"Reasonableness" and related jurisprudential concepts in the law of delict*

R Ahmed
LLB LLM LLD
Senior Lecturer, University of South Africa

OPSOMMING

"Redelikheid" en verwante jurisprudensiële konsepte in die deliktereg

Regskundiges en akademiese skrywers vind dit moeilik om die begrip "redelikheid" presies te omskryf. Dit is nietemin 'n bekende, bepaalde normatiewe konsep wat aansluit by rasionaliteit en morele beginsels. Dit omvat uitspraaklewering en die opweeg van onder andere belange, risiko's en voordele. Dit word algemeen gebruik om optrede te beoordeel en tot 'n beslissing te kom. Die huidige rol van "redelikheid" in die Suid-Afrikaanse deliktereg is veelvlakkig en kompleks. Daar is 'n onderlinge verband tussen "redelikheid" en ander jurisprudensiële konsepte soos gelykheid, regverdigheid, geregtigheid, openbare beleid en die *boni mores*. Die doel van hierdie bydrae is om 'n kort oorsig te bied oor die moderne gebruik van die konsep van redelikheid in die reg as 'n geheel en die verband tussen dié konsep en die bogenoemde jurisprudensiële konsepte in die deliktereg te verduidelik.

1 INTRODUCTION

In a previous contribution,[1] a brief overview of the historical development of the concept of "reasonableness" in the South African law of delict was provided. Before an in depth analysis of the influence of reasonableness on the individual elements of liability in the current South African law of delict can be undertaken,[2] it is useful to consider the general, modern uses of the concept of reasonableness in the substantive law as a whole and within the context of the law of delict or tort law.[3] Due to the fact that reasonableness is related to the

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1 "The historical development of the concept 'reasonableness' in the law of delict" 2018 *THRHR* 257. This is the second in a series of contributions based on the influence of reasonableness on the elements of delictual liability.

2 The influence of reasonableness on the individual elements of delictual liability is discussed further in detail in later contributions still to be published (see fn 1 above).

3 South African civil law, like some other civil law systems found on the European continent whose civil law was influenced by Roman law, make use of the word "delict" and the "law of delict" when referring to a "civil wrong" or the "law of civil wrongs"

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jurisprudential concepts of equity, fairness, justice, public policy and the *boni mores* in South African law, it is necessary to refer briefly to their interrelatedness. The purpose of this contribution is to provide a brief overview of the modern uses of the concept of reasonableness in this sense and to explain its interrelatedness with the other abovementioned jurisprudential concepts in the South African law of delict.

2 MODERN USES OF THE CONCEPT "REASONABLENESS"

According to the *Oxford dictionary*,[4] the word "reasonableness" means having "[s]ound judgement; fairness"; "[t]he quality of being based on good sense"; "[t]he quality of being as much as is appropriate or fair; moderateness". It is evident that it is a word often closely associated with other words, terms or concepts such as "fairness" and belongs to a family of general clauses.[5] Indeed, in South African law, it has been closely linked to the concepts of "justice", "equity" and "fairness".[6] Legal and academic writers worldwide have not provided a precise definition of the word "reasonableness" but as will be shown they have tried to characterise or qualify it. Moran[7] explains that both "reasonableness" and "equality" have been referred to as "weasel words" because they encourage and require the use of discretion in judgments. Spadaro[8] submits that the word and concept reasonableness is "slippery, ambiguous", and "polysemous", but it is about the way rights are applied or protected – it is the middle ground between an excess of rationality and sentimentality. Zipursky[9] submits that "the word 'reasonable' is a paradigmatic example of a *standard* in the law, and its meaning is, if nothing else, vague". Legal, philosophical and economic theories have been used to flesh out the concept.[10] Viola[11] points out that the question of

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respectively (see Van der Walt and Midgley *Principles of delict* (2016) 1; Burchell *Principles of delict* (1993) 1). The word "tort", an Anglo-French word of Latin origin, meaning conduct which is "crooked or twisted" and departing from the norm as opposed to conduct which is "straight or right (*rectum*)" is synonymous with the word "delict" referring to a "civil wrong" (see Heuston and Buckley *Salmond and Heuston on the law of torts* (1996) 12 13 fn 50; Dobbs, Hayden and Bublick *Hornbook on torts* (2016) 4). It is used by certain legal systems which were influenced by English law (see Loubser and Midgley (eds) *The law of delict in South Africa* (2018) 5 fn 2; Burchell *Delict* 1). In this contribution, and in the series of contributions to follow (see fn 1 above), the words "tort" and "delict" are essentially used as synonyms and the jurisdictional context determines which one of them is used in any given part of the text.

