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THE ORIGINS OF THE RECENT NEW APPROACH TO DETERMINING WRONGFULNESS IN THE SOUTH AFRICAN LAW OF DELICT*

OPSOMMING

Die oorsprong van die onlangse nuwe benadering tot onregmatigheidsbepaling in die Suid-Afrikaanse deliktereg

Die onlangse nuwe benadering om onregmatigheid in die Suid-Afrikaanse deliktereg te bepaal, voortvloeiend uit *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 1 SA 461 (SCA) 468, is dat onregmatigheid teenwoordig is wanneer dit volgens beleidsoorwegings of openbare beleid, redelik sal wees om 'n persoon aanspreeklik te hou. Na *Telematrix* het die howe hierdie benadering uitgebrei deur te verklaar dat onregmatigheid handel oor die redelikheid van die oplegging van aanspreeklikheid vir 'n nalatige handeling of 'n handeling wat veronderstel word om nalatig te wees. Navorsing oor die Engelse *tort law* het aan die lig gebring dat die Engelse reg die oorsprong van hierdie onlangse benadering is. Die onlangse benadering wat gebruik word om onregmatigheid in die Suid-Afrikaanse reg te bepaal is merkwaardig soortgelyk aan 'n toets wat gebruik word om 'n *duty of care* in die *tort of negligence* van die Engelse reg te bepaal. Die Suid-Afrikaanse deliktereg verskil fundamenteel van die Engelse *law of torts* in soverre die Suid-Afrikaanse reg 'n generaliserende benadering tot die bepaling van deliktuele aanspreeklikheid volg, terwyl die Engelse reg 'n verskeidenheid van verskillende *torts*, elk met sy eie vereistes, erken. Ons howe moet baie omsigtig met die moontlike implikasies omgaan en moet veral waak om nie die *tort of negligence* heelhuids oor te neem nie. Wanneer toetse en beginsels by die Engelse reg geleen word, moet ons versigtig wees om nie toetse en beginsels te aanvaar wat nie inpas by of kenmerkend is van ons generaliserende benadering nie.

1 Introduction

Much has been written about the "new test" or "new variation" of the test for wrongfulness in determining delictual liability in South African law (see Scott "*Loureiro and Others v iMvula Quality Protection (Pty) Ltd* 2014 3 SA 394 (SCA): Determination of constitutional nature of contractual and delictual claims" 2014 *De Jure* 388; Neethling and Potgieter *Law of delict* (2015) 80–87). Upon researching English tort law it has become apparent that the origin of this

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"new" test or "new variation" of the test (referred to as the "recent approach" from here on) is in all probability derived from English tort law and more specifically from the test applied in determining a "duty of care" with regard to the tort of negligence. The South African courts, in applying this recent approach, are in fact drawing closer to adopting English law and the tort of negligence.

In this note, the recent approach, the test applied to determining wrongfulness before this recent approach (referred to as the "traditional approach" from here on) and fundamental similarities and differences between the South African law of delict and English tort law are referred to briefly. The English test for determining a *duty of care* is discussed and compared with the recent approach to determining wrongfulness in South African law. A conclusion follows with a summary of the submissions made.

