THE CONSTITUTIONALITY OF VICARIOUS LIABILITY IN THE CONTEXT OF THE SOUTH AFRICAN LABOUR LAW: A COMPARATIVE STUDY

by

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## TABLE OF CONTENTS

Acknowledgement .................................................................................................................. 3

Chapter 1: Introduction ......................................................................................................... 5

Chapter 2

Chapter 2.1: The decision of the Constitutional Court in *NK v Minister of Safety and Security* .......................................................................................................................... 9

Chapter 2.2: An omission can bring about a close connection ...........................................12

Chapter 2.3: The close connection test formulated by the Constitutional Court ............13

Chapter 2.4: The origin of the close connection test and its development in Common law countries ......................................................................................................................... 15

Chapter 2.5: The constitutional basis of the close connection test formulated in *NK v Minister of Safety and Security* ......................................................................................... 25

Chapter 3: The applicability of the Constitutional Court’s test to ‘non constitutional’ cases .......................................................................................................................................... 29

Chapter 4: South African cases decided since the decision in *NK v Minister of Safety and Security* ................................................................................................................................. 35

Chapter 5

Chapter 5.1: Observations .................................................................................................. 55

Chapter 5.2: Conclusion ....................................................................................................... 59

Bibliography: .......................................................................................................................... 62
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SUMMARY

If the expectancy that someone was to act according to what we deem to be his or her “duty” was that straightforward, there would be no need to address the issues of liability of the employee for the wrongful acts of the employer. The recent - and some say alarming - trend in South Africa to hold employers (particularly the government) liable for wrongful, culpable acts committed by their employees, gives rise to difficulties and any inquiry into the possible vicarious liability of the employer should necessarily always start by asking whether there was in fact a wrongful, culpable act committed by the employee. If not, there can neither be direct liability of the employee nor vicarious liability by the employer. Where the employee did indeed commit a delict, the relationship between the wrongdoer and his or her employer at the time of the wrongdoing becomes important. It is then often, in determining whether the employee was acting in the scope of his or her employment that normative issues come to the fore. Over the years South African courts have devised tests to determine whether an employee was in fact acting in the scope of his employment.

Title of thesis:

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CHAPTER 1
INTRODUCTION

The requirements for the vicarious liability of an employer are threefold: an employment relationship, the commission of a delict, and the fact that the delict must have been committed within the scope (sometimes course and scope) of employment.¹ The last requirement ensures that there is a measure of fairness towards the employer who is held strictly liable. Courts in common law countries have grappled with the question under which circumstances an act would be within the scope of employment, especially in the case of intentional wrongdoing by the employee. Courts in Canada, the United Kingdom and Australia have in recent times moved away from a strict interpretation of the scope of employment and applied the ‘close connection’ test² to answer this question. This trend has been followed in South Africa by the Constitutional Court in *NK v Minister of Safety and Security* (hereafter the ‘NK case’).³ The Constitutional Court developed the close connection test to reflect constitutional values, which raises questions on how this test is to be applied to cases in which constitutional rights and duties are less prominent. The aim of this thesis is to examine the meaning of the close connection test as formulated by the Constitutional Court against the background of the development of the test in those common law countries referred to above. It commences with a discussion of the *NK*, followed by an assessment of the origin of the close connection test and its development in common law countries. Thereafter the meaning of the test as applied by the Constitutional Court is analysed, and its applicability to those cases where constitutional rights and duties are less prominent is discussed. South African cases decided after the *NK* case is then examined, and in conclusion some remarks are made on the possible application of the test in future.

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¹ *Mkize v Martens* 1914 AD 382 390.
² *Lister v Hesley Hall* [2001] UKHL 22 para 25.
³ 2005 26 ILJ 1205 (CC)
The objective of this research was to discover what constitutes vicarious liability in the workplace as same is a controversial topic. It is prevalent in every country around the world, and seems to be occurring more frequently here in South Africa with every passing year.

As we struggle to overcome previously entrenched social and cultural mores and practises, the incidence of an employee causing misfortune and damage to third parties is becoming ever more apparent. Whether this represents an increase in the occurrence of the damage itself, or merely a rise in the number of reported cases, the problem represents a growing threat to South African employers.

In turn, this represents the South African employer with a proportionately even greater risk. After all the employer is the one who will, at the end of the day, most likely be liable for paying the heavy financial cost of dealing with the problem.

The incidence of vicarious liability seems to be increasing in South Africa.

In this dissertation I have sought to clarify the notion of liability for vicarious liability as it relates to the employer. The different avenues open to an employer are, in essence, related to the practical considerations of where the third party is most likely to obtain the relief necessary to assuage the damage caused by the employee. Such damage also causes physical and psychological stresses brought about by the actions of the employee. The concepts of direct and vicarious liability are examined from statutory and common law perspectives, taking into account the relevant case law and more specifically Constitutional Court case law.

It was important to compare the concept of vicarious liability in relation to the interpretation thereof in other countries such as the United Kingdom, Canada and Australia, as vicarious liability has traditionally been founded upon no more than the existence of the employment
relationship – thus directing the enquiry only to whether the wrongdoer was engaged in the affairs or business of his or her employer when the delictual act was committed – recent cases in Canada and England reflect a principal shift by introducing into the enquiry duties on the part of the employer. Such cases all concern an intentional act of employees which are usually difficult to conceive as having been committed within the course of the wrongdoer’s employment as being improper modes of doing an act authorized by the employer.

Formal duty, in the form of employment, often defines an individual. It is not uncommon to refer to someone as “John the architect” or to introduce a friend by saying: “Ingrid is a writer.” This close association between an individual’s name and his or her occupation is indicative of society’s expectations that people will generally act in accordance with their duties, training and expertise. Members of the public would be justified in their expectation that police on stand-by duty would not harm them, but protect them. It is to be expected that a police officer is to behave like a police officer should.

Vicarious liability in terms of the relationship between employer and employee is an ever increasing drain on the resources of the modern employer and, takes up much time in terms of legal battles and court cases. The concept of vicarious liability has undergone much revision over the past decades.

The Constitution protects and enshrines important rights like dignity, equality and the right to fair labour practices. These are further defined and protected through the application of various statutes. In terms of statutory liability, the employer will be liable for the illegal act(s) of its employees, unless it takes a proactive stance and implements comprehensive precautionary measures in order to avoid such liability by employing honest, honourable, well qualified employees. In this way the employer will at least have a clear conscience when held liable for the actions of his or her employee and even escape liability.
The common law vicarious liability of the employer cannot be escaped as easily. The entire concept of the law of delict is to remedy harm suffered. In terms of the common law, employers will be held vicariously liable for the act of their employees if it can be shown that the act(s) occurred within a valid working relationship, if the act(s) actually occurred through a delict, and if the act occurred within the course and scope of employment.

Vicarious liability in English law is a doctrine of English tort law that imposes strict liability on employers for the wrongdoings of their employees. Generally, an employer will be held liable for any tort committed while an employee is conducting their duties. This liability has expanded in recent years to better cover intentional torts. Historically, it was held that most intentional wrongdoings were not in the course of ordinary employment, but recent case law suggests that where an action is closely connected with an employee's duties, an employer can be found vicariously liable.

Historical tests centered around finding control between a supposed employer and an employee, in a form of master and servant relationship. The control test effectively imposed liability where an employer dictated both what work was to be done, and how it was to be done.

This dissertation reflects on the requirements for and constitutionality of vicarious liability. In order to achieve a logical rationale it is inevitable to discuss and compare those principles, decisions and concepts formulated in foreign countries.

Decisions of the Constitutional Court will be used in support of explanations contained herein. The principles and requirements laid down and accepted over the past hundred years by foreign courts will be used in comparison and support of explanations contained herein.
CHAPTER 2

CHAPTER 2.1

THE DECISION OF THE CONSTITUTIONAL COURT IN NK V MINISTER OF SAFETY AND SECURITY

The NK case \(^4\) concerned a claim by a woman, the applicant, who in the early hours of the morning was stranded without transport. She tried to phone her mother from a garage shop to ask her to come and fetch her when three policemen on duty at the time, in uniform and in a marked police vehicle, offered to take her home and she readily accepted. On the way to her home they took a wrong turn and stopped somewhere, where all three of them raped her. She was left to find her own way home. The policemen were delictually liable for their conduct, but that was not the issue in this case. The policemen were subsequently tried and convicted and the applicant thereafter sued for damages. The High Court dismissed the applicant’s claim against the Minister in terms of the vicarious liability of the Minister and she appealed to the Supreme Court of Appeal.

The Supreme Court of Appeal \(^5\) dismissed the appeal on the basis that the acts of the policemen could not be regarded as having been done within the course and scope of their employment. The Court stated that difficulty often arises in the so-called deviation cases in which the employer could still be held liable even though the employee deviated from instructions, but in such cases the question was:

‘... whether the deviation was of such a degree that it can be said that in doing what he or she did the employee was still exercising functions to which he or she had been appointed or was still carrying out some instruction of his or her employer’. \(^6\)

\(^4\) K v Minister of Safety and Security 2005 26 ILJ 681 (SCA) (due to differences in the way in which the name of the case was reported in the ILJ, the CC Judgment will be referred to as the NK case and the SCA judgment as the K case).

\(^5\) Para 4.
This reasoning relied on past South African cases which held that deviation from authorised duties should not be too drastic. If so, the act would not fall within the scope of employment.\textsuperscript{6} The Supreme Court of Appeal declined to develop the common law test for vicarious liability to reflect the spirit, purport and objects of the Constitution, as urged by counsel for the applicant. The Court held that it is:

'... unnecessary to consider the question of the development of the law which in any event would best be dealt with by the legislature should a change in law be considered necessary.'\textsuperscript{7}

On appeal, the Constitutional Court held that the common law doctrine of vicarious liability should be developed to reflect the spirit, purport and objects of the Constitution. The Court held that in the light of the policy considerations\textsuperscript{8} on which the doctrine of vicarious liability is based and the normative influence of the Constitution, it cannot be asserted, as the courts did in the past, that it is purely a factual matter whether a certain act falls within the scope of employment. This would in effect sterilise the common law rules of vicarious liability, and isolate them from the pervasive normative influence of the Constitution.\textsuperscript{9}

The Court stated that the most important policy considerations which form the basis of the vicarious liability of an employer are 'efficacious remedies' for harm suffered and to 'incite employers to take active steps to prevent their employees from harming members of the broader community;,'\textsuperscript{10} in short, the policy considerations of adequate compensation and deterrence. The Court added that there is also a countervailing principle namely 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.'\textsuperscript{11}

\textsuperscript{6} See the minority decision in \textit{Feldman v Mall} 1945 AD 733 (hereafter 'Feldman') and \textit{Viljoen v Smith} 1997 1 SA 309 (A) (hereafter 'Viljoen').
\textsuperscript{7} \textit{K case supra} para 8.
\textsuperscript{8} These are similar to the policy considerations considered to be the basis for vicarious liability in \textit{Bazley v Curry} 1999 2 SCR 534 (hereafter 'Bazley').
\textsuperscript{9} \textit{NK case para 22}.
\textsuperscript{10} Para 21.
\textsuperscript{11} \textit{ibid}.
The Constitutional Court held that statements by South African courts\textsuperscript{12} that the reason for the rule must not be confused with the rule itself, and that the application of common law principles of vicarious liability remains a matter of fact, could not be correct.\textsuperscript{13}

The Constitutional Court’s \textit{dictum} that the underlying policy considerations are relevant to the rule is in accordance with the decision in \textit{Feldman},\textsuperscript{14} in which the Court stated that the examination of the basis for the rule (risk) assists in establishing the limits of the employer’s liability.\textsuperscript{15} The courts in \textit{Bazley}\textsuperscript{16} and \textit{Grobler v Naspers} (hereafter the ‘\textit{Grobler} case’),\textsuperscript{17} to mention only two, also investigated the reason for the rule to assist in establishing the scope of the employer’s vicarious liability.