4 Available at https://bit.ly/2Gu0jzV (accessed on 15 January 2019).

5 See Artosi in Bongiovanni *et al* (eds) *Reasonableness and law* (2009) 69; Nivarra "Reasonableness and private law" 2002 *Yearbook of Legal Hermeneutics* 321.

6 See *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 2 SA 520 (W) 528–529; *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 1 SA 645 (A) 652 and *S v Mokgethi* 1990 1 SA 32 (A) 40–41.

7 *Rethinking the reasonable person: An egalitarian reconstruction of the objective standard* (2003) 283.

8 "The rights of reasonableness and the reasonableness of rights" 2002 *Yearbook of Legal Hermeneutics* 299–300.

9 "Reasonableness in and out of negligence law" 2015 *U Pa LR* 2134.

10 See, in general, Rawls *A theory of justice* (1971); Rawls *Political liberalism* (1993); Scanlon *What we owe to each other* (1998). Spadaro 2002 *Yearbook of Legal Hermeneutics* 300 points out that the concept has also been studied from a constitutional perspective in respect of its role in constitutional justice.

reasonableness is central to political philosophy debates. In terms of determining negligence, an economic or deontic[12] approach is used.[13] Coleman[14] explains that generally tort law has a deontic form which is reflected in the norms and remedies. Morality, corrective justice[15] and the idea of recourse explain the deontic form. Wells[16] submits that according to the deontic approach, conduct is evaluated with an objective, rational set of moral principles. The deontic approach is one of the two types of moral theories. The second moral theory called the "consequentialist" theory determines conduct according to its consequences, in the sense that conduct is good if, on a balance, the consequences are beneficial.[17] It is also closely linked to the concept of "rationality". Rationality is distinct from reasonableness and is thought to be goal-orientated while reasonableness is thought to be value-orientated.[18] Rationality encompasses three components: logic, end-reasoning and reliability or empirical truth.[19] On the other hand, reasonableness is thought to refer to the correct way of acting and what is moral.[20] In respect of decision-making in order to determine whether, for example, an action was reasonable, the action in question would need to be both rational and moral.[21]

Nivarra[22] correctly submits that the concept of "reasonableness" is used as a tool to qualify conduct and as a decision-making tool. It is a normative concept whereby *inter alia* interests, values and principles are balanced.[23] It is generally used in the assessment of law, actions, decisions, rules, arguments and judgments.[24]

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11 "Reasonableness, cooperation, and the golden rule" 2002 *Yearbook of Legal Hermeneutics* 99.

12 Referring to duties, obligations, rights and powers (see Coleman "Mistakes, misunderstandings, and misalignments" 2012 *Yale LJ Forum* 557).

13 Zipursky 2015 *U Pa LR* 2134.

14 2012 *Yale LJ Forum* 558 565.

15 Based on the idea that if the defendant has wronged the plaintiff "to whom he owes a duty of care" he has a duty to repair the harm done to him. See Coleman and Kraus "Rethinking the theory of legal rights" 1986 *Yale LJ* 1338–1339 with reference to American tort law.

16 "Tort law as corrective justice: A pragmatic justification for jury adjudication" 1990 *Mich LR* 2395–2396.

17 *Idem* 2395.

18 See Sibley "The rational versus the reasonable" 1953 *Philosophical R* 554ff; Keating "Reasonableness and rationality in negligence theory" 1996 *Stan LR* 311; Viola 2002 *Yearbook of Legal Hermeneutics* 104; Spadaro 2002 *Yearbook of Legal Hermeneutics* 300.

19 Sibley 1953 *Philosophical R* 556 submits that "rationality" is an "*intellectual* virtue" but also encompasses one's will. In acting rationally one promotes his own interests, but whether one's conduct is reasonable is based on an objective impartial judgment taking into account others' interests (557). Rawls *Political liberalism* 48–50 submits that reasonableness involves practical reasoning, like rationality. However, in acting reasonably, one restrains his pursuit of his own desires to accommodate for those of other people. See Keating 1996 *Stan LR* 311–312; Zipursky 2004 *Fordham LR* 1928.

20 According to Von Wright "Images of science and forms of rationality" in *The tree of knowledge and other essays* (1986) referred to by Alexy in Bongiovanni *et al* (eds) *Reasonableness and law* 5.

21 See Sartor in Bongiovanni *et al* (eds) 17; Alexy in Bongiovanni *et al* (eds) 5.

22 2002 *Yearbook of Legal Hermeneutics* 321 330.

