



An Appraisal of the Vicarious Liability of Juristic Persons (Minister of Police) in the Law of Delict with a Constitutional Developmental Imprint of K. v Minister of Safety and Security

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ABSTRACT

The common-law principles of vicarious liability hold an employer liable for the delicts committed by its employees, where the employees are acting in the course and scope of their duty as employees. The principle of vicarious liability ascribes liability to an employer where its employees have committed a wrong but where the employer is not at fault. There is also a countervailing principle too, which is that damages should not be borne by employers in all circumstances, but only in those circumstances in which it is fair to require them to do so. It means a person in authority, like the Ministry of Police, will be held liable to a third party for injuries caused by a person under its authority. It is alleged that in the subject matter of this study in case law, *K v Minister of Safety and Security*, that constitutional issues are not raised. It is averred that the case concerns the application of the principle of vicarious liability only. But the highest court in South Africa, the Constitutional Court, exerted that it is necessary to move beyond vicarious liability and

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implicate the state/Ministry of Police with direct liability. In *K v Minister of Safety and Security* direct liability was not dealt with because it was not argued. The research stresses that 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. This why the time is right to develop *K v Minister of Safety and Security* to bring vicarious liability and other delictual principles, such as wrongfulness, negligence, intent and direct liability in line with constitutional developments and demands of the time. The Constitutional Court of South Africa held that the common-law principle of vicarious liability be adapted so that it grows in harmony with the objective normative system found in the Constitution.

Keywords: *Vicarious liability; K. v Minister of Safety and Security; common-law principle; constitutional issues; law of delict; employee and employer; juristic person.*

1. JURISTIC PERSON AND ITS LEGALITIES

1.1 Introduction

Legal personality pertains to be capable of having legal rights and obligations in law. These rights and obligations hinge upon the notion of entering into contracts and to sue or being sued to name but a few. Legal persons are of two kinds: natural persons and juristic persons. The latter connotes to a group of individuals, such as corporations/organisations, which are treated by law as if they are persons. The juristic personality allows one or more natural persons to act on behalf of a corporate body or government institution (for legal purposes) [1].

An entity with legal personality, like the Ministry of Police, may shields its members from civil (personal) and criminal liability. However, the concept of juristic personality is not absolute as the precept “piercing the corporate veil” aims at the individual or natural person acting as agents involved in a company action or decision. This may result in a legal decision in which the rights or duties of a corporation or public institution are treated as the rights or liabilities of that corporation’s members of directors. The enquiry is to establish whether or not a delict was committed during the course and scope of performing another’s work or in executing another’s instruction. This means that a corporation or an institution’s member must have engaged in carrying out the function for which he or she was employed for purpose of furthering the employer’s business [2].

1.2 Responsibility

The responsibility of the company/organisation for acts or omissions of an employee from which a benefit accrues forms the basis of vicarious liability where the plaintiff has suffered loss,

damage or injury as a result: *respondeat superior* [3]. Such a responsibility is founded on an assumption of control by the company over the employee and the need for the offending act or omission to be undertaken in the course and scope of employment. An indication of corporate vicarious liability is found in *Eastern Counties Railway Co v Broom* [4], wherein it is stated that a corporation may be liable in delict for the acts of their servants.

A practical explication of the rights and duties of a juristic person appears in the case of *Fish Hoek Primary School v Welcome* [5]. The appellant (the school) issued summary against the respondent (Gregory) in a Magistrate’s Court claiming the sum of R1610, “being in respect of arrears school and related fees, for the period July 2003 to date, with interest and costs.” The issue here is the payment of school fees for a child born of unmarried parents, in instances, where the father did not have any parental authority over the child. A school, as a juristic person, can claim payment of outstanding school fees from both parents, including the non-custodian parent, regardless of the relationship or the marital status of the parents. It is held in this case that the appellant is a so-called “public school” as defined in section 1 of the *South African Schools Act*, No. 84 of 1996. The appellant describes itself in its summons as “a school and a juristic person in terms of section 15 of the *South African Schools Act*. Section 15 of the *Schools Act* reads: “Every public school is a juristic person...” On the basis of its legal personality (as a juristic person) the school was able to hold a non-custodian parent liable for the payment of school fees.

1.3 Liability

Juristic persons are liable for the wrongs of persons acting in a special representative capacity like directors, managers, school

professionals, police servants, medical practitioners, etc [3]. A prerequisite for such claim is a delictual act committed by the representative. The basic principle of vicarious liability for juristic persons is not own fault, but imputation of another person's delictual act. These rules also apply to certain representatives of the State and its organisations. Public servants, on the one hand, who are acting beyond the scope of their respective duties are regarded as liable according to the general principles of vicarious liability in delict. But, on the other hand, State and or corporate liability is introduced for the wrongs of public servants, thus excluding claims against the public servants themselves. These two opposing ideas can be epitomised in *New Zealand Guardian Trust Co. Ltd v Brooks and Others*: "[...] the acts of an employee or agent render the [company] vicariously liable [because] the employee or agent was in breach of a duty which he personally owed to the injured party [...]" [6].

Besides that, claims against public servants only acting negligently were (and still are) excluded in cases where victims gain compensation from other sources [7].

Vicarious liability seeks to fix corporate liability by reference to an employee's conduct undertaken in the course of his or her employment.

2. THE HISTORIC EVOLUTION OF A JURISTIC OR CORPORATE PERSON: A COMPARATIVE ANALYSIS

Juristic or corporate liability has its origin in ancient law and became the centre of doctrinal discussion at the end of the 19th century as will be envisaged in this study.

The Roman state and its territorial units, the *civitas* or *coloniae*, had legally enabled individuals to constitute trade and other charitable associations. These Roman entities were called *universitates personarum* (or *corpus/universitas*, which included the Roman state and other entities with religious, administrative, financial, or economic scopes) and *universitates rerum* (which included entities with charitable scopes). These entities also had their own identity, owned property separate from that of their founders and had independent rights and obligations. The existence of such independent entities with rights and obligations (in Rome), constituted the basis for the evolution of corporate institutions in the medieval period.