2 The traditional and recent approach to determining wrongfulness in South African law

The traditional approach to determining wrongfulness emanated from the decision of *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 596–597 where it was held that in order for conduct to be deemed wrongful, the harm suffered must be caused in a legally reprehensible or unreasonable manner, *contra bonos mores*, in light of all surrounding circumstances (see further *Minister of Law and Order v Kadir* 1995 1 SA 303 (A) 317–318; *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 27; *Administrateur, Transvaal v Van der Merwe* 1994 4 SA 347 (A) 361; *Government of the Republic of South Africa v Basdeo* 1996 1 SA 355 (A) 367; *Carmichele v Minister of Safety and Security* 2001 1 SA 489 (SCA) 494; Neethling and Potgieter *Delict* 36 fn 19–21). In determining wrongfulness, the basic question is whether a legally recognised interest was infringed and if so whether it was infringed in a legally reprehensible or unreasonable manner (see *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) 498–499; *Premier Western Cape v Faircape Property Developers (Pty) Ltd* 2003 6 SA 13 (SCA) 31–32; *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 27; Neethling and Potgieter "Wrongfulness and legal causation as separate elements of a delict: Confusion reigns: *eBotswana (Pty) Ltd v Sentech (Pty) Ltd* 2013 6 SA 327 (GSJ); *Cape Empowerment Trust Limited v Fisher Hoffman Sithole* 2013 5 SA 183 (SCA)" 2014 *TSAR* 890; Neethling and Potgieter *Delict* 33; Loubser and Midgley (eds) *The law of delict in South Africa* (2012) 142 146). The criterion used to determine whether a legally recognised interest was infringed in a legally reprehensible or unreasonable manner is the *boni mores* yardstick (see *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 596–597; *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 27; *Carmichele v Minister of Safety and Security* 2001 1 SA 489 (SCA) 494; *Moses v Minister of Safety and Security* 2000 3 SA 106 (C) 113; *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 1 SA 389 (SCA) 395; *Minister of Law and Order v Kadir* 1995 1 SA 303 (A) 317–318; *F v Minister of Safety and Security* 2012 1 SA 536 (CC) 566; *Paixão v Road Accident Fund* 2012 6 SA 377 (SCA) 381; *Lee v Minister of Correctional Services* 2013 2 BCLR 129 (CC) 149 167; *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2014 2 SA 214 (SCA) 222; Neethling and Potgieter 2014 *TSAR* 890; Neethling and Potgieter *Delict* 36 fn 21–22; Loubser and Midgley (eds) *Delict* 142 144; Van der Walt and Midgley

Principles of delict (2016) 113–114). The *boni mores* yardstick is an objective test based on the criterion of reasonableness and the courts have an obligation to develop the *boni mores* in order to ensure that it is in line with the spirit, purport and objects of the Bill of Rights (Neethling and Potgieter *Delict* 39–40). The *boni mores* is thus a flexible, open-ended, juridical yardstick that gives expression to the evolving convictions of the South African community allowing the courts to continuously adapt the law and provide value judgements (see *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) 396, 400; *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) 442; *Deneys Reitz v SA Commercial, Catering and Allied Workers Union* 1991 2 SA 685 (W) 693; *Marais v Richard* 1981 1 SA 1157 (A) 1168; *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 3 SA 579 (A) 593; *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA) 1212; Neethling and Potgieter *Delict* 40 fn 41). The courts may be faced with two or more competing interests which the plaintiff and defendant rely on and which require protection of the law (see *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 3 SA 579 (A) 585; *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA); *H v W* 2013 5 BCLR 554 (GSJ); Loubser and Midgley (eds) *Delict* 141 145). In such instances the courts must weigh the different interests and decide according to the particular circumstances of the case whether the infringement of the plaintiff's interests was reasonable or not (see *Oosthuizen v Van Heerden* 2014 6 SA 423 (GP) 434–435; *Natal Fresh Produce Growers' Association v Agroserve (Pty) Ltd* 1990 4 SA 749 (N) 753–754; *Hattingh v Roux* 2011 5 SA 135 (WCC) 140; other cases referred to by Neethling and Potgieter *Delict* 38 fn 27; Loubser and Midgley (eds) *Delict* 145; Van der Walt and Midgley *Delict* 110, 187–189; Burchell *Principles of delict* (1993) 38).

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

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

(2) In establishing wrongfulness in borderline and novel cases, for example, where there is uncertainty whether the defendant's conduct exceeded the bounds of a ground of justification (see *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376, 383 (T); *Hattingh v Roux* 2011 5 SA 135 (WCC) 140–141; Neethling and Potgieter *Delict* 45–58; Van der Walt and Midgley *Delict* 71 105 113–116; Loubser and Midgley (eds) *Delict* 146–148; Burchell *Delict* 39).

(3) The application of a ground of justification. The *boni mores* would condone the *prima facie* infringement of interests or breach of a legal duty based on the criterion of reasonableness. In actual fact, the defendant exercises his own lawful rights and the plaintiff's rights are thereby limited by the defendant's exercise of his rights. Proof of a ground of justification illustrates reasonableness of conduct and the defendant's conduct may not

be found wrongful (see Van der Walt and Midgley *Delict* 101 190; Loubser and Midgley (eds) *Delict* 162–163; Neethling and Potgieter *Delict* 88).

The option of which route to take in determining wrongfulness, will depend on the facts of the case. In some instances it may be easier to identify the right infringed while in others, a legal duty to prevent harm or loss may be more easily established. Causing of physical harm by a commission or infringement of an interest may be considered *prima facie* wrongful. However, not all factual infringements of interests are *prima facie* wrongful and it is possible that a ground of justification may still be applicable (see *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T) 387; *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) 497; Neethling and Potgieter *Delict* 45 fn 69 46; Loubser and Midgley (eds) *Delict* 146).

