



The Implications of Negligent Misrepresentation in Law of Delict: A Judicial Rendition

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Authors' contributions

This work was carried out in collaboration between all authors. Author PNS designed the study, wrote the protocol, and wrote the first draft of the manuscript. Authors OOI and KT managed the literature searches and analyses of the study, performed the spectroscopy analysis. All authors read and approved the final manuscript.

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ABSTRACT

This paper is based upon a literature review. Its aim is to forward a review on the evolution of negligent misrepresentation especially in the South African jurisdiction. The birth of negligent misrepresentation stemmed from Roman law under the guise of the action legis Aquiliae. This action was confined to claims of personal damage and damage to property. The Roman-Dutch law attempts an extension to this action, to every kind of loss sustained by a person in consequence of wrongful acts of another. The Aquilian action has reached its end development in South African law, where compensation for negligent misrepresentation may be claimed ex lege Aquilia. As Aquilian liability results from every culpable and wrongful act which causes patrimonial damage, it is adumbrated that the law of delict will collide with the constitutional demands of the South African law. This paper suggests that the South African law of delict should developed and used as an instrument to serve constitutional purposes. South African Constitutional cases, such as Fose v Minister of Safety and Security and Carmichele exert that if the law of delict does provide a remedy, it is inappropriate to award additional constitutional damages. Foreign case law of Canada in Hedley Byrne & Co v Heller advocates a fresh approach with regard to negligent misrepresentation which relies heavily on Mukheiber v Raath case law.

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1. PURPOSE OF THE PAPER/RESEARCH QUESTION

This paper aims to clarify negligent misrepresentation. It proposes modelling the common law as well as Roman-Dutch law as the legal substratum upon which the principle of negligent misrepresentation rest. This research contrives a development of law of delict along constitutional lines in order to stay abreast of developments required for constitutional demands. The study proposes the development of law of delict with due regard to the spirit, purpose and objects of the Bill of Rights.

2. DESIGN/METHODOLOGY OF THE PAPER

The paper opted for a theoretical study. The data acquired are going to be complemented by documentary analysis. Text books and case laws from South Africa and international jurisdiction will be utilises to pose a holistic conception on the principle of negligent misrepresentation. The methodology of the paper presents an innovative, thorough, and systematic attempt to address the research question.

The article aims to present a strong, current and relevant theoretical or conceptual framework within which the inquiry is located.

3. RESEARCH LIMITATIONS

Because of the chosen research approach, the research results may lack generalizability in the context of the location of the country. But this notion is dispel when taken into consideration that the South African judicature has been influenced by English common law and Roman-Dutch law. This sentiment, however may not hold water, because these two legal realms, have formed part of South African law for years and had been naturalised. The research, however has invoked Canadian case law to equate the balance.

4. THE CULMINATION OF THE COMMON LAW SYSTEM IN SOUTH AFRICA

When Dutch settlers set foot in South Africa they brought with them their own legal system, which became applicable at the Cape. The Roman-

Dutch law was practised in the Cape even after he Cape had become part of the British Empire in the nineteenth-century. The English or British colonial power had infiltrated the Cape and as a result the two spheres of law (English common law and Roman-Dutch law) operate today in some form of tenuous co-existence [1].

Throughout the nineteenth-century with the tuition of Roman-Dutch law in the Cape in 1870, and the creation of the Cape Law Journal in 1884, the consolidation of Roman-Dutch law was established [2]. Roman-Dutch law became the common law of South Africa [3]. The foundations of the South African legal system were therefore steeped in Roman-Dutch law. This is evident in the adoption of the label "delict" instead of the English common law equivalent "tort". Never the less, the adoption of an English-style judicial structure has weakened the Roman-Dutch law legal substratum [4].

English common law has now increasingly played an important role in the South African judicature. South African courts follow the English approach to judicial precedent, known as the *stare decisis* [5].

The New Constitution of South Africa, after it came into force, has subscribed that the development of the common law be actuated through the Bill of Rights.

5. WHAT IS A DELICT?

A delict is a wrong against an individual who may himself institute a civil action. The remedies available are compensation and rescission. Courts have awarded punitive damages designed not merely to compensate the victim, but also to punish the wrongdoer [6].