23 Spadaro 2002 *Yearbook of Legal Hermeneutics* 303.

24 Alexy in Bongiovanni *et al* (eds) 7.

The antonym of reasonable – "unreasonable" – is often used to differentiate between the positive and negative. For example, conduct may be reasonable in a positive way or unreasonable in a negative way. There is also an adjectival use of the word to modify a noun, as in: a reasonable inference, a reasonable belief or reasonable reliance which is epistemic relating to justified exercise of judgment. There is an adverbial use of the word where the word "reasonably" is used to modify adjectives, as in, "reasonably necessary". It is used as a verb, as in, "reasonably relied" or "unreasonably interfered".[25] Phrases such as a "reasonable mistake" and a "reasonable risk", etcetera, are used to refer to discernment of the reasonable person.[26] The idea of balancing or weighing, for example, competing interests, risks and benefits, is at the heart of reasonableness.[27]

The various ways in which the concept of reasonableness is used in the law are vast.[28] It is evident, though, that reasonableness is a normative concept linked to rationality and moral principles. It involves the exercise of judgment and the weighing of *inter alia* interests, risks and benefits. It is broadly used to judge conduct and to reach a decision.

3 JURISPRUDENTIAL CONCEPTS RELATED TO THE CONCEPT OF "REASONABLENESS"

The concepts reasonableness, fairness, justice, public policy, legal policy, policy considerations and the *boni mores* (legal convictions of the community) are generally ambiguous and difficult to define with precision. There is no consensus with regard to their precise meanings and the boundaries between the meanings are often somewhat blurred. Nevertheless, there is consensus that they are closely related to one another, they involve value judgments and they can be distinguished. They are in the end tools used by the adjudicators to determine delictual liability or liability in tort law.

3 1 Public policy, legal policy and policy considerations

According to the *Oxford dictionary*,[29] "public policy" in its ordinary use means "[t]he principles, often unwritten, on which social laws are based". From a legal perspective it refers to "[t]he principle that injury to the public good is a basis for denying the legality of a contract or other transaction".[30] Public policy, legal policy and policy considerations are often used interchangeably.

Jones,[31] in respect of determining the existence of a duty of care in the tort of negligence in English law[32] states that justice and reasonableness is a test of "common sense" and "ordinary reason" which involves a number of considerations:

> "At its narrowest, it focuses on justice and fairness as between the parties. At a broader level, it will consider the reasonableness of a duty from the perspective of

25 See Zipursky 2015 *U Pa LR* 2136–2141.
26 Fletcher "The right and the reasonable" 1985 *Harvard LR* 949.
27 Alexy in Bongiovanni *et al* (eds) 8.
28 Zipursky 2015 *U Pa LR* 2135.
29 Available at https://bit.ly/2t7eZ0b (accessed on 15 January 2019).
30 *Ibid.* The term "policy" here relates to contracts.
31 In Jones (gen ed) *Clerk and Lindsell on torts* (2014) 450.
32 Under the criterion of whether it is fair, just and reasonable to impose a duty of care on the defendant (see in general Ahmed "The origins of the recent new approach to determining wrongfulness in the South African law of delict" 2019 *THRHR* 140ff with regard to the English test for determining a duty of care in the English tort of negligence).

> legal policy, focusing on the operation of the legal system and its principles. At a still wider but more controversial level, it may take account of the social and public policy implications of imposing a duty."

Jones,[33] with reference to English tort law under the heading "public policy" refers to "general considerations of the 'public good'" which may be viewed as a concept similar to the concept of the *boni mores*.[34] Under "legal policy", Jones[35] essentially refers to what is commonly known in the South African law of delict as "policy considerations" such as the floodgates argument where the concern of imposing liability in a case may result in a high influx of claims in the future; and fear of indeterminate liability. There is no *numerus clausus* with regard to policy considerations. Other policy considerations include vulnerability to risk, where the plaintiff is considered vulnerable to risk because he cannot protect himself adequately by other legal remedies; conservation and conservatism of the law in the sense that there is for example a reluctance to provide a delictual or tort law remedy if a contractual one exists, or the law of delict or tort law should not undermine the law of contract; allocation of loss concerning which party can afford to bear the loss and whether the parties are insured; and the practical effect of imposing liability – will the decision act as a deterrent for future behaviour or have some other adverse effect?[36]

Floyd[37] states that in South African law, public policy manifests itself in legislation, the common law, the *boni mores* and what is in the public interest – all of which have been underpinned by constitutional norms and values since 1994.

Public policy, legal policy and policy considerations, when applied to limiting or excluding liability, should be reasonable. Generally public policy, legal policy and policy considerations are used as a tool by adjudicators to justify their decisions for limiting or excluding delictual liability.[38]

3 2 Justice, equity and fairness

Often, when dealing with delictual liability or liability in tort law, whether based on fault or strict liability, moral terms such as blameworthiness, reasonableness, fairness and justice, *inter alia*, are referred to under the theory of corrective

33 In Jones (gen ed) *Clerk and Lindsell on torts* 454.

34 See Hawthorne "Public policy: The origin of a general clause in the South African law of contract" 2013 *Fundamina* 319.

35 In Jones (gen ed) *Clerk and Lindsