The past, present and future of vicarious liability in South Africa

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OPSOMMING

Die verlede, hede en toekoms van middelike aanspreeklikheid in Suid-Afrika

Die onlangse – en volgens sommige, onrusbarende – tendens in Suid-Afrika om werkgewers (veral die staat) aanspreeklik te hou vir die onregmatige, skuldige dade van hulle werknemers gee aanleiding tot probleme en enige ondersoek na die moontlike middellike aanspreeklikheid van die werkgewer moet noodwendig altyd begin met die vraag of die werknemer wel 'n delik gepleeg het. Waar daar nie 'n delik is nie, is daar nie sprake van direkte of middellike aanspreeklikheid nie. Dit is belangrik om vas te stel wat die verhouding tussen die deliksplegер en sy werkgewer was waar dit vasstaan dat die werknemer wel 'n delik gepleeg het. Dit is dan juis by die vasstelling of die werknemer in die loop van sy diens gehandel het dat beleids-oorwegings na vore kom. Suid-Afrikaanse howe het oor die jare toetse geformuleer om vas te stel of 'n werknemer in die loop van sy diens gehandel het of nie. Die doel van hierdie artikel is om die probleem van middellike aanspreeklikheid onder die loep te neem. Eisers probeer altyd in die diepste sakke grawe – diè van werkgewers – en hierdie tendens sal waarskynlik voortgesit word. Hierdie artikel streef om 'n nuwe perspektief op middellike aanspreeklikheid te gee en begin deur 'n kort historiese oorsig van hierdie vorm van skuldlose aanspreeklikheid in Suid-Afrika. Die artikel bespreek ook 'n aantal spesifieke probleme, waarvan die dilemma aangaande werknemers wat op diens is of nie en die ingewikkelde vraag rondom diensbestek die eerste is. Die artikel ondersoek ook die Wet op Arbeidsverhoudinge soos wat dit op wangedrag van toepassing is en die aard van die verhouding tussen werkgewer en werknemer. Direkte aanspreek-likheid as 'n alternatiewe eisoorsaak teen werkgewers onder sekere omstandighede word spesifiek gemeld.

1 Introduction

Ellen Sturgis Hooper wrote:

> I slept, and dreamed that life was beauty;
> I woke, and found that life was duty.[1]

Sturgis Hooper's words epitomise that which is arguably the defining aspect of daily life, namely, duty. Formal duty, in the form of

1 *Beauty and Duty* (1840).

employment, often defines an individual. It is not uncommon to refer to someone as "Bob the builder" or to introduce a friend by saying: "Pearl's a singer."[2] This close association between an individual's name and his or her occupation is indicative of society's expectations that people will generally act in accordance with their duties, training and expertise. It is perhaps not surprising then that the rape victim in *F v Minister of Safety and Security*[3] expected the police officer who was on stand-by duty to take her home and not to harm her. Surely one may expect a police officer to behave like a police officer?

However, if expecting someone to act according to what we deem to be his or her "duty" was that straightforward, we would not be writing this article. The recent – and some say alarming – trend in South Africa to hold employers (particularly the government) liable for wrongful, culpable acts committed by their employees gives rise to difficulties and any inquiry into the possible vicarious liability of the employer should necessarily always start by asking whether there was in fact a wrongful, culpable act committed by the employee.[4] If not, there can neither be direct liability of the employee nor vicarious liability by the employer. Where the employee did indeed commit a delict, the relationship between the wrongdoer and his employer at the time of the wrongdoing becomes important.[5] It is then often, in determining whether the employee was acting in the scope of his employment, that normative issues come to the fore. Over the years South African courts have devised tests to determine whether an employee was in fact acting in the scope of his employment.[6]

The purpose of the article is to delve a bit deeper into the issue of vicarious liability. Plaintiffs always seek to dig into the deepest pockets – that of an employer – and this trend is likely to continue.[7] The article seeks to contrast vicarious liability with direct liability and sets out to sketch a brief historical overview of this form of strict liability in South Africa. It discusses the case of *F* as an example of an extreme situation in which vicarious liability arose.

In addition, the article discusses a number of specific issues, first of which is the dilemma around on- and off-duty employees and the problematic issue of "scope of employment". The article examines the Labour Relations Act[8] as it applies to misconduct and the nature of the

2 Written by Leibner *et al* and performed by Elkie Brooks, "Pearl's a singer" tells the tale of a performer who "sings songs for the lost and the lonely". We are also told that "her job is entertaining folks, singing songs and telling jokes, in a nightclub." Accessed from http://www.lyrics.com/pearls-a-singer-lyrics-elkie-brooks.html on 2012-03-13.
3 [2011] ZACC 37.
4 Neethling, Potgieter & Visser *Law of Delict* (2010) 365.
5 Neethling *et al* 366-368.
6 Neethling *et al* 368-371.
7 Potgieter "Preliminary Thoughts on Whether Vicarious Liability Should be Extended to the Parent-Child Relationship" 2011 *Obiter* 189 191.
8 66 of 1995.

relationship between employer and employee. In addition, vicarious liability is compared to other forms of strict liability such as that introduced by the Consumer Protection Act.[9] Finally, the article deals in some detail with Froneman J's judgment in *F* that argues that the direct – and not strict liability – of an employer may in some instances form the basis of a delictual claim against that employer.

2 Vicarious and Other Forms of Liability

Vicarious liability may in general terms be defined as "the *strict liability* of one person for the delict of another".[10] Initially foreign to South African law, vicarious liability had been borrowed from English law.[11] Many theories attempt to explain the rationale and basis of vicarious liability, such as the employer's fault in selecting the employee, the interest and profit theory, the solvency theory, and the risk or danger theory, to mention a few.[12] Regardless of the basis of vicarious liability, it is now well established that one person can be vicariously liable for the damage caused by another.[13] This type of liability is an exception to the "basic premise of the law of delict that fault is a prerequisite for liability".[14] Remember, according to the fault theory the wrongdoer had to act with fault, either intent or negligence, in order to incur delictual liability,[15] whereas strict liability is liability in the absence of fault. Recognised instances of strict liability are rare and stem mainly from modern legislation (such as the Consumer Protection Act)[16] or common law actions of Roman origin.[17] Already before the enactment of the Consumer Protection Act[18] writers argued in favour of strict product liability. In the words of Van der Walt:

9 68 of 2008.
10 Neethling *et al* 365 (authors' emphasis).
11 *Ibid;* Calitz "Vicarious Liability of Employers: Reconsidering Risk as the Basis for Liability" 2005 *TSAR* 215 217; *Grobler v Naspers Bpk* 2004 4 SA 220 (C) 277E-F.
12 For a detailed discussion, see Potgieter 2011 *Obiter* 189 191-192. See also Neethling *et al* 365-366.
13 Neethling *et al* 365.
14 Potgieter 2011 *Obiter* 189.
15 Neethling *et al* 329.
16 Botha & Joubert "Does the Consumer Protection Act 68 of 2008 provide for Strict Liability? – A Comparative Analysis" 2011 *THRHR* 305 305-319.
17 Van der Walt & Midgley *Principles of delict* (2005) par 28.
18 In terms of s 61 Consumer Protection Act, a producer, importer, distributor or retailer of goods will be liable for defective products. These categories of persons are liable jointly and severally. They are also liable wholly or partly as a consequence of (a) supplying any unsafe goods; (b) a product failure, defect or hazard in any goods; or (c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods, irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be. At first glance it thus seems that the Consumer Protection Act imposes strict liability on all of these categories of persons but a closer look to the provision and the defences in s 61(4) makes it clear that a form of strict liability is only applicable to

> The recognition of strict liability in the case of products liability can be justified by various other factors: the public interest in the physical-psychological well-being of human beings requires the highest measure of protection against defective consumer products; by marketing and advertising the manufacturer creates a belief in the minds of the public that his product is safe; strict liability serves as encouragement to take the utmost degree of care; the manufacturer is, from an economic perspective, the party most capable of absorbing and spreading the risk of damage by price increases and insurance.[19]

Strict liability, however, is not only applied to product liability in South Africa. It has been applied for quite some time (and has been well-established) to the employment relationship where an employer may be held vicariously liable for delicts committed by employees. In addition, instances where vicarious liability is applied include relationships between a principal and agent; motor vehicle owner and driver as well as state and public school.[20] Potgieter[21] discusses the possibility of extending vicarious liability to the parent-child relationship and, after taking into account various theories, case law, policy considerations and foreign law, concludes as follows:

> As has been submitted, the reasons for vicarious liability of parents for the conduct of their children have to be sought in a number of policy considerations, for example the risk created by bringing a child into the world, the fact that the parent rather than the impecunious child is usually better suited to pay for (or to distribute through insurance) the loss caused by the child, the notion that possible liability for a child's conduct may cause the parent to instruct, control, supervise, guide and discipline the child more thoroughly regarding potentially damage-causing behaviour. Naturally the existence of a parent-child relationship should not without further ado give rise to parental liability, just as an employment relationship in itself does not constitute vicarious liability: prerequisites must be satisfied for liability to

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manufacturers and importers. It thus clear that distributors and retailers can escape liability by proving that "it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person's role in marketing the goods to consumers".

