice And Wrongful Gain" (1982) 11 *Journal of Legal Studies* 421.
- Coleman J "Property, Wrongfulness, and the Duty to Compensate" (1987) 63 *Chicago-Kent Law Review* 451.
- Coleman J "The Mixed Conception of Corrective Justice" (1992) 77 *Iowa Law Review* 427.
- Coleman J *Risks and Wrongs* (1992), Cambridge University Press.
- Coleman J "Tort Law and the Demands of Corrective Justice" (1992) 67 *Indiana Law Review* 349.
- Coleman J "The Practice of Corrective Justice" in DG Owen (ed), *Philosophical Foundations of Tort Law* (1995).
- Coleman J "Doing Away with Tort Law" (1995) 41 *Loyola of Los Angeles Law Review* 1148.
- Cooper W *Delictual Liability in Motor Law* 2 ed (1996), Juta
- Davis D "How many positivist legal philosophers can be made to dance on the head of a pin? A reply to Professor Fagan" (2012) 129 *South African Law Journal* 59.

Stellenbosch University https://scholar.sun.ac.za

- Deak F "Compulsory Liability Insurance under the British Road Traffic Acts Of 1930 And 1934" (1936) *Law and Contemporary Problems* 565.

- Deakin S, Johnston A & Markesinis B *Markesinis and Deakin's Tort Law* (2013), Oxford University Press.

- Deakin, S "Tort Law and Workmen's Compensation Legislation: Complementary or Competing Models?" in TT Arvind & J Steele (eds) *Tort Law and the Legislature* (2013), Hart Publishing.

- Dendy M "Agency and Representation" in WA Joubert & JA Faris (eds) *LAWSA 1* 3 ed (2014).

- Dereymaeker G "Making sense of the numbers: civil claims against the SAPS" (2015) 54 *South African Crime Quarterly* 29.

- Devaney M "A Comparative perspective of Personal Injuries Compensation Schemes: Lessons for Tort Reform" (2009) *EJCL* 1.

- De Villiers M *Roman and Roman-Dutch Law of Injuries* (1899), Juta.

- D'Oliviera *State liability for the wrongful exercise of discretionary powers*. Unpublished LLD dissertation. University of South Africa (1976).

- Du Bois F "Private Law in the Age of Rights" in Reid and Visser (eds) *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (2012), UCT Press.

- Du Bois F "State Liability in South Africa: A Constitutional Remix" (2010) 25 *Tulane European & Civil Law Forum* 139.

- Duff P "The Measure of Criminal Injuries Compensation: Political Pragmatism or Dog's Dinner?" (1998) 18(1) *Oxford Journal of Legal Studies* 105.

- Dugard J & K Drage "To Whom Do The People Take Their Issues?" *Justice and Development Working Paper Series* (2013) 2.

- Elliot DW & H Street *Road Accidents* (1968), Allen Lane.

- Fagan A "Reconsidering Carmichele" (2008) 124 *South African Law Journal* 659.

- Fagan A "The secondary role of the spirit, purport and objects of the Bill of Rights in the common law's development' (2010) 127 *South African Law Journal* 611.

- Fagan A "The Right to Personal Security" in E Reid and D Visser (eds) *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (2012), UCT Press.

- Fagan A "The Confusions of K" (2009) 126 *South African Law Journal* 156.

Stellenbosch University https://scholar.sun.ac.za

- Fairgrieve D (ed) *Product Liability in Comparative Perspective* (2005), Cambridge University Press
- Faure M (ed) *Tort Law and Economics* (2009), Edgar Elgar Publishing.
- Fleming J "Is There a Future for Tort?" (1984) 44 *Louisiana Law Review* 1193.
- Fleming J "The Role of Negligence in Modern Tort Law" (1967) 52 *Virginia Law Review* 815.
- Fletcher GP "Fairness and Utility in Tort Theory" (1972) 85 *Harvard Law Review* 537.
- Franklin MA "Replacing the Negligence Lottery: Compensation and Selective Reimbursement" (1967) 53 *Virginia Law Review* 774.
- Fry M "Justice for Victims" (1959) 8 *Journal of Public Law* 191.
- Fry M "Justice for Victims" *The Observer* (7 July 1957).
- Gardner J "Some Rule-of-Law Anxieties About Strict Liability in Private Law" in LM Austin & D Klimchuk (eds) *Private Law and the Rule of Law* (2014), Oxford University Press.
- Gardner J "Torts and Other Wrongs" (2011) 39 *Florida State University Law Review* 43.
- Gardner J "What is Tort Law For? Part 1. The Place of Corrective Justice" (2011) 30 *Law and Philosophy* 1.
- Gardner J "What is Tort Law for? Part 2. The Place of Distributive Justice" in J Oberdiek (ed) *The Philosophical Foundations of the Law of Torts* (2014), Oxford University Press.
- Glenn HP "The Aims of Comparative Law" in J Smits (ed.) *Elgar Encyclopedia of Comparative Law* 2 ed (2012), Edward Elgar Publishing.
- Giliker P *Vicarious Liability in Tort* (2010), Cambridge University Press.
- Goldberg AJ "Equality and Government" (1964) 39 *New York University Law Review* 205.
- Goodey J *Compensating Victims of Violent Crime in the European Union* (2003).
- Goudkamp J "Reforming English Tort Law: Lessons from Australia" in E Quill & RJ Friel (eds) *Damages and Compensation Culture: Comparative Perspectives* (2016), Bloomsbury.