\textsuperscript{12} See, eg, the judgment in \textit{Ess Kay Electronics v First National Bank} 2001 1 SA 1214 (SCA).
\textsuperscript{13} \textit{NK case} para 22.
\textsuperscript{14} 1945 AD 733.
\textsuperscript{15} 741.
\textsuperscript{16} \textit{Supra} para 26.
\textsuperscript{17} 2004 4 SA 220 (C) 278.
CHAPTER 2.2
AN OMISSION CAN BRING ABOUT A CLOSE CONNECTION

The Constitutional Court relied on Feldman\textsuperscript{18} in holding that a deviation from authorised duties, which is in effect neglect of a duty, could in certain circumstances be closely connected to the employment. This would be the case if the omission led to mismanagement of the master’s affairs and this in turn led to damages to the third party.\textsuperscript{19} The employer could thus be liable for the intentional wrongdoing if this had a negative impact on the employee’s duties, but not if the third party suffered damages as a result of an act of the employee unconnected to the work of his employer.

The Court in the NK case relied on the reasoning in Feldman to indicate that an employer can be held liable for acts of the employee done in the employee’s own interest and not in furtherance of the employer’s work if the act led to a negligent or improper performance of the employer’s work.

The Constitutional Court thus did not agree with the Supreme Court of Appeal’s reasoning in the same case that the greater the deviation, the less justification there can be for holding the employer liable.\textsuperscript{20}

\textsuperscript{18} Supra.
\textsuperscript{19} NK case paras 47-48.
\textsuperscript{20} Para 5.
CHAPTER 2.3

THE CLOSE CONNECTION TEST FORMULATED BY THE CONSTITUTIONAL COURT

The close connection test as formulated in the United Kingdom entails that the courts ask whether a close link exists between the wrongful conduct of the employees and the business of the employer or the nature of the employment.21 The Constitutional Court has held that this test is very similar to the test formulated in the South African case of Minister of Police v Rabie22 (hereafter ‘Rabie’) In the Rabie case an off-duty policeman in plain clothes arrested and assaulted an innocent member of the public against whom he had a personal grudge and laid a false charge against the person. The Court in Rabie23 formulated the test for vicarious liability as follows:

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

Subsequent to the Rabie case, the above test, consisting of a subjective and objective part, was applied in various South African cases,24 although not in all cases on vicarious liability.25 The Constitutional Court held that if the intention of the employee was not to further his or her employer’s business (a subjective test), the master could still be vicariously liable if there was a sufficiently close link between the acts of the employee for his own interests and the purposes and business of the employer (an objective test). This connection, the Court reasoned, had two elements. It is not merely a factual question as was sometimes argued

21 Lister v Hesley Hall supra.
22 1986 1 SA 117 (A).
23 Supra 134.
24 E.g., in Grobler v Naspers supra and Viljoen v Smit (an older case) supra.
25 Commissioner for the SA Revenue Service v TFN Diamond Cutting works 2005 26 ILJ 1391 (SCA).
in South African courts, but also a legal question, thus a question of mixed fact and law. The Court did not go into the question of what would factually constitute a close connection. Presumably this is the easy part of the close connection, meaning closeness to the employment or authorised acts of the employee. It would probably include acts which on the surface are similar to the employment of the employee, such as doing the wrongful act while doing authorised acts, or acts closely resembling authorised acts, and in the time and the place where the employee has to do his or her job.

The answer to what would constitute a legally close connection is more complicated. This is the new element in the close connection test formulated by the Constitutional Court, which explained its application as follows:

'The objective element of the test relates to the connection between the deviant conduct and the employment, approached with the spirit, purport and objects of the Constitution in mind, is sufficiently 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.'

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26 *Ess Kay Electronics v First National Bank* supra paras 9-10.
27 *NK* case para 45.
28 This aspect will be discussed below.
29 *NK* case para 44. Interestingly, the close connection test applied by the courts in Canada and the UK, although allowing room for policy considerations, does not incorporate any human rights issues.
CHAPTER 2.4

THE ORIGIN OF THE CLOSE CONNECTION TEST AND ITS DEVELOPMENT IN COMMON LAW COUNTRIES

The close connection requirement for vicarious liability has its origin in the so-called Salmond-rule:

'A master is not responsible for a wrongful act done by his servant unless it is done by his servant in the course of his employment. It is deemed to be so done if it is either (a) a wrongful act authorized by the master, or (b) a wrongful and unauthorized mode of doing some act authorized by the master.'

Salmond further stated that:

'A master is liable even for acts which he has not authorized provided that they are so connected with acts which he has authorized that they might rightly be regarded as modes – although improper modes – of doing them.'

Courts in common law countries acknowledged that intentional wrongdoing does not fit comfortably in the mould of the Salmond rule, as it was difficult to conceive that intentional misconduct could be an 'improper mode' of doing authorised acts. Conduct of this type has often been held to constitute independent acts falling outside the scope of employment. However, courts have in recent years increasingly concentrated on the last part of the Salmond formulation, namely the connection with authorised acts and taking a less narrow view of authorised acts to accommodate intentional wrongdoing.

The difficulty is that the close connection test as applied by different courts does not always have the same meaning.

The Canadian case of Bazley v Curry concerned a warden of a school for troubled boys who sexually abused some of them. The question which the Supreme Court of Canada had to answer was whether the employer could be held liable for these acts, which were the antithesis of what a person in the position of the warden was employed to do.

31 Salmond & Heuston on the Law of Torts 443.
32 Lister v Hesley Hall supra para 20.
33 Trotman v North Yorkshire CC 1999 LGR 584 CA (hereafter Trotman).
34 Rose v Plenty 1976 1 All ER 97 (hereafter Rose).
35 Supra.
The argument for the defence was that these acts could hardly be seen as ‘modes’ of doing an unauthorised act. According to the defence, the acts fell outside the Salmond formulation and thus outside the range of acts for which the employer could be held liable.

McClaghlin J for the majority, stated that courts should openly confront the question of whether the liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of ‘scope of employment’ and ‘mode of conduct’.36

The Court further stated that the fundamental question is whether the wrongful act is sufficiently related to conduct authorised by the employer to justify the imposition of vicarious liability. According to the Court, vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of risk and the wrong that accrues there from. The Court reasoned that where this is the case, holding the employer liable, will serve to fulfill policy considerations, the first of which would be providing an adequate and just remedy to the victim. Equally important was the notion that by holding the employer liable, the second policy consideration of deterrence would be met, namely encouraging of the employer to take preventative measures to guard against wrongdoing by employees.37

The following factors would, according to the Court,38 indicate that there is a significant risk that the wrongful act would take place:

- the opportunity that the enterprise afforded the employee to abuse his or her power;
- the extent to which the wrongful act may have furthered the employer’s aims;
- the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the enterprise;
- the extent of power conferred on the employee in relation to the victim; and
- the vulnerability of potential victims to wrongful exercise of the employee’s power.

36 Para 41.
37 Ibid.
38 Ibid.
The test in the *Bazley* case\(^\text{39}\) could be criticised on the ground that the liability of an employer would be too wide if risk is regarded as the basis for liability. This would mean that the employer would in effect become an insurer. However, the Court was aware of this danger and stated that a wrong that is only coincidentally linked to the activity of the employer cannot justify the imposition of vicarious liability on the employer.

The judgment in *Jacobi v Griffiths*\(^{40}\) in which the test formulated by McClaghlin J in the *Bazley* case was applied, did not result in the employer being held liable. In this case, children at a youth club were under the supervision of an employee in charge of recreational activities. The employee invited two of the children to his house, where acts of sexual abuse took place. The Canadian Supreme Court held that the employer was not vicariously liable as the employee was not placed in a special position of trust and power with respect to the children.\(^{41}\) His position did not significantly increase the risk that such abuse would take place.\(^{42}\) The children did not live at the club, could go home at any time and did not have to go to the employee’s house.\(^{43}\) The employee’s duties did not include ‘parenting activities’ that usually include intimate care as was the case in the *Bazley* decision. The Supreme Court of Canada held in the *Jacobi* case that the employer was not vicariously liable as the connection between the acts of the employee and the risk created by the employer’s business was not sufficiently close. The mere opportunity provided by his employment was not sufficient to establish a close connection.\(^{44}\)

In *Lister v Hesley Hall*,\(^{45}\) a warden of a school for boys with emotional and behavioural problems sexually abused some of the boys. The House of Lords quoted the decision in *Bazley* with approval and applied the close connection test. However, the Court did not base its decision on a close connection between the acts of the employee and the risk created by

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\(^{39}\) *Supra* para 36.

\(^{40}\) 1999 2 SCR 570.

\(^{41}\) *Jacobi v Griffiths* *supra* para 83.

\(^{42}\) Para 79.

\(^{43}\) Para 80.

\(^{44}\) Para 81.

\(^{45}\) *Supra*. 
the employer’s business. Lord Steyn, for the majority, simply required a close connection between the acts of the employee and the employment (or authorised acts of the employee). 46 This test seems to focus on factual closeness, as Lord Steyn 47 remarked:

‘[T]here is a very close connection between the torts of the warden and his employment. After all, they were committed in the time and on the premises of the employers, while the warden was also caring for the children.’

Lord Clyde 48 stated that:

‘... the care and safekeeping of the boys had been entrusted [to him and] his position as warden and the close contact with the boys which that work involved created a sufficient connection between the acts of abuse which he committed and the work which he had been employed to do’.