19 Van der Walt "Die deliktuele aanspreeklikheid van die vervaardiger vir skade berokken deur middel van sy defekte produk" 1972 *THRHR* 254; in *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* 2003 4 SA 285 (SCA) 297, 300 the court stated that at that moment no urgent grounds existed to apply strict product liability in South African law and referred the possible imposition of strict liability to the legislature: "[F]urther, as to the argument that strict liability had to be imposed for commercial reasons, that it was preferable that this should be done by legislation after due Parliamentary process and investigation so as to produce a comprehensive set of principles, rules and procedures. Single instances of litigation could not possibly provide for the depth and breadth of investigation, analysis and determination necessary to produce, for use across the manufacturing industry, a cohesive and effective structure by which to impose strict liability".

20 Wicke "Vicarious Liability: Not Simply a Matter of Legal Policy" 1998 *Stell LR* 21 22; Neethling *et al* 363.

21 Potgieter 2011 *Obiter* 203.

> follow. Although the prerequisites for vicarious liability in the traditional categories may offer valuable guidelines, the requirements for a parent's vicarious liability, should it be recognised, will have to be worked out with reference to the distinctive nature of the parent-child relationship in a particular fact-situation. In this regard it will be useful to investigate instances in other legal systems where parents are being held liable for the damage caused by their minor children.

Another interesting example is corporate criminal liability where individuals who form part of the corporate body can be held liable either on the basis of the doctrine of identification or vicarious liability.[22] In terms of the doctrine of identification "a corporate body may be identified with certain key individuals who act on its behalf" whereas vicarious liability "lays a corporate body open to liability for crimes committed by individuals in the course of their duties, or in the scope of their employment and with the intent to further the interests of the corporation".[23]

To return to the employer-employee relationship: One of the first cases that dealt with liability of an employer for delicts of his employees was *Feldman (Pty) Ltd v Mall*,[24] where the court stated that a master who uses servants creates risk of harm to others if the servant proves to be "negligent, inefficient or untrustworthy" and "[i]t follows that if the servant's acts in doing his master's work or his activities are incidental to or connected with it are carried out in a negligent or improper manner so as to cause harm to a third party the master is responsible for the harm".[25]

It is generally accepted that the following requirements must be met in order for an employer to be vicariously liable: An employment relationship must exist at the time when the employee committed the delict and the employee must have acted within the scope of his employment.[26] For an employer to be held liable the person committing the delict must therefore be an employee[27] and must have acted in the

22 Borg-Jorgensen & Van der Linde "Corporate Criminal Liability in South Africa: Time for Change? (part1)" 2011 *TSAR* 452 453-454.
23 *Ibid*.
24 1945 AD 733.
25 741.
26 *Mkhize v Martens* 1914 AD 382 390.
27 In terms of s 213 Labour Relations Act 66 of 1995 (LRA), an employee is defined as: "(a) any person, excluding an independent contractor, who works for any person or for the State and who receives, or is entitled to receive, any remuneration; (b) any other person who in any manner assists in carrying on or conducting the business of the employer." The common law definition of an employee has been expanded in order to extend protection to as many persons as possible. The definitions of "employee" in the LRA as well as the Basic Conditions of Employment Act 75 of 1997 (BCEA); the Compensation for Occupational Injuries and Diseases Act 130 of 1993; the Unemployment Insurance Act 63 of 2001; and the Skills Development Act 97 of 1998 all expressly exclude an independent contractor from the definition of "employee". It is therefore clear that a contract of mandate which involves an independent contractor is

scope of his employment. Some kind of *nexus* must exist between the employee's wrongful conduct and the relationship between him and his employer.[28] The determination of what is inside or outside the scope of employment has proved to be quite problematic over the years. In *Mkhize*,[29] for example, it was stated that "the master is answerable for the torts of his servant committed in the course of his employment, bearing in mind that an act done by the servant solely for his own interest and purposes and outside his authority is not done in the course of his employment, even though it may have been during his employment". In *Boland Bank Bpk v Bellville Munisipaliteit*[30] the court explained the problem regarding the course-of-employment-requirement as follows:

> Die probleem is egter om, na aanleiding van die feite van die betrokke saak, te bepaal of die gewraakte optrede deur die werknemer uitgevoer is binne of buite sy werksbestek of diensbetrekking. Die blote feit dat die gewraakte optrede plaasvind terwyl die werknemer met sy werkgewer se sake bemoeid is, is opsigself nie genoeg om die werkgewer aan aanspreeklikheid bloot te

specifically excluded from the doctrine of vicarious liability (See *Langley Fox Building Partnership (Pty) Ltd v De Valance* 1991 1 SA 1 (A) 8; *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A) where the court listed factors that are indicative of an employment relationship as well as *Midway Two Engineering & Construction Services v Transnet Bpk* 1998 3 SA 17 (SCA) 23). *Niselow v Liberty Life Association of Africa Ltd* (1998 *ILJ* 752 (SCA)) dealt with the definition of "employee" in terms of the Labour Relations Act 28 of 1956. The Court in the *Niselow* case held (753I) that an employee at common law undertakes to render a personal service to an employer. The Court further held that regardless of the second part of the definition ("... any other person whomsoever who in any manner assists in the carrying on or conducting of the business of an employer") it also did not bring the individual in that case within the scope of the definition. The Court based this on distinguishing a contract of work and a contract of service. Consequently, the appellant in that case, who was an agent contracted to canvass insurance business for the respondent, was carrying on and conducting his own business rather than assisting in the carrying on or conducting of the business of the respondent. In the labour appeal court the court noted, however, that the supreme court of appeal "did not have the benefit of argument on the second part of the definition of 'employee'". (See also Smit & Botha's discussion on whether members of parliament ere employees and employers for purposes of the Protected Disclosures Act 26 of 2000 ("Is the Protected Disclosures Act 26 of 2000 Applicable to Members of Parliament? 2011 *TSAR* 815 815-829)). In 2002, the LRA and BCEA were amended to include the rebuttable presumption of employment in order to assist persons who claim to be employees rather than independent contractors. These factors are: (i) the manner in which the person works is subject to the control or direction of another person; (ii) the person's hours of work are subject to the control or direction of another person; (iii) in the case of a person who works for an organisation, the person forms part of that organisation; (iv) the person has worked for that person for an average of at least 40 hours per month over the last three months; (iv) the person is economically dependent on the other person for whom he or she works or renders services; (v) the person is provided with tools of trade or work equipment by the other person; or (vi) the person only works for or renders service to one person.

28 Wicke 1998 *Stell LR* 21 30.

29 394.

30 1981 2 SA 437(C) 444-445.

> stel nie. Die toets is of die gewraakte daad op 'n onregmatige wyse van uitvoering van die werk wat aan die werknemer toevertrou is, neerkom, of iets is wat bykomstig is tot, of verbonde is aan sy dienste.[31]

It is clear from various examples over the years that there is no general rule when it comes to the question whether the act of the employee falls inside or outside the scope of employment. It is largely dependent on the facts of each case.[32] To deal with this difficulty, the courts have developed certain sub-rules. These include the so-called deviation cases,[33] "intentional misconduct (wilful wrongdoing) where the employee did not act in furtherance of the employer's business" and unauthorised transport of passengers in the vehicles of the employer.[34] In the past, deviation cases were the focus of most cases dealing with vicarious liability and the Supreme Court of Appeal in *Minister of Safety & Security v Jordaan t/a Andre Jordaan Transport*[35] held that

> [i]n each case, whether the employer is to be held liable or not must depend on the nature and extent of the deviation. Once the deviation is such that it cannot be reasonably held that the employee is still exercising the functions to which he was appointed or still carrying out some instruction of his employer, the latter will cease to be liable. Whether that stage has been reached is essentially a question of degree.