6. LAW OF DELICT AND THE SOUTH AFRICAN CONSTITUTIONAL DEVELOPMENT

Certain sections of Roman law, for example the liability for patrimonial damage (*damnum iniuria datum*) still exists in South African law. This is known as the *lex Aquilia*. The Aquilian action was restricted to liability based to damage to property and liability for patrimonial loss. Under the Roman Dutch law dimensions, Aquilian liability underwent important extensions such as the

claimant for patrimonial damage resulting from any injury to personality [7]. The Aquilian action has reached its apex in South African law, where apart from the claimant for compensation to physical injury and damage to property, compensation for negligent misrepresentation is now to be included under this action (*Coronation Brick v Strachen Construction*). The protection of personality that has been started in Roman-Dutch law has spilled over to South African law.

Before the 1994 general democratic election in South Africa, protection of human rights by the courts was impossible. The 1910 Union Constitution in South Africa was dominated by the doctrine of parliamentary sovereignty. The South African Parliament represented only the white minority of citizens. It was therefore not possible for a court to declare an Act of Parliament invalid because it violated human rights. The common law provided some protection for individual rights, but Parliament could pass legislation amending the common law in whatever way it thought fit [8].

The interim Constitution of South Africa came into force in 1994. The doctrine of Parliamentary sovereignty was replaced by the doctrine of Constitutional supremacy. A Bill of Rights was put in place to safeguard human rights. Constitutionalism underpins the rule of law. The rule of law implies that the state may not use its power in such a way as to violate the fundamental rights of its citizens [9].

The entrenchment of fundamental rights in the Bill of Rights enhances their protection. Any limitation of a fundamental right must be in accordance with the limitation clause of the Constitution.

7. NEGLIGENCE MISREPRESENTATION

Koffman & MacDonald exert that before a contract is entered into, there must be some discussion. It may be that during the discussion one party may make a statement to the other which proves to be untrue [10]. The other party will be aggrieved if he or she relied upon that statement in entering into the contract. If the statement becomes a term of the contract, there is a breach and the injured party can take action.

Negligent misrepresentation is a false statement made by one party to the contract to the other [11].

Rescission and damages are the main remedies for negligent misrepresentation. Courts will try to prevent a double recovery. No damages should be available to cover losses which have been wiped out by rescission [12].

In the law of delict the aim is to give damages which will put the party back in the position he or she was in before the delict occurred. In other words courts will attempt to restore the aggrieved party (representee) to the position he or she would have been in had the misrepresentation not been made. The representee can recover for the profit he or she would have made had he or she not relied upon the misrepresentation, and used his or her resources in another way [13].

The delictual action for negligent misstatement was established in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1964). When damages are awarded in law of delict for negligent misrepresentation it will be on the basis of returning the injured party to the position he or she was in before the delict occurred.

8. PURE ECONOMIC LOSS

Pure economic loss has although its historical evolution or origination in the late Roman Era deserved little attention by scholars. Its pilloried status entails that a number of legal systems neither recognized pure economic loss as a legal principle nor distinguish it as an autonomous form of damage [14]. Case law, such as *Telematrix v Advertising Standards Authority* 2006 1 SA 461 (SCA) 468, has been able to resuscitate the ignoble treatment meted out to pure economic loss and furnish it a stand in the legal arena.

As a result of its subsequent recognition, pure economic loss is now viewed as loss without antecedent harm to plaintiff's person or property. The word "pure" is accorded a central role in the particular principle itself, because economic loss is connected to the damage to a person or property. In *Telematrix v Advertising Standards Authority* SA 2006 1 SA 461 (SCA) 465, Harms JA described pure economic loss, "as loss that does not arise directly from damage to the plaintiff's person or property, but rather in consequence of the negligent act itself, such as loss of profit, being put to extra expenses or the diminution in the value of property."

The definition furnished by *Telematrix* boils down to the notion that pure economic loss strikes at the victim's wallet [15].

Pure economic loss, on the one hand, comprises patrimonial loss that does not result from damage to property or impairment of personality, and, on the other hand, it may refer to financial loss that does flow from damage to property or impairment of personality. The financial loss, however, does not involve the plaintiff's property or person, or if it does, the defendant did not cause such damage or injury (Kadir v Minister of Law and Order). This is usually the case in regard to negligent misrepresentation (and unlawful competition). For purposes of the study we shall only discuss negligent misrepresentation as an offshoot for pure economic loss.