The Roman law though rendered these institutions judicially incapacitated, because they lacked independent will [8]. This concept of juristic or corporate liability perpetuated its dynamics from the 12th until the 14th century. Pope Innocent IV, for example, had created a legal maxim, *societas delinquere non potest* (the fiction theory), which claimed that unlike individuals who have willpower and a soul, *universitas* are fictions that lack a body and a soul and, therefore, cannot be punished. But despite the maxim, the realities of the time and the demands of the law eventually admitted the existence of juristic persons and their capacity of being sanctioned for their delictual acts. This idea has, however, been implemented with hesitation and only utilised by powerful figures like the popes, who now frequently sanction the villages, provinces and corporations. The sanctions could be fines, the loss of specific rights, dissolution and spiritual sanctions upon the members of the corporations, such as the loss of the right to be buried, or excommunication [8].

The later development of Roman *universitates* and its subjugation to delictual liability fell in place within the Germanic concept of corporate or juristic responsibility. German law considered that both the corporations and the individual were real subjects of law. The rationale for the collective responsibility under German law was that if damages resulted from an individual action, a sanction was imposed to repair the damages. Because the property was owned by the collectivity, it was only logical that the collectivity should pay the damages [8].

In the 14th century, the hesitancy to actuate liability upon juristic or corporate persons', had been cast off. Corporations had now their own willpower and were therefore liable for the actions of their members. This theory became prevalent in Continental Europe until the end of the 18th century. The dynamics in law, were that corporations should be liable, both civilly and criminally for the acts committed by their members. Cities, villages, universities, trade and religious associations have been required to pay fines for their delictual conduct [8].

In France, criminal and civil liabilities against corporate persons or organizations had been enacted by the Ordonnance de Blois of 1579. The requirement for liability to the corporate entity was that a crime committed must have been the result of the collectivity's decision. The

ordonnance provided for the simultaneous liability of individuals for committing the same crime as their accomplices. The French Revolution, however brought changes in the French law. Adherents to the fiction theory, Malblanc and Savigny, sustained the principle *societas delinquere non potest*, which maintained that a corporation is a legal fiction which lacks body and soul and was not able of committing the criminal *mens rea* or to act in *propria persona*. By this act, these two proponents had taken back the development of the law with regard to corporate responsibility hundreds of years. Other adherents to the fiction theory, E. Bekker and A Briz, argued that corporations have a pure patrimonial character which is created for a particular commercial purpose and lacks juridical capacity. In light of these renditions, it is clear that corporations cannot be the subjects of civil and even criminal liability. A deviation to the fiction theory had been contrived by O. Gierke and E. Zitelman, who had explained that corporations are unities of bodies and souls and can act independently. They asserted that corporations' willpower is the result of their members' will. F. von Liszt and A Maester argued that corporations' capacity to act under the criminal law is not fundamentally different from that under law of delict or administrative law. They like their predecessors Gierke and Zitelman, asserted that corporations are juristic persons that have willpower and can act independently from their members. The latter groups' canvassing resulted in the *Nouveau Code Penale* in 1994. It is provided in Article 121-2 of the instrument that all juristic persons are civilly and criminally liable for the offenses committed on their behalf by their organs or representatives [8].

France's illuminating example was followed by numerous other European countries. Belgium instituted the civil and criminal liability of juristic persons in 1999 in Article 5 of the Belgian Penal Code. Netherland adopted the concept of corporate criminal and civil liability even earlier in 1976. Article 51 of the Dutch Penal Code provides that natural persons as well as juristic persons can commit offenses. But Italy, Portugal, Greece and Spain recalcitrated and refused to hold corporations delictually and criminally liable [8].

Initially, England also refused to accept the idea of corporate civil and criminal liability. Under English law corporations were considered legal fictions, artificial entities that could do no more than what they are legally empowered to do.

These laws contend further like the fiction theorists that corporations lacked souls, that they could not have *mens rea* and could neither be blameworthy nor punished. But during the 16th and 17th centuries in England, corporations became more common and their importance had been spiralled. By borrowing the principle of vicarious liability from delict, courts now imposed vicarious criminal liability on corporations in those cases when natural persons could be vicariously liable as well. In 1944, the High Court of Justice decided to impose criminal liability on corporations and established that the *mens rea* of certain employees was to be considered as that of the company itself [8].

At present, corporate criminal and civil liability is broad as individual criminal liability.

Tapped from this historical evolution on the vicarious liability of juristic persons, South Africa have become one of the last strongholds in the modern world of European jurisprudence, with reference to authoritative court decisions and learned treaties, hence the term mixed legal system. Mixed legal systems refer to the interplay of the civil law and common law jurisdictions. South Africa has been described as being a Roman-Dutch (civilian) system onto which an appreciable amount of English law has been grafted. Others have maintained that South African law is fundamentally and characteristically British. When the Union of South Africa was created in 1910, it was in essence a British state created by Britain for British imperial purposes. Yet it is also obvious that Roman-Dutch law (introduced by the Dutch in 1652 by Jan Van Riebeeek in the Cape Colony (South Africa)) emerged as a dominant source in many fields. Thus it has been argued that both Roman-Dutch and English law fulfil the role of "common law" in South Africa [9].

The history of South Africa was, however confronted with the dilemma of discrimination and oppression. Private law was a structural part of the system of domination in South Africa and thus actuated the isolation of the development of the common law. Before 1994 human rights protection by the courts was impossible. Constitutional law was dominated by the doctrine of parliamentary sovereignty. It was 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.

A constitutional dispensation came into effect in 1996, whereby a framework for democracy and a supreme constitution have been established. Under the Constitution of South Africa, Act 108 of 1996 the fundamental rights and freedoms of all citizens are protected [10].

Vicarious liability in South Africa imposes liability without fault usually on employers [11]. Whilst this doctrine was regarded as an indispensable element of law of delict textbooks could provide no clear rationale for its existence. Uncertainty seemed to arise at each stage of its operation. This study elevate this legal principle out of the quagmire of doubt by postulating the questions, was there a relationship giving rise to vicarious liability? And what connection had to exist between the employee's misconduct and the job he was supposed to perform? These questions have been successfully answered in this research.

3. DISCUSSION

3.1 An Analysis of Case Law Regarding Vicarious Liability of Juristic Persons (Ministry of Police)

The common-law principle of vicarious liability holds an employer liable for the delicts committed by its employees, where the employees are acting in the course and scope of their duty as employees. The principle of vicarious liability ascribes liability to an employer where its employees have committed a wrong, but where the employer is not at fault. There is also a countervailing principle too, which is that damages should not be borne by employers in all circumstances, but only in those circumstances in which it is fair to require them to do so. It means a juristic person, like the Ministry of Police, will be held vicariously liable to a third party for injuries caused by a person under the juristic person's authority.