The court then added that a close consideration of the facts will be taken into account on a case to case basis.[36]

In 2003 and 2004 two very important judgments with regard to liability of employers emerged from the Labour Court and the High Court respectively. These cases were *Ntsabo v Real Security CC*[37] and *Grobler*.[38] *Ntsabo* dealt with the statutory liability of an employer for unfair discrimination or harassment[39] of employees against other employees, whereas *Grobler* dealt with an employer's vicarious liability

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31 See also *Ngubetole v Administrator, Cape* 1975 3 SA 1 (A); *Viljoen v Smith* 1997 *ILJ* 61 (A); *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank* 1997 2 SA 591 (W); *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* 2001 1 SA 372 (SCA); *Ess Kay Electronics Pty Ltd v First National Bank of Southern Africa Ltd* 2001 (SA) 1214 (SCA).

32 Wicke 1998 *Stell LR* 21 30; Calitz 2005 *TSAR* 215 218.

33 Wicke 1998 *Stell LR* 21 31. In *Feldman (Pty) Ltd v Mall (supra)* the court also dealt with deviation cases and said that it is a question of degree with regard to space and time when determining if the act of an employee falls within scope of employment or not.

34 Calitz 2005 *TSAR* 215 218.

35 2000 *ILJ* 2585 2588D-F.

36 See also *Viljoen v Smith (supra)* and *African Guarantee and Indemnity Co Ltd v Minister of Justice* 1959 2 SA 437 (A) with regard to this matter.

37 (2003) 24 *ILJ* 2341 (LC).

38 This case was taken on appeal as *Media 24 Ltd v Grobler* 2005 6 SA (SCA).

39 Etsebeth "The Growing Expansion of Vicarious Liability in the Information Age (part 2)" 2006 *TSAR* 752 points out that it is "evident that companies can be held vicariously liable in the case of the inappropriate use/abuse of corporate internet and email facilities, in the form of harassment, discrimination, defamation (resulting from ill-conceived wording in an e-mail), copyright infringement (where the employee carelessly downloads

for sexual harassment by another of its employees. The facts in these cases were not similar but, when compared, they clearly illustrate a development of the common law with reference to vicarious liability. The *Grobler* case included sexual harassment, applied common law remedies rather than statutory remedies, and used the High Court to enforce these remedies, whereas *Ntsabo* utilised the statutory remedies and used the Labour Court to enforce these remedies.[40] In *Ntsabo* the court found that the supervisor's conduct was a contravention of section 60 of the Employment Equity Act[41] and that it amounted to sexual harassment and constituted unfair discrimination which is prohibited in terms of section 6(3) of that Act. Damages were awarded to *Ntsabo* for breach of this duty. In *Grobler* the court held that the employer was vicariously liable for the supervisor sexually harassing Mrs Grobler. It has clearly been established that whether an employee acts within the scope of his employment or not is a subjective-objective test.[42] In *Minister of Police v Rabie*,[43] the court explained the so-called standard test[44] for vicarious liability as follows:

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

In 2005 the Constitutional Court in *K v Minister of Safety & Security*[45] again examined the *sufficiently-close-connection*-test (as mentioned in *Rabie* and discussed below).[46] The Supreme Court of Appeal dismissed the appeal due to the fact that the employees' acts were outside the course and scope of their employment and that the question in deviation cases was "whether the deviation was of such a degree that it can be said that in doing what he or she did the employee was still exercising functions to which he or she had been appointed or was still carrying out some instruction of his or her employer".[47] It is however possible for an

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and disseminates copyright material and software), criminal liability (if child pornography is downloaded) and even liability under the law of contract (where an employee inadvertently forms a contract through an email)".

40 See for detailed discussion Smit & Van der Nest "When Sisters are doing it for themselves: Sexual Harassment Claims in the Workplace" 2004 *TSAR* 520 520-543; Le Roux "Sexual Harassment in the Workplace: Reflecting on *Grobler v Naspers*" 2004 *ILJ* 1897 1897-1900; Whitcher "Two Roads to an Employer's Vicarious Liability for Sexual Harassment: *S Grobler v Naspers Bpk en 'n Ander* and *Ntsabo v Real Security CC*" 2004 *ILJ* 1907 1907-1924.

41 55 of 1998.

42 *Neethling et al* 368.

43 1986 1 SA 117 (A) 134.

44 *Neethling et al* 368-369.

45 [2005] ZACC 8; 2005 6 SA 419 (CC); 2005 9 BCLR 835 (CC).

46 See 3 1 4 1 below.

47 *K v Minister of Safety & Security* 2005 26 *ILJ* 681 (SCA) *par* 4.

employee to act within the course and scope of his employment and outside of it at the same time. This "dual capacity"[48] of the employee again featured in *Bezuidenhout NO v Eskom*.[49] *In casu* the court held that when there is an express instruction not to transport passengers while the employee is entrusted with driving the employer's vehicle and the passenger is then injured, the employer was not vicariously liable because the employee did not act within the course and scope of employment. This illustrates that an employer will not be vicariously liable for all actions[50] of employees. On the other hand, it must be pointed out that an employer will not escape liability merely because the conduct was "fraudulent,[51] unauthorised and undertaken for the employee's own interest".[52] If a "sufficiently close link between the employee's conduct and what the employer authorises to perform is established, the employer is vicariously liable".[53]

3 Critical Analysis of *F v Minister of Safety and Security*

3 1 Facts

The facts of the case were in short that Ms F visited a night club in George on 14 October 1998.[54] After midnight (on 15 October) she was offered a lift home by one Van Wyk. There were two other passengers in the car.[55] It was also common cause that Van Wyk was a police officer on standby duty.[56] The court referred to Standing Order 6, issued by the National Commissioner of the South African Police Service in June 1997, and explains that "standby duty" means that Van Wyk could have been called upon to "attend any crime-related incident if the need arose".[57] In addition, Van Wyk had the use of an unmarked vehicle if he needed it for

48 Le Roux "Vicarious Liability: Revisiting an Old Acquaintance" 2003 *ILJ* 1879.
49 2003 24 *ILJ* 1084 (SCA).
50 See *Costa da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy* 2003 24 *ILJ* 1337 (SCA) where an employee (a barman) assaulted a patron because he was upset about the quality of service and made comments about it. The barman later followed the patron outside and assaulted him. The Court held that the employee's conduct was a personal act of aggression that was neither in furtherance of the employer's interest nor under his authority.
51 See *Minister of Finance v Gore* 2007 1 SA 111 (SCA) where the court held that the Minister of Finance is vicariously liable for the employees' deliberate dishonest actions (fraud) in the tender process. The court held the Minister is liable "if objectively seen, there is a sufficiently close link between the self-directed conduct and the employer's business" (par 28); see also Neethling & Potgieter "Middellike Aanspreeklikheid vir 'n Opsetlike Delik" 2007 *TSAR* 616 for discussion of the *Gore*-case.
52 Smit & Van der Nest 2004 *TSAR* 520 536.
53 *Ibid*.
54 Par 8.
55 *Ibid*.
56 Par 9.
57 *Ibid*.

standby duty and he was being paid the prescribed hourly tariff. Ms F also noticed that the vehicle was equipped with a police radio.

Ms F was seated on the back seat of the vehicle with one of the other passengers when they left the club. After they had been dropped off, Van Wyk asked her to move to the front passenger seat, which she did.[58] Upon moving to the front seat, Ms F saw a pile of police dockets and when she asked Van Wyk about these, he replied that he was a private detective. Ms F understood that he was a policeman.[59] Instead of driving her home as agreed, Van Wyk drove towards Kaaimansrivier and told Ms F that he wanted to see his friends before dropping her off. At that point Ms F became suspicious.[60] When they approached Kaaimansrivier, Van Wyk stopped the vehicle at a dark spot. Ms F got out of the vehicle, ran away and hid. Van Wyk left after a while.[61] After a while Ms F approached the road and hitchhiked. Van Wyk's vehicle then stopped next to her and again he offered to take her home. Ms F was desperate and agreed. She testified that she believed that Van Wyk was a policeman and she trusted him despite her suspicions.[62]

It is on their way to Ms F's home that Van Wyk unexpectedly turned off the road near Kraaibos. Again Ms F tried to flee but Van Wyk prevented her and then assaulted and raped her.[63] He threatened to kill her if she told anybody.[64] However, Ms F reported the crime and this resulted in Van Wyk's conviction and subsequent sentence.[65]

Upon reaching the age of majority in December 2005, Ms F instituted an action for damages against the Minister of Safety and Security and Van Wyk.[66]

3 2 Judgment of the High Court

Bozalek J applied the test that was laid down in *K* and found the Minister vicariously liable for the damages suffered by Ms F.[67] The court ruled that there was a sufficiently strong link between Mr Van Wyk's actions and his employer's business to justify that conclusion. The court highlighted three factors in support of its conclusion, namely Van Wyk's being in possession of a police vehicle, Ms F's understanding that Van Wyk was a policeman, and what the court refers to as the nature of the assistance that Van Wyk pretended to offer as well as the normal task of members of the police service, which is "to protect vulnerable groups such as