In a concurring judgment, Lord Hobhouse of Woodborough declined to follow the risk-based test in the Bazley case but held the employer liable on the ground of a breach of a special (delegated) duty that the employer had towards the victims. 49 He stopped short of finding the employer liable on a non-delegable duty. 50

The close connection test as applied in Lister v Hesley Hall (as opposed to the test applied in the Bazley case), in requiring that the conduct must have a close link with authorised conduct, still clings to a strict interpretation of the Salmond test and thus to acts that were authorised. A further problem is that it does not give guidance on when the close connection requirement will be satisfied. In the Bazley case 51 the Court at least gave a list of factors that would indicate that the enterprise enhanced the risk that the wrongful act would take place. However, there may be little difference between a close connection between the wrongful acts of the employee and acts authorised by the employer (the test in the Lister case) and between the wrongful acts of the employee and the risk posed by his employment (the test in

46 Para 20.
47 Ibid.
48 Para 50.
49 Para 57.
50 See the discussion of the nature of a non-delegable duty in the Australian Supreme Court in New South Wales v Lepore; Samin v Queensland; Rich v Queensland 2003 HCA 4 infra.
51 Supra.
the *Bazley* case). To come to a decision on whether there was a close connection of the wrongful act to the risk, the court will have to take the employment or duties of the employee into consideration and there would be little difference between this and authorised acts.

In *New South Wales v Lepore; Samin v Queensland; Rich v Queensland*, the High Court of Australia examined the possibility that the employers (educational authorities) owed a non-delegable duty to the child-victims who were assaulted by their teachers. A non-delegable duty is one which, if breached, would lead to personal liability for the employer, as the duty cannot be discharged by delegation. This liability is similar to vicarious liability in that it also does not require fault. Only one of the seven judges held that the educational authority was liable on account of a non-delegable duty. The majority of the judges held that a non-delegable duty was not appropriate in the case of intentional wrongdoing.

In regard to the close connection test, Gleeson J said the following:

> ‘The considerations that would justify a conclusion as to whether an enterprise materially increases the risk of an employee’s offending would also bear upon the nature of the employee’s responsibilities, which are regarded as central in Australia.’

Gleeson J emphasised that the specific duties of a teacher should be scrutinised to establish whether there would be a close connection between the wrongful act and the employment:

> ‘The degree of power and intimacy in the teacher-student relationship must be assessed by reference to factors such as the age of the students [and] their particular vulnerability…’

In *B(E) v Order of the Oblates of Mary Immaculate (British Columbia)*, decided a few years after the *Bazley* and *Jacobi* cases, the Canadian Supreme Court found that the educational

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52 2003 HCA 4.
53 Gleeson J para 20.
54 The four recognised relationships in which non-delegable duties are acknowledged by Australian law and listed by the Court are the following: employer and employee, hospital and patient, adjoining owners of land and education authority and student.
55 McHugh J.
56 Para 65.
57 Para 74.
58 2005 SCC 60.
authority was not vicariously liable for the sexual abuse of a pupil by an employee working in
the bakery at the school.

The Court held that the connection between the job-conferred authority and the sexual
assault was not sufficiently close. The employee, although residing on the premises of the
school where the pupils also lived, ‘had no position of power, trust or intimacy with respect to
the children.’

The above discussion sketches the development of the close connection test for vicarious
liability in some common law countries. The Canadian Supreme Court in the Bazley case
relied on a close connection between the wrongful act of the employee and the risk of the
undertaking. The House of Lords in the Lister case in turn appeared to favour a close
connection between the wrongful act of the employee and acts authorised by the employer.

The judgment of the Australian High Court in the Lepore case indicated that these two
approaches are not far apart, as an investigation into whether the enterprise will increase the
risk of an employee’s offending would include an investigation into the nature of the
employee’s responsibilities. A need to focus on the exact duties of the employee to establish
whether there is a close connection was also confirmed by the Supreme Court of Canada in
the Oblates case.

The Constitutional Court’s formulation of the close connection test in the NK case will be
analysed against the background of the preceding discussion of its development in common
law countries.

59 Para 57.
60 Para 51.
Vicarious liability is a form of strict, secondary liability that arises under the common law doctrine of agency respondeat superior which means the responsibility of the superior for the acts of their subordinate or the responsibility of any third party that had the 'right, ability or duty to control' the activities of a violator. It can be distinguished from contributory liability, another form of secondary liability which is rooted in the tort of enterprise liability.

Under English Law principles are vicariously liable, under the respondeat superior doctrine, for negligent acts or omissions by their employees in the course of employment (sometimes referred to as 'scope of employment').[1] For an act to be considered within the course of employment, it must either be authorized or be so connected with an authorized act that it can be considered a mode, though an improper mode, of performing it.

Courts sometimes distinguish between an employee's "detour" vs. "frolic". For instance, an employer will be held liable if it is shown that the employee had gone on a mere detour in carrying out their duties, whereas an employee acting in his or her own right rather than on the employer's business is undertaking a "frolic" and will not subject the employer to liability.

Generally, an employer will not be held liable for assault or battery committed by employees, unless the use of force was part of their employment (such as a police officers), or they were in a field likely to create friction with persons they encountered (such as car re-possessors). However, the employer of an independent contractor is not held vicariously liable for the tortuous acts of the contractor, unless the contractor injures someone to whom the employer owes a non-delegable duty of care, as when the employer is a school authority and the injured party a pupil.

Employers are also liable under the common law principle represented in the Latin phrase, "qui facit per alium facit per se" (one who acts through another acts in one's own interests). That is a parallel concept to vicarious liability and strict liability, in which one person is held liable in criminal law or tort for the acts or omissions of another.
In English law, a corporation can only act through its employees and agents so it is necessary to decide in which circumstances the law of agency or vicarious liability will apply to hold the corporation liable in tort for the frauds of its directors or senior officers.

If liability for the particular tort requires a state of mind, then to be liable, the director or senior officer must have the state of mind and it must be attributed to the company. For example, should employees of a company, whilst acting within the scope of their authority but unknown to the directors, used company funds to acquire shares, the question arise as to whether the company knew, or ought to have known that it had acquired those shares. Whether by virtue of their actual or ostensible authority as agents acting within their authority or as employees acting in the course of their employment, their acts and omissions and their knowledge could be attributed to the company, and this could give rise to liability as joint tortfeasors where the directors have assumed responsibility on their own behalf and not just on behalf of the company.

So if a director or officer is expressly authorised to make representations of a particular class on behalf of the company, and fraudulently makes a representation of that class to a Third Party causing loss, the company will be liable even though the particular representation was an improper way of doing what he was authorised to do. The extent of authority is a question of fact and is significantly more than the fact of an employment which gave the employee the opportunity to carry out the fraud.

From the above it is clear that the doctrine of vicarious liability and its impact in common law countries had to be researched and interpreted first in terms of its incorporation and interpretation in terms of our law.

The standard test for vicarious liability is the question whether the employee was ‘engaged in the affairs or business of his employer’ which is sometimes expressed as whether the employee was acting ‘in the course and scope’ of his or her employment, at the time the delict was committed. At one extreme the delict might be committed by the employee while going about his or her employment in the ordinary way, in which case the employer will be
liable. At the other extreme the delict might be committed by a person who, albeit that he or she is an employee, is going about his or her own private business, unconnected to that of the employer, in which case the employer is not liable. Between these extremes is an uncertain and wavering line. Decided cases fall somewhere between these two extremes.

It is important to refer to and compare cases in Canada and England as same reflect a principal shift by introducing into the enquiry duties on the part of the employer. These cases all concern intentional acts of employees. It was decided that trial judges are required to investigate the employee’s specific duties and determine whether they gave rise to special opportunities of wrongdoing. In cases such as child abuse, special attention should be paid to the existence of a power or dependency relationship, which on its own often creates a considerable risk of wrongdoing. To justify imposing liability on the basis of a creation of risk it was decided that there must be a strong connection between the created risk and the wrongful act. If such connection is absent the employer will not be held vicariously liable. If this approach to the nature of employment is adopted, it is not necessary to ask the question whether the wrongful acts were modes of doing authorized acts. It becomes possible to consider the question of vicarious liability on the basis that the employer undertook to abide by certain conditions through the services of an employee and that there is a very close connection between the torts of the employee and his employment. Once this is established, the employer can be held vicariously liable.

The introduction into the principle of vicarious liability of a duty owed by the employer was taken further by adopting the ‘two-stage’ enquiry that was adopted in later cases. The first stage requires a subjective consideration of the employee’s state of mind and is a purely factual stage. Should the state of mind be one of entire self-direction, then the second objective stage of whether even though the acts done have been done solely for the purposes of the employee, there is nevertheless a sufficiently close link between the employee’s acts for his own interests and the purposes of the employer. These stages do not
raise purely factual questions, but mixed questions of fact and law. The question of law it raises relate to what is ‘sufficiently close’ to give rise to vicarious liability. It is in answering this question that a court should consider the need to give effect to the spirit, purport and objects of the Bill of Rights.
CHAPTER 2.5

THE CONSTITUTIONAL BASIS OF THE CLOSE CONNECTION TEST FORMULATED IN 
NK V MINSTER OF SAFETY AND SECURITY

The Constitutional Court is clearly correct in maintaining that no part of the common law should be immune to the pervasive normative influence of the Constitution. In cases such as Minister of Safety and Security v Carmichele and Minister of Safety and Security v Van Duivenboden the Bill of Rights has already had an effect on the way courts assessed the wrongfulness of acts of the police. The Constitutional Court rightly states that there is no reason why questions of constitutional rights cannot arise in a different aspect of the law of delict, namely vicarious liability.

The court in the NK case distinguished it from Phoebus Apollo Aviation CC v Minister of Safety and Security (hereafter Phoebus Apollo). In Phoebus Apollo, which dealt with policemen who stole money, the Constitutional Court held that the case did not raise a constitutional matter. But in the appeal to the Constitutional Court in the NK case, constitutional issues were placed in sharp focus. O'Regan J distinguished the Phoebus Apollo case on the ground that the constitutionality of the rules of vicarious liability was not in issue in that case. This result is criticised by Carole Lewis who argues that there is in principle no difference between a policeman who commits the crime of theft and a policeman who commits the crime of rape.

However, these two cases could perhaps be distinguished on the basis that the policemen in the Phoebus Apollo case were not on duty, not wearing uniforms and were not investigating the original robbery. It could be argued that the connection between their employment and their acts was not sufficiently close to justify the vicarious liability of the employer. One of the difficulties with having a Constitutional Court as the highest authority in regard to cases

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61 In Carmichele v Minster of Safety and Security 2001 4 SA 938 (CC) para 54 the Constitutional Court stated that the Constitution is not merely a formal document regulating public power, but it embodies an objective normative value system that provides the matrix within which the common law must be developed.
involving constitutional matters and a Supreme Court of Appeal which is the highest authority in all other cases, is that parties have to cast an appeal to the Constitutional Court in constitutional terms.\textsuperscript{65} When the matter in the NK case reached the Constitutional Court, it was argued that the State bears direct responsibility if they are in breach of their constitutional obligation to protect the complainant. It would seem as if the court in the NK case could only have reached its decision by casting the reasons for holding the employer liable in constitutional terms. To justify hearing the case, the Constitutional Court had to find the reasons why the decision of the Supreme Court of Appeal in the K case was repugnant to the Constitution. The Constitutional Court could instead have relied on the development of the doctrine of vicarious liability in South Africa and other common law countries, and could have held the employer liable without having recourse to a complicated objective part of the close connection test involving constitutional values.

The question is what guidance can be derived from the test formulated by the Constitutional Court in the NK case,\textsuperscript{66} particularly in cases where constitutional rights and duties (especially of non-state parties) are less directly relevant. This question is important as the Constitutional Court intended to formulate a general test applicable to all vicarious liability cases.

In applying the test it formulated, the Constitutional Court found that a close connection did exist between the acts of the policemen and their employment because of the following three factors:

- the Minister, and therefore the policemen-employees, had a statutory and constitutional duty to protect the victim;

\textsuperscript{65} Lewis 2005 SAJHR 519-522 .

\textsuperscript{66} Supra para 33.
• the policemen had a special duty to protect her as they escorted her home – she trusted them because they wore uniforms; and
• they breached their duty by way of a commission (the rape) and an omission (failing to protect her in accordance with their duty).

According to the Constitutional Court, the above three factors, viewed against the background of the Constitution, provided a sufficiently close connection for the employer to be held liable; unlike the Supreme Court of Appeal, it therefore felt that the failure to impose such liability would give rise to a result at odds with the Constitution. Earlier in the judgment, the Constitutional Court explained the implication of the development of the test for vicarious liability by stating that the principles of vicarious liability and their application need to be developed to accord more fully with the spirit, purport and objects of the Constitution.

The Court warned that this conclusion should not be misunderstood to mean anything more than that the existing principles of common law vicarious liability must be understood and applied within the normative framework of our Constitution, and the social and economic purposes which they seek to pursue. The Court further emphasised that the conclusion also does not mean that an employer will be saddled with damages simply because injuries might be horrendous. Courts should bear in mind the values the Constitution seeks to promote and should on that basis decide whether the case before it is of the kind which in principle should render the employer liable.67

The Constitutional Court developed the test for vicarious liability to encompass constitutional values and applied this test to the specific case in which constitutional duties were breached and constitutional rights infringed. No guidance was given as to the kind of case that will in principle dictate that the employer should be held liable if no constitutional duties were breached or no constitutional rights were infringed. From recent decisions in cases not

67 NK case para 23.
dealing with vicarious liability but other aspects of State liability, it could be concluded that constitutional norms may result in the State being held liable in circumstances where private persons would not be held liable:

'It is clear that the Constitution will have a strong influence where the defendant is a state party and while it is undesirable to create a separate body of rules for state parties, the application of standard principles could well lead to results different from those cases in which ordinary persons are involved.'

The above would be especially true where the State is in breach of a constitutional duty. The question is whether there will be an absolute or non-delegable duty on the State if its constitutional duty is breached by one of its employees. Another question left unanswered is under which circumstances constitutional values underlying the close connection test, as formulated by the Constitutional Court, would require that a non-state employer should be held vicariously liable. The Constitutional Court in the *NK* case held that the doctrine of vicarious liability must be applied within the normative framework of the Constitution, but that the infringement of the rights of the third party alone ('horrendous injuries') would not be sufficient to bring about the close connection needed for vicarious liability. Something else is needed. In applying the test to the facts of the case, the Court emphasised the duty of the employer and employees, the trust placed in them by the victim because of their authority and the abuse of that authority. These factors, which correspond with the development of the doctrine in common law countries, may provide guidance to apply the close connection test as developed by the Constitutional Court to cases where the State is not the employer and where constitutional norms are not directly relevant.

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68 See Van der Walt & Midgley *Principles of Delict* 3 ed (2005) 25
CHAPTER 3

THE APPLICABILITY OF THE CONSTITUTIONAL COURT’S TEST TO ‘NON CONSTITUTIONAL’ CASES

3.1 The Constitutional Court

It is clear that the Constitutional Court purported to lay down a general test for all vicarious liability cases and not only those where constitutional issues are prominent.\(^{69}\) The test seems to be specially formulated for the \(NK\) case, or at least for cases where the State had a duty to guard constitutional rights and these rights have been infringed by the very employees charged with guarding these rights. It is thus a very narrow test. However, the Constitutional Court stated that the test is broad enough to include not only constitutional norms, but other norms as well. The problem with this test is that from now on a court will have to interpret and apply relevant norms in every case of vicarious liability to establish whether there will be a close connection. The question then is which norms could be distilled from the \(NK\) judgment that would indicate a close connection and thus make it fair to hold the employer liable? These ‘other norms’ may be understood to mean that the legal convictions of the community (infused by constitutional values) should in each case be taken into account. While it is laudable that the Court did away with a test that is purely factual and acknowledged that it is in the end a policy decision of whether the employer should be held liable, the guidance given on how to decide the matter is confusing. The test formulated by the Constitutional Court could lead to uncertainty about how to apply it and this may lead to undesirable results.

3.2 The close connection test in relation to the Constitution

The close connection test, ‘viewed through the prism of the Constitution’,\(^{70}\) could mean that the State would always be liable if it has a constitutional duty as constitutional values would be better protected if compensation comes from the ‘deeper pocket’ of the employer. The test

\(^{69}\) NK case para 45
\(^{70}\) NK as above v Minister of Safety and Security supra para 22.
has the potential to lead to liability for the State every time its duty is breached by its employees, thus a kind of non-delegable duty.\textsuperscript{71} The test may also be interpreted to mean that as soon as constitutional rights are infringed, the employer should be held liable as these rights are of the utmost importance to society\textsuperscript{72} and that holding the employer liable would protect these rights better than by only holding the employee liable. This raises three important questions. First, how is the countervailing principle,\textsuperscript{73} namely that the employer must not be held liable in all circumstances, to be applied where the State owes a constitutional duty? Secondly, how can the liability of a non-state employer (who owes no constitutional duty) be limited where constitutional rights are infringed? And thirdly, how is the close connection test (of viewing the applicability of vicarious liability through the constitutional prism) to be applied to cases where constitutional duties or rights are not prominent?

3.3 Factors that would indicate a close connection

The Constitutional Court emphasised the constitutional duty of the employer and the corresponding duties of the employees in the \textit{NK} case.\textsuperscript{74} The fact that the employer had a duty towards the third person and had placed an employee in a position of authority to do the duty on its behalf, indicated by the wearing of uniforms, was an important factor in leading the Court to the conclusion that there was in fact a close connection. In \textit{Lister v Hesley Hall}, the duty of the employer to the pupils as well as the duty of the warden (bathing the children, putting them to bed and other intimate actions associated with parenting), as well as the abuse of the position of power and trust in which the employee was placed, indicated a close connection between the wrongful acts and the employment.\textsuperscript{75} The opportunity of abuse was therefore created by the employer and forged a close connection between the wrongful act and employment. On this test, sexual abuse by the porter or groundsman at the school

\textsuperscript{71} See the requirements for such a duty in the discussion of the \textit{Lepore case supra}.
\textsuperscript{72} See the discussion of \textit{Carmichele v Minister of Safety and Security 2001 4 SA 938 (CC)} in para 15 of the \textit{NK case}.
\textsuperscript{73} \textsuperscript{NK case} para 20.
\textsuperscript{74} \textsuperscript{Supra} para 51.
\textsuperscript{75} \textsuperscript{NK case} para 50.
would, according to Lord Millet,\(^76\) not render the employer vicariously liable.

In *Bazley v Curry* the duties and authority of the employee and the opportunity of abuse were also scrutinised to evaluate the risk that the wrongful act could take place. The vulnerability of the victims was emphasised in both the *Bazley* and *Lister* cases. The duty to protect a weaker party (vulnerability of the victim) also seems to be one of the factors taken into consideration by the Constitutional Court\(^77\) in finding a close connection.

However, if the vulnerability of the victim does not enhance or contribute to the risk inherent to the undertaking, deterrence would have no effect. Holding the employer vicariously liable would not serve policy considerations and would thus not be fair. The vulnerability of the victims in both the *Bazley* and *Lister* cases was part of the inherent risk posed by the undertaking as these were the children for whom the warden had to care and they were under his authority. The vulnerability of a specific victim should not always be seen as enhancing the risk or probability that wrongful actions would take place.

In *Jacobi v Griffiths* the victims were also a boy and girl of tender age, but they were not under the authority of the youth club organiser in the same way as the children in the *Bazley* and *Lister* cases. Their vulnerability did not contribute to the risk posed by the undertaking.\(^78\) The same argument would be true in the Canadian decision of *B(E) v Order of the Oblates*\(^79\) in which the baker/boatsman did not have any authority in respect of the pupils. The sufficiently close link (close connection) between risk and the wrongful acts of the employee as applied in the *Bazley* case provides a satisfactory test for the employer’s liability, as the risk-theory also encompasses the policy considerations of adequate compensation and deterrence. The argument is that it is fair that the employer who places the risk in the

\(^{76}\) Para 82.

\(^{77}\) The Constitutional Court in the *NK* case para 18 quoted part of the decision of the court in the *Carmichele* case that emphasised the duties of the police to protect the constitutional rights of women and children.

\(^{78}\) *Lister v Hesley Hall* para 86.

\(^{79}\) *Supra.*
community for his own benefit must compensate the victim and this will lead to the employer taking care that such acts will not take place (in other words, it acts as a deterrence). A list of circumstances that will point towards enhancement of risk such as the opportunity to abuse power, vulnerability of the victim and the opportunity for friction is provided in that case as indicated above.\footnote{NK case para 41.} If the factors listed in the Bazley case were to be applied in the NK case, it would point towards a significant enhancement of the risk that abuse of power would take place. The position of authority indicated by the wearing of uniforms, the use of a police vehicle and carrying of fire-arms by the policemen indicate an enhancement of the risk that policemen could commit the crime of rape. The vulnerability of potential victims (especially the trust that would be placed in the policemen by vulnerable victims needing protection) could indicate a close connection between the risk of the undertaking (police force) and the acts that caused the harm.\footnote{NK v Minister of Safety para 57.} However, the vulnerability of the victim in the NK case could be seen as incidental and not as an inherent factor enhancing the risk of the undertaking. In this regard the Constitutional Court stated that:

\begin{quote}
'... the opportunity to commit the crime would not have arisen but for the trust the applicant placed in them because they were policemen, a trust which harmonizes with the constitutional mandate of the police and the need to ensure that mandate is successfully fulfilled'.\footnote{NK v Minister of Safety and Security para 57.}
\end{quote}

This aspect is emphasised as the argument seems to be that if the Minister is not held liable in this case, the public would no longer place their trust in the police. The test applied by the Lister case as well as by the NK case, which focuses on the duty of the employer entrusted to the employee, emphasises the authority with which the employee was endowed and the opportunity created by that authority to abuse the position. In these circumstances it would seem fair to hold the employer liable as the wrongful act could not have been committed but
for the authority and position of power with which the employer endowed the employee. In the absence of authority of the employee, the connection between the act and the employment would not be sufficiently close and the employer would accordingly not be vicariously liable. This will be the case whether the duty is constitutional or not, but as indicated above, there could be a stronger tendency to hold the State liable if it owes a constitutional duty to the victim. The test formulated in the *NK* case could be seen to signify that a duty (not necessarily of a constitutional nature) resting on the employer and ‘delegated’ to the employee, would be an important factor in bringing about a close connection. This would especially be true in circumstances in which the employer placed such a person in a position of power or trust that has created the opportunity to abuse by the employee. The normative values of society (or the legal convictions of the community) could be seen to prescribe that the employer should be held liable if the wrongful act is closely linked to the employment or risk of the undertaking.