In *Minister of Police v Rabie* [12], the Appellate Division had to consider a claim for damages from the wrongful arrest, detention and assault of the plaintiff. A member of the police force who had made the arrest, was a mechanic, in plain clothes and not on duty at the time. In making the arrest, he had acted in pursuance of his own interests. He had, however, identified himself as a policeman to the plaintiff, taken the plaintiff to the police station, filled out a docket and wrongfully charged the plaintiff with attempted

house-breaking. The case thus concerned a clear deviation of an employee from the ordinary tasks of his employment. The question was whether his employer, the Ministry of Police, was vicariously liable for the damages suffered by the plaintiff. The Court answer in the affirmative and held the Ministry of Police vicariously liable for the delictual wrongs of its employee.

In *E.C. Adams v The Minister of Police* [13], the plaintiff in this matter, the mother of the deceased, claimed damages for loss of amenities of life, emotional shock, emotional trauma as well as damages for funeral expenses, future medical expenses and an estimated accrued loss of support. On 18 March 2008, the plaintiff's son, Chiwago Davids (the deceased) was found in a cell at the Claremont Police Station hanging by his neck by two long white shoelaces tied together and attached to the burglar shutters in the cell. He was on the day preceding his arrest arrested on a charge of robbery. The legal position of this case is summarised in *Moses v Minister of Safety and Security* [14] at 113G-J. It is stated that in the context of delictual liability a clear distinction is to be made between wrongfulness and negligence. An omission is wrongful if in the particular circumstances a legal duty to act positively exists and the party whose conduct is under consideration fails to discharge that duty. Wrongfulness is determined according to the criterion of reasonableness with reference to the legal convictions of the community. By contrast, reasonableness in the context of negligence is determined with reference to the conduct of a *bonus paterfamilias* in the position of the person whose conduct is under consideration. Once a person is arrested, the Ministry of Police's employees, in terms of s 13 of the *South African Police Service Act* 68 of 1995, are under an obligation to such a person to perform their duties and functions in a manner reasonable in the circumstances subject to the provisions of the *Constitution of the Republic of South Africa*, Act 108 of 1996 and with due regard to such a person's fundamental rights. When a person is detained any object must be removed from him/her to ensure that he does not do harm to him/herself or others. That established a duty on the police to ensure the safety of the detainee and others. On the facts of this case, the police could not have properly searched the deceased or the cell. They therefore failed in their duty to the deceased. Their conduct was therefore not only negligent, but also wrongful as they had a legal duty to act positively to avoid the deceased

doing harm to himself or others. The Court ruled therefore that the Ministry of Police is vicariously liable and is instructed to pay the plaintiff the amount of R243 400,00. The Ministry is also to pay the plaintiff's attorney's costs.

In *Minister of Police v Ewels* [15], an ordinary citizen had been assaulted by a sergeant of police, who was not on duty, in a police station under the control of the police and in the presence of several members of the police from whom it was jointly reasonable possible to have prevented or to have put an end to the attack. It was held by the Court of Appeal that there rests a legal duty on the policemen to have come to the assistance of the respondent. In the light of the failure of the policemen to assist the respondent against the attack of one of their members, they rendered the Ministry of Police liable for the damages claimed by the respondent. South African law has developed to the stage wherein an omission is regarded an unlawful conduct. Such an omission incites moral indignation. The damage suffered ought to be made good by the person who neglected to do a positive act. There was a duty in law on the policemen to act reasonably.

The respondent founds his case on inaction on the part of the policemen. The respondent alleges that there was a legal duty on the policemen to intervene in the assault and he thus relies on the provisions of the *Police Act* (No. 7 of 1958) and certain alleged prior conduct. The prior conduct hinges upon the failure to prevent the police sergeant, Barnard from entering and/or remaining in the police station (he was probably there for an unlawful purpose). The judgment of the Court *a quo* states if a person is in control of another and fails to prevent that other from committing a delict that person is guilty of actionable *culpa*. The policemen in question were in control of Barnard because one of them enjoyed a higher rank in the police force than Barnard; and the provisions of the *Police Act* confer an implied control in favour of policemen over any other person who commits a crime in their presence. The *Police Act* lays down that it is the function of the police to prevent crime and to maintain law and order. The respondent avers that the appellant's servants acted negligently in breaching the duty imposed on them by the *Police Act*. There will thus be liability in respect of an omission where there is a legal duty in the circumstances to act. The reasonable man in the position of appellant's servants would have foreseen the probability of

harm or further harm to respondent if Barnard were not restrained and such reasonable man would have acted to effect the necessary restraint.

The Court of Appeal rules that the appellant (Ministry of Police) is liable for the damages claimed by the respondent.

In *Minister of Police v Skosana* [16], the widow and children of Skosana claimed damages from the Ministry of Police as a result of the death of their breadwinner. Whilst heavily under the influence of intoxicating liquor, Skosana had lost control over the car he was driving and was injured in the accident. Shortly afterwards he was arrested and examined by a district surgeon who was unable to detect any internal injury. Early the next morning, however, Skosana complained of a severe pain in the abdomen and two hours later he was taken to the same doctor again. Although the latter had ordered Skosana to be hospitalised immediately, the police failed to summon an ambulance as directed with the result that the patient arrived at the hospital only two hours later. On arrival his condition was extremely serious and although he was immediately operated upon, he died shortly afterwards. The majority of the court confirmed the judgment of the trial court, holding the minister liable for the wrongful, negligent failure of his servants to see to it that medical aid was administered timeously.

The issue is whether the harm suffered by the respondent and her children was caused by the negligence of constables Davel and Mahela (of the *Skosana* case). The constables were acting in the course and scope of their duty as policemen. The enquiry into the case was the issue whether Davel and Mahela acted negligently towards the deceased, and, if so, whether their negligent conduct caused the death of the deceased. Negligence would, in this case, give rise to legal responsibility, and the appellant, in his capacity as the Ministry of Police, is obliged to compensate the respondent.