The recent approach stemming from *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 1 SA 461 (SCA) 468 ("*Telematrix*") is that wrongfulness is present when according to policy considerations or public policy, it would be reasonable to hold a person liable, or that wrongfulness turns on "the reasonableness of imposing liability for conduct that has been shown, or is assumed to be, negligent" (see Neethling and Potgieter *Delict* 80; Fagan "Rethinking wrongfulness in the law of delict" 2005 *SALJ* 93; Fagan "Blind faith: A response to Professors Neethling and Potgieter" *SALJ* 2007 292; Loubser and Midgley (eds) *Delict* 140; Van der Walt and Midgley *Delict* 99). The recent approach, to my mind, as far as can be ascertained, began with the views of Du Bois ("Getting wrongfulness right: A Ciceronian attempt" 2000 *Acta Juridica* 1ff), was adapted by Fagan (2005 *SALJ* 106–115), was adopted by Harms JA in *Telematrix* (468) and Brand JA ("Reflections on wrongfulness in the law of delict" 2007 *SALJ* 79, see some of the following decisions in which Brand JA presided over: *Le Roux v Dey* 2011 3 SA 274 (CC) 315; *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2014 2 SA 214 (SCA) 223; *Cape Empowerment Trust Limited v Fisher Hoffman Sithole* 2013 5 SA 183 (SCA) 193; *Roux v Hattingh* 2012 6 SA 428 (SCA) 439; *RH v DE* 2015 5 SA 83 (CC) [18]; *iMvula Quality Protection (Pty) Ltd v Loureiro* 2013 3 SA 407 (SCA) 424–425; *Lee v Minister of Correctional Services* 2013 2 SA 144 (CC) 173; *F v Minister of Safety and Security* 2012 1 SA 536 (CC) 567–568; *Nashua Mobile (Pty) Ltd v GC Pale t/a Invasive Plant Solutions* 2012 1 SA 615(GSJ) 622; *Jacobs v Chairman, Governing Body, Rhodes High School* 2011 1 SA 160 (WCC) 165. See also Neethling and Potgieter *Delict* 80 fn 308) and then recently endorsed by the courts (see cases referred to by Neethling and Potgieter *Delict* 78 fn 276–280 where this recent approach was followed; cf Fagan 2007 *SALJ* 287).

This recent approach was severely and justifiably criticised for *inter alia*: attaining superiority as the central element in determining delictual liability; causing conflation between the elements of wrongfulness, negligence and legal causation; for wrongfulness being established after all the other elements are established; for conforming to an Anglo-American approach where there are separate torts instead of the generalising approach followed in South Africa law; for the English *duty of care* concept being equated with the South African legal duty to prevent harm or loss; for the reference to the legal duty to prevent harm or loss as a legal duty not to act negligently; and for the approach being incomplete, under-developed and rather vague (see Neethling and Potgieter

Delict 80–87 158–160; Knobel "Thoughts on the functions and application of the elements of a delict" 2008 *THRHR* 652–653; Scott "*Mpongwana v Minister of Safety and Security* 1999 2 SA 795 (C): Delictual liability for omission" 1999 *De Jure* 342, Scott "Railroad operator's failure to protect passenger against attack on train not negligent: *Shabalala v Metrorail* 2008 3 SA 142 (SCA)" 2009 *THRHR* 158–163; Scott "Delictual liability for adultery: A healthy remedy's road to perdition" in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling* (2015) 433).

3 Fundamental similarities and differences between the South African law of delict and English tort law

The South African law of delict follows a general approach, in that generally all the elements of a delict must be present before liability will ensue in any given case of a civil wrong. In other words, where required, conduct, wrongfulness, fault, causation and harm must be present before liability will ensue (except in cases of strict liability where fault is not required or where an interdict is sought: see *Perlman v Zoutendyk* 1934 CPD 151 155; Neethling and Potgieter *Delict* 4; Van der Walt and Midgley *Delict* 9 39; Loubser and Midgley (eds) *Delict* 16). In comparison, English law follows a "casuistic approach" where there are approximately seventy torts each with its own specific requirements. The main tort is the tort of negligence and there are a number of intentional torts. Therefore in English law, liability will ensue only when the specific requirements for that specific tort (civil wrong) have been met (see Koziol in Koziol (ed) *Basic questions of tort law from a comparative perspective* (2015) 697).