58 Par 10.
59 *Ibid.*
60 Par 11.
61 *Ibid.*
62 *Ibid.*
63 Par 14.
64 *Ibid.*
65 Par 15.
66 Par 16.
67 *F v Minister of Safety and Security* 2010 1 SA 606 (WCC).

women and children".[68] Not surprisingly, the Minister raised the issue of Ms F's victory potentially opening the floodgates to the state's strict liability for delictual acts committed by the police. Bozalek J's response was that the test in K was sufficiently flexible to allow a case-by-case determination of the issues.[69]

Various prominent academics (such as Neethling[70] and Scott[71]) commented on the judgment of the High Court. In his discussion of the High Court judgment, Neethling referred to *K* as well as *Minister of Safety and Security v Luiters*[72] and specifically commented that the "authoritative and well-reasoned"[73] decision of Bozalek J deserves his full support.[74] The fact is that the state is in the same position as other employers and that the state may escape vicarious liability when it can show that the official was not "*pro hac vice* an employee of the state at the time when the delict was committed."[75] The latter will be the case when the state did not at the particular time have the right to control the employee. Control, according to Neethling, "does not mean factual control but the right of control".[76] Therefore, control is not only important when it is ascertained that an employer-employer relationship existed but it is also a factor that must be taken into account when determining whether "a sufficiently close link existed between the conduct of the employee and his employment, and therefore whether the employee acted within the scope of his employment".[77]

It must, however, be noted that generally a distinction is drawn between on-duty or off-duty misconduct. If, for example, the conduct is regarded as off-duty and it is determined that it falls outside the scope and course of employment, the employer will thus not be held vicariously liable. Generally speaking, an employer can only take action against an employee if his conduct is linked to the workplace. However, when an employee's conduct falls outside the workplace the employer can hold an employee accountable for this conduct if it impacts on the business of the employer. Such conduct would impact on the employer's business "if it prejudices a legitimate business interest or undermines the relationship of trust and confidence that is a necessary component of the employ-

68 Par 18.
69 Par 19c.
70 Neethling "Vicarious Liability of the State for Rape by a Police Official" 2011 *TSAR* 186.
71 Scott "Middellike Aanspreeklikheid van die Staat vir Misdadige Polisie-optrede: Die Heilsame Ontwikkeling Duur Voort: *F v Minister of Safety and Security* 2010 1 SA 606 (WKK)" 2011 *TSAR* 135 135-147.
72 2007 2 SA 106 (CC).
73 Neethling 2011 *TSAR* 186 189.
74 See also Neethling "Liability of the State for Rape by a Policeman: The Saga Takes a New Direction: *Minister of Safety and Security v F* 2011 3 SA 487 (SCA)" 2011 *Obiter* 428 430.
75 Neethling 2011 *TSAR* 186 190.
76 *Ibid*.
77 *Ibid*.

ment relationship".[78] However, it must be pointed out that dismissal could only be justified if the misconduct, albeit on or off-duty, has a serious impact on the employment relationship.[79] On the point of misconduct and with reference to police officials, Neethling points out that:

> [t]he right of control is the highest level when a policeman is officially on duty (as in the *K* case), or where an off-duty officer has put himself on duty (as in the *Luiters* case), but the level of control is also acceptable where direct control is attenuated or limited because the officer is on standby-duty (as in the *F* case). But this does not mean that vicarious liability cannot exist where a police official committed a delict whilst off duty. Although the element of control is absent at that particular time, Bozalek J (618C-G) pointed out that the *Rabie* case (133-134) serves as authority for the proposition that the state does not necessarily escape vicarious liability for a police officer's delicts simply because he is formally off duty, dressed in private clothes and commits the delict purely for his private and selfish purposes. This will be the case where an off-duty policeman, without putting himself on duty, nevertheless *mala fide* purported to act as policeman in committing the delict in question.[80]

It must be stressed that Bozalek J also referred to the "creation of risk of harm" as formulated in *Rabie*.[81] Neethling and Scott both discuss this issue in some detail. Scott,[82] explains that the court attaches much value to the risk principle in light of the fact that Bozalek J was willing to hold the state liable, even though the employee had no previous convictions. Neethling is correct that the creation of risk-approach should be considered in *all* instances of intentional wrongdoing by an employee and that:

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78 Van Niekerk, Christianson, McGregor, Smit & Van Eck *Law@work* (2012) 269.

79 *Ibid*.

80 Neethling 2011 *TSAR* 189. Scott's (2011 *TSAR* 145) sentiments are similar to the extent where he concludes as follows: "Daar word aan die hand gedoen dat hierdie uitspraak onafwendbaar was in die lig van die presedent wat in die baanbrekende beslissing van regter O'Regan in die *K*-saak neergelê is. Die enigste werklike verskil tussen die onderhawige feitestel en die feite in daardie saak, is dat die polisiebeampte in hierdie geval, anders as in dié van *K*, nie voltyds aan diens was nie. Daar kan volle instemming betuig word met die feit dat hierdie verskil nie voldoende rede was om die onderhawige geval van die *K*-saak te onderskei en slegs om daardie rede 'n teenoorgestelde beslissing te vel nie. Die motivering wat regter Bozalek verskaf vir sy hantering van die effek van die feit dat die tweede verweerder ten tyde van delikspleging op blote bystandsdiens was, is myns insiens ten volle geregverdig en lofwaardig. Die gevolg van al die statutêre bepalings en *dicta* uit die regspraak wat die regter aanhaal ter stawing van sy interpretasie van die gevolg van bystandsdiens word trouens treffend geparafraseer in 'n enkele sinnetjie uit *Rabie v Minister of Police* 1984 1 SA 786 (W), waarin die standaardtoets finaal sy beslag gekry het: 'When a member of the South African Police Force is off duty it cannot be suggested that his statutory duties as a member of the Force or that his authority are suspended' (791F)."

81 625B-626C.

82 2011 *TSAR* 135 143-144 (authors' emphasis).

> [a]s a general guideline an employer should be liable for an (intentional) delict by his employee if his appointment and work conditions enabled him to commit the delict (and hence created a heightened risk of prejudice) in such a manner.[83]

This heightened risk of prejudice would be present where employees (such as police officials) have been placed in a position of trust or authority and the possibility of abuse and as well as the fact that the employee was on duty (or stand-by duty, as in the *F* case) when the delict was committed, should be indicative of liability and should be of increasing weight the more the employee used the "trappings" of his work while committing a delict on duty.

It seems that employers are at risk of always getting the short end of the stick and this seems harsh. However, if the employer (in the current discussion the state) is held to be vicariously liable and all of the above-mentioned are established, the employer can discipline or dismiss an employee for misconduct. Fairness dictates that, in addition to a fair reason, the employer must follow a fair procedure. It will not make a difference if the employer decides not to dismiss the employee for his misconduct. *Sidumo v Rustenburg Platinum Mines Ltd*[84] is useful in this regard. The Constitutional Court lists the following factors that must be taken into account when a commissioner is called upon to determine whether a misconduct dismissal was fair: (i) the totality of the circumstances; (ii) the importance of the rule that has been breached by the employee; (iii) the employer's reason for imposing the sanction of dismissal; (iv) the employee's reason for challenging the sanction of dismissal; (v) the harm caused by the employee's conduct; (vi) considerations of other corrective measures; (vii) the impact the dismissal will have on the employee; and (viii) the employee's service record.[85] In addition to taking action short of dismissal (or dismissal) the employer can also exercise his right of recourse against the errant employee. For instance, an employer can make deductions from an employee's remuneration. Such deductions are, however, subject to the employee agreeing in writing to the deduction or where the deduction is required or permitted in terms of a law, collective agreement, court order

83 Neethling 2011 *TSAR* 186 191.

84 2007 28 *ILJ* 2405 (CC) par 78. See also *Lipka v Voltex PE* 2010 31 *ILJ* 2199 (CCMA) in this regard.