The deceased sustained bowel injury in the accident, which resulted in peritonitis. The negligent delay in furnishing the deceased with medical aid and treatment (for which Davel and Mahela were responsible), contributed to the deceased death. If the operation had been performed five hours earlier, then the probabilities are that the result would have been different and that the deceased would have

survived. By not communicating with a medical officer immediately after receipt of Skosana's (the deceased's) complaint and his request to see a doctor, the police officials acted in breach of their own standing orders. The Court *a quo* found that a reasonable man would have been aware that at 7h45 would have foreseen that unless medical aid was furnished expeditiously, the deceased might die.

The counter argument furnished by the applicant (The Ministry of Police) relied on the "the man on the Clapham omnibus" test. This test implied that nobody expects the man on the Clapham omnibus to have any skill as a surgeon, a lawyer, a dockerman or a chimney-sweep unless he is one. If he professes to be one, then the law requires him to show such skill as any ordinary member of the profession or calling to which he belongs, or claims to belong, would display. Relying on these analogies, counsel for the applicant argued that Mahela and Davel were laymen in the medical field. They could not be expected to notice and correctly assess the clinical signs and symptoms which to the medical practitioners signified danger. The Court *a quo* counter that notion by stating that both Davel and Mahela were aware that Skosana had been involved in a serious accident the night before and ought reasonably to have foreseen Skosana's death as a result, if they unduly delayed getting him to hospital. However, this ruling of the Court *a quo*, the Appellate Division position itself contrary to it and held that the widow and children had failed on a balance of probabilities to prove that the negligence of Davel and Mahela was a cause of Skosana's death. The judgment of this decision dove-tailed, but the gist of this study shows a penchant for the verdict of the Court *a quo* which rendered the Ministry of Police vicariously liable for the delictual conduct of the two policemen.

In *Minister of Law and Order v Kadir* [17], the plaintiff had driven 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, the car left the road and he was injured. Two constables arrived on the scene where the plaintiff had been injured shortly after the accident. While they were conducting an investigation the offending driver returned to the scene in the vehicle from which the bundle had fallen. A witness to the incident informed the policemen of the circumstances under which it had occurred and that the vehicle constituted a danger to other users of the road.

They failed to take down the registration number of the vehicle on which the bundles were transported or the identity of the driver, when it was possible for them to do so. Had they done so the vehicle would have been identified and the plaintiff would have been able to claim compensation from the *Motor Vehicle Accidents 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 policemen should reasonably have foreseen that a failure to properly investigate the collision could and would cause the plaintiff to suffer damage.

The Counsel for the Ministry of Police argued that in terms of the *Police Act* 7 of 1958 the two policemen's omission did not constitute a breach of a duty owed to the plaintiff. According to this statute law, the police force is an agency employed by the State for the maintenance of law and order and the prevention, detection and investigation of crime with a view to bringing criminals to justice. In the course of the performances of their duties, its members often collect information relevant to the issues in civil proceedings. The aim of their 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 that whereas parties to civil litigation often make use of information gathered by police, they must make do with whatever the police have available and cannot insist on anything better. Can in these circumstances be said that the policemen owed the plaintiff a legal duty to record the information relating to the identity of the driver or his vehicle? Viewing the matter objectively, society will take account of the fact 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.

In *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* [18], the plaintiff was attacked, indecently assaulted, raped and robbed by a suspect (Mohammed) who had escaped from police custody. Mohammed was a dangerous suspect who had been arrested for various crimes, such as housebreaking, theft, *crimen iniuria*, indecent assault, rape and armed robbery. His escape was facilitated by the fact that the police had failed to close the security gate. The plaintiff instituted a delictual action for damages against the Ministry of Police. Since the escape could

easily have been prevented by the police simply by keeping the security door closed, the state conceded that the police acted, but denied that the police had owed a legal duty to the plaintiff to prevent the perpetrator from escaping as he had. The trial court agreed that the police did not act wrongfully and dismissed the claim. On appeal, the Supreme Court of Appeal reversed the decision and allowed the claim.

The issue in this case was whether the Ministry of Police owed the appellant a legal duty to prevent Mohammed from escaping and causing her harm. Mohammed was a dangerous criminal who was likely to commit further sexual offences. His escape could easily have been prevented by ensuring that the gate was locked. The Court *a quo* by mouth of Judge Swart erroneously dismissed the appellant's claim. Judge Swart contends that he was bound by the decision of *Carmichele v Minister of Safety and Security and Another* [19], which rendered that the police owed no legal duty to the appellant to act positively in order to prevent harm.

It is asserted that the *Carmichele* –decision had overlooked s 39(2) of the *Constitution of South Africa Act 108 of 1996*. S 39(2) requires all courts to develop the common law so as to reflect the spirit, purport and objects of the Bill of Rights.

Common law employs the element of wrongfulness (in addition to fault, causation and harm) to determine liability for delictual damages caused by an omission. An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. Defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm.

The concept of legal conviction of the community in this case refers to whether the community regards a particular act or form of conduct as delictually wrongful. The legal conviction of the community is incorporated under the norms, values and principles contained in the *Constitution*. In terms of s 12(1)(c) of the *Constitution*, everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources. Freedom from violence is recognised as fundamental to the equal enjoyment of human rights and fundamental freedoms [20]. S 12(1)(c) of the *Constitution* requires the State to protect individuals, both by refraining from such

invasions itself and by taking active steps to prevent violation of the right. The subsection places a positive duty on the State to protect everyone from violent crime. S 12 should be read with s 7(2) of the *Constitution* which imposes a duty on the State to respect, protect, promote and fulfil the rights in the Bill of Rights. The Constitutional Court has held in both *Boloyi* (para 13) [21] and *Carmichele* (para 62) that the State is, furthermore, obliged under international law to protect women against violent crime and against the gender discrimination inherent in violence against women. This obligation is imposed on the State by s 39(1)(b) of the *Constitution*, read with the preamble to the *Universal Declaration of Human Rights*; art 4(d) of the *Declaration on the Elimination of Violence against Women* and art 2 of the *Convention on the Elimination of All Forms of Discrimination against Women*. S 205(3) of the *Constitution* reads: "The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."