What is essentially common to tort law and the law of delict is that where some harm or loss is suffered by the claimant as a result of infringements of legally recognised interests, the claimant is entitled to redress by the law (except if an injunction/interdict is sought: see Witting *Street on torts* (2015) 4–5 10–14 with regard to English law; Neethling and Potgieter *Delict* 3, Van der Walt and Midgley *Delict* 1, Loubser and Midgley (eds) *Delict* 7–8 and Burchell *Delict* 9–10 with regard to South African law).

4 The English test for determining a *duty of care* in the tort of negligence and the recent approach to determining wrongfulness in the South African law of delict

The tort of negligence in English law is recognised as the most important tort due to the large number of cases dealing generally with *negligently inflicted harm* that are brought before the courts (see Peel and Goudkamp *Winfield and Jolowicz on tort* (2014) 78; Witting *Street on torts* 26). In English law, *negligence* from a South African perspective is not only a factor to be taken into account in determining liability in the tort of negligence but is also known as a distinct tort protecting a number of interests. The elements required to succeed with regard to the tort of negligence are: duty, breach, causation and damage or harm (see Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* (2013) 99; Jones in Jones (gen ed) *Clerk and Lindsell on torts* (2014) 439 fn 1 441; Peel and Goudkamp *Winfield and Jolowicz on tort* 78; Witting *Street on torts* 25; Steele *Tort* law (2014) 112). In respect of the duty element, the claimant must prove that the defendant owed him or her a duty of care, that is, a duty to take reasonable care and not inflict harm upon him or her. The requirement of "duty of care" is a distinct essential element owed particularly to the claimant

(Peel and Goudkamp *Winfield and Jolowicz on tort* 80). The duty of care concept in English law is a preliminary question of law, demarcating the range of people, the type of relationships and the interests that should receive protection of the law as a result of *negligent conduct*. With regard to the breach of that duty; it is described as a factual question as to whether the defendant's conduct strayed from the legally-required standard of care of the reasonable person (in other words, was his or her conduct negligent from a South African perspective, see Witting *Street on torts* 26; Jones in Jones (gen ed) *Clerk and Lindsell on torts* 31). The defendant's breach of duty must have factually *caused* the harm or loss sustained by the claimant. The loss must not be unforeseeable or too remote or must be within the scope of the duty. There must be damage for liability in the tort of negligence to follow (see Jones in Jones (gen ed) *Clerk and Lindsell on torts* 31, 441; Witting *Street on torts* 25; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 99).

Turning to the duty of care, in practice, the claimant need only prove the existence of an acknowledged *duty of care* category and the general test for duty will only be necessary in novel duty categories or in cases where there is doubt as to the presence of a particular duty category. Specific categories of duties are recognised for *inter alia* omissions; psychiatric injury or mental harm; pure economic loss; wrongful conception, wrongful birth and wrongful life, once again, in respect of *negligent conduct* (see Jones in Jones (gen ed) *Clerk and Lindsell on torts* 441; Deakin, Johnston and Markesinis *Markesinis and Deakin's tort law* 102; Witting *Street on torts* 26–27).

There are currently three approaches applied by the English courts in determining whether the defendant owes the claimant a general duty of care (see *Customs and Excise Commissioners v Barclays Bank plc* 2007 1 AC 181 189–190; Peel and Goudkamp *Winfield and Jolowicz on tort* 87–89). They are known as the three-fold test, the incremental approach and the assumption of responsibility test. With regard to the incremental approach, and acknowledging a novel duty of care, existing authority must be considered first and if there is a need for the law to be extended, it should be extended incrementally resulting in a positive development (Witting *Street on torts* 34). Stemming from the decision of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* 1964 AC 465, the court (House of Lords) acknowledged liability in the tort of negligence where the defendant voluntarily assumes responsibility for the accuracy of a statement made to a claimant and where the claimant relies on such statement. The phrase "assumption of responsibility" simply means that the law recognises the duty of care and assumption of responsibility may really just indicate proximity (see the explanation of this concept below). Where the assumption of responsibility is established, it is not necessary to consider the last element of the three-fold test (which is also explained in more detail below) as such a finding demonstrates the existence of a duty of care and the actual relationship between the parties makes it fair, just and reasonable to impose the duty of care (*Customs and Excise Commissioners v Barclays Bank plc* 2007 1 AC 181 199). The three-fold test is, however, the most common and preferred test used by the courts (see *Van Colle v Chief Constable of the Hertfordshire Police* 2009 1 AC 225 260–261; *Marc Rich & Co v Bishop Rock Marine* 1996 AC 211 235). In *Customs and Excise Commissioners v Barclays Bank plc* 2007 1 AC 181 89–192 the court confirmed that the three-fold test may be combined with the incremental approach and the assumption of responsibility approach.