85 The Code of Good Practice: Dismissal sets out the requirements of a fair pre-dismissal procedure in cases of alleged misconduct. This procedure is laid out in item 4(1) as follows: "Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal inquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare a response and to the assistance of a trade union representative or fellow employee. After the inquiry, the employer should communicate the decision taken, and preferably furnish the employee with a written notification of that decision."

or arbitration award. When a deduction is made due to a written agreement it may only be made to reimburse an employer:

> (a) for loss or damage only if the loss or damage occurred in the course of employment and was due to the fault of the employee; (b) the employer has followed a fair procedure and has given the employee a reasonable opportunity to show why the deductions should not be made; (c) the total amount of the debt does not exceed the actual amount of the loss or damage; and (d) the total deductions from the employee's remuneration in terms of this subsection do not exceed one-quarter of the employee's remuneration in money.[86]

With reference to the police services, Scott concludes as follows:

> Dit is duidelik dat daar 'n balans gevind sal moet word tussen die toenemende "wetteloosheid" van die sentrale polisiediens enersyds, en die groeiende blootstelling van die algemene publiek aan wetteloosheid en misdaad, andersyds. Inagneming van die konstitusionele imperatiewe wat betref veiligheid en sekuriteit, wat in talle meer onlangse wetgewende maatreëls en regspraak gestalte gevind het (soos deeglik uit die onderhawige saak blyk), noodsaak na my mening 'n uitspraak soos dié van regter Bozalek: mens kan as't ware sê dat hoe hagliker die posisie van lede van die publiek as gevolg van die vergrype van lede van die polisiediens word, hoe swaarder word die *konstitusionele plig* van die staat om daardie tipe gewraakte optrede goed te maak. In 'n mate kom dit dus voor – en tereg – dat die staat wesentlik en vir praktiese doeleindes as 'n versekeraar optree vir die vergrype wat tot hierdie soort nadeel aanleiding gee. Hierdie toedrag van sake is egter aan die staat self te wyte, hoofsaaklik as gevolg van die versuim van die staat om 'n goedopgeleide, professionele polisiediens te ontwikkel en in stand te hou. Hy wat met sy bewuste aanstellingsbeleid bedenklike karakters in uniform steek, moet die gevolge dra wat deur sy optrede veroorsaak word. Indien daar dan "fouteer" moet word wat die verskynsel van middellike staatsaanspreeklikheid vir polisiedelikte betref, is dit sonder twyfel te verkies dat dit in die rigting van 'n wyer staatsaanspreeklikheid sal geskied, as in die rigting van die blootstelling van lede van die algemene publiek aan 'n bestel waar die enigste remedie van die slagoffer teen 'n platsak individu is. Ter tempering behoort egter dan heroorweeg te word of die staat sonder meer regresloos behoort in te staan vir die regskostes aangegaan ter verdediging van sy werknemers in litigasie waar beslis word dat die werknemers flagrant onwettig of onregmatig opgetree het.[87]

Scott also stresses that the principle ought to be that the legal costs must be claimed from the convicted criminal (the employee) and that vicarious liability should not exempt the primary perpetrator (the employee). He adds that the employer should be entitled to claim all legal costs that stem from him being held vicariously liable from the employee.[88]

86 S 34(1) & (2) BCEA.
87 Scott 2011 *TSAR* 135 147.
88 *Ibid*.

3 3 Supreme Court of Appeal

The supreme court of appeal reversed the decision of the High Court. Nugent JA, with Snyders JA and Pilay AJA concurring, argued that the state's liability in *K* was based only on the delictual omission of the on-duty policeman involved.[89] Second, it was argued that an intentional delictual commission cannot attract the state's vicarious liability. Proper interpretation of *K* leads one to conclude that the state is not vicariously liable for the positive delictual acts of police officials but only for their omissions.[90] In addition, because Van Wyk was not on duty, he was not engaged in the business of the police service and he had not breached his duty to protect Ms F. What was even more alarming was the court's conclusion that an off-duty policeman has no duty to protect members of the public and cannot therefore be held liable for their failure to protect a victim of crime. Because there was no duty upon Van Wyk, he cannot be held personally liable.[91] In addition, the majority stated that a policeman cannot be said to be "engaged in the affairs or business of his employer" when he commits rape and it cannot even be said that rape is an "improper mode" of exercising authority.[92]

The minority as per Maya JA made a more sensible observation. They stated that although the rape had nothing to do with the performance of Van Wyk's official duties, there was a sufficiently close link "between his acts of personal gratification and the business of the police service".[93] In addition, Van Wyk had offered to take Ms F home, thereby placing himself on duty. As well, because Van Wyk was a policeman, Ms F was induced to trust Van Wyk and accept a lift from him.[94] Another interesting observation by the minority was that policy considerations underpin vicarious liability in matters such as these. It is also an employer's duty to ensure that no one is injured as a result of an employee's improper or negligent conduct when performing his duties.[95] In addition, the minority found that *K* applies to so-called deviation cases. This particular aspect was discussed in some detail by the Constitutional Court.[96]

89 Par 20.
90 *Ibid*.
91 *Ibid*.
92 Par 22.
93 Par 23.
94 Par 24.
95 *Ibid*.
96 See par 3.4 below. The minority judgment of Maya JA, however, is not without criticism. Scott "Die Hoogste Hof van Appèl Smoor Heilsame Regsontwikkeling: *Minister of Safety and Security v F* 2011 3 SA 487 (HHA)" 2011 *TSAR* 773 786 argues that although the minority judgment was less substantial than the majority judgment of Nugent AJ, the minority judgment is preferred nevertheless. The reason Scott prefers it is because it followed the constitutional imperatives (as mentioned in *K*) to protect vulnerable groups such as women and children. The majority judgment is also criticised by this author and he concludes as follows: "[i]ndien die uitgebreide en meer beredeneerde meerderheidsuitspraak van appèlregter

3 4 Constitutional Court

The substantive issue before the Constitutional Court was whether the state could be held vicariously liable for damages arising from the rape of a young girl by a policeman on stand-by duty.

It is often said that when two lawyers agree, at least one did not apply his mind. In this particular case, Mogoeng J and with him Cameron J, Kampepe J, Nkabinde J Skweyiya J and van der Westhuizen J found in favour of Ms F. Froneman J came to the same conclusion but delivered a separate judgment and Yacoob J found in favour of the Minister. These three judgments will be discussed separately.

3 4 1 Majority Judgment

Mogoeng sets out to explain that vicarious liability "means that a person may be held liable for the wrongful act or omission of another even though the former did not, strictly speaking, engage in any wrongful conduct".[97] Employment is one such relationship and the employer is vicariously liable for the wrongful acts or omissions of an employee committed within the course and scope of employment "or whilst the employee was engaged in any activity reasonably identical to it".[98]

The court then explains that there are two tests to determine whether there is vicarious liability. The first is the standard test which applies when an employee commits a delict while going about the employer's business. The second test applies in the so-called deviation cases where the wrongdoing takes place outside the course and scope of employment.[99] The court explains that the matter *in casu* is definitely a deviation case and then proceeds to the pre-constitutional case of *Feldman* as authority. *In casu* an employee used his employer's vehicle to deliver parcels as instructed by his employer and afterwards attended to personal matters. He drank alcohol, drove back to his employer's premises and negligently collided with and killed the father of two dependants. The majority held the employer liable for the minors' loss of support.[100]

Mogoeng observes that *Feldman* proposes that employees are extensions of their employers and thus they create a risk of harm to

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Nugent nugter betrag word, tref dit die leser dat dit net sowel in die pre-konstitusionele era gelewer kon wees: daar is nie eens 'n enkele beroep op die grondwetlike beginsels wat in die *Carmichele*- en *K*-sake gefigureer het nie. Bloot wat hierdie aspek betref, is die hoogste hof van appèl se meerderheidsuitspraak 'n retrogressiewe stap in 'n andersins lofwaardige en gesonde regsontwikkeling wat die grondwetlike regte van verkragte en aangerande vroue en kinders betref".

97 Par 40.

98 Par 41.

99 *Ibid*.