The Ministry of Police is one of the primary agencies of the State responsible for the discharge of its constitutional duty to protect the public in general and women in particular against the invasion of their fundamental rights by perpetrators of violent crime [17,19]. In *Minister of Safety and Security v Van Duivenboden* [22], it is indicated that the existence of the State's constitutional duty to act in protection of the rights in the Bill of Rights implies the norm of public accountability. In *Van Duivenboden* the court held that certain police officers who were in possession of information that reflected adversely upon the fitness of a person to possess firearms owed a legal duty to members of the public to take reasonable steps to act on that information in order to prevent harm. In *Seema v Lid van die Uitvoerende Raad vir Gesondheid, Gauteng* [23], the Court held that the responsible authorities and personnel at a mental hospital owed a legal duty to members of the public to take reasonable steps to prevent mental patients from leaving the hospital premises and causing them harm. The Court relied on two factors as indicative of the existence of a legal duty, namely that the defendant was in control of potentially dangerous patients and that it could easily have taken proper preventative measures such as fencing or guarding the premises. The Court found that a legal duty existed – and it did not rely on the *Constitution* in such finding.

In England the Courts have on occasion declined to impose vicarious liability in delict on public authorities such as the Ministry of Police for the negligent performance of their functions on the ground that it would not be in the public interest as it would inhibit the provisioning of public services in the interest of the community as a whole. In *Carmichele*, the Court refers to an English decision, House of Lords in *Barrett v Enfield London Borough Council* [24], at 199D-J, that a more flexible approach to delictual claims against public authorities has emerged. The Constitutional Court in *Carmichele* went on to say that a public interest immunity absolving the respondents from liability would be inconsistent with the *Constitution* and its values.

Counsel for the respondent submitted that the imposition of a legal duty on the Ministry of Police in the *Van Eeden* case could open the "floodgates" of litigation and result in limitless liability on public authorities.

The Ministry of Police owed the appellant in the *Van Eeden* case a legal duty to act positively to prevent Mohammed's escape. The existence of such a duty accords with what would have to be perceived to be the legal convictions of the community and there are no considerations of public policy militating against the imposition of such a duty. The Ministry of Police acted wrongfully and in view of negligence, vicarious liability and causation, the State must be held liable for any damages suffered by the appellant.

In *K v Minister of Safety and Security* [25], Ms NK, the applicant, seeks compensation for damages in delict from the Ministry of Safety and Security, the respondent, on the basis that she was raped by three uniformed and on-duty policemen after she had accepted a lift home from them, when she found herself stranded in the early hours of the morning. The case raises the scope of the vicarious liability of the Ministry of Safety and Security under the law. Both the High Court and the Supreme Court of Appeal dismissed Ms K's claim on the grounds that the respondent was not vicariously liable for the conduct of the policemen which had caused the harm to Ms K.

On 26 March 1999, Ms K, had a date with a boyfriend at the Bundu Inn. The arrangement was that he would take her home at the end of the evening. At midnight, when the Inn closed, they chose to go to another bar. There a former girlfriend of her companion turned up and an

argument broke out between Ms K and her companion (boyfriend). Shortly after, she asked him to take her home, but he refused and she decided to find a telephone to call her mother to collect her. There was no phone at the bar and she decided to walk to a nearby petrol station. It was about approximately 4 a.m. At the petrol station, the attendant informed her that the phone could not be used for outgoing calls. At that time, a car drew up and a policeman in full uniform came into the shop. The policeman, Sergeant Nathaniel Rammutle, was the driver of the car which was an official South African Police Service vehicle. Sergeant Rammutle approached Ms K and addressed her in fluent Afrikaans to ask where she was going. She answered that she really wanted to go home and he offered to take her there. She accepted his offer and climbed into the vehicle in which there were two other policemen, Sergeant Ephraim Gabaatholwe and Sergeant Edwin Nqandela, who were also both in uniform. All of the policemen were on duty at the time. Ms K did not know any of the policemen.

They started in the direction of her home. Ms K did not speak to them, but they spoke amongst themselves in a language she did not understand. She fell asleep for a short while. When she awoke, the vehicle took a turn in the wrong direction. She immediately said to the driver that it was the wrong direction. But the policeman told her to be quiet and a policeman's jacket was thrown over her head and it was held tight. She struggled unsuccessfully to free herself. She begged them to remove the jacket but she was punched in the stomach and told that she would be killed if she did not stay quiet. Thereafter the vehicle came to a halt. Ms K was then forced onto the back seat of the vehicle, her denim jeans, underwear, socks and shoes were removed and she was raped by the three policemen in turn. After raping her, the policemen put some of her clothing back on her, and helped her out of the car. She was then thrown down on the ground and the three men climbed back on the vehicle which raced away.

A charged of rape was laid and the three policemen were arrested, charged and convicted of rape and kidnapping in the Johannesburg High Court. They were sentenced to life imprisonment for rape and ten years' imprisonment for kidnapping [25].

Ms K instituted proceedings in the Johannesburg High Court against the respondent (the Ministry

of Safety and Security), as well as the three policemen, for damages arising from the conduct of the three policemen. She subsequently abandoned the claim against the three policemen, who were in prison and unlikely to be able to pay any damages awarded against them. The issue of liability of the Ministry should now be determined. The High Court dismissed Ms K's claim but granted her leave to appeal to the Supreme Court of Appeal. The Supreme Court of Appeal dismissed the appeal. It held that on existing principles of vicarious liability, the respondent was not liable for the damages suffered by Ms K. Scott JA reasoned as follows: "The legal principles underlying vicarious responsibility are well established. An employer, whether a Ministry of State or otherwise, will be vicariously liable for the delict of an employee if the delict is committed by the employee in the course and scope of his or her employment. Difficulty frequently arises in the application of the rule, particularly in so-called 'deviation' cases. But the test, commonly referred as the 'standard test,' has been repeatedly applied by this Court. Where there is a deviation the inquiry, in short, is 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 the functions to which he/she was appointed or was still carrying out some instruction of his/her employer. If the answer is yes, the employer will be liable no matter how badly or dishonestly or negligently those functions were being exercised by the employee" [25].

The Supreme Court of Appeal held that on this test, the Ministry could not be held liable for the rape of the applicant. This Court also rejected arguments that the common-law rule should be developed in the light of the spirit, purport and objects of the Constitution and also rejected an argument that the Ministry was liable because at the time of the rape, the policemen were simultaneously failing to perform their duty to protect the applicant. Scott JA noted that he had the deepest sympathy for Ms K, but held that providing her with compensation was a matter for the legislator and not the courts. Ms K now seeks leave to appeal to the Constitutional Court.