9. NEGLIGENT MISREPRESENTATION AS AN OFFSHOOT OF PURE ECONOMIC LOSS

9.1 Negligent Misrepresentation

Deeds are not regarded as susceptible as words. Words uttered by specialists (medical practitioner, financial advisor), can create reliance on the part of others.

An utterer of a misstatement or misrepresentation is usually a professional person, who professes skill in giving advice in a certain area [16]. Misrepresentation occurs when such professional person makes an incorrect or misleading representation in a wrongful and culpable manner to another person who acts on it to his or her detriment.

9.2 Wrongfulness and Negligence

In order to determine liability for negligent misrepresentation, the elements of wrongfulness and negligence must be present. The former (wrongfulness) can be determined by deciding whether there was a breach of a legal duty; whether the defendant was under a legal duty to furnish the correct information in a particular circumstance [17].

Liability can be constituted if the wrongdoer acted negligently. However, if the wrongdoer showed the necessary care in spite of the non-fulfilment of his legal duty, he ought not to be liable, on account of the absence of fault. If the

wrongdoer acts negligently, the possibility of contributory negligence on the part of the prejudiced party must be taken into account [18].

An example of pure economic loss pertaining to the loss of income suffered by a family, who must cater for an unwanted baby after the negligent misrepresentation from their medical practitioner, is portrayed in the case of *Mukheiber v Raath*.

In order to hold Dr Mukheiber delictually liable, Neethling et al. (cited Boberg, *The Law of Delict* at 390), opines that culpa (negligence) is to be determined. According to *Neethling et al*, culpa arises if a reasonable person in the position of the defendant (Dr Mukheiber) would have foreseen harm of the general kind that actually occurred. Dr Mukheiber should have foreseen the general kind of causal sequence by which that harm occurred; and that the defendant would have taken steps to guard against it. Under the tenor of the case of *Mukheiber v Raath*, it is established that the defendant failed to take those steps.

9.3 Causal Link or Causation

There must be a factual causal link between the misrepresentation and the damage. This entails that the plaintiff must have been misled by the misrepresentation. In other words, he/she must have believed that the misrepresentation was true. A plaintiff who cannot prove that the defendant's misrepresentation is the most important cause of the loss, does not prove factual causation on a balance of probability (*Perlman v Zoutendyk*). This entails that the plaintiff's damage must not be too remote. The approach to determine proximity in a claim for negligent misrepresentation is the standard of foreseeable reasonable reliance. The court in *Hercules Management Ltd v Ernst & Young* 1997 SCJ, NO. 51, para 43, identified five general indicia for reasonable reliance. We will treat only three of these indicia, which is applicable in this research: (i) the defendant must be a professional or someone who possessed special skill, judgment or knowledge; (ii) the advice or information was provided in the course of the defendant's business and (iii) the information or advice was given deliberately, and not on a social occasion. These three indicia are applicable in the *Mukheiber v Raath* case. In this case, Mrs Raath was not sterilized by Dr Mukheiber. The representation by the latter in or to the positive was false and this

misrepresentation was conclusive for the Raath's loss.

The legal position relating to the unlawfulness of a misrepresentation is encapsulated by Corbett CJ, in an article entitled: Aspects of the Role of Policy in the Evaluation of Our Common Law, in (1987) 104 SA Law Journal 52 at 59: "[...] the key to liability is the existence of a legal duty on the part of the defendant, that is the person making the statement, not to make a misstatement to the plaintiff, that is the person claiming to have been damaged by the statement [...]. [19].

9.4 A Legal Duty

Misrepresentation is contingent upon a legal duty by the defendant to take reasonable steps to ensure that what he was saying is correct. In order to help the defendant in his or her assessment of a legal duty, the law serves as a guiding tool by engineering the so-called reasonableness or *boni mores* criterion. This legal paraphernalia has been bolstered by the courts in *ABSA Bank Ltd v Fouche* 2003 1 SA 176 (SCA) 181. With this ammunition at his/her disposal, the defendant will become aware of his or her legal duty to aver him or her from a misstatement to the plaintiff. As adumbrated in the *Raath v Mukheiber* case, Mrs Raath was not sterilised by Dr Mukheiber. The fact that he said so was untrue. Because of this falsified statement to Mrs Raath, delictual liability is founded upon the consequences of Dr Mukheiber's action or conduct.