100 Par 42. The court quotes Watermeyer CJ in *Feldman*. See discussion in 2 above.

others where their employees are inefficient or untrustworthy and herein lies the duty: that employers should ensure that their employees do not do the opposite of what they are supposed to do. In addition, where employees do the opposite of what they are supposed to do, a link must be established between the employers' business and the delictual conduct complained of in order to hold the employer vicariously liable.[101]

The court then comments on *Rabie*.[102] Here a mechanic who was employed by the police conducted a wrongful arrest, detention and assault of the plaintiff. At the time of the arrest, the perpetrator was not wearing a police uniform and he was off duty.[103] Mogoeng comments that *Rabie* is an example of an employee's radical deviation from the tasks incidental to his employment and also comments that *Rabie* illustrates that even if a servant acts solely for his own purpose (which is a subjective enquiry relating to his intent), if there is a sufficiently close relationship between the servant's acts and the "business of his master", the latter may be liable. In determining the link, an objective test is used.[104]

This argument was employed in both *Rabie* and *K*.[105] Therefore, the court formulates the crisp legal question *in casu* as "whether there was a close connection between the wrongful conduct of the policeman and the nature of their employment". The court correctly observes that Van Wyk did not rape Ms F in the furtherance of his duties or "the constitutional mandate of his employer."[106] *Au contraire!* Van Wyk pursued his own selfish interests and if one employs the subjective test in *Rabie* and *K*, there cannot be state liability. However, the second leg of the test which pertains to the objective enquiry raises both factual questions and questions of law.[107] The normative components that would determine the Minister's liability are stated as the state's constitutional obligations

101 Par 45.
102 1986 1 SA 117 (A).
103 Par 46.
104 *Rabie* 134C-E.
105 The court quotes the following passage from *K*: "The approach makes it clear that there are two questions to be asked. The first is whether the wrongful acts were done solely for the purposes of the employee. This question requires a subjective consideration of the employee's state of mind and is a purely factual question. Even if it is answered in the affirmative, however, the employer may nevertheless be liable vicariously if the second question, an objective one, is answered affirmatively. That question is whether, even though the acts done have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee's acts for his own interests and the purposes and the business of the employer. This question does not raise purely factual questions, but mixed questions of fact and law. 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." (Par 32).
106 Par 51.
107 Par 52. The court quotes O'Regan in *K* par 32.

to protect the public, the fact that the public is entitled to place trust in the police, the significance of a policeman having been on standby duty or off duty, the policeman's rape and simultaneous omission to protect the victim and whether there is an intimate link between the policeman's conduct and his employment.[108] The court then deals with each of these aspects at length.

As far as the state's constitutional obligations are concerned, the court sets out to explain that the state has a general duty to protect members of the public against violations of their constitutional rights.[109] The court mentions at the outset that the state has obligations to prevent crime and to protect members of the public.[110] The court mentions that this aspect, together with Ms F's constitutional rights, form the "prism through which this enquiry should be conducted".[111] As far as Ms F's constitutional rights are concerned, the court mentions her rights to freedom and security of the person[112] and inherent dignity as the rights that should be protected and respected.[113]

The court deals with sexual violence against women and children in some detail and re-iterates that the state should be at the forefront in the fight against these crimes and that there is definitely a normative basis for holding the state liable for the wrongful conduct of a policeman, albeit one on standby duty.[114]

The second matter pertains to trust. This lays a normative basis for holding the state liable and it provides the factual connection between the employment and the wrongful conduct.[115] In the case of the police service, reliance is placed on each individual member to execute its constitutional mandate to the public.[116] Here, the court again refers to *K* and makes the very important point that "the employment of someone as a police official may rightly be equated to an invitation extended by the police service to the public to repose their trust in that employee".[117] In addition, when that trust is abused there is a link between the employee's employment and the misconduct complained of.[118] Therefore, where a child or a woman places trust in a policeman and that trust is violated, he would be personally liable to that woman or child and, in addition, if the policeman's employment as a policeman secured the trust that was placed in him, the state might be held vicariously liable.[119] Therefore it makes little difference whether the policeman was

108 Par 52.
109 Par 53.
110 Par 54.
111 *Ibid.*
112 *Ibid.*
113 *Ibid.*
114 Par 62.
115 *Ibid.*
116 Par 63.
117 *Ibid. K* par 57.
118 Par 64.
119 Par 66.

on standby duty or off-duty: The perception of the victim and the breach of trust are of importance here.[120]

On the interplay between the commission and the omission, the Court provided a detailed judgment. The Supreme Court of Appeal ruled that the state can only be vicariously liable for an omission of an on-duty policeman who was under an obligation to protect a victim who was harmed in his presence and not for a positive act such as rape.[121] However, this proves to be an incorrect interpretation of *K* because in the latter case the Court stressed that there was a simultaneous act (rape) and omission (failure to protect the victim) and both were equally important.[122]

Mogoeng J then turns to the question relating to a sufficiently-close connection between the policeman's delictual conduct and his employment. He states that normative factors are important here. Ms F placed her trust in Van Wyk and she was betrayed.[123] Even though Van Wyk was on standby, the use of the police car facilitated the rape. In addition, he had the power to place himself on duty and the dockets in the car made Van Wyk identifiable as a policeman.[124]

The majority concludes that the Minister is vicariously liable, even though the case is distinguishable from *K* because of the fact that the policemen were on duty and Van Wyk was not.[125]

3 4 2 Froneman J

A very interesting point in *F* is that Froneman J also holds the Minister liable but for different reasons than the majority judgment as discussed in the previous paragraph. Interestingly, the learned judge observes that the majority holds the state liable on the basis of vicarious liability and believes that the "close connection" test as in *K* was correctly applied *in casu*.[126] As a means of introduction, Froneman J states:

> We should 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. This is because the state invariably acts through the instruments of its organs – state officials performing public duties. The difficult normative issue of when the state is liable in delict for their conduct should in my view no longer be dealt with as an aspect of vicarious liability

120 Par 68.
121 Par 69.
122 Parr 71-73.
123 Par 78.
124 Parr 80-81.
125 Also refer to Neethling & Potgieter "Deliktuele staatsaanspreeklikheid weens polisieverkragting" *LitNet Akademies* 9(1), March 2012 (accessed at www.LitNet.co.za on 27-07-2012).
126 Par 88.

> 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.[127]

Froneman J identifies four reasons why it is necessary to move beyond vicarious liability. The first of these relates to the reason why the court in *K* found it necessary to use the "language of vicarious liability".[128] The second is to acknowledge the difficulties related to the language of vicarious liability where the state's constitutional and statutory duties are concerned, the third is the state's acting through its organs and employees and the fourth is the question whether wrongfulness as a delictual requirement is more suited to limit state liability than the "sufficiently close link" test.[129]

The judge mentions that the main judgment does not deal with direct liability because it was not argued. Nevertheless, Froneman J considers the pleadings and the evidence an appropriate basis for considering the state's direct liability. He mentions that possible prejudice that may have been caused by using direct liability could have been addressed by calling for further argument or for referring the matter back to the high court but as that had not taken place, the judge proceeds to apply the "substantive normative considerations pioneered by *K*".

As far as the language of vicarious liability is concerned, Froneman J begins by explaining that vicarious liability in its traditional formulation "may imply that there is no normative link between the conduct of an innocent employer ... and the culpable conduct of the employee".[130] However, there is a normative link between the employer-employee relationship and the delict and this link is the requirement that the delict must have been committed in the course and scope of the employee's employment.[131] According to the judge, this requirement gave rise to two "fallacies", which was that scope of employment was a question of fact, and also that this rule had to be treated as separate from the reasons of justification for the rule.[132]

According to Froneman J, *K* exposed both these false assertions. He states that vicarious liability has a normative character which relates not to the wrongfulness issue but to the "sufficiently close connection" investigation.[133] In addition, *K* uses the language of vicarious liability as this was the basis upon which state delictual liability was always approached. The learned judge provides a short historical overview of vicarious state liability and then concludes that even though *K* applied the values of the Constitution, that judgment still uses traditional vicarious liability.[134] He doubts whether it is at all appropriate and quotes

127 Par 89.
128 Par 90.
129 *Ibid.*
130 Par 93.
131 *Ibid.*
132 Par 94.
133 Par 96. Froneman J refers to par 32, 45 and 49 of *K*.
134 Par 98.

Baxter[135] who argues that where state officials act, they are not employees but rather the state or public authority itself.