The first question at the Constitutional Court is whether the matter raises a constitutional issue. The respondent (counsel for the Ministry of Safety and Security) argues that it does not. It avers that the case concerns the application of the principle of vicarious liability. This Court relies on its own judgment in *Minister van Veiligheid en*

Sekuriteit v Phoebus Apollo Aviation BK [26]. In this case (*Phoebus Apollo*), the applicant had sought to hold the Ministry of Safety and Security liable in delict for damages arising from the theft by certain policemen of property of the appellant. It was common cause that the appellant was robbed of a large sum of money by an armed gang of policemen. The investigating officer traced the proceeds of the robbery, but when he arrived, he discovered that the money had already been taken by three dishonest policemen. It was not clear where these three policemen had come by the information concerning the location of the stolen money, but it was clear that they had not been responsible for the investigation of the robbery, nor had they been on duty when they went to recover the money, nor had they been in uniform, although they had induced the man guarding the money to hand it over because they were policemen.

Both the High Court and the Supreme Court of Appeal (in the *K*-case) held that if a proper application of the common-law rule of vicarious liability be applied, then it renders that the state is not going to be held liable for the applicant's damages. The Constitutional Court interfered and stated that the common-law rule of vicarious liability should be developed. In developing the rule, the Constitutional Court held that courts should consider the applicant's constitutional right to freedom and security of the person, and in particular, the right to be free from all forms of violence as well as her right to dignity, right to privacy and her right to substantive equality. It means that the common-law rule of vicarious liability should be developed to render it consistent with the spirit, purport and objects of the Bill of Rights. Ms K's constitutional rights should be vindicated and a remedy should have been provisioned to correspond with the Ministry's allegation that there is no constitutional duties present in the *K*-case [25].

The influence of the fundamental constitutional values on the common law is mandated by s 39(2) of the *South African Constitution*. It is within the matrix of this objective normative value system that the common law must be developed. The judiciary is bound by the provisions of the Bill of Rights in the performance of its functions. In *S v Thebus and Another*, [27] Mosenke J noted that there were at least two instances in which the need to develop the common law under s 39(2) of the *Constitution* could arise. The first would be when a rule of the common law is inconsistent with a constitutional provision.

Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second possibility arises when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the objective normative value system found in the *Constitution*. From time to time, a common-law rule is changed altogether, or a new rule is introduced. This constitutes the development of the common-law [25]. The purpose of s 39(2) is to ensure that the common-law is infused with the values of the *Constitution*. It is not only in cases where existing rules are inconsistent with the Constitution that such an infusion is required. The normative influence of the *Constitution* must be felt throughout the common law [25].

In the *K*-case, the applicant argues that the Supreme Court of Appeal's conclusion that the principles of vicarious liability do not render the respondent liable in this case, is inconsistent with the spirit, purport and objects of the Bill of Rights and that the principles of vicarious liability therefore need to be developed to hold the respondent liable. This argument raises a constitutional issue. The question of the protection of Ms K's rights to security of the person and dignity are of profound constitutional importance. It is clear that it was part of the three policemen's work to ensure the safety and security of all South Africans and to prevent crime. These obligations arise from the Constitution and are affirmed by the *Police Act* [28]. In light of these obligations, the Court said in *Carmichele*, "In addressing these obligations in relation to dignity and freedom and security of the person, few things can be more important to women than freedom from the threat of sexual violence... Sexual violence and the threat of sexual violence goes to the core of women's subordination in society..." [29] South Africa has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights.

The fact that a Court is concerned with a different aspect of the law of delict, such as the one pertaining to vicarious liability, does not mean that questions of constitutional rights cannot arise. The obligations imposed upon courts by ss. 8(1) and 39(2) of the *Constitution of South*

Africa are not applicable only to the criterion of wrongfulness in the law of delict. In considering the common-law principles of vicarious liability, and the question of whether that law needs to be developed in that area, the normative influence of the Constitution must be considered.

4. THE APPROACH OF OTHER LEGAL SYSTEMS IN CONJUNCTION WITH *K v MINISTER OF SAFETY AND SECURITY*

The approach of other legal systems remains of relevance to us. It would seem parochial to consider that no guidance, whether positive or negative, could be drawn from other legal system's grappling with issues similar to those with which we are confronted. Consideration of the responses of other legal systems may enlighten us in analysing our own law and assist us in developing it further. It is for this very reason that the *South African Constitution* contains an express provision authorising courts to consider the law of other countries when interpreting the Bill of Rights. The respondent relied heavily on the United States case of *Primeaux v United States* [30], which it said was the only foreign case to be directly comparable on the facts to the *K*-case. In the *Primeaux*-case, an off-duty police officer returning from a work seminar in his government vehicle in the early hours of one morning encountered a woman walking along the road. She had abandoned her car because it was stuck in a snow-drift. He offered her a lift and then drove to a side road where he raped her. The question of the vicarious liability of the employer is governed in the US by the provisions of the *Federal Tort Claims Act* [31], in terms of which the government is liable, if the employee was acting within the scope of his office or employment. A majority of the Court held that the officer was unarmed, out of uniform, and off-duty insofar as his law enforcement responsibilities were concerned. However, nearly half of the Court dissented and the minority held that the officer was within the scope of his employment. The officer was authorised to travel to a training session in New Mexico. During his return trip, he was receiving *per diem* and mileage. He was authorised to drive his assigned police car with red lights affixed on top. He testified that he thought it part of his duties to offer a stranded motorist a ride. Ms. Primeaux testified that Officer Scott approached her and turned on his red lights on the police vehicle. The district court found all of these facts to be true. To hold that Officer Scott, under these circumstances, was

not acting within the scope of his employment is inexplicable.

In the England case of *Lister v Hesley Hall* [32], the plaintiffs, who had been boarders at a private school for boys, were sexually abused by the warden in charge of the school's hostel. The school was held vicariously liable for the conduct of the warden even though it was clear that it constituted a gross deviation from his duties. The test established by Lord Steyn after a careful consideration of the authorities, was whether the torts were so closely connected with the warden's employment that it would be fair and just to hold the employers vicariously liable. Lord Millet reasoned that the school was responsible for the care and welfare of the boys. It entrusted that responsibility to the warden. He was employed to discharge the school's responsibility to the boys. For this purpose the school entrusted them to his care. He did not merely take advantage of the opportunity which employment at a residential school gave him. He abused the special position in which the school had placed him to enable it to discharge its own responsibilities, with the result that the assaults were committed by the very employee to whom the school had entrusted the care of the boys. The Court held the school vicariously liable.