Stellenbosch University https://scholar.sun.ac.za

- Greenbaum B *Compensation for Victims of Sexual Violence in South Africa: A Human Rights Approach to Remedial Criminal Compensation Provisions* Unpublished Doctorate in Criminal Justice. University of Cape Town (2013).
- Greer D (ed) *Compensating Crime Victims: a European Survey* (1996), Iuscrim.
- Grote R "Product Liability under German and European Law" in M Wendler, B Buecker & B Tremml (eds) *Key Aspect of German Business Law* (2006) 111.
- Hedley S "Tort and Personal Injuries, 1850 to the Present" in TT Arvind & J Steele (eds) *Tort Law and the Legislature* (2013) 235.
- Hodges C, S Vogenauer & M Tulibacka "Costs and Funding in Civil Litigation: A Comparative Study" (2009) *University of Oxford Legal Research Paper Series* (55/2009) 3.
- Holness D "Recent Developments in the Provision of Pro Bono Legal Services by Attorneys in South Africa" (2013) 16(4) *Potchefstroom Electronic Law Journal* 129.
- Hubbard FP "The Nature and Impact of the 'Tort Reform' Movement" (2006) 35 *Hofstra Law Review* 437.
- Hutchison D "Aquilian Liability II (Twentieth Century)‟ in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996), Oxford University Press.
- Hutchison D & CJ Pretorius (eds) *The Law of Contract in South Africa* 2 ed (2012), Oxford University Press.
- Ison T *The Forensic Lottery* (1967), Staples Press.
- Jackson RM "Reform of the Costs Regime" (2011) *Advocate* 37.
- Joubert WA *Grondslae van die Persoonlikheidsreg* (1953).
- Joubert JJ (ed) *The Criminal Procedure Handbook* 12 ed (2017), Juta.
- Howells G "Product Liability" in J Smits (ed.) *Elgar Encyclopedia of Comparative Law* (2006), Edgar Elgar Publishing.
- Keren-Paz T *Torts, Egalitarianism and Distributive Justice* (2007), Ashgate Publishing Ltd.
- Klaaren J "The Cost of Justice" (2014) *Briefing Paper for Public Positions Theme Event, 24 March 2014 WiSER, History Workshop & Wits Political Studies Department* 1.
- Kleeberg JM "From Strict Liability to Workers' Compensation: The Prussian Railroad Law, the German Liability Act, and the Introduction of Bismarck's

Stellenbosch University https://scholar.sun.ac.za

Accident Insurance in Germany, 1838-1884" (2003) *Journal for International Law and Politics* 57.

- Klopper HB *Law of Third Party Compensation* (2000), LexisNexis.
- Klopper HB *Road Accident Fund: the Practitioner's Guide* (2009), LexisNexis.
- Kruger A *Organised Crime and Proceeds of Crime Law in South Africa* 2 ed (2013), LexisNexis.
- Lewis R "Employer's Liability and Workers' Compensation: England and Wales" in K Oliphant & G Wagner (eds) *Employer's Liability and Workers' Compensation* (2012), De Gruyter.
- Linden AM *The Report of the Osgoode Hall Study on Compensation for Victims of Crime* (1968), Osgoode Hall Law School.
- Linscott JA "A critical analysis of the majority judgment in *F v Minister of Safety and Security* 2012 (1) SA 536 (CC)" (2014) 17(6) *Potchefstroom Electronic Journal* 2916.
- Loubser MM & E Reid *Product Liability* (2012), Juta.
- Loubser MM & JR Midgley (eds) *Law of delict in South Africa* (2012), Oxford University Press.
- Loubser MM & T Gidron "State Liability: Israel and South Africa" (2011) 57 *Loyola Law Review* 727.
- Loubser MM *Inleiding tot MMF-Wetgewing* (1993), Digma.
- Loubser MM "Strict Liability" in E Reid and D Visser (eds) *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (2012), UCT Press.
- Lytton TD, RL Rabin & PH Schuck "Tort as litigation lottery: a misconceived lottery" (2010) 52 *Boston College Review* 267.
- Macintosh JC *Negligence in Delict* (1926), Juta.
- MacQueen H "Delict, contract and the Bill of Rights: a perspective from the United Kingdom" (2004) 121 *South African Law Journal* 359.
- Markesinis B & Unberath H *The German Law of Torts* 4 ed (2002), Hart Publishing.
- McEwin RI "No-fault compensation schemes" in *Encyclopedia of Law and Economics* (2000), Edward Elgar Publishing.
- McGillis D & P Smith *Compensating Victims of Crime: An Analysis of American Programs* (1983).

Stellenbosch University https://scholar.sun.ac.za

- McKerron RG *The Law of Delict: a Treatise on the Principles of Liability for Civil Wrongs in the Law of South Africa* (1971), Juta.

- McKerron RG *The Apportionment of Damages Act* (1956), Juta.

- McQuillan LJ & H Abramyan, "The Tort Law Tax" (2007) *Wall Street Journal* 1 <http://www.wsj.com/articles/SB117496524456750056> (accessed on 2 February 2015).

- Merkin R & S Dzibion "Tort Law and Compulsory Insurance" in TT Arvind & J Steele (eds) *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (2013), Hart Publishing.

- Miers D "Offender and state compensation for victims of crime: Two decades of development and change" (2014) 20(1) *International Review of Victimology* 145.

- Miers D "Compensating deserving victims of violent crime: the Criminal Injuries Compensation Scheme 2012" (2014) 34 *Legal Studies* 242.