There was a legal duty in the *Mukheiber/Raath* case on the defendant (Dr Mukheiber) to speak the truth. The relationship between Mrs Raath (and her husband) and Dr Mukheiber and the nature of his duties towards them amounted to a special duty on his part to be careful and accurate in everything that he did and said pertaining to such relationship. The misrepresentation by Dr Mukheiber actuated the Raaths from not engaging in family planning. It must have been obvious to a person in Dr Mukheiber's position that the Raaths would place reliance on what he told them, that the correctness of the representation was of vital importance to them, and that if it were incorrect they could suffer serious damage.

Neethling is of the opinion that there rest a legal duty on the defendant (Dr Mukheiber) in speaking the truth. The legal duty has its origin or

stems from the doctor-client relationship between Mrs Raath (and her husband) and Dr Mukheiber.

The false representation by Dr Mukheiber carries a risk of birth of an unwanted child. On the other hand, Dr Mukheiber's representation was also subjective as the danger of a false representation of the kind under discussion should have been obvious to the mind of a gynaecologist in the position of Dr Mukheiber. The misrepresentation induced the Raaths not to take contraceptive care. It should have been clear to a person in Dr Mukheiber's position that the Raaths would place reliance on what is told to them by him. The veracity of the representation was of crucial interest to the Raaths, and that, if it were incorrect they could suffer serious harm. The representation related to technical matters concerning a surgical procedure about which the Raaths as lay people were subjected, could be ascribed to Dr Mukheiber, who should or would be knowledgeable.

Our law applies the standard of the reasonable man test. In the case of *Raath v Mukheiber*, the reasonable gynaecologist in the position of the defendant, Dr Mukheiber is alluded to.

In the case of an expert, such as a gynaecologist, the standard is higher than that of the ordinary lay person and the Court must consider the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs. In applying the reasonable man test, Dr Mukheiber should reasonably have foreseen the possibility of his representation causing damage to the Raaths and should have taken reasonable steps or has a duty of care towards the Raaths - to guard against such occurrence. He had failed to take such reasonable steps to ensure that no harm be inflicted on his patient [20].

In the light of these renditions, and apart from the reasonable man test, there rest also a duty of care on Dr Mukheiber to the Raaths [21]. By the negligence of Dr Mukheiber, the Raaths action for compensation would be granted. They (the Raaths) would probably not wish to have (more) children. It is not unprecedented. Socio-economic and other family considerations might have induced their choice of not having children [22]. These notions do not induce Dr Mukheiber from exemption for liability from his negligent action. But, Dr Mukheiber's liability can be no greater than that which rests on the parents to

maintain the child according to their means and station in life [23].

Dr Mukheiber's misrepresentation moved the Raaths from not engaging in contraceptive measures. The wrong consists not of the unwanted birth as such, but of the misrepresentation which led to the birth of the child and the consequent financial loss. The hardship to which the Raaths is subjected to, the maintenance of the child, can be viewed as a legal loss which could invoked compensation.

10. NEGLIGENT MISREPRESENTATION UNDER CANADIAN LAW

Feldthusen in his discussion of *Hedley Byrne & Co v Heller & Partners* entreat the courts of Canada to treat economic loss cases in five different categories, rather than just one: for example, negligent misrepresentation, negligent performance of a service, defective products, relational economic losses and public authorities' failure to confer an economic benefit. He advocates that intervening medical malpractice cases should be analysed individually. On the part of negligent misrepresentation, Feldthusen does a thorough analysis of this principle in the *Hedley Byrne* case. He exams three questions: Is there a duty? To whom and for what is that duty owed and, what are the specific obligations owed? These questions can easily be answered in our reflection on the Mukheiber/ Raath case.

In Canada, the current law is that it is only when important policy decisions involving social, political, economic factors and budgetary allotments that immunity from negligence liability is involved. The less protective approach in the Canadian jurisprudence is consistent with the Canadian view which frequently holds government officials accountable for constitutional breaches as well as for conduct that denies our citizens fairness [24].