The factors below would indicate a close connection in terms of the test laid down in the *NK* case:

- if the State is the employer and owed a constitutional duty to the victim;
- breach of the victim’s constitutional rights by the employee;
- if the employee was placed in a position of authority and as a result of this, trusted by the victim;
- in the case of the police, providing the employee with a police vehicle, a uniform, handcuffs, firearm, et cetera, enhances the opportunity (the risk) of the employee committing a wrongful act; and
- if vulnerable groups, such as women and children, suffer damages.

Two of these factors might be contentious, namely the stricter liability of the State and the vulnerability of the victim as indicated above.

On the close connection test as applied in the cases above, the Minster would not be liable if a woman walking in the garden of the police station was raped by the gardener, also an
employee of the Minister. There would be no close connection as the gardener would have no duty to the woman. The Minister of Police does have a duty to protect the woman, but this duty was not assigned to the gardener. In a second scenario, an off-duty plain clothes policeman without a fire-arm or official vehicle would pose less of a risk that trust will be placed in him and that the trust could be abused. But in the third scenario of a policeman who works at the child protection unit and then abuses the children he has to take care of, the Minister will be liable. The vulnerability of the victims will be part of the reason why there is a close connection. In the first two scenarios, the policy consideration of deterrence would not be served if the Minster is held liable, while it would be served if the Minster is held liable in the third scenario.
CHAPTER 4

SOUTH AFRICAN CASES DECIDED SINCE THE DECISION IN NK V MINISTER OF SAFETY AND SECURITY

4.1 INJURY CAUSED BY A POLICEMAN

*Luiters v Minister of Safety and Security*\(^{83}\) involved an off-duty policeman who placed himself on duty. In endeavouring to arrest certain suspects who had robbed him, he shot and severely injured Luiters, an innocent passer-by. Apparently the policeman was under the impression that Luiters was one of the robbers. The Supreme Court of Appeal applied the two-stage test formulated in the *NK* case and found that the Minister was vicariously liable as the policeman placed himself on duty in endeavouring to arrest the robbers and thus subjectively acted in furtherance of his employer’s business. The implication was that there was no need to apply the objective second stage of the test, namely the close connection test. The Minister argued that in the case of an off-duty policeman, the subjective part of the test (factual test of determining whether the employee intended acting in the interests of the employer) should not be regarded as sufficient, and that in such a case a close connection should also be required between the state of mind of the employee and the employment. According to the Minister, this raised a constitutional issue, as the common law would have to be developed to extend the test formulated in the *NK* case. The Constitutional Court did not accept this argument. It held that off-duty policemen were already included in the test in the *NK* case, and that the two-stage test originated in the *Rabie* case, which did concern an off-duty policeman.\(^{84}\)

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\(^{83}\) 2007 3 BCLR 287 (CC).

\(^{84}\) Para 36
4.2 FRAUD

In *Minister of Finance v Gore* (hereafter the ‘Gore’ case), the Supreme Court of Appeal had to decide whether the Minister could be vicariously liable for the deliberate dishonest actions of its employees. The Court applied the close connection test and found that objectively there was indeed a close connection between the employees’ actions and that which they were employed to do. Although they acted fraudulently in awarding the tender, they did in fact go through the process of awarding it. This application of the test stops short of examining whether there was a legal close connection. The Court remarked that as a result of the difficulties raised by these cases it is important to point out the policy reasons for imposing liability in each case. The fact that the Court referred to the policy reasons of deterrence and adequate compensation advanced by McLachlin J in *Bazley v Curry*, is confirmed by the case being mentioned in a footnote to the previous statement. The Court did not rely on constitutional or any other norms to reach its conclusion of whether there was a close connection. The Court stated that even in the case of a deliberately dishonest act, committed for the employee’s own interests, the employer may be rendered liable:

> 'if, objectively seen, there is a sufficiently close link between the self-directed conduct and the employer's business.'

The court further stated that:

> 'However gross the violation of their duties by Louw and Scholtz, it cannot be gainsaid that all their actions that were directed at wrongfully securing the contract for Nisec were nonetheless performed so that the tender would be awarded... the award for the tender was false but not a total fake.'

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85 2007 1 SA 111 (SCA).
86 *Minister of Finance v Gore* supra n 10.
87 Supra para 28.
88 Supra para 30.
The Supreme Court of Appeal in this case referred to the Constitutional Court decision in the NK case in a footnote to indicate that vicarious liability for intentional wrongdoing is by no means rare. The Court did not mention the development of the test by the court in the NK case.

The factual closeness of their wrongful acts to their employment forged the required close connection. The guidance which the Constitutional Court provided by its close connection test in two parts was not followed.

No constitutional rights or duties were raised in the case. The Court emphasised the duties of the employees and the fact that their employer placed them in a position of authority which gave them the opportunity to act fraudulently. Some of the factors indicated in the NK case were, however, found to be present. The legal part of the objective test could thus be satisfied. The outcome of the case would probably have been the same had the test as laid down in the NK case been applied.

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89 Supra para 27.

90 The SCA instead was guided by cases such as Feldmann, Rabie and Minister van Veiligheid en Sekuriteit v Japmoco BK (t/a Status Motors 2002) 5 SA 649 (SCA).
4.3 RAPE

The case of The Minister of Safety and Security v F (592/09) [2011] ZASCA 3 (22 February 2011),91 (hereafter the ‘F case’), takes the case of NK a step further. The respondent (hereafter referred to as ‘Ms F’), was in a similar situation as the victim in the NK case and as such also raped by a policeman.

The facts of the case were that Ms F visited a night club on 14 October 1998.92 After midnight Ms F was offered a lift home by Mr Van Wyk (a police officer on standby duty).93 There were two other passengers in the car.94 The court referred to Standing Order 6, issued by the National Commissioner of the South African Police Service in June 1997, and explains that ‘standby duty’ means that Van Wyk could have been called upon to ‘attend any crime-related incident if the need arose’.95 Van Wyk at the time had the use of an unmarked vehicle if he needed it for standby duty and he was being paid the prescribed hourly tariff. Ms F noticed that the vehicle was equipped with a police radio.

Ms F was seated on the back seat of the vehicle with one of the other passengers when they left the club. After the two passengers had been dropped off, Van Wyk asked Ms F to move to the front passenger seat, which she did.96 Upon moving to the front seat, Ms F saw a pile of police dockets and she asked Van Wyk about the files. Van Wyk replied that he was a private detective. Ms F testified she understood that he was a policeman.97 Instead of driving her home as agreed, Van Wyk drove towards Kaaimansrivier and told Ms F that he wanted to see his friends before dropping her off. At that point Ms F became suspicious.98 When they approached Kaaimansrivier, Van Wyk stopped the vehicle at a dark spot. Ms F got out of the vehicle, ran away and hid. Van Wyk waited and then left after a while. Ms F came out of hiding, approached the road and hitchhiked. Van Wyk’s vehicle then stopped next to her and

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91 The Minister of Safety and Security v F (592/09) [2011] ZASCA 3
92 Para 8.
93 Ibid.
94 Para 9.
95 Ibid.
96 Para 10.
97 Ibid.
98 Para 11.
again he offered to take her home. Ms F was desperate and agreed. She testified that she believed that Van Wyk was a policeman and she trusted him despite her suspicions.99

On their way to Ms F’s home, Van Wyk unexpectedly turned off the road near Kraaibos. Again Ms F tried to flee but Van Wyk prevented her and then assaulted and raped her.100 He threatened to kill her if she told anybody.101 However, Ms F reported the crime and this resulted in Van Wyk’s conviction and subsequent sentence.102

Upon reaching the age of majority in December 2005, Ms F instituted an action for damages against the Minister of Safety and Security and Van Wyk.103

4.3.1 JUDGMENT OF THE HIGH COURT

Bozalek J applied the test that was laid down in K and found the Minister vicariously liable for the damages suffered by Ms F.104 The court ruled that there was a sufficiently strong link between Mr Van Wyk’s actions and his employer’s business to justify that conclusion. The Court highlighted three factors in support of its conclusion, namely Van Wyk’s being in possession of a police vehicle, Ms F’s understanding that Van Wyk was a policeman, and what the Court refers to as the nature of the assistance that Van Wyk pretended to offer as well as the normal task of members of the police service, which is ‘to protect vulnerable groups such as women and children.’105 Not surprisingly, the Minister raised the issue of Ms F’s victory potentially opening the floodgates to the state’s strict liability for delictual acts committed by the police. Bozalek J’s response was that the test in K was sufficiently flexible to allow a case-by-case determination of the issues.106

Various prominent academics (such as Neethling107 and Scott108) commented on the
judgment of the High Court. In his discussion of the High Court judgment, Neethling referred to *K* as well as *Minister of Safety and Security v Luiers*¹⁰⁹ and commented that the ‘authoritative and well-reasoned’¹¹⁰ decision of Bozalek J is correct.¹¹¹ The state is in the same position as other employers and that the state may escape vicarious liability when it can show that the official was a regular employee of the state at the time when the delict was committed.¹¹² The latter will be the case when the state did not at the particular time have the right to control the employee. Control, according to Neethling, ‘does not mean factual control but the right of control.’¹¹³ Control is important only when it is ascertained that an employer-employee relationship existed but it is also a factor that must be taken into account when determining whether ‘a sufficiently close link existed between the conduct of the employee and his employment, and whether the employee acted within the scope of his employment.’¹¹⁴

A distinction was to be drawn between on-duty and off-duty misconduct. If the conduct is regarded as off-duty and it is determined that it falls outside the course and scope of employment, the employer will not be held vicariously liable. When an employee’s conduct falls outside the course and scope of his or her employment the employer can hold an employee accountable for his or her conduct if it impacts on his or her business. Such conduct would impact on the employer’s business ‘if it prejudices a legitimate business interest or undermines the relationship of trust and confidence that is an essential component of the employment relationship’.¹¹⁵ Dismissal could only be justified if the misconduct, whether committed on or off-duty, has a serious impact on the employment relationship.¹¹⁶

¹⁰⁹ 2007 2 SA 106 (CC).
¹¹⁰ Neethling 2011 TSAR 186 189.
¹¹² Neethling 2011 TSAR 186 190.
¹¹³ Ibid.
¹¹⁴ Ibid.
¹¹⁵ Van Niekerk, Christianson, McGregor, Smit & Van Eck Law@work (2012) 269.
¹¹⁶ Ibid.
With reference to misconduct and with specific reference to police officials, Neethling points out that:

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

Bozalek J referred to the ‘creation of risk of harm’ as formulated in Rabie. Neethling and Scott discusses this issue in detail. Scott, explains that the court attaches much value to the risk principle in light of the fact that Bozalek J was willing to hold the state liable, even though the employee had no previous convictions. Neethling is correct that the creation of risk-approach should be considered in all instances of intentional wrongdoing by an employee and that:

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

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

118  625B-626C.