The next nine paragraphs of the judgment deal with the difficulties of vicarious liability and these may be summarised as the overlap between vicarious liability and direct liability on the one hand, and the potential conceptual difficulties on the other. As a means of introducing the discussion on these difficulties, Froneman J refers to O'Regan J in *K* where she concluded that the state was vicariously liable in delict for three reasons. First, the state and policeman had a general statutory and constitutional duty to prevent crime and protect members of the public. Second, on the facts, the policeman had a specific duty to assist K and third, the harmful conduct of the policeman constituted a simultaneous commission and omission because the omission was their failure to protect K from harm.[136]

From this observation the Supreme Court of Appeal in *F* deducted that only omissions by policemen provided a basis for delictual liability and where there was a positive act, there could not be vicarious liability. The SCA also interpreted *K* to signify that where the policemen were personally liable for their omissions, the state was vicariously liable, but the state could also have been directly liable for its own omission.[137] In addition, Froneman J mentions that with the breach of public duties, it is essentially about the legal duty not to cause harm negligently to another and normally this forms part of an enquiry into wrongfulness that is already dealt with when looking at the conduct of the employee.[138] Overall, it seems that the distinction between vicarious liability and direct liability is not all that clear and for this reason, according to Froneman J, as well as because of "potential conceptual difficulty", the question is whether the delictual liability of the state should not perhaps be approached differently.[139]

This then brings Froneman J to a discussion of direct liability of the state.[140] He begins by stating that the state is a legal person in South

135 Baxter *Administrative law* (1984) 63-632.
136 Par 100.
137 Par 101.
138 Par 104.
139 Par 108.
140 Although Neethling 2011 *Obiter* 428 437-438 also in the latter part of 2011 commented on the Supreme Court of Appeal's judgment in *F* his concerns regarding direct liability are noteworthy. He feels that the state can only be vicariously, and not directly, liable for delicts of employees because "[o]n the face of it, there does not seem to be any room for direct liability of the state where the sate itself committed a wrong or delict acting through employees. Seen in this light, Nugent JA's submission that the SCA decisions in *Van Duivenboden*, *Van Eeden*, *Hamilton* and *Carmichele* (in 2004), none of which was even based on intentional police wrongdoing, should have been founded upon direct liability of the state acting through the instrument of its employees, cannot be accepted. In this regard Nugent JA made no attempt to explain how the conduct of employees acting as functionaries of the state for the purposes of its direct liability, differs from their conduct acting in the

African law.[141] In addition, organs of the state are only permitted to perform the functions entrusted to them by the Constitution.[142] This is also true of the police service and "the acts of state organs are at the same time acts for which the state is liable, because they are the state's own acts".[143] The time is then right to further develop *K* and to accept direct and not vicarious liability as the basis for the state's delictual liability. According to Froneman J, direct liability had been dismissed in *Mhlongo and Another NO v Minister of Police*,[144] but that was before the 1996 Constitution.[145]

The matter of wrongfulness is discussed in detail. Froneman J starts a novel argument by explaining that the requirement for wrongfulness as well as the "sufficiently close connection" test involve questions of fact and law. However, it does matter whether the court makes this normative assessment in respect of wrongfulness or as part of the "close connection" test. So, where a state employee breaches a public duty there is direct liability. The remainder of the discussion does not introduce anything new on wrongfulness and only reiterates that constitutional values must be taken into account in establishing whether there was wrongfulness.[146] One of these constitutional values is accountability and that was evident in cases such as *Minister of Safety and Security v Van Duivenboden*[147] and *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*.[148]

What is strange about Froneman J's remarks on wrongfulness is that he states that this element "is determined on the assumption of negligent state conduct on the part of the official directly involved in the breach of a public duty" and that "[w]hen one turns to the actual determination of negligence this assumption obviously falls away".[149] However, it is not

course and scope of their employment for the purposes of the state's vicarious liability. This can only lead to confusion and create legal uncertainty in an area where clarity existed beforehand. Clearly, in all these cases it was the employees who, while acting in the execution of their legislative duties, negligently breached their duty to prevent crime and protect the public. For their wrongs or delicts the state was correctly held vicariously liable."

141 Par 109.

142 *Ibid*.

143 *Ibid*.

144 1978 2 SA 551 (A).

145 Par 110.

146 Par 121.

147 2002 6 SA 431 (SCA).

148 2001 4 SA 938 (CC). See also Neethling & Potgieter (n 124). The authors do not seem to prefer vicarious liability to direct liability or *vice versa*. Instead, they summarise that one may consider replacing the constitutional court's "constitutional" approach to vicarious liability with direct liability as the requirement of a sufficiently close connection in vicarious liability cases which deal with rape is over extended.

149 Par 125.

necessary to dwell on this issue as the judge ultimately applies the test for wrongfulness first on the particular facts.

In applying the principles so laboriously explained, Froneman J asks first whether Van Wyk and the Minister owed Ms F a public, legal duty and what the nature and content of such a duty might be.[150] In dealing with this issue, the judge remarks that Van Wyk's conduct constituted a commission because of the rape and a simultaneous omission because of a failure to protect her.[151] In Froneman J's opinion, the facts do point to the existence of a legal duty which was intentionally disregarded by Van Wyk. The judge states:

> Similar considerations apply here. I accept that there is no general obligation on the police to protect citizens from crime where they are not on duty. But the converse, that they never have that obligation when not on duty, is not true either. While off-duty, they are entitled to arrest without a warrant. They may place themselves on duty when the occasion warrants it. When they are placed in possession of police resources by virtue of their status as police officials when they are off-duty, particular circumstances might oblige them to assume their protective duties towards the public. Those circumstances would arise where, objectively, vulnerable people place their trust in them because they are police officials.[152]

In Froneman J's opinion, wrongfulness had been established.

As far as negligence is concerned, the judge explains that Van Wyk's actions were deliberate and negligent. No explanation is provided for this particular conclusion. However, it is the judge's mission to find that the state is directly liable and it is well-known that once wrongfulness had been determined, the next step is to determine fault. The judge finds that there is no evidence that the state took other reasonable measures to prevent Van Wyk from committing a delict. He was allowed to continue service despite his previous convictions and this factor alone points to the foreseeability of harm.[153] The judge fails to deal in detail with the second leg of the test for negligence, which is preventability and one is left to assume that it was within the Minister's power to suspend or dismiss Van Wyk and in doing so prevent him from using police facilities to perpetuate crime.

3 4 3 Minority Judgment

Yacoob J, with Jafta J concurring, ruled that the Minister was not vicariously liable and they reiterated that the test for vicarious liability was laid down in *K*. They are of the view that, unless the court holds that this particular case was decided incorrectly, the flexible test in *K* should be applied.

150 Par 136.
151 Par 137.
152 Par 146.
153 Par 148.

The first observation that is made is that Van Wyk "had not been on duty, either subjectively or objectively".[154] In any event, it is not a decisive factor whether a policeman is on or off duty but, according to the minority, Van Wyk was on a "frolic of his own".[155] In addition, there was "no official police promise of safe carriage".[156] On the matter of trust, the learned judges conclude that there were no reasonable grounds for Ms F to trust Van Wyk, rather, she had every reason to distrust him and went with him because she was in a desperate situation.[157]

On the matter of a simultaneous commission and omission, the minority argued that neither existed because Van Wyk was not on duty.[158] In the circumstances they conclude that there was not a sufficient connection between Van Wyk's deeds and his employment as a policeman.[159]

4 Some Observations

From the case under discussion various observations may be made. It does seem that government liability cases are on the rise and some do involve disturbing, violent conduct by policemen such as the one in Van Wyk.

The first observation is that, when properly applied, vicarious liability serves a purpose in our society. One cannot fault the logic applied by the majority in *F*. Here, one can re-iterate the sentiments of Neethling after the Supreme Court of Appeal's decision and before the Constitutional Court's judgment, that:

> [t]he only difference between *K* and *F* was that in *K* the policemen were on duty when raping K, while in *F* the rapist was on stand-by duty. The core question in *F* was therefore whether a policeman on stand-by duty is on par with a policeman on duty so that according to the standard test for vicarious liability he can be found to have acted within the course and scope of his employment when raping a woman while on stand-by duty.[160]

It is therefore submitted that Mogoeng J *et al* came to the correct conclusion on the facts as all the elements of vicarious liability had been proven. There is definitely a place for vicarious liability in South African law even though it is a well-known fact that this enables a plaintiff to recover his damages from a defendant who is not a so-called "man of straw".[161] In addition, where all the elements of vicarious liability had been proven, the employer should be held liable.

154 Par 155.
155 Par 168.
156 Par 169.
157 Parr 173-174.
158 Par 175.
159 Par 177.
160 2011 *Obiter* 428 438.
161 Potgieter 2011 *Obiter* 189 191.

The second observation is that the aspect of control should not be confused with course and scope of employment. While it is true that control is a factor that is looked at in evaluating whether an employer-employee relationship did exist or whether a sufficiently-close relationship existed between the conduct of the employee and his employment, control cannot be equated to scope of employment because a wrongdoer who was not necessarily under the control of his employer could still have acted within the course and scope of his employment.[162]

The third observation is that although a majority of the Constitutional Court had re-affirmed the basis of vicarious liability in the employer-employee relationship, it is also necessary to consider the alternative to vicarious liability as suggested by Froneman J.[163] Although Froneman J agrees with the majority in holding the Minister liable, he argues that the basis for liability *in casu* is direct – as opposed to vicarious – liability. Now this is intriguing, as direct liability of the state had been severely criticised before.[164] Why then is it mentioned again by Froneman J and do the reasons for his judgment make sense? Furthermore, is direct liability only a possibility in cases involving the state or is it a possibility for all actions against employers?