11. SOUTH AFRICAN CONSTITUTIONAL COURT CASES ON DELICT AND BILL OF RIGHTS

The judgments in *Fose v Minister of Safety and Security* and *Carmichele v Minister of Safety and Security* are significant for two reasons. In the first place they establish that the South African law of delict be used as an instrument to serve constitutional purposes. On the one hand, the law of delict can and should be used to vindicate constitutional rights. If a constitutional right is

infringed by a defendant and the plaintiff suffers a loss as a result, the law of delict is an important mechanism with which to vindicate the right by holding the defendant liable to the plaintiff to compensate the loss. If the law of delict does provide a remedy, it is normally inappropriate to award additional constitutional damages. On the other hand, the law of delict can and should be developed and applied in a manner that promotes the values, spirit and purposes of the Bill of Rights.

In *Fose* the court struck out the plaintiff's claim for constitutional damages over and above delictual damages, in order to vindicate his constitutional rights to dignity, freedom and security of the person and privacy when he was assaulted by the police. In doing so the majority held that, given the court's duty to develop the common law with due regard to the spirit and objects of the Bill of Rights. In many cases the common law will be broad enough to provide all the relief that would be appropriate for a breach of constitutional rights and that delictual damages are themselves a powerful vindication of the constitutional rights in question requiring no further vindication by way of an additional award of constitutional damages.

In *Carmichele*, the Constitutional Court hold that the trial and appeal courts mistakenly assumed that the pre-constitutional test for determining the wrongfulness of omissions in delictual actions should be applied and thereby overlooked by the demands of section 39 (2), when they concluded that the police and prosecutors' failure to oppose the pre-trial release of a dangerous accused person was not wrongful in delict. The court declined to reach a firm decision on how, if at all, the wrongfulness test should be develop under the circumstances, because the lower courts had not considered the issue and a full trial had not been held.

12. IS THE FURNISHING OF INCORRECT INFORMATION OR REFUSAL TO GRANT INFORMATION TANTAMOUNT TO MISREPRESENTATION? AN EXTENSION OF RAATH/MUKHEIBER CASE

12.1 Misrepresentation: Omission or Commission

The existence of a misrepresentation can be in the form of an omission or a commission.

With regard to the former, Van Zyl J states in *McCann v Goodall Group Operations (Pty) Ltd* 1995 2 SA 718 (C) 721, that an omission in the case of negligent misrepresentation can exist in the form of a non-disclosure of information. In this case, the alleged omission was constituted by the defendant's failure to inform the plaintiff that he was not a registered general motor car dealer. The plaintiff was therefore under the false impression that the defendant was in fact such a dealer and accordingly did not claim the legally prescribed sales tax from him. The plaintiff was held liable for tax by the Receiver of Revenue and he claimed this amount from the defendant on the ground of negligent misrepresentation.

Another example of an omission is the facts in *Bowley Steels (Pty) Ltd v Dalian Engineering (Pty) Ltd* 1996 2 SA 393 (T).B (the defendant) sold his business to A without informing his customers, amongst others C (plaintiff).This created the false impression that there was no change in the ownership of the business and misled C into thinking that it was doing business as usual with the same entity with which it had traded for a long time. A was however a credit risk and failed to pay his debt to C. C suffered financial loss. The court held that C had a cause of action since B had a "legal duty to speak" about the change of ownership.

12.2 Furnishing of Incorrect Information or No Information

In law of delict there is in principle no legal duty to give the correct information where such information is merely furnished informally. This principle was accepted in a South African case, *Administrateur, Natal v Trust Bank van Suid-Afrika Bpk* 1979 3 SA 824 (A) and underpinned by an English case *Mutual Life and Citizens' Assurance Co Ltd v Evatt* 1971 1All ER 150. The court stated that: "[...] it would be quite unreasonable for the enquirer to expect more in such circumstances and quite unreasonable to impose any greater duty on the adviser [...] ordinary people would think they had some obligation beyond merely giving an honest answer." This dictum is congruent to Justice (of Appeal) Van den Heever's decision in *Herschel v Mrupe* 1954 3 SA 464 (A). Justice Van den Heever asserts that the defendant has to avail the information. Unless, a defendant is obliged to do so by reason of a specific occupation, he/she will not be vexed by the requirement of furnishing information when so requested.