The facts of these two international cases are distinguishable from the facts of the *NK*-case, particularly in view of the fact that the police officer was neither formally on duty, nor in uniform. Its persuasiveness is also weakened too, by the fact that it is clear that the provisions of the United States federal legislation are not directly comparable to our own rules.

It is interesting to note that the approach in the United Kingdom, in terms of which courts ask whether there is close link between the wrongful conduct of the employees and the business of the employer or the nature of the employment, is very similar to the test set in the *Rabie* case. From this comparative review, we can see that the test set in *Rabie*, of whether the deviant conduct is sufficiently connected to the employer's enterprise, is a test similar to that employed in other jurisdictions. The objective element of the test which relates to the connection between the deviant conduct and the employment, approached with the spirit, purport and objects of the Constitution in mind, is flexible to incorporate not only constitutional norms, but other norms as well. It requires a court when applying it to articulate its reasoning for its

conclusions as to whether there is a sufficient connection between the wrongful conduct and the employment or not. Thus developed, by the explicit recognition of the normative content of the objective stage of the test, its application should not offend the Bill of Rights or be at odds with our constitutional order.

5. APPLICATION OF FACTS TO K v MINISTER OF SAFETY AND SECURITY

The *South African Constitution* mandates members of the police to protect members of the community and to prevent crime. This lays a normative basis for holding the state liable and it provides the factual connection between the employment and the wrongful conduct. 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 official. In the *K*-case, it was reasonable for the applicant, Ms. K, to place her trust in the policemen who were in uniform and offered to assist her.

The conduct of the policemen which caused harm constituted a simultaneous commission and omission. The commission lay in their brutal rape of Ms. K. Their simultaneous omission lay in their failing while on duty to protect her from harm. These inter-related factors, viewed against the background of the *Constitution*, i.e. the constitutional rights of Ms K and the constitutional obligations of the Ministry of Safety and Security, make it plain that the Ministry as respondent is vicariously liable. These factors indicated there was a close connection between the wrongful conduct of the policemen and the nature of their employment. When the policemen, on duty and in uniform, raped Ms K, they were simultaneously failing to perform their duties to protect Ms K. In committing the crime, the policemen not only did not protect the applicant, they infringed her rights to dignity and security of the person. This close connection renders the respondent, the Ministry of Safety and Security, liable vicariously to the applicant, Ms K, for the wrongful conduct of the policemen.

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. State organs may be liable for omissions which include instances where a state organ had a legal duty to act positively to prevent harm. Liability follows if such

an omission is wrongful. Such an omission, in the *K v Minister of Safety and Security*, is where the Ministry of Police has failed its legal duty to act positively to protect fundamental rights, such as the right to life, human dignity and freedom and security of the person. In *K v Minister of Safety and Security* it was relied on the *Carmichele*-case in stressing that the constitutional values of accountability is the *boni mores* which implies that constitutional values should be taken into account in establishing wrongfulness.

On the issue of fault, the three policemen had every intention of raping Ms K. and that fault in the form of intent is present.

The three policemen were negligent as well. The state's failure to take reasonable steps to prevent the three policemen from causing harm is indicative of the state's negligence. If the wrongful, culpable act of the state then caused harm to a victim such as Ms K, there is no reason why she should not be able to hold the Ministry of Police directly liable.

It is established that the state as an employer can be held vicariously liable for delicts of its employers or organs, but in addition, there is no reason why direct liability should not be an option. Although direct liability was not argued in *K v Minister of Safety and Security*, the pleadings in the case provide a basis for considering the state's direct liability. The state's constitutional and statutory duty to protect people from crime is "direct" and not "vicarious." The Supreme Court of Appeal 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 omission. With both causes of action, the pure application of the principles of delict will prevent unfair results. In practice the 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. 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 also established in this study that a breach of a statutory duty (*Police Act*) had occurred. Because of such violation, the plaintiff is entitled to a delictual remedy.

6. CONCLUSION

It has been ascertained in this study that the legal principles underlying vicarious liability are well established. But this study also used pertinent case law analysis of *K v Minister of Safety and Security* to hold the state (Ministry of Police) liable for direct liability as well. Apart from this developmental approach of delictual principles, the Courts endeavour to develop delictual principles in line with constitutional and fundamental human rights and the demands of the time. A juristic person as an employer will be held vicariously liable for the delict of an employee if the delict is committed by the employee in the course and scope of his/her employment. Both the High Court and Supreme Court of Appeal, by strictly applying the common-law principle of vicarious liability under law of delict, held that the Ministry of Police could not be held liable for the rape of the appellant in the *K v Minister of Safety and Security*-case law. The Supreme Court of Appeal dispelled the idea that constitutional principles be at play in the specific case law. However, the Constitutional Court interfered and stated that the common-law rule of vicarious liability should be developed. In developing the rule, the Constitutional Court held that courts should consider the applicant's constitutional right to freedom and security of the person, and in particular, the right to be free from all forms of violence as well as her right to dignity, right to privacy and her right to substantive equality. It means that the common-law rule of vicarious liability should be developed to render it consistent with the spirit, purport and objects of the Bill of Rights. In summation, in the *K v Minister of Safety and Security* case the Supreme Court of Appeal's conclusion that the principles of vicarious liability do not render the juristic person, the Ministry of Police liable, is inconsistent with the spirit, purport and objects of the Bill of Rights and that the principles of vicarious liability need to be developed to hold the Ministry of Police liable.

This development of the principle of vicarious liability is to be triggered by the courts in their judgments in case law and their interpretation of other legal instruments such as statute law and international instruments. For example, it is stated in case law, *Feldman (Pty) Ltd v Mall* 1945 AD 733 that a master who uses servants creates risk of harm to others if the servant proves to be negligent. It follows that if the servants acts in doing his master's work 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. The courts must state that the following requirements must be met in order for an employee 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.