The three-fold test was enunciated in *Caparo Industries plc v Dickman* 1990 2 AC 605 ("*Caparo*"), a case dealing with pure economic loss caused by alleged *negligent* misstatements (similar to the South African case, *Telematrix* where the recent approach to wrongfulness was enunciated). In *Caparo*, the court held (617–618 632–633) that the three elements that must be established in respect of a duty of care are foreseeability of harm; proximity and whether it is fair, just and reasonable to impose a duty of care. With regard to foreseeability of harm, specific harm to the claimant need not be foreseeable and it is sufficient if the claimant falls within the category of persons that could be reasonably foreseen to be injured as a result of the defendant's negligence (see Jones in Jones (gen ed) *Clerk and Lindsell on torts* 443–444; Peel and Goudkamp *Winfield and Jolowicz on tort* 91). The concept of "proximity" encompasses different forms of closeness including physical, assumed, causal and circumstantial (Jones in Jones (gen ed) *Clerk and Lindsell on torts* 447 450). Its use varies depending on the particular case and source of harm (Peel and Goudkamp *Winfield and Jolowicz on tort* 91–93). Deakin, Johnston and Markesinis (*Markesinis and Deakin's tort law* 113) submit that the "ambiguous term" of "proximity" generally refers to "a pre-tort relationship of some kind between the claimant and defendant arising *prior* to the infliction of damage".

The last test – whether it is fair, just and reasonable to impose a duty of care – requires further explanation. Jones (in Jones (gen ed) *Clerk and Lindsell on torts* 447 450) refers to this test as one of common sense, ordinary reason and whether it is right for the court to impose a duty of care in a given case. It also refers to the "exercise of judicial pragmatism, which is the same as judicial policy". In a narrow sense, it relates to fairness and justice between the claimant and defendant. In a wider sense it relates to the *reasonableness* of imposing a duty of care based on *legal* (where the focus is on the legal system and principles) *social* and *public policy* (see *idem* 450–451; *Alcock v Chief Constable of South Yorkshire Police* 1992 1 AC 310 365).

The third element of the three-fold test is generally used by the courts to reach a decision as to whether a duty of care should be imposed and whether a claim should be allowed. Witting *Street on torts* 48–50 points out that it is either used in a restrictive manner, to limit the scope of duty of care or in a positive manner, in recognising a duty where it was previously unrecognised or non-existent. An example of the court using the "fair, just and reasonable" element in a restrictive manner is illustrated in *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* 1996 AC 211. In this case, a ship carrying the claimants' cargo sustained a crack while on voyage. The ship docked at a port. A surveyor was employed by a classification society charged with checking the safety of ships at sea. The surveyor, upon inspection, recommended that the ship continue with its voyage after some minor repairs. A couple of days later the ship sank. The claimants' recovered a certain amount of their loss from the ship owner and tried to recover the remainder of the loss from the classification society "alleging breach of a duty of care owed by the society to the cargo owners to take reasonable care in the surveys undertaken and the recommendations made so as not to expose the cargo to risk of damage or loss" (211–212). The House of Lords found that reasonable foreseeability of harm as well as proximity was present but that it was not fair, just and reasonable to impose a duty of care on the defendant. In concluding that it was not fair, just and reasonable to impose liability on the classification society, the House of Lords held *inter alia* that: the imposition of duty of care

may result in the classification societies refusing to inspect vessels which could result in compromising public safety at sea with detrimental consequences; increased litigation against such societies would occur and it would be a costly process diverting resources and "personnel" to the litigation process instead of focusing on the ships and saving lives; and that such recognition of a duty of care would be in conflict "with the international contractual structure" between ship and cargo owners (212 242).