It is trite law that in order for a defendant to be liable in delict, the plaintiff needs to prove on a balance of probabilities that the defendant had committed a wrongful, culpable act which caused damage to the plaintiff.[165] It is also a well-known fact that conduct for purposes of delictual liability may be in the form of a commission or an omission. One can see how state organs may be liable for positive acts (such as the confiscation of property or the poisoning of residents' water) and then it is also evident that actionable omissions will include instances where a state organ had a legal duty to act positively to prevent harm.[166] Also, liability only follows if such an omission is in fact wrongful. The existence of wrongfulness is always determined with reference to the legal convictions of the community or the *boni mores*.[167] In *Carmichele*,[168] the Constitutional Court pronounced that in some circumstances, such as with an omission, there may also be a legal duty on the state to take positive steps to protect fundamental rights, such as the right to life, human dignity and freedom and security of the person as entrenched in the Bill of Rights.[169] Failure to do so would be wrongful.

162 See 3.1.2 above.
163 Par 109.
164 Neethling 2011 *Obiter* 428 437-438.
165 Neethling *et al* 4.
166 Neethling *et al* 30, 57, 76-77.
167 Neethling *et al* 57.
168 2001 (4) SA 938 (CC).
169 Parr 27-29 and 72-74. See also Neethling, Potgieter & Scott *Case book on the Law of delict* (2006) 26.

In addition to conduct having to be wrongful, it should also be culpable. There is a primary distinction between intent and negligence as forms of fault.[170] In order to establish intent, there should be the direction of the will and consciousness of wrongfulness and the test for intent is subjective.[171] Negligence on the other hand is where a person is blamed for an attitude of carelessness, thoughtlessness because he failed to adhere to the objective standard of care required of him and test for negligence is that of the reasonable person or bonus paterfamilias.[172] Therefore, a *diligens paterfamilias* or reasonable person in the defendant's position would foresee the reasonable possibility of his conduct injuring another and he would take reasonable steps to prevent such harm. Where the defendant had in fact failed to take such steps, he would have acted negligently.[173]

It is against these general rules pertaining to the first three elements of the delict that Froneman J's judgment should be viewed. In the first instance one must agree with Froneman J that the state is a legal person[174] and as such should perform the functions entrusted to it by the Constitution.[175] Therefore, on the issue of the act as a delictual element, acts of state organs such as the police are acts of the state[176] and failures to act positively where there is a constitutional duty to do so, constitutes wrongfulness.[177] Froneman effectively uses *Carmichele* in stressing that the constitutional value of accountability is here the *boni mores* and it goes without saying that constitutional values should be taken into account in establishing wrongfulness.

On the issue of fault, Froneman J states that Van Wyk's actions were both "deliberate and negligent" and fails to explain this statement any further.[178] While it is easy to see that Van Wyk had every intention of raping Ms F and that fault in the form of intent is present, it is not certain why Froneman J thought Van Wyk to be negligent as well. However, for purposes of this argument Van Wyk's intent suffices. What is interesting is that Froneman J then also observes that the state was negligent in not taking reasonable measures to prevent Van Wyk from committing a delict, this despite the fact that his previous convictions made him a time bomb and that it was foreseeable that he could cause harm to members of the public. Therefore, the state's failure to take reasonable steps to prevent Van Wyk from causing harm is indicative of the state's negligence. Although Froneman J does not discuss preventability of harm in detail, one can argue that, if the Minister had proper policies in place

170 Neethling *et al* 123.
171 Neethling *et al* 126.
172 Neethling *et al* 131.
173 *Kruger v Coetzee* 1966 2 SA 428 (A) 430; Neethling *et al* 133.
174 Par 109. See also Okpaluba & Osode *Government Liability: South Africa and the Commonwealth* (2010) 16.
175 Par 109.
176 *Ibid*.
177 Par 121.
178 Par 148.

to discipline the obviously-errant Van Wyk, he would not have been in possession of the police vehicle and could not have offered Ms F a lift home. If the wrongful, culpable act of the state then caused harm to a victim such as Ms F, there is no reason why she should not be able to hold the Minister directly liable.

The question whether the state had taken reasonable steps to prevent harm also ties in with the risk theory in connection with state liability. According to Wiechers, the legal basis for holding the state liable for the actions of its employees lies in the risk theory, which postulates that if an employer empowers his employees to perform certain functions, he must bear the risk that those employees may cause damage to individuals.[179] In addition, the state's mandate is to serve the citizens of South Africa in accordance with the Constitution. One need only look at the principles of *Batho Pele*[180] to realise that the idea of service is central to the government's functions. Therefore, a government body has the duty not to infringe any of the human rights guaranteed in the Bill of Rights and sometimes, in the case of an omission, there may even be a duty on the state to take positive steps to protect these rights.[181] By employing unsuitable individuals such as Van Wyk, the state runs the risk of being held liable, not only on the basis of vicarious liability, but on the basis of being directly to blame for their culpable failures.

Of course, when litigating on the basis of direct liability, fault on behalf of the government body should be proven and this may prove tricky in some instances. However, this should not be an obstacle for a victim in employing direct liability. In addition, there should also not be policy considerations prohibiting a litigant from proceeding on the basis of direct liability. One such objection could possibly be that it would open the proverbial flood gates and that government's coffers would soon be emptied because of a multitude of lawsuits. This is a legitimate concern. After all, as Scott so aptly states, it seems as though we are experiencing an all-time low in the quality of normal policing functions as policemen commit serious crimes almost on a daily basis; fire arms are being stolen and sold *en masse*; service pistols are used in countless incidents of domestic violence; and the former chief of the South African Police Service and Interpol was even found guilty of corruption.[182] However, it

179 Wiechers *Administrative Law* (1985) page number as quoted by Olivier "Delictual liability of the South African Revenue Service: The wrongfulness element" 2009 *TSAR* 740 744.

180 *Batho Pele* means "people first" and these principles are access, which means to offer integrated service delivery, openness and transparency, which means to create a culture of collaboration, consultation, which means to listen to the customer's problems, redress, which means to apologise when necessary. In addition there are the principles of courtesy, service standards, information and value for money. See http://www.info.gov.za (accessed on 2012-03-21).

181 *Carmichele* par 1

182 Scott 2011 *TSAR* 135 147. The writer states that all these factors would explain why we are dealing with "near absolute liability" in cases concerning the police.

is submitted that proper application of the delictual elements should avoid that.

5 Concluding Remarks

Life is duty – that is certain. There is no escaping the fact that the state exists to serve the citizens of South Africa and to evade this duty continuously and openly creates the risk of delictual liability. It is submitted that the state as an employer can be held vicariously liable for delicts of its employees or organs but, in addition, there is no reason why direct liability should not be an option. With both causes of action, the pure application of the principles of the law of delict will prevent unfair results.

In practice, this proposal means that a plaintiff who sues the state has the option of pleading the elements of vicarious liability and, in the alternative, direct liability, or *vice versa*. The time has come to accept that there is no basis for denying a plaintiff an action against the state based on direct liability. With direct liability, the factual and normative enquiry is evident in the test for wrongfulness, whereas the same factual and normative enquiry takes place in establishing "course and scope of employment" in vicarious liability.

It is submitted that Froneman J's judgment paves the way for recognising the possibility of direct liability and that the time is ripe for employing that particular cause of action. Although this is not the function of the law of delict, it may just be that a positive spin-off of direct liability may be that it would serve as a deterrent for state organs and that they would make a greater effort to take reasonable steps to ensure that they perform their constitutional duties.

Grave concerns about the state of the police service are not groundless. Typically, employers in general terms can only discipline or take action against employees when their misconduct is within the work context, except where the employer can prove that the off-duty misconduct impacts on its business. As pointed out by Neethling, the right to control is not only applicable when a policeman is on duty but can also be extended to situations when they are on standby-duty or even when they are off-duty and then place themselves on duty and commit a delict. It is submitted that Neethling is correct: the creation of risk approach should be considered in *all* instances of intentional wrongdoing by an employee and the general guideline should be that an "employer should be liable for an (intentional) delict of his employee if his appointment and work conditions enabled him to commit the delict (and hence created a heightened risk of prejudice) in such a manner". This should thus compel employers (especially the state) to take active steps to prevent employees working from them from causing harm to others (and the public at large). If the state as an employer takes proper steps in curbing such behaviour and dismiss employees who abuse their

authority and trust, then instances such as *F* or *K* will not be the order of the day. Accountability is ultimately the responsibility of the employer (in this case the state) and the saying "I am not my brother's keeper" will not be applicable here because it already has been established in *Feldman* that a master who uses servants creates risk of harm to others if the servant is negligent, inefficient or untrustworthy.