119  2011 TSAR 135 143-144 (authors’ emphasis).

120  Neethling 2011 TSAR 186 191.
This higher risk of prejudice would be present where employees (such as police officials) have been placed in a position of trust or authority and the possibility of abuse as well as the fact that the employee was on duty (or stand-by duty, as in the F case) when the delict was committed, should be indicative of liability and should be of increasing weight the more while committing a delict on duty.

It seems that employers are always at risk which seems harsh and unfair. However, if the employer is held to be vicariously liable, the employer can discipline or dismiss an employee for misconduct. Fairness dictates that the employer must follow a fair procedure. The situation will be no different if the employer decides not to dismiss the employee for his misconduct. *Sidumo v Rustenburg Platinum Mines Ltd*[^21] is referred to as an illustration of such a situation. The Constitutional Court lists the following factors that must be taken into account when a commissioner is called upon to determine whether a misconduct dismissal was fair:

(i) all the surrounding circumstances;
(ii) the seriousness and importance of the rule that has been breached by the employee;
(iii) the employer’s reason for imposing the sanction of dismissal;
(iv) the employee’s reason for challenging the sanction of dismissal;
(v) the harm caused by the employee’s conduct;
(vi) considerations of other corrective measures;
(vii) the impact the dismissal will have on the employee; and
(viii) the employee’s service record.[^122]

[^121]: 2007 28 *ILJ* 2405 (CC) par 78. See also *Lipka v Voltex* PE 2010 31 *ILJ* 2199 (CCMA) in this regard.

[^122]: The Code of Good Practice: Dismissal sets out the requirements of a fair pre-dismissal procedure in cases of alleged misconduct. This procedure is laid out in item 4(1) as follows: ‘Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal inquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare a response and to the assistance of a trade union representative or fellow employee. After the inquiry, the employer should communicate the decision taken, and preferably furnish the employee with a written notification of that decision.’
In addition to taking action short of dismissal (or dismissal) the employer can also exercise his or her right of recourse against the employee such as deductions from an employee’s remuneration. Such deductions will be subject to the employee agreeing in writing to the deduction and where the deduction is permitted in terms of a law, collective agreement, court order or arbitration award. When a deduction is made in terms of a written agreement it may only be made to reimburse an employer:

a) for loss or damage only if the loss or damage occurred in the course of employment and was due to the fault of the employee;

b) the employer has followed a fair procedure and has given the employee a reasonable opportunity to show why the deductions should not be made;

c) the total amount of the debt does not exceed the actual amount of the loss or damage; and

d) the total deductions from the employee’s remuneration in terms of this subsection do not exceed one-quarter of the employee’s remuneration in money.\(^{123}\)

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

'\(\text{Dit is duidelik dat daar }'n\) balans gevind sal moet word tussen die toenemende “wetteloosheid” van die sentrale polisiediens enersyds, en die groeiende blootstelling van die algemene publiek aan wetteloosheid en misdaad, andersyds. Inagneming van die konstitusionele imperatiewe wat betref veiligheid en sekeriteit, wat in talle meer onlangs geweegde maatreëls en regspraak gestalte gevind het (soos deeglik uit die onderhawige saak blyk), noodsaak na my mening 'n uitspraak soos dié van regter Bozalek: mens kan as't ware sê dat hoe hagliker die posisie van lede van die publiek as gevolg van die vergrype van lede van die polisiediens word, hoe swaarder word die konstitusionele plig van die staat om daardie tipe gewraakte optrede goed te maak. In 'n mate kom dit dus voor - en tereg - dat die staat wesentlik en vir praktiese doeleindes as 'n versekeraar optree vir die vergrype wat tot hierdie soort nadeel aanleiding gee. Hierdie toedrag van sake is egter aan die staat self te wyte, hoofsaaklik as gevolg van die verskyn van die staat om 'n goedopgeleide, professionele polisiediens te ontwikkel en in stand te hou. Hy wat met sy bewuste aanstellingsbeleid bedenlike karakters in uniform steek, moet die gevolge dra wat deur sy optrede veroorsaak word. Indien daar dan “fouteer” moet word wat die verskynsel van middellike staatsaanspreeklikheid vir polisiedelike betref, is dit sonder twyfel te verkies dat dit in die rigting van 'n wyer staatsaanspreeklikheid sal geskied, as in die rigting van die blootstelling van lede van die algemene publiek aan 'n bestel waar die enigste remedie van die slagoffier teen 'n platsak individu is. Ter tempering behoort egter dan heroorweeg te word of die staat sonder meer regresloos behoort in te staan vir die regskostes aangegaan ter verdediging van sy werknemers in litigasie waar beslis word dat die werknemers flagrant onwettig of onregmatig opgetree het.'\(^{124}\)

\(^{123}\) S 34(1) & (2) BCEA.

\(^{124}\)
Scott alleges that the principle ought to be that the legal costs must be claimed from the convicted criminal (the employee) and that vicarious liability should not exempt the primary perpetrator (the employee). The employer should be entitled to claim all legal costs from the employee.\(^\text{125}\)

### 4.3.2 SUPREME COURT OF APPEAL

The Supreme Court of Appeal reversed the decision of the High Court. Nugent JA, with Snyders JA and Pilay AJA concurring, found that the state’s liability in K was based only on the delictual omission of the on-duty policeman involved.\(^\text{126}\) It was argued that an intentional delictual commission cannot attract the state’s vicarious liability. Thorough interpretation of K leads to the conclusion that the state is not vicariously liable for the positive delictual acts of police officials but only for their omissions.\(^\text{127}\) Because Van Wyk was not on duty, he was not engaged in the business of the police service and he had not breached his duty to protect Ms F. The court’s conclusion that an off-duty policeman has no duty to protect members of the public and cannot therefore be held liable for their failure to protect a victim of crime is of grave concern. Because there was no duty upon Van Wyk, he cannot be held personally liable.\(^\text{128}\) The majority also found that a policeman cannot be said to be ‘engaged in the affairs or business of his employer’ when he commits rape where rape is an ‘improper mode’ of exercising authority.\(^\text{129}\)

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\(^{124}\) Scott 2011 TSAR 135 147.
\(^{125}\) Ibid.
\(^{126}\) Para 20.
\(^{127}\) Ibid.
\(^{128}\) Ibid.
\(^{129}\) Para 22
The minority per Maya JA found that although the rape had nothing to do with the performance of Van Wyk's official duties, there was a sufficiently close link 'between his acts of personal gratification and the business of the police service'. The found that the fact that Van Wyk had offered to take Ms F home, placed him on duty. They also found that because Van Wyk was a policeman, Ms F was induced to trust Van Wyk and accept a lift from him. According to the minority the policy considerations underpin vicarious liability in matters such as these. It is also an employer's duty to ensure that no one is injured as a result of an employee's improper or negligent conduct when performing his duties. The minority found that K applies to these so-called deviation cases. This aspect was discussed in some detail by the Constitutional Court.

4.3.3 CONSTITUTIONAL COURT

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

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

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130 Para 23.
131 Para 24.
132 Ibid.
133 The minority judgment of Maya JA, however, is not without criticism. Scott 'Die Hoogste Hof van Appèl smoor Heilsame Regsontwikkeling: Minister of Safety and Security v F 2011 3 SA 487 (HHA)' 2011 TSAR 773 786 argues that although the minority judgment was less substantial than the majority judgment of Nugent AJ, the minority judgment is preferred nevertheless. The reason Scott prefers it is because it followed the constitutional imperatives (as mentioned in K) to protect vulnerable groups such as women and children. The majority judgment is also criticised by this author and he concludes as follows: '[i]ndien die uitgebreide en meer beredeneerde meerderheidsuitspraak van appèlregter Nugent nugter betrag word, tref dit die leser dat dit net sowel in die pre-konstitusionele era gelewer kon wees: daar is nie eens 'n enkele beroep op die grondwettlike beginsels wat in die Carmichele- en K-sake gefigureer het nie. Bloot wat hierdie aspek betref, is die hoogste hof van appèl se meerderheidsuitspraak 'n retrogressiewe stap in 'n andersins lofwaardige en gesonde regsontwikkeling wat die grondwettlike regte van verkragte en aangerande vroue en kinders betref'.
134 Para 40.
4.3.3 (1) Majority Judgment

Mogoeng explains that vicarious liability ‘means:

‘... that a person may be held liable for the wrongful act or omission of another even though the former did not, strictly speaking, engage in any wrongful conduct.’134 Employment is one such relationship and the employer is vicariously liable for the wrongful acts or omissions of an employee committed within the course and scope of employment ‘or whilst the employee was engaged in any activity reasonably identical to it.’135

The Court found that there are two tests to determine whether there is vicarious liability. The first is the standard test which applies when an employee commits a delict while going about the employer’s business. The second test applies in the so-called deviation cases where the wrongdoing takes place outside the course and scope of employment.136 The court explains that this is an example of a deviation case and refers to the pre-constitutional case of Feldman as authority. In Feldman an employee used his employer’s vehicle to deliver parcels as instructed by his employer and afterwards attended to personal matters. He drank alcohol, drove back to his employer’s premises and negligently collided with and killed the father of two dependants. The majority held the employer liable for the minors’ loss of support.137

Mogoeng J observes that Feldman proposes that employees are extensions of their employers and thus they create a risk of harm to others where their employees are inefficient or untrustworthy and herein lays the duty: those employers should ensure that their employees do not do the opposite of what they are supposed to do. In addition, where employees do the opposite of what they are supposed to do, a link must be established between the employers’ business and the delictual conduct complained of in order to hold the employer vicariously liable.138

The Court refers to Rabie.139 In the Rabie case a mechanic who was employed by the police conducted a wrongful arrest, detention and assault of the plaintiff. At the time of the arrest,

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134 Para 41.
135 Ibid.
136 Para 42. The court quotes Watermeyer CJ in Feldman. See discussion in 2 above.
137 Para 45.
138 1986 1 SA 117 (A).
139 1986 1 SA 117 (A).
the perpetrator was not wearing a police uniform and he was off duty. Mogoeng J comments that Rabie is an example of an employee’s deviation from the tasks incidental to his employment and also comments that Rabie illustrates that even if a servant acts for his own purpose (which is a subjective enquiry relating to his intent), if there is a sufficiently close relationship between the servant’s acts and the ‘business of his master’, the latter may be liable. In determining the link, an objective test is used. This argument was employed in both Rabie and K. The court formulates the crisp legal question in casu as ‘whether there was a close connection between the wrongful conduct of the policeman and the nature of their employment’. The court observes that Van Wyk did not rape Ms F in the furtherance of his duties or ‘the constitutional mandate of his employer.’ The court found that van Wyk pursued his own selfish interests and if one uses the subjective test in Rabie and K, there cannot be state liability. However, the second leg of the test which pertains to the objective enquiry raises both factual questions and questions of law. The normative components that would determine the Minister’s liability are stated as the state’s constitutional obligations to protect the public, the fact that the public is entitled to place trust in the police, the significance of a policeman having been on standby duty or off duty, the policeman’s rape and simultaneous omission to protect the victim and whether there is an intimate link between the policeman’s conduct and his employment. The court deals with each of these aspects.