An example of the court using the "fair, just and reasonable" element in a positive manner is illustrated in *White v Jones* 1995 2 AC 207 (see the discussion of this case by Witting *Street on torts* 49–50). In this case, a legal practitioner did not draw up a new will as requested by the testator before his death, resulting in the testator's daughters not inheriting. The House of Lords held that a duty of care should be imposed in such instances based on fairness, reasonableness and justice. Lord Goff (259–260) *inter alia* provided the following reasons: solicitors play an important role in discharging their professional duties relating to the testator's intentions and if they act *negligently* in fulfilling their duties it is not unjust if such solicitor should be found liable, there is a lacuna in the law which needs to be filled; to deny a remedy to the disappointed beneficiary is unjust; the testator has a right to bequeath his assets to whom he pleases; and legacies are important in society.

The majority of the duty of care cases have been established by taking account of two broad types of policy issues: whether certain types of harm, such as pure economic loss and psychiatric injury, can ground liability in the tort of negligence; and whether the duty of care can be imposed with respect to certain types of conduct by for example, public authorities' and professionals (Peel and Goudkamp *Winfield and Jolowicz on tort* 49). Other policy factors considered under the element of whether it is fair, just and reasonable to impose a duty of care include: the fear of indeterminate liability or the opening of the floodgates argument; vulnerability (to risk) of the claimant; whether a duty of care would undermine an imperative public interest; preference of protecting physical interests over pure economic loss or psychiatric injury; preference of protecting vulnerable victims such as the blind; the need to avoid conflict between claims in contract and in tort; the notion that people should be held accountable for their own actions; the desire to impose liability on primarily responsible parties such as regulatory authorities; and the notion that people should protect themselves from loss by taking out insurance or taking other precautionary measures (see Peel and Goudkamp *Winfield and Jolowicz on tort* 95–96; Witting *Street on torts* 48).

The last and third criterion has in a sense been adopted and adapted in our law as the recent approach. The difference is that in our law, the third criterion is used to establish wrongfulness instead of a *duty of care*. This criterion from an English perspective is also policy-based and has the effect of either excluding a duty of care or recognising a duty of care in terms of policy. It is useful in determining whether a duty of care exists in borderline, novel or difficult cases. Thus, it plays a prominent role in *inter alia* cases of omissions; wrongful conception, wrongful birth and wrongful life claims; psychiatric injury; and pure economic loss. It is an objective, flexible test enabling a value judgment as to whether the defendant owes the claimant a duty of care and allows the courts to rely on policy as well as principles of fairness, justice and reasonableness in

deciding whether to exclude or extend a category of duty of care in the tort of negligence.

Harms JA in *Telematrix* (468) stated that our law should not adopt the English tort of negligence. He was faced with a case where it was not appropriate to use the breach of a legal duty to prevent harm approach in determining wrongfulness, he instead referred to policy considerations which would justify awarding compensation to the plaintiff (Neethling, Potgieter and Scott *Casebook on the law of delict* (2013) 100). Even though Harms JA did not intend to adopt the tort of negligence, as submitted earlier, with this recent approach, our law is closer to adopting it. Our Constitutional Court has also already endorsed this recent approach (see *Le Roux v Dey* 2011 3 SA 274 (CC) 315; *Lee v Minister of Correctional Services* 2013 2 BCLR 129 (CC) 150; *Country Cloud Trading v MEC, Department of Infrastructure Development* 2015 1 SA 1 (CC) 8; *Loureiro v Imvula Quality Protection (Pty) Ltd* 2014 5 BCLR 511 (CC) 525; *DE v RH* 2015 5 SA 83 (CC) 101; *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) 216).

For example, Van der Westhuizen J in the Constitutional Court decision of *Loureiro v iMvula Quality Protection (Pty) Ltd* (2014 5 BCLR 511 (CC) 521 referred to the *boni mores* as the test for wrongfulness enunciated in *Minister van Polisie v Ewels* 1975 3 SA 590 (A) but stated that now the *boni mores* takes on "constitutional contours" and are "by necessity underpinned and informed by the norms and values of our society, embodied in the Constitution". Thus in essence the *boni mores* must consider and conform to the constitutional values. Van der Westhuizen J further stated that the wrongfulness enquiry

> "focuses on the conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability" (525).

With these words, Van der Westhuizen J effectively reconciled the traditional and the recent approaches. The recent approach is used in the end to justify the imposition of wrongfulness. Van der Westhuizen J (526) reasoned that there were sufficient public policy reasons for imposing liability and finding conduct as wrongful.

It is evident that according to the recent approach, the courts do still consider the *boni mores*, constitutional values, policy considerations and the parties' competing interests in deciding whether to impose liability upon the defendant (assuming all the other delictual elements are present). It is also evident that the recent approach seems to attach more weight to policy considerations. The recent approach to establishing wrongfulness was initially applied in instances of omissions and pure economic loss. However, it is no longer limited to instances of omissions and pure economic loss (see Scott 2014 *De Jure* 388–389). For example, in the recent decision of *DE v RH* 2015 5 SA 83 (CC) 101 the Constitutional Court in answering the question of whether our law still recognises adultery as a specific form of *iniuria*, concluded that public policy dictates that it is not reasonable to attach delictual liability to adultery. Thus adultery is no longer considered wrongful (105). The court's decision was, however, influenced by the changing *mores* or softening of the attitude towards adultery.

In *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) 216 where the court was called upon to determine whether our law recognises a wrongful life claim, Froneman J stated that

> "our law has developed an explicitly normative approach to determining the wrongfulness element in our law of delict. It allows courts to question the

> reasonableness of imposing liability . . . on grounds rooted in the Constitution, policy and legal convictions of the community . . . Part of the established wrongfulness enquiry is to determine whether there has been a breach of a legal duty not to harm the claimant, or whether there has been a breach of the claimant's rights or interests".

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

In South African law, it is has been suggested that the existence of a duty of care is similar to the element of wrongfulness and similar to the concept of a legal duty to prevent harm or loss as one of the tests for establishing wrongfulness (according to Fagan 2000 *Acta Juridica* 65, a legal duty to prevent harm and a duty of care are almost identical). South African courts have, however, stated that the *duty of care* concept is not part of South African law (*Knop v Johannesburg City Council* 1995 2 SA 1 (A) 27; *Local Transitional Council of Delmas v Boshoff* 2005 5 SA 514 (SCA) 522; *Telematrix* 468; *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 3 SA 138 (SCA) 144; *Hawekwa Youth Camp v Byrne* 2010 6 SA 83 (SCA) 90; *Herschel v Mrupe* 1954 3 SA 464 (A) 485–486; *Administrateur Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) 833; *McCarthy Ltd t/a Budget Rent A Car v Sunset Beach Trading 300 t/a Harvey World Travel* 2012 6 SA 551 (GNP) 559–561; *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2014 2 SA 214 (SCA) 222). In South African law, in determining wrongfulness, reasonable foreseeability of harm may be considered as a factor in determining whether there was a legal duty to prevent harm, but its role is small and controversial (see Neethling and Potgieter *Delict* 163 fn 222; Neethling and Potgieter 2014 *TSAR* 893–894. Even the relationship between the parties under the idea of proximity plays a role in determining whether there was a legal duty to prevent harm, but again the role is small (see in general *Deacon v Planet Fitness* 2016 2 SA 236 (GP) 242; Neethling and Potgieter *Delict* 60–78; Van der Walt and Midgley *Delict* 116; Burchell *Delict* 40–45; McKerron *The Law of delict* (1971) 15–25 where the authors refer to a number of factors that may be considered in establishing the presence of a legal duty to prevent harm or loss, and there is no *numerus clausus* in respect of these factors). However, South African law has just adopted the third element of the English three-fold test (in determining a duty of care) in determining wrongfulness.

5 Conclusion

As shown above, the third element of the English three-fold test and the recent test for wrongfulness are strikingly similar. The three-fold test in English law was developed with regard to the tort of negligence, where *negligent* instead of intentional conduct was at the heart of the enquiry. There are specific intentional torts which deal with intentional conduct and there are a number of remedies and types of damages available in English law. Together, as a system, they no doubt work in harmony. Our courts have adopted this recent approach for all kinds of harm or loss and not necessarily only negligently inflicted harm or loss. The recent approach to determining wrongfulness, was an unnecessary approach adopted in South African law. The traditional approach was more than sufficient to deal with even novel and problematic cases. Nevertheless, the traditional approach to determining wrongfulness, is still followed in the South African law of delict next to the recent approach to determining wrongfulness, which is now

a part of our law. The two approaches are sometimes combined, with the recent approach applying as a final conclusion as to whether the defendant acted wrongfully. This approach is no doubt better than the recent approach applying on its own in determining wrongfulness.

Now that the probability of the origin of the recent approach has been traced, our courts and writers should be very careful of the possible implications, in particular of adopting the tort of negligence. In borrowing tests and principles from English law we must be wary of adopting tests and principles that do not fit in with or are characteristic of our generalising approach.

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