The fact that there rests a legal duty to provide the correct information in general, does not mean that breach thereof amounts to wrongful conduct. This can also be construed along the line of an omission to supply information to another, as is evident in the case of *Minister of Law and Order v Kadir* 1995 1 SA 303 (A). In this case, the plaintiff, Kadir, is seeking to recover damages allegedly suffered on account of his inability to claim compensation for personal injuries from the Multilateral Motor Vehicle Accidents Fund. The facts in the case were that the plaintiff drove his motor vehicle on a public road behind another motor vehicle on which bundles of clothes were loaded. One of the bundles fell off, and the plaintiff had to swerve to avoid it, as a result on which his car left the road and he was injured. Shortly thereafter two police constables arrived on the scene to investigate the accident and, although it was possible at that stage, they failed to take down the registration numbers of the vehicle on which the bundles were transported, or the identity of the driver. As a result of the non-availability of these particulars, the plaintiff could not institute a delictual claim against the driver (MMF) and he allegedly suffered loss.

In light of the fact that there was no contact between the vehicles or with the bundle, a claim against the Fund could, in terms of the regulations promulgated under the Act be maintained, if the driver or owner of the other vehicle could be identified. As is adumbrated earlier, this was not possible, because the police men who attended the scene, failed to take down the necessary information relating to the driver and the identity of the said vehicle. This failure, is alleged, to have constituted a breach of a legal duty which they owed to the plaintiff.

It is also stated in the minority decision of *Minister van Polisie v Ewels* 1975 3 SA 590 (A), that a delictual liability can arise from omissions such as in the (present) case of *Minister of Law and Order v Kadir*. The omission in the *Kadir*-case not only evokes moral indignation, but also the fact that the legal convictions of the community demand that it be regarded as wrongful and that the loss should be compensated by the person who failed to act positively. Have the two police officers recorded the registration number of the vehicle or the identity of the driver, the plaintiff would have been able to claim compensation from the Fund. By virtue of the fact that they knew that the plaintiff had been seriously injured and that the incident was caused solely by the wrongful

conduct of the driver of the unknown vehicle, the police men should reasonably have foreseen that a failure to properly investigate the accident, could and would cause the plaintiff to suffer damage.

But despite the compelling argument of the breach of a legal duty by the police men, Rumpff CJ maintains the majority decision. He exerts that the omission of the police men did not constitute a breach of a duty owed under the *Police Act* 7 of 1958. Rumpff alleged that the aim of the police's investigation is not to provide the parties to such proceedings with useful information; nor does a prospective litigant have the right to demand a police investigation for the sole purpose of providing him with evidence. The fact of the matter is simply that, whereas parties or prospective parties to civil litigation often make use of information gathered by the police, they must do with whatever the police have available and cannot insist on anything better. In fact, what Rumpff actually said, is that the police men do not owe the plaintiff a legal duty to record the information relating to the identity of the driver or his vehicle. It can be conjectured that the functions of the police relate in terms of the Act to criminal matters and were not designed for the purpose of assisting civil litigants. *Incasu* it is established in the *Ewels* case that there is thus no legal duty on the police to prevent pure economic loss.

In *Bayer South Africa (Pty) Ltd v Frost*, the plaintiff claimed damages as a result of damage to his onion and wheat crops. He based his claim on the fact that he was persuaded by the defendant's representatives to buy Herbicide Sting which could suitably be applied on his vineyards by helicopter. Le Grange stated that he first heard about Herbicide Sting early in 1985. His informant was De Wet, who visited him on the farm. De Wet told him that Herbicide Sting was cheaper than Gramaxone and Reglone, which were used at the time. On the evening of 30 June 1985 and on instructions from respondent, Le Grange attended a farmers' meeting at Brandvlei Kelders at which both De Wet and Du Toit were present. Du Toit, the appellant's technical adviser in the area, addressed the meeting on the merits of Herbicide Sting and demonstrated its application and effectiveness by means of photographic slides. He stated that Herbicide Sting could safely be sprayed from the air by means of a helicopter. With reference to one of the slides Du Toit pointed to the cut-off line along the edge of the

area of application and stated that they (the appellant) had done tests to demonstrate how accurately the herbicide could be sprayed and controlled where there were adjacent crops. Le Grange, conscious of the fact that on the respondent's farms the vineyards were surrounded by cash crops, asked Du Toit after the slide presentation what the maximum distance was over which one could expect damage outside the vineyard which was being sprayed. With reference to the slide Du Toit assured him that the cut-off line would not be more than three to five metres beyond the edge of the vineyard. Du Toit told the farmer that it would be by means of a helicopter that appellant would make all the necessary arrangements and that all that the farmer had to do was to provide persons with flags in order to act as markers for the guidance of the helicopter pilot during the spraying operation. Du Toit gave no indication of any dangers inherent in the application of Herbicide Sting from a helicopter.