- Midgley JR & JC van der Walt *Principles of Delict* 4 ed (2016), LexisNexis Butterworths.

- Midgley JR & Leinius B "The impact of the constitution on the law of delict: *Carmichele v Minister of Safety and Security*" (2002) 119 *South African Law Journal* 17.

- Moore MJ & WK Viscusi *Compensation Mechanisms For Job Risks* (1990), Princeton University Press.

- Myburgh P, N Smit & D van der Nest "Social security aspects of accident compensation: COIDA and RAF as examples" *Law, Democracy and Development* (2011) 43.

- Neethling J & JM Potgieter "Deliktuele staatsaanspreeklikheid weens polisieverkragting" 2012 (9) *Litnet Akademies* 73.

- Neethling J & JM Potgieter *Neethling-Potgieter-Visser The Law of Delict* 7 ed (2015), LexisNexis Butterworths.

- Neethling J "Delictual Protection of the Right to Bodily Integrity and Security of the Person Against Omissions by the State" (2005) 122 *South African Law Journal* 572.

- Neethling J "Die *Carmichele*-sage kom tot 'n gelukkige einde" (2005) 2 *TSAR* 402.

- Neethling J "Die Hoogste Hof van Appèl Bevestig die Uitdyende Verantwoordelikheid van die Staat om die Reg op die Fisies-Psigiese Integriteit in die Lig van die Grondwet te Beskerm" (2003) 4 *TSAR* 783.

Stellenbosch University https://scholar.sun.ac.za

- Neethling J "Liability of the state for rape by a policeman: The saga takes a new direction" (2011) *Obiter* 437.

- Neethling J "South Africa" in K Oliphant (ed) *The Liability of Public Authorities in Comparative Perspective* (2016), Intersentia.

- Neethling J "State (public authority) liability *ex delicto* (1)" (2012) 75 *THRHR* 622.

- Neyers JW "A Theory of Vicarious Liability" (2005) 43 *Alberta Law Review* 1.

- Oberdiek J (ed) *Philosophical Foundations of the Law of Torts* (2014), Oxford University Press.

- Okpaluba C & Osode P *Government Liability: South Africa and the Commonwealth* (2012), Juta.

- Oliphant K & BC Steininger *European Tort Law: Basic Texts* (2011), De Gruyter.

- Olivier MP "Social Security: Core Elements" in WA Joubert & JA Faris (eds) LAWSA 13(3) 2 ed (2007).

- Olivier MP "Social Security: Framework" in WA Joubert and JA Faris (eds) LAWSA *13(2)* 2 ed (2007).

- Olivier MP, MC Okpaluba, N Smit & M Thompson (eds) *Social Security Law: General Principles* (1999), Butterworths.

- Olivier MP, JF Khoza, L Jansen van Rensburg & E Klinck "Constitutional Issues" in MP Oliver, N Smit & E Kalula (eds) *Social Security: A Legal Analysis* (2003) 49.

- Olman MM, JCD van de Weerd & M Zoethout "Dood door schuld en het Schadefonds Geweldsmisdrijven" (2016) *Verkeersrecht* 449.

- Ormerod D, JC Smith & B Hogan *Smith and Hogan's Criminal Law* 14 ed (2015), Oxford University Press.

- Osidele OA *An Analysis of Patterns and Trends of Road Traffic Injuries and Fatalities in Vhembe District, Limpopo Province, South Africa* Unpublished LLM dissertation. University of Venda (2016)

- Owen DG "Deterrence and Desert in Tort: A Comment" (1985) 73 *California Law Review* 556.

- Owen DG "Philosophical Foundations of Fault in Tort Law," in DG Owen (ed) *Philosophical Foundations of Tort Law* (1995), Oxford University Press.

- Owen DG (ed) *Philosophical Foundations of Tort Law* (1995), Oxford University Press.

Stellenbosch University https://scholar.sun.ac.za

- Palmer G "New Zealand's Accident Compensation: 20 Years On" (1994) 44 *University of Toronto Law Journal* 223.

- Posner R "A Theory of Negligence" (1972) 29 *Journal of Legal Studies* 29.

- Potgieter JM, L Steynberg & TB Floyd *The Law of Damages* 3 ed (2012), Juta.

- Price A "State Liability and Accountability" (2015) *Acta Juridica* 313-335.

- Price A "The Contract/Delict Interface in the Constitutional Court" (2014) 25 *Stellenbosch Law Review* 501-510.

- Price A *The Influence of Human Rights on State Negligence Liability In England and South Africa* Unpublished PhD thesis. University of Cambridge (2012).

- Reimann M "Product Liability" in M Bussani & AJ Sebok (eds) *Comparative Tort Law: Global Perspectives* (2015), Edward Elgar Publishing.

- Reimann M "Liability for Defective Products at the Beginning of the Twenty-First Century: Emergency of a Worldwide Standard?" (2003) 51(4) *American Journal of Comparative Law* 751.

- Schadbach K "The Benefits of Comparative Law: A Continental European View" (1998) 16 *Boston University International Law Journal* 331.

- Schuck P "Tort Reform, Kiwi-Style" (2008) 27 *Yale Law and Policy Review* 187.

- Schwarz J "How Governments Pay: Lawsuits, Budgets, and Police Reform" (2016) 63 *University of California Law Review* 1144.

- Scott J "Die Hoogste Hof van Appèl Smoor Heilsame Regsontwikkeling" (2011) 4 *TSAR* 773.

- Scott RE "Compensation for Victims of Violent Crimes: An Analysis" (1967) *William & Mary Law Review* 277.