The Ministry raised the issue that Ms K. victory would have opening the floodgates to the state's strict liability for delictual acts committed by the police. But the state may escape vicarious liability when it can show that the official was not an employee. On the other hand, an employer can take action against an employee if his conduct is linked to the workplace. If the employer (In the K-case) is held to be vicariously liable, the employer can discipline or dismiss an employee for misconduct. Dismissal could be justified if the misconduct has a serious impact on the employment relationship.

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. The court mentioned that this aspect, together with Ms K's constitutional right, form the prism through which this enquiry should be conducted. In the case of the police service, reliance is placed on each individual member to execute its constitutional mandate to the public. The perception of the victim and the breach of trust are of importance here. On the interplay between the commission and omission, the court provided a detailed judgment, by stressing that there was a simultaneous act (rape) and omission (failure to protect the victim).

The time is right to further develop *K v Minister of Safety and Security* and to accept direct and not only vicarious liability as the basis for the state's delictual liability. The judgment in *K v Minister of Safety and Security* did not, however deal with direct liability because it was not argued. 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 omissions. For example, where a state employee breaches a public duty there is direct liability.

There exists a legal duty on state organs such as the Ministry of Police not to cause harm negligently to another and this forms part of an enquiry into wrongfulness. The existence of

wrongfulness is determined with reference to the legal conviction of the community or the *boni mores*. In *K and Carmichele v Minister of Safety and Security* 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. Failure to do so would be wrongful. 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. In order to establish intent, there should be the direction of the will and consciousness of wrongfulness and the test for intent is subjective. Negligence on the other hand is where a person is blamed for an attitude of carelessness because he failed to adhere to the objective standard of care required of him and the test for negligence is that of the reasonable person or *bonus paterfamilias*. A reasonable person or *bonus paterfamilias* 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, the Ministry of Police had in fact failed to take such steps, it would have acted negligently. Acts of the police are acts of the state and failures to act positively where there is a constitutional duty to do so, constitutes wrongfulness. 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. The three policemen in *K v Minister of Safety and Security* had every intention of raping Ms K. and that fault in the form of intent is present. The state was negligent in not taking reasonable measures to prevent the three policemen from committing a delict. Therefore the state's failure to take reasonable steps to prevent the three policemen from causing harm is indicative of the state's negligence. If the wrongful, culpable act of the state then caused harm to a victim such as Ms K, there is no reason she should not be able to hold the Ministry of Police directly liable.

It would be parochial to consider only one's own national law in developing delictual principles along constitutional indicators. Other legal systems may enlighten us in our own law and assisting us in even developing it further. Pointers regarding such guidance and developments are indicative in case laws such as *Primeaux v United States* and the England case

of *Lister v Hesley Hall*. The approach in the United Kingdom, in terms of which courts ask whether there is a close link between the wrongful conduct of the employees and the business of the employer is very similar to the test set in the *Rabie*-case. But in developing our own law with regard to international jurisdiction, we should not offend the Bill of Rights or be at odds with our own constitutional dispensation.

COMPETING INTERESTS

Authors have declared that no competing interests exist.

REFERENCES

1. Summer. Lecture notes. Law of Persons. B. Juris. UNAM, Windhoek, Namibia; 2015.
2. Neethling J, Potgieter JM. Law of delict. 6th edition. Edited and translated by Knobel: LexisNexis, Durban; 2010.
3. Hawke N. Corporate Liability. Sweet & Maxwell: London; 2000.
4. Eastern Counties Railway Co v Broom, 6 Exch. 314; 155 E.R. 562; (1851).
5. Fish Hoek Primary School v Welcome (A154/08) [2008] ZAWCHC 79; 2009 (3) SA 36 (C); (17 September 2008).
6. New Zealand Guardian Trust Co. Ltd. v Brooks and Others, B.C.C. 407; 1995.
7. Spier J, (editor). Unification of Tort Law: Liability for Damages caused by others. European Centre of Tort and Insurance Law: Kluwer Law International. The Hague. The Netherlands. Aspen Publishers; 2003.
8. Pop AI. Criminal liability of corporations. Comparative Jurisprudence. King Scholar Program. Michigan State University College of Law: USA; 2006.
9. Zimmermann R, Visser D. Southern cross. Civil Law and Common Law in South Africa: Clarendon Press, Oxford; 1996.
10. Currie I, De Waal J. The Bill of Rights Handbook. 5th edition. Juta & Company Ltd; 2005.
11. Giliker P. Vicarious Liability in Tort. A comparative perspective. Cambridge Studies in International and Comparative Law: Cambridge University Press; 2010.
12. Minister of Police v Rabie. 1986;(1) SA 117 (A).
13. E.C. Adams v The Minister of Police, Case No: 5065/11, ZAWCHC 222; 2012.
14. Moses v Minister of Safety and Security 2000 (3) SA 106 (C).
15. Minister of Police v Ewels. 1975 (3) SA 590 (AD).
16. Minister of Police v Skosana. 1977 (1) SA 311 (A).
17. Minister of Law and Order v Kadir 1995 (1) SA 303 (A).
18. Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae). 2003 (1) SA 389 (SCA).
19. Carmichele v Minister of Safety and Security and Another. 2001 (1) SA 489 (SCA).
20. (Minister of Justice and another Intervening). 2000 (2) SA 425 (CC), PARA [13].
21. S v Baloyi and Others (CCT29/99) [1999] ZACC 19; 2000 (1) BCLR 86; 2000 (2) SA 425 (CC) (3 December 1999).
22. Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA).
23. Seema v Lid van die Ultvoerende Raad vir Gesondheid, Gauteng. 2002 (1) SA 771 (T).
24. Barret v Enfield London Borough Council [1999] 3 All E.R. 193 (HL).
25. K v Minister of Safety and Security (CCT52/04) [2005] ZACC 8.
26. Minister van Veiligheid en Sekuriteit v Phoebus Apollo Aviation BK 2002 (5) SA 476 (CC).
27. S v Tebus and Another [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC).
28. South African Police Service Act 68 of 1995.
29. Carmichele v Minister of Safety and Security and Another [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC).
30. Primeaux v United States. [1997] USCA 8 502; 181 F3d 876 (8th Cir 1999).
31. 28 USC Sections 1346(B) (1), 2671.
32. Lister v Hesley Hall [2001] UKHL 22; [2002] 1 AC 215 (HL).

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