According to Le Grange, Du Toit stated at the Farmers' meeting at Brandvlei Kelders that they had done tests to establish how accurately spraying could be done from the air in the event of there being adjacent crops and that these had shown that there was a definite cut-off line. The application of the herbicide could thus be controlled. But it appears from the evidence of Olivier that this was untrue. At that stage no tests had been done to determine drift action in the case of aerial application. This was not disputed by appellant. The Court held that because of the misrepresentation made by the appellant's representatives, respondent would not have applied Herbicide Sting from the air by helicopter and consequently would not have sustained the damage caused by aerial application to his cash crops. There is also a direct factual and causal link between the misrepresentation and the loss suffered.

In a similar situation, in *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A), the appellant, Standard Chartered Bank suffered pure economic loss as a result of relying on a financial report on the viability of Triomf RB, a South African company, producing a phosphate-based fertilizer. A Canadian corporation (Cansulex) supplied sulphur to Triomf RB and had, since 1982, made use of banking facilities provided by Stanchart, who issued lines of credit, after an examination of the financial standing of customers. In the second half of 1985, credit facilities had been granted to

Cansulex in respect of shipping sulphur to Triomf RB. In terms of a facility agreement, Stanchart undertook to discount bills drawn on Triomf in respect of such sulphur exports, with recourse to Cansulex. A review of the line of credit to Cansulex in respect of its transactions with Triomf was due at 31 July 1985. But Triomf had changed the scheduling of the financial year, so that up-to-date financial statements were not available. On 18 November 1985 Stanchart sent a telex to the Johannesburg branch of Standard Bank of South Africa Ltd, requesting, on behalf of Stanchart, an up-to-date financial report on Triomf, including in the telex information that Triomf's bank was Nedbank (Braamfontein). Standard Bank SA sent a telex to Nedbank (now Nedperm Bank) requesting an urgent financial report on Triomf. The next day Nedbank replied that Triomf was one of the largest fertilizer manufacturers in South Africa and, although it had suffered setbacks, it was trading "normally" and would be regarded as good to their normal commitments. Bank reports regarding Triomf and Cansulex were considered favourable and lines of credit and the existing financial arrangements regarding Triomf, Cansulex and Stanchart remained in place. In January 1986 Cansulex shipped a big cargo of sulphur to Richards Bay in South Africa, for Triomf. When bills of exchange were presented for payment, they were dishonoured and on 14 July 1986 Triomf was placed under provisional liquidation. Stanchart suffered extensive pure economic loss as a result, and sued Nedperm Bank for negligently misstating the financial position of Triomf. Corbett CJ held Nedperm Bank liable to the appellant (Stanchart) [25].

Corbett held that the misstatement was unlawful. He emphasized that the bank could have refused to give the report or it could have protected itself against the consequences of a negligent report by a disclaimer. The action in delict for negligent misstatement causing pure economic loss therefore succeeded.

In *Delphisure Group Insurance Brokers Cape (Pty) Ltd v Dippenaar and Others*, the general manager of Delphisure caused Dippenaar to suffer pure economic loss as a result of misrepresentation [26]. The general manager has misrepresented a product to be in existence and further that the product was underwritten by Lloyds of London. In the light of the facts of the case, this was not true and as a result of the misrepresentation Dippenaar cancelled his Mutual & Federal crop insurance policy.

After his crops failed and when it turned out that the Farmsure product did not exist, Dippenaar claimed from the appellant damages in the amount which he would have recovered from Mutual & Federal, had he insured his crops with it.

The court ruled that liability should be imposed for the negligent misrepresentation by the general manager of Delphisure, because it caused economic loss to Dippenaar.

13. CONCLUSION

The evolution for negligent misrepresentation has been established in this research. South Africa serves as the focal point for discussion of this principle. The paper heralded the need for extension and transformation of the principle of negligent misrepresentation, as it will soon fall into abeyance. During the Constitutional supremacy after 1994, South African court cases, such as Fose and Carmichele succeeded in the development of the law of delict to bring it in line with constitutional demands of the time.

CONSENT

Not applicable.

ETHICAL APPROVAL

Not applicable.

COMPETING INTERESTS

Authors have declared that no competing interests exist.

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