- Scott WE *Middellike Aanspreeklikheid in die Suid-Afrikaanse Reg* (1983), Butterworth.

- Shapiro S "Overcoming Under-Compensation and Under-Deterrence in Intentional Tort Cases: Are Statutory Multiple Damages the Best Remedy?" (2011) 62 (2) *Mercer Law Review* 449.

- Singh AM "Changing the soul of the nation? South Africa's National Crime Prevention Strategy" *The British Criminology Conference: Selected Proceedings* 1997.

- Spencer JR "Rylands & Fletcher: a Chapter of Accidents in the History of Law and Motoring" (1983) 42(1) *Cambridge Law Journal* 65.

- Stapleton J *Product Liability* (1994), Cambridge University Press.

Stellenbosch University https://scholar.sun.ac.za

- Stapleton J *Disease and the Compensation Debate* (1986), Oxford University Press.
- Stein MA "Victorian Tort Liability for Workplace Injuries" (2008) *University of Illinois Law Review* 935.
- Sugarman S "Doing Away with Tort Law" (1985) 73 *California Law Review* 555.
- Sugarman S "Serious Tort Law Reform" (1987) 24 *San Diego Law Review* 795.
- Suzman A, G Gordes & MW Hodes *The Law of Compulsory Motor Vehicle Insurance in South Africa* 3 ed (1982), Juta.
- Taschner HC "Product liability: basic problems in a comparative law context" in D Fairgrieve (ed) *Product Liability in Comparative Perspective* (2005), Cambridge University Press.
- Todd S "Forty Years of Accident Compensation in New Zealand" (2011) 28(2) *Thomas M Cooley Law Review* 189.
- Van der Merwe NJ & Olivier PJJ *Die Onregmatige Daad in die Suid-Afrikaanse Reg* 3 ed (1976), Van der Walt Publishing.
- Van den Heever FP *Aquilian Damages in the South African Law* (1944), Juta.
- Van der Nest D "Motor vehicle accidents" in MP Olivier, N Smit & ER Kalula (eds) *Social Security: A Legal Analysis* (2003), LexisNexis Butterworths.
- Van der Walt AJ *Property and the Constitution* (2012) 92.
- Van Eeden E *Consumer Protection Law in South Africa* (2013).
- Van Gerven W, Larouche P & Lever J (eds) C*ases, materials and text on national, supranational and international tort law* (2000), Hart Publishing.
- Van Rensburg ADJ, JG Lotz & T van Rhijn "Contract" in WA Joubert & JA Feris (eds) *LAWSA 9* 3 ed (2014), Butterworths.
- Verloren van Themaat W *Staatsreg* (1968), Butterworths.
- Visser D "Delict" in F du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007), Juta.
- Von Bonde JC *Redress for Victims of Crime in South Africa: A comparison with Selected Commonwealth Jurisdictions* Unpublished LLD thesis. Nelson Mandela Metropolitan University (2007).
- Van Hoecke M "Methodology of Comparative Legal Research" (2015) *Law and Method* 1.

Stellenbosch University https://scholar.sun.ac.za

- Wallis M "Reform of the Costs Regime – A South African Perspective" (2011) *Advocate* 33.
- Wagener S *An assessment of the normative bases for the doctrine of vicarious liability in South African law, and the implications for its application* Unpublished PhD thesis. University of Cape Town (2011).
- Wagener S "*K v Minister of Safety and Security* and the Increasing Blurred Line between Personal and Vicarious Liability" (2008) 125 *South African Law Journal* 673.
- Weinrib E *The Idea of Private Law* (1995), Oxford University Press.
- Weinrib E "Corrective Justice in a Nutshell" (2002) 52 *The University of Toronto Law Journal* 349.
- Weir T *Tort law* (2002), Oxford University Press.
- Wicke H "Vicarious liability for agents and the distinction between employees, agents and independent contractors" (1998) 61 *THRHR* 609.
- Wicke H *Vicarious Liability in Modern South African Law* unpublished LLM thesis. University of Stellenbosch (1997).
- Zimmermann R *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990), Juta.
- Zimmermann R & Visser D (eds) *Southern Cross – Civil Law and Common Law in South Africa* (1996), Juta.

Cases

South Africa

- *AA Mutual Insurance Association Ltd v Biddulph* 1976 (1) SA 725 (AD).
- *Absa Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* 2001 (1) SA 372 (SCA).
- *Aetna Insurance Co v Minister of Justice* 1960 (3) SA 273 (A).
- *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (A).
- *African National Congress v Democratic Alliance and Another* 2014 (3) SA 608 (GJ).
- *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A).
- *Bridgman NO v Witzenberg Municipality* 2017 (3) SA 435 (WCC).
- *Brooks v Minister of Safety and Security* 2009 (2) SA 94 (SCA).