140 Para 46.  
141 Rabie 134C-E.  
142 The court quotes the following passage from K: ‘The approach makes it clear that there are two questions to be asked. The first is whether the wrongful acts were done solely for the purposes of the employee. This question requires a subjective consideration of the employee’s state of mind and is a purely factual question. Even if it is answered in the affirmative, however, the employer may nevertheless be liable vicariously if the second question, an objective one, is answered affirmatively. That question is whether, even though the acts done have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee’s acts for his own interests and the purposes and the business of the employer. This question does not raise purely factual questions, but mixed questions of fact and law. The questions of law it raises relate to ‘what is sufficiently close’ to give rise to vicarious liability. It is in answering this question that a court should consider the need to give effect to the spirit, purport and objects of the Bill of Rights.” (Para 32).  
143 Para 51.  
144 Para 52. The court quotes O’Regan in K para 32.  
145 Para 52.
With regards the state’s constitutional obligations, the court finds that the state has a general duty to protect members of the public against violations of their constitutional rights. The court mentions that the state has obligations to prevent crime and to protect members of the public. The court finds that this aspect, together with Ms F’s constitutional rights, form the ‘prism through which this enquiry should be conducted’. As far as Ms F’s constitutional rights are concerned, the court mentions her rights to freedom and security of the person and inherent dignity as the rights that should be protected and respected.

The court deals with sexual violence against women and children and confirms that the state should be at the forefront in the fight against these crimes and that there is a definite basis for holding the state liable for the wrongful conduct of a policeman, as well as one on standby duty.

The second issue the court raises pertains to trust. This lays a definite basis for holding the state liable and it provides the required connection between the employment and the wrongful conduct. In the case of the police service, reliance is placed on each individual member to execute its constitutional mandate to the public. The court refers to K and makes the point that ‘the employment of someone as a police official may rightly be equated to an invitation extended by the police service to the public to repose their trust in that employee.’ When that trust is abused there is a link between the employee’s employment and the misconduct complained of. It follows that where a child or a woman places trust in

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146 Para 53.
147 Para 54.
148 Ibid.
149 Ibid.
150 Ibid.
151 Para 62.
152 Ibid.
153 Para 63.
154 Ibid. K par 57.
155 Para 64.
a policeman and that trust is violated, he or she would be personally liable to that woman or
child and, in addition, if the policeman’s employment as a policeman secured the trust that
was placed in him, the state might be held vicariously liable. It makes no difference
whether the policeman was on standby duty or off-duty. The perception of the victim and the
breach of trust are of importance here.

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

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

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

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156 Para 66.
157 Para 68.
158 Para 69.
159 Para 71-73.
160 Para 78.
161 Para 80-81.
162 Also refer to Neethling & Potgieter ‘Deliktuele staatsaanspreeklikheid weens polisieverkragting’ LitNet Akademies 9(1),
4.3.3 (2) Froneman J

Froneman J holds the Minister liable but for different reasons than the majority judgment.

The learned judge finds that the majority holds the state liable on the basis of vicarious liability and believes that the ‘close connection’ test as in K was correctly applied.163

Froneman J states:

'We should recognise that state delictual liability in circumstances where the state has a general constitutional and statutory duty to protect people from crime is usually ‘direct’, and not ‘vicarious’ in the sense traditionally understood by that term. This is because the state invariably acts through the instruments of its organs - state officials performing public duties. The difficult normative issue of when the state is liable in delict for their conduct should in my view no longer be dealt with as an aspect of vicarious liability but rather as part of the normal direct enquiry into whether the elements of our law of delict are present when instruments of the state act.'164

Froneman J identifies four reasons why it is important to move beyond vicarious liability. The first of these relates to the reason why the court in K found it important to use the ‘language of vicarious liability.’165 The second is to confirm the difficulties related to the language of vicarious liability where the state’s constitutional and statutory duties are concerned, the third is the state’s actions through its departments and employees and the fourth is the question whether wrongfulness as a delictual requirement is more suited to limit state liability than the ‘sufficiently close link’ test.166

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

163 Para 88.
164 Para 89.
165 Para 90.
Froneman J begins by explaining that vicarious liability in its traditional formulation ‘may imply that there is no normative link between the conduct of an innocent employer ... and the culpable conduct of the employee’. However, there is a normative link between the employer-employee relationship and the delict and this link is the requirement that the delict must have been committed in the course and scope of the employee’s employment. According to the judge, this requirement gave rise to two ‘fallacies’, which was that scope of employment was a question of fact, and also that this rule had to be treated as separate from the reasons of justification for the rule.

According to Froneman J, K exposed both these false assertions. He states that vicarious liability has a normative character which relates not to the wrongfulness issue but to the ‘sufficiently close connection’ investigation. In addition, K uses the language of vicarious liability as this was the basis upon which state delictual liability was always approached. The learned judge provides a short historical overview of vicarious state liability and then concludes that even though K applied the values of the Constitution, that judgment still uses traditional vicarious liability. He doubts whether it is at all appropriate and quotes Baxter who argues that where state officials act, they are not employees but rather the state or public authority itself.

Froneman J refers to O’Regan J in K and concluded that the state was vicariously liable in delict for three reasons. The state and policeman had a general statutory and constitutional duty to prevent crime and protect members of the public. On the facts, the policeman had a specific duty to assist K and the harmful conduct of the policeman constituted a simultaneous commission and omission because the omission was their failure to protect K from harm. The Supreme Court of Appeal in F deducted that only omissions by policemen provided a basis for delictual liability and where there was a positive act, there could not be vicarious

167 Para 93.
168 Ibid.
169 Para 94.
170 Para 96. Froneman J refers to para 32, 45 and 49 of K.
171 Para 98.
173 Para 100.
liability. The Supreme Court of Appeal interpreted \( K \) to signify that where the policemen were personally liable for their omissions, the state was vicariously liable, but the state could also have been directly liable for its own omission.\(^{174}\) Froneman J finds that with the breach of public duties, it is about the legal duty not to cause harm negligently to another and this forms part of an enquiry into wrongfulness that is dealt with when taking into consideration the conduct of the employee.\(^{175}\) The distinction between vicarious liability and direct is not clear and for this reason, according to Froneman J, as well as because of ‘potential conceptual difficulty’, the question is whether the delictual liability of the state should be approached differently.\(^{176}\)

Froneman J deals with direct liability of the state.\(^{177}\) The Honourable Judge begins by stating that the state is a legal person in South African law.\(^{178}\) Organs of the state are only permitted to perform the functions entrusted to them by the Constitution.\(^{179}\) This includes the police service and ‘the acts of state organs are at the same time acts for which the state is liable, because they are the state’s own acts’.\(^{180}\) This will indicate that the State in the \( K \) case will be directly liable and not vicariously liable. According to Froneman J, direct liability had been dismissed in *Mhlongo and Another NO v Minister of Police*,\(^ {181}\) but that was before the 1996 Constitution.\(^{182}\)

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\(^{174}\) Para 101.

\(^{175}\) Para 104.

\(^{176}\) Para 108.

\(^{177}\) Although Neethling 2011 Obiter 428 437-438 also in the latter part of 2011 commented on the Supreme Court of Appeal’s judgment in \( F \), his concerns regarding direct liability are noteworthy. He feels that the state can only be vicariously, and not directly, liable for delicts of employees because ‘[o]n the face of it, there does not seem to be any room for direct liability of the state where the state itself committed a wrong or delict acting through employees. Seen in this light, Nugent JA’s submission that the SCA decisions in Van Duivenboden, Van Eeden, Hamilton and Carmichele (in 2004), none of which was even based on intentional police wrongdoing, should have been founded upon direct liability of the state acting through the instrument of its employees, cannot be accepted. In this regard Nugent JA made no attempt to explain how the conduct of employees acting as functionaries of the state for the purposes of its direct liability, differs from their conduct acting in the course and scope of their employment for the purposes of the state’s vicarious liability. This can only lead to confusion and create legal uncertainty in an area where clarity existed beforehand. Clearly, in all these cases it was the employees who, while acting in the execution of their legislative duties, negligently breached their duty to prevent crime and protect the public. For their wrongs or delicts the state was correctly held vicariously liable.’

\(^{178}\) Para 109.

\(^{179}\) *Ibid.*

\(^{180}\) *Ibid.*

\(^{181}\) 1978 2 SA 551 (A).

\(^{182}\) Para 110.
Wrongfulness is discussed. Froneman J finds that the requirement for wrongfulness as well as the ‘sufficiently close connection’ test involves questions of fact and law. It does matter whether the court makes this finding in respect of wrongfulness or as part of the ‘close connection’ test. It is clear that where a state employee breaches a public duty there is direct liability. Constitutional values must be taken into account in establishing wrongfulness. One of these constitutional values is accountability and that was evident in cases such as Minister of Safety and Security v Van Duivenboden (herafter ‘Van Duivenboden’), and Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening).

Froneman J remarks on wrongfulness and states that this element:

‘... is determined on the assumption of negligent state conduct on the part of the official directly involved in the breach of a public duty...’

and that

‘[w]hen one turns to the actual determination of negligence this assumption obviously falls away.’

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

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

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

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183 Para 121.
184 2002 6 SA 431 (SCA).
185 2001 4 SA 938 (CC). See also Neethling & Potgieter (n 124). The authors do not seem to prefer vicarious liability to direct liability or vice versa. Instead, they summarise that one may consider replacing the constitutional court’s ‘constitutional’ approach to vicarious liability with direct liability as the requirement of a sufficiently close connection in vicarious liability cases which deal with rape is over extended.
186 Para 136.
187 Para 137.
188 Para 146.
4.3.3 (3) Minority Judgment

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

They found that Van Wyk ‘had not been on duty, either subjectively or objectively’.191 They also found that it is not a decisive factor whether a policeman is on or off duty but, according to the minority, Van Wyk was on a ‘frolic of his own’.192 There was ‘no official police promise of safe carriage’.193 The learned judges conclude that there were no reasonable grounds for Ms *F* to trust Van Wyk and she had every reason to distrust him and went with him because she was in a desperate situation.194

On the matter of a simultaneous commission and omission, the minority argued that neither existed because Van Wyk was not on duty.195 In the circumstances they conclude that there was not a sufficient connection between Van Wyk’s deeds and his employment as a policeman.196

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190 Para 148.
191 Para 155.
192 Para 168.
193 Para 169.
194 Paras 173-174.
195 Para 175.
196 Para 177.
CHAPTER 5

CHAPTER 5.1

Observations

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

The first observation is that vicarious liability serves a purpose in our society when properly applied. The majority judgement in *F* cannot be faulted. The sentiments of Neethling after the Supreme Court of Appeal’s decision and before the Constitutional Court’s judgment are that:

‘[t]he only difference between *K* and *F* was that in *K* the policemen were on duty when raping *K*, while in *F* the rapist was on stand-by duty. The core question in *F* was therefore whether a policeman on stand-by duty is on par with a policeman on duty so that according to the standard test for vicarious liability he can be found to have acted within the course and scope of his employment when raping a woman while on stand-by duty.’  