Stellenbosch University https://scholar.sun.ac.za

- *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA).
- *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA).
- *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC).
- *Carmichele v Minister of Safety and Security* 2001 (1) SA 489 (SCA).
- *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 (2) SA 520 (W).
- *Columbus Joint Venture v ABSA Bank Ltd* 2000 (2) SA 491 (W) 512.
- *Commercial Union Assurance Company of South Africa Ltd v Clarke* 1972 (3) SA 508 (AD).
- *Costa da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy* 2003 (4) SA 34 (SCA).
- *Country Cloud Trading CC v MEC, Department Of Infrastructure Development* 2015 (1) SA 1 (CC).
- *Dendy v University of the Witwatersrand and Others* 2005 (5) SA 357 (W).
- *Dikoko v Mokhatla* 2006 (6) SA 235 (CC).
- *EFF v Speaker of the National Assembly; DA v Speaker of the National Assembly* 2016 (5) BCLR 618 (CC).
- *Enslin v Nhlapo* 2008 (5) SA 146 (SCA).
- *Eskom Holdings Ltd v Hendricks* 2005 (5) SA 503 (SCA).
- *Ess Kay Electronics (Pty) Ltd v First National Bank of Southern Africa Ltd* 1998 (4) SA 1102 (W).
- *F v Minister of Safety and Security* [2011] ZACC 37.
- *F v Minister of Safety and Security* 2012 (1) SA 536 (CC).
- *Feldman (Pty) Ltd v Mall* 1945 AD 733.
- *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).
- *Fourie v Road Accident Fund* 2014 (2) SA 88 (GNP).
- *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA).
- *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA).

Stellenbosch University https://scholar.sun.ac.za

- *Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security* 2012 (2) SA 137 (SCA).
- *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 (4) SA 901 (N).
- *Grütter v Lombard* 2007 (4) SA 89 (SCA).
- *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC).
- *Harrington NO v Transnet Ltd* 2010 (2) SA 479 (SCA).
- *Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 (1) SA 827 (SCA).
- *Healy v Compensation Commissioner* 2010 (2) SA 470 (E).
- *Hirsch Appliance Specialists v Shield Security Natal (Pty) Ltd* 1992 (3) SA 643 (D).
- *Jacobs and Another v Transnet Ltd t/a Metrorail and Another* 2015 (1) SA 139 (SCA).
- *Jooste v Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC).
- *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA).
- *K v Minister of Safety and Security* 2005 (3) SA 179 (SCA).
- *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).
- *Kay Electronics Pte Ltd v First National Bank of Southern Africa Ltd* 1998 (4) SA 1102 (W).
- *Khumalo v Holomisa* 2002 (5) SA 401 (CC).
- *Kruger v Coetzee* 1966 (2) SA 428 (A).
- *Law Society of South Africa v Minister for Transport and Another* 2011 (1) SA 400 (CC).
- *Lee v Minister of Correctional Services* 2011 (6) SA 564 (WCC).
- *Lee* v *Minister for Correctional Services* 2013 (2) SA 144 (CC).
- *Leon Bekaert Southern Africa (Pty) Ltd v Rauties Transport (Pty) Ltd* 1984 (1) SA 814 (W).
- *Le Roux v Dey; Freedom of Expression Institute and Another Amici Curiae* 2011 (3) SA 274 (CC).

Stellenbosch University https://scholar.sun.ac.za

- *Longueira v Securitas of South Africa (Pty) Ltd* 1998 (4) SA 258 (W).
- *Loureiro v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC).
- *Mankayi v Anglogold Ashanti Ltd* 2011 (3) SA 237 (CC).
- *Mankayi v Anglogold Ashanti Ltd* 2010 (5) SA 137 (SCA).
- *Mashongwa v Passenger Rail Agency of South Africa* (GNP case NO 29906/2011).
- *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC).
- *MEC for Education, Western Cape Province v Strauss* 1008 (2) SA 366 (SCA).
- *MEC for Health v DN* 2015 (1) SA 182 (SCA).
- *Minister of Defence v Von Benecke* 2013 (2) SA 361 (SCA).
- *Minister of Justice and Constitutional Development v X* 2015 (1) SA 25 (SCA).
- *Minister of Police v Rabie* 1986 (1) SA 117 (A).
- *Minister of Safety and Security v Booysen* (35/2016) [2016] ZASCA 201.
- *Minister of Safety & Security v Carmichele* 2004 (3) SA 305 (SCA).
- *Minister of Safety and Security v F* 2011 (3) SA 487 (SCA).
- *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA).
- *Minister of Correctional Services v Lee* 2012 (3) SA 617 (SCA).
- *Minister of Safety and Security v Luiters* 2007 (2) SA 106 (CC).
- *Minister of Safety and Security v Madyibi* 2010 (2) SA 356 (SCA).
- *Minister of Safety and Security v Van der Merwe* 2011 (2) SACR 301 (CC).
- *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA).
- *Minister of Safety and Security v Venter* 2011 (2) SACR 67 (SCA).
- *Minister van Polisie v Ewels* 1975 (3) SA 590 (A).
- *Minister van Veiligheid en Sekuriteit v Japmoco BK h/a Status Motors* 2002 (5) SA 649 (SCA).
- *Minister van Veiligheid en Sekuriteit v Phoebus Apollo Aviation BK* 2002 (5) SA 475 (SCA).

Stellenbosch University https://scholar.sun.ac.za

- *Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 (6) SA 512.
- *Mkize v Martens* 1914 AD 382.
- *Mohunram v NDPP* 2007 (4) SA 222 (CC).
- *Molefe v Compensation Commissioner and Another* (25579/05) [2007] ZAGPHC.
- *NDPP v 37 Gillespie Street Durban (Pty) Ltd.*
- *NDPP v Bosch* 2009 (2) SACR 547 (KZP).
- *NDPP v Cole* 2005 (2) SACR 553 (W).
- *NDPP v Gardener* 2011 (1) SACR 612 (SCA).
- *NDPP v Geyser* [2008] ZASCA 15.
- *NDPP v Gouws* 2005 (2) SACR 193 (SE).
- *NDPP: In re Appeal* 2005 (2) SACR 610 (N).
- *NDPP v Mniki* [2010] ZAECPEHC 39 (29 June 2010).
- *NDPP v Parker* 2006 (1) SACR 284 (SCA).
- *NDPP v Ramlutchman* 2017 (1) SACR 343 (SCA).
- *NDPP v Ro Cook Properties (Pty) Ltd.*
- *NDPP v Salie* 2015 (1) 121 (WCC).
- *NDPP v Seevnarayan* 2004 (2) SACR 208 (SCA).
- *NDPP v Seleoane* [2003] 3 All SA 102 (NC).
- *NDPP v Swart* 2005 (2) SACR 186 (SE).
- *NDPP v Van der Merwe* 2011 (2) SACR 188 (WCC).
- *NDPP v Van Staden* 2007 (1) SACR 338 (SCA).
- *Ntsoko v NDPP* 2016 (1) SACR 103 (GP).
- *Ngubane v South African Transport Services* 1991 (1) SA 756 (A).
- *Nkisimane v Santam Insurance Co Ltd* 1978 (2) SA 430 (AD).
- *NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)* 2007 (5) SA 250 (CC).

Stellenbosch University https://scholar.sun.ac.za

- *Ntombenkosi Hlomza v Minister of Safety and Security* 2011 JDR 0030 (ECM).
- *Nyathi v The MEC, Department of Health, Gauteng* 2008 (5) SA 94 (CC).
- *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA).
- *Oppelt v Department of Health, Western Cape* 2016 (1) SA 325 (CC)
- *Op't Hof v SA Fire & Accident Insurance Co Ltd* 1949 (4) SA 741 (W).
- *Passenger Rail Agency of South Africa v Mashongwa* (2014) ZASCA 202.
- *PE v Ikwezi Municipality* 2016 (5) SA 114 (ECG).
- *Phoebus Apollo Aviation CC v Minister of Safety and Security* 2003 (2) SA 34 (CC).
- *Pithey v Road Accident Fund* 2014 (4) SA 112 (SCA).
- *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* 2003 (6) SA 13 (SCA).
- *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC).
- *Rose's Car Hire (Pty) Ltd v Grant* 1948 (2) SA 466 (A).
- *S v Dlamini* 2012 (2) SACR 1 (SCA).
- *S v Seedat* 2017 (1) SACR 141 (SCA).
- *S v Shaik* 2008 (2) SACR 165 (CC).
- *S v SMM* 2013 (2) SACR 292 (SCA).
- *Sanan v Eskom Holdings Ltd* 2010 (6) SA 638 (GSJ).
- *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 (1) SA 827 (SCA).
- *Shabalala v Metrorail* 2008 (3) SA 142 (SCA).
- *Singh v NDPP* 2007 (2) SACR 326 (SCA).
- *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA).
- *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC).
- *Stewart and Another v Botha and Another* 2008 (6) SA 310 (SCA).

Stellenbosch University https://scholar.sun.ac.za

- *Seymour v Minister of Safety and Security* 2006 (5) SA 495 (W).
- *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA).
- *Thomas v Minister of Defence and Military Veterans* 2015 (1) 253 (SCA)
- *Terblanche v Minister of Safety and Security* 2016 (2) SA 109 (SCA)
- *Van der Burg v NDPP* 2012 (2) SACR 331 (CC).
- *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA).
- *Van Zijl v Hoogenhout* 2005 (2) SA 93 (SCA); *Truter v Deysel* 2006 (4) SA 168 (SCA).
- *Victoria Falls Power Co. Ltd v Lloyd No.* 1908 TS.
- *Viv's Tippers (Edms) Bpk v Pha Phama Staff Services (Edms) Bpk t/a Pha Phama Security* (2010) (4) SA 455 (SCA).
- *Wagener v Pharmacare Ltd and Cuttings v Pharmacare Ltd* 2003 (4) SA 285 (SCA).
- *Waring & Gillow v Sherborne* 1904 TS 340.
- *Webster v Santam Insurance Co Ltd* 1977 (2) SA 874 (AD).
- *Workmen's Compensation Commissioner v Norwich Union Fire Insurance Society Ltd* 1953 (2) SA 546 (AD).

<u>England</u>

- *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264.
- *Donoghue v Stevenson* [1932] AC 562.
- *Hill v Chief Constable of West Yorkshire* [1989] AC 53.
- *Lister v Hesley Hall Limited* [2002] 1 AC 215.
- *R v Criminal Injuries Compensation Appeals Panel, ex parte August and Brown* [2001] 2 All ER 874.
- *R v Criminal Injuries Compensation Board, ex p Clowes* [1977] 3 All ER 854.
- *R (on the application of Jones) v First-tier Tribunal* [2013] 2 All ER 625; [2013] UKSC.

Stellenbosch University https://scholar.sun.ac.za

- *R v Criminal Injuries Compensation Board, ex p Warner* [1985] 2 All ER 1069.
- *R v Criminal Injuries Compensation Appeals Panel, ex p August, R v Criminal Injuries Compensation Appeals Panel, ex p Brown* [2001] 2 All ER 874, [2001] QB 774.
- *Rylands v Fletcher* [1868] UKHL 1.
- *Wing v London General Omnibus Company* [1909] 2 KB 652.

Germany

- BGH VIZR 36/55, 'Der Betrieb' 1956.

United States of America

- *Escola v Coca-Cola Bottling Co of Fresno* 24 Cal. 2d 453, 462 (1944).
- *Greenman v Yuba Products* 59 Cal 2d 57.
- *Henningsen v Bloomfield Motors Inc.* 32 N.J. 358.