Mogoeng *et al* came to the conclusion on the facts that all the elements of vicarious liability had been proven. There is a place for vicarious liability in South African law even though it is a well-known fact that this enables a plaintiff to recover his damages from a defendant who is not a so-called ‘man of straw’.  

Where all the elements of vicarious liability had been proven, the employer should be held liable.

The second observation is that control should not be confused with the course and scope of employment. It is true that control is a factor that is taken into consideration in establishing whether an employer-employee relationship did exist or whether a sufficiently-close relationship existed between the conduct of the employee and his employment. Control cannot be compared to scope of employment because a wrongdoer was not under the
control of his employer, the wrongdoer could still have acted within the course and scope of
his employment.199

The third observation is that although a majority of the Constitutional Court had re-affirmed
the basis of vicarious liability in the employer-employee relationship, it is useful and
necessary to consider the alternative to vicarious liability as suggested by Froneman
J.200 Although Froneman J agrees with the majority in holding the Minister liable, he finds that
the basis for liability in casu is direct - as opposed to vicarious - liability. This is strange, as
direct liability of the state had been severely criticised before.201 This makes the findings by
Froneman J and the reasons for his judgment arguably questionable. The question can be
asked whether direct liability is only a possibility in cases involving the state or is it a
possibility for all actions against employers.

It is trite law that in order for a defendant to be liable in delict, the plaintiff needs to prove on a
balance of probabilities that the defendant had committed a wrongful, culpable act which
caused damage to the plaintiff.202 Conduct for purposes of delictual liability may be in the
form of a commission or an omission. State organs may be liable for positive acts (such as
the confiscation of property or the poisoning of residents’ water). It is evident that actionable
omissions will include instances where a state organ had a legal duty to act positively to
prevent harm.203 Liability will be established if an omission is found to be wrongful. The
finding of wrongfulness is established with reference to the legal convictions of the
community or the boni mores.204 In Carmichele,205 the Constitutional Court found that an
omission can place 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.206 Failure to do so would be wrongful. In addition to conduct

199 See 3.1.2 above.
200 Para 109.
202 Neethling et al 4.
203 Op cit 30, 57, 76-77.
204 Op cit 57.
205 2001 (4) SA 938 (CC).
having to be wrongful, it should also be culpable. There is a distinction between intent and negligence as forms of fault.\textsuperscript{207} To establish intent, there should be the direction of the will and consciousness of wrongfulness and the test for intent is subjective.\textsuperscript{208} Negligence is where a person is blamed for an attitude of carelessness, thoughtlessness because he or she failed to adhere to the objective standard of care required and the test for negligence is that of the reasonable person or \textit{bonus paterfamilias}.\textsuperscript{209} Therefore, a diligent \textit{paterfamilias} or reasonable person in the defendant’s position would be able to foresee the reasonable possibility of his conduct injuring another and he or she would take reasonable steps to prevent harm. Where the defendant had failed to take such steps, he or she would have acted negligently.\textsuperscript{210}

Froneman J found that the state is a legal person\textsuperscript{211} and as such should perform the functions entrusted to it by the Constitution.\textsuperscript{212} On the issue of the act as a delictual element, acts of state organs such as the police are acts of the state\textsuperscript{213} and failures to act positively where there is a constitutional duty to do so, constitutes wrongfulness.\textsuperscript{214} Froneman effectively uses \textit{Carmichele} in finding that the constitutional value of accountability is here the \textit{boni mores} and constitutional values should be taken into account in establishing wrongfulness.

\begin{flushright}
\begin{itemize}
\item \textsuperscript{207} Neethling \textit{et al} 123.
\item \textsuperscript{208} \textit{Op cit} 126.
\item \textsuperscript{209} \textit{Op cit} 131.
\item \textsuperscript{210} \textit{Kruger v Coetzee} 1966 2 SA 428 (A) 430; Neethling \textit{et al} 133.
\item \textsuperscript{211} Para 109. See also Okpaluba & Osode \textit{Government Liability: South Africa and the Commonwealth} (2010) 16.
\item \textsuperscript{212} \textit{Ibid}.
\item \textsuperscript{213} \textit{Ibid}.
\item \textsuperscript{214} Para 121
\end{itemize}
\end{flushright}
Van Wyk had the intention to rape Ms F and fault in the form of intent was present, but Froneman J found Van Wyk to be also negligent. Froneman J found that the state was negligent in not taking reasonable measures to prevent Van Wyk from committing a delict, although his previous convictions made him a human time bomb and the court found it was foreseeable that he could cause harm to members of the public. The state’s failure to take reasonable steps to prevent Van Wyk from causing harm is indicative of the state’s negligence. If the Minister had proper policies in place to discipline Van Wyk, he would not have been in possession of the police vehicle and could not have offered Ms F a lift home. If the wrongful, culpable act of the state then caused harm to a victim such as Ms F, there is no reason why she should not be able to hold the Minister directly liable.

According to Wiechers, the legal basis for holding the state liable for the actions of its employees lies in the risk theory, which means that if an employer empowers his employees to perform certain functions, he must bear the risk that those employees may cause damage to individuals.215 In addition, the state’s mandate is to serve the citizens of South Africa in accordance with the Constitution. The principle of Batho Pele216 indicates that the idea of service is central to the government’s functions. Consequently, a government body has the duty not to infringe any of the human rights guaranteed in the Bill of Rights and in the case of an omission, there may even be a duty on the state to take positive steps to protect these rights.217

By employing unsuitable individuals such as Van Wyk, the state runs the risk of being held liable, on the basis of vicarious liability and also on the basis of directly liability.

216 Batho Pele means ‘people first’ and these principles are access, which means to offer integrated service delivery, openness and transparency, which means to create a culture of collaboration, consultation, which means to listen to the customer’s problems, redress, which means to apologise when necessary. In addition there are the principles of courtesy, service standards, information and value for money. See http://www.info.gov.za (accessed on 2012-03-21).
217 Carmichele par 1
CHAPTER 5.2

Conclusion

In the NK case the Constitutional Court held that, in the light of the policy laden character of vicarious liability, the application of the rules of vicarious liability cannot only be a factual issue. Policy considerations such as deterrence and a fair and adequate remedy to the victim, fairness to the employer and, most importantly, the normative influence of the Constitution, have to be taken into consideration.

The Constitutional Court developed the objective stage of the close connection test for vicarious liability of an employer formulated in the Rabie case to encompass mixed elements of fact and law. The elements of law entail that the court is required to view the question of whether the employer should be held liable through the prism of constitutional norms. According to the Court, this test is wide enough to include other norms (not embodied in the Constitution) as well. The difficulty is that the test, as applied to the facts of the case, does not provide any guidance on how it should be applied in other cases where constitutional issues are not as prominent.

The Canadian Supreme Court in Bazley v Curry held that there would only be a close connection between the wrongful act and the business in the case of a risk created or substantially enhanced by the employer’s business. Only in those circumstances would holding the employer liable serve the twin goals of adequate compensation and deterrence. This approach was followed in South Africa in Grobler v Naspers. The Constitutional Court in the NK case steered away from enterprise risk as the basis for vicarious liability and formulated a test that focuses on the duties of the employer and employee and the position of authority and trust that was conducive to abuse. This basis for vicarious liability is closer to the test for a close connection as formulated and applied in the UK case of Lister v Hesley Hall in which the Court emphasised the duties of the employer and the employee and the connection between the wrongful act of the employee and the authorised acts of the employee. These two approaches may not be that wide apart as courts will have to look
closely at the specific duties of the employee to establish whether the employer’s enter-prise
did indeed pose a risk that the particular kind of wrongful act could take place. When the
constitutional dimension of the test in the NK case is left aside, it is clear that the close
connection test is very similar to that applied in other common law countries. The test
formulated in the NK case can be interpreted to mean that where the employee was
empowered with authority to perform a certain duty, and the employee was placed in a
position of authority and trust that was conducive to abuse, the breach of that duty may
render the employer liable in cases of intentional wrongdoing. According to the NK case, the
court must in each case decide whether the case before it is one in which the employer must
in principle be held liable. Constitutional and other norms must therefore be taken into
account in each case. A very positive aspect of the test is that the Court did not adhere to
semantics, but held that the test is a policy decision that is based on values. However, it will
be difficult to establish the limits of this liability to ensure that the State does not become an
involuntary insurer based on a type of non-delegable duty. The application of this test to non-
constitutional cases also poses certain difficulties. The solution to these problems would
again lie in following the developments in Canada, the United Kingdom and South Africa, in
focusing on the specific duties of the employee or the risk brought about by the undertaking.
In practice, this proposal means that a plaintiff who sues the state has the option of pleading
the elements of vicarious liability and, in the alternative, direct liability, or vice versa. The time
has come to accept that there is no basis for denying a plaintiff an action against the state
based on direct liability. With direct liability, the factual and normative enquiry is evident in
the test for wrongfulness, whereas the same factual and normative enquiry takes place in
establishing ‘course and scope of employment’ in vicarious liability.
It is submitted that Froneman J’s judgment paves the way for recognising the possibility of
direct liability and that the time is ripe for employing that particular cause of action. Although
this is not the function of the law of delict, it may be that a positive spin-off of direct liability
may be that it would serve as a deterrent for state organs and that they would make a
greater effort to take reasonable steps to ensure that they perform their constitutional duties.
Grave concerns about the state of the police service are not groundless. Typically,
employers in general terms can only discipline or take action against employees when their
misconduct is within the work context, except where the employer can prove that the off-duty
misconduct impacts on its business. As pointed out by Neethling, the right to control is not
only applicable when a policeman is on duty but can also be extended to situations when
they are on standby-duty or even when they are off-duty and then place themselves on duty
and commit a delict. It is submitted that Neethling is correct: the creation of risk approach
should be considered in all instances of intentional wrongdoing by an employee and the
general guideline should be that: ‘... an employer should be liable for an (intentional) delict of
his employee if his appointment and work conditions enabled him to commit the delict (and
hence created a heightened risk of prejudice) in such a manner.’. This should compel
employers (especially the state), to take active steps to prevent employees working for them
from causing harm to others (and the public at large). If the state as an employer takes
proper steps in curbing such behaviour and dismiss employees who abuse their authority
and trust, then instances such as F or K will not be the order of the day. Accountability is
ultimately the responsibility of the employer (in most instances the state) and the saying ‘I am
not my brother’s keeper’ will not be applicable because it already has been established in
Feldman that a master who uses servants creates risk of harm to others if the servant is
negligent, inefficient or untrustworthy.
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