Legislation

South Africa

- Apportionment of Damages Act 34 of 1956.
- Arms and Ammunition Act 75 of 1969.
- Cape Employer's Liability Act 35 of 1886.
- Compensation for Occupational Injuries and Diseases Act 130 of 1993.
- Constitution of the Republic of South Africa, 1996.
- Consumer Protection Act 68 of 2008.
- Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
- Criminal Procedure Act 51 of 1977.

Stellenbosch University https://scholar.sun.ac.za

- Defence Act 44 of 1957.
- Domestic Violence Act 116 of 1998.
- Government Gazette 36111 of 30 January 2013.
- Miners' Phthisis Act of 1912.
- Miners' Phthisis Act of 1916.
- Miners' Phthisis Acts Consolidation Act of 1925.
- Miners' Phthisis Allowances Act of 1911.
- Miners' Phthisis Amendment Act of 1914.
- Motor Vehicle Insurance Act 29 of 1942.
- Motor Vehicle Accident Act 84 of 1986.
- Multilateral Motor Vehicle Accidents Fund Act 93 of 1989.
- Occupational Health and Safety Act 85 of 1993.
- Occupational Diseases in Mines and Works Act 78 of 1973.
- Pneumoconiosis Act 57 of 1956.
- Pneumoconiosis Compensation Act of 1962.
- Prevention of Organised Crime Act 121 of 1998.
- Road Accident Fund Act 56 of 1996.
- Road Accident Amendment Act 15 of 2005.
- Road Accident Benefit Scheme Bill of 2014.
- Rules Board for Courts of Law Act 107 of 1985.
- Schools Act 84 of 1996.
- Silicosis Act 47 of 1946.
- South African Police Service Act 68 of 1995.
- South African Transport Services Act 9 of 1989.
- State Liability Act 20 of 1957.
- Workmen’s Compensation Act 40 of 1905 (Cape of Good Hope).

Stellenbosch University https://scholar.sun.ac.za

- Workmen's Compensation Act 36 of 1907.
- Workmen's Compensation Act 25 of 1914.
- Workmen's Compensation Act 59 of 1934.
- Workmen's Compensation Act 30 of 1941.
- Workmen's Compensation (Industrial Diseases) Act 13 of 1917.

New Zealand

- Accident Compensation Act of 1972.
- Accident Compensation Act of 2001.
- Criminal Injuries Compensation Act of 1963.
- Injury, Prevention, Rehabilitation and Compensation Act of 2001.
- Sentencing Act of 2002.

England

- Consumer Protection Act of 1987.
- Civil Partnership Act of 2004.
- Criminal Injuries Compensation Act of 1995.
- Criminal Injuries Compensation Scheme of 2012.
- Fatal Accidents Act of 1976.
- Products Liability Act of 1989.
- Road Traffic Act of 1930.
- Road Traffic Act 1988.
- Road Traffic (Compensation for Accidents) Bill of 1934.
- Sale of Goods Act of 1979.
- White Paper, "Compensation of Victims of Crimes of Violence" (1964) (cmnd 2323).

Stellenbosch University https://scholar.sun.ac.za

The Netherlands

- Criminal Injuries Compensation Fund Act of 1975.
- Dutch Criminal Code.
- Dutch Road Traffic Act of 1994.

The United States of America

- Second Restatement of Torts of 1965.

Reports

- AfriMAP and the Open Society Foundation for South Africa *South Africa: Justice Sector and the Rule of Law* (2005).
- Arrive Alive *Motor Vehicle Accident Crash Statistics 1930 – 2000* (2000).
- Canadian Resource Center for Victims of Crime "Financial Assistance" available at <https://crcvc.ca/for-victims/financial-assistance/> (accessed on 28 June 2017).
- Civilian Secretariat for Police *White Paper on Safety and Security* (2016).
- Criminal Injuries Compensation Authority *UK 2012 Scheme Guide* (2012).
- Community Safety Forums Policy (2011).
- Department of Justice and Constitutional Development *2015/2016 Annual Report* (2016).
- Department of Justice and Constitutional Development *Annual Performance Plan 2017/2018* (2017).
- Department of Justice and Constitutional Development *Service Charter of Victims of Crime in South Africa* (1998).
- Department of Justice and Constitutional Development *Criminal Asset Recovery Account (CARA) Annual Report 2010/2011* (2011).
- Department of Social Development *Early Childhood Development Policy* (2015).
- Department of Social Development *Integrated Social Crime Prevention Strategy* (2011).

Stellenbosch University https://scholar.sun.ac.za

- Department of Social Development *National Policy Guidelines for Victim Empowerment* (2009).
- Department of Social Development *Victim Empowerment Policy* (2007).
- Department of Social Development *White Paper on Families* (2012).
- Department of Transport *Policy Paper for the RABS* (2011).
- Draft Integrated Urban Development Framework (2015).
- House of Commons Committee of Public Accounts *Compensating Victims of Violent Crime* 2007-2008 HC 251 (2008).
- Het Schadenfonds Geweldsmisdrijven *Beleidsbundel* (2017).
- Het Schadenfonds Geweldsmisdrijven *Beleidsbundel* (2016).
- Het Schadenfonds Geweldsmisdrijven *Bijlage bij Beleidsbundel Schadefonds Geweldsmisdrijven: dood door schuld* (2016).
- Het Schadenfonds Geweldsmisdrijven *Letsellijst* (2016).
- Het Schadenfonds Geweldsmisdrijven *Letsellijst* (2015).
- Home Office *Rebuilding Lives: Supporting Victims of Crime* Home Office (2005).
- International Labour Office *Strengthening the Role of Employment Injury Schemes to Help Prevent Occupational Accidents and Diseases* (2013).
- International Transport Forum *Road Safety Annual Report* (2013).
- Independent Police Investigative Directorate *Annual Report 2012/13* (2013).
- KPMG *Too costly to ignore – the economic impact of gender-based violence in South Africa* (2014).
- Law Society of South Africa *Statistics for Legal Education and Development (LEAD) and the Legal Profession* (2014/2015) (2015).
- Jackson *Report: Review of Civil Litigation Costs* (2010).
- McGills D & P Smith *United States Department of Justice: Compensating Victims of Crime – An Analysis of American Programs* (1983).
- Ministry of Justice *Getting it Right for Victims and Witnesses* (2012).
- Ministry of Justice *Getting it Right for Victims and Witnesses: the Government Response* (2012).
- National Center for Victims of Crime *Repairing the Harm* (2004).

Stellenbosch University https://scholar.sun.ac.za

- National Defence Force *National Security Strategy* (2012).
- National Director of Public Prosecutions *Annual Report 2015/2016* (2016).
- National Planning Commission *National Development Plan* (2011).
- New Zealand Law Commission Report (2008): *Compensating Crime Victims.*
- Pew Research Center *Health Care, Education Are Top Priorities in Sub-Saharan Africa* (2015).
- Proceedings of the Extended Public Committee *Debates of Parliament 1993-1994* (1994) 12305.
- Road Accident Fund Commission *Report of the Road Accident Fund Commission* (2002).
- Road Traffic Management Corporation *The Costs of Crashes in South Africa* (2016).
- Royal Commission on Civil Liability and Compensation for Personal Injury *Pearson Report* (1978).
- SAPS *Annual Crime Report 2015/2016: Addendum to the SAPS Annual Report 2015/2016* (2016).
- SAPS *Rural Safety Strategy* (2010).
- Scottish Government Social Research *No-Fault Compensation Schemes for Medical Injury: A Review* (2010).
- Select Committee of the House of Assembly *Report of the Select Committee on Compensation to Workmen* (1904).
- South African Law Reform Commission Project 82: *A Compensation Fund for Victims of Crime* Report (2004).
- South African Institute for Race Relations *Race Relations in South Africa: Reasons for Hope* (2016).
- United States Agency International Development *Worker's Compensation in the Republic of South Africa* (2008)

Online resources

- Africa Check "Factsheet: South Africa's 2015/2016 crime statistics" available at <https://africa check.org/factsheets/factsheet- south-africas-201516-crime-statistics/>

Stellenbosch University https://scholar.sun.ac.za

- Africa Check “Factsheet: South Africa’s 2014/2015 murder and robbery crime statistics” available at <https://africacheck.org/factsheets/factsheet-south-africas-201415-murder-and-robbery-crime-statistics/>

- Africa Check “Rape Statistics in South Africa: A Guide” available at <https://africacheck.org/ factsheets/guide-rape-statistics-in-south-africa/>

- Canadian Resource Center for Victims of Crime “Financial Assistance” available at <https://crcvc.ca/for-victims/financial-assistance/>

- Inflation Calculation “Inflation Calculation” available at <http://www.inflationcalc.co.za/>

- ISS Crime Hub “Fact Sheet: Explaining the official crime statistics for 2013/2014” available at <http://www.issafrica.org/uploads/ISS-crime-statistics-factsheet-2013-2014.pdf>

- Legal Aid “Who Qualifies for Legal Aid?” available at <http://www.legal-aid.co.za/?p=956>

- “Legal Framework of the RAF” available at <http://www.raf.co.za/About-us/pages/Legal-framework.aspx>

- McQuillan LJ & H Abramyan, “The Tort Law Tax” (2007) available at <http://www.wsj.com/articles/SB117496524456750056>

- Nationmaster “Countries Compared by Crime>Rape rate. International Statistics at NationMaster.com” available at <http://www.nationmaster.com/country-info/stats/Crime/Rape-rate>

- Newham “Warning Lights Flashing: Exploring Police Abuses and Performance in South Africa” available at <http://www.issafrica.org/uploads/2013CrimeConfNewham.pdf>

- News24 “Rape in South Africa” available at <http://www.news24.com/MyNews24/rape-in-south-africa-20160810>

- Polmed “Attention Service Providers” available at <http://www.polmed.co.za/injury-on-duty-claims/>

- Prince L “R14,6 mjd. se siviele eise teen polisie in boekjaar” available at <http://www.netwerk24.com/Nuus/Politiek/r146-mjd-se-siviele-eise-teen-polisie-in-boekjaar-20170420>

- Rape Crisis “Prevalence of Rape” available at http://rapecrisis.org.za/rape-in-south-africa/#prevalence

- Road Accident Fund “Fuel Levy” available at <http://www.raf.co.za/about-us/pages/fuel-levy.aspx>

Stellenbosch University https://scholar.sun.ac.za

- Schadenfonds Geweldsmisdrijven “Veel gestelde vragen” available at < https://schadefonds.nl/veel-gestelde-vragen/>
- South African Government “National Crime Prevention Strategy: A Summary” available at http://www.gov.za/documents/national-CRIME-prevention-strategy-summary#6
- Williams “The adoption of Criminal Injuries Compensation Scheme: Chronology” available at < https://www.open.ac.uk/Arts/history/downloads/pdfs/Williams_Compensation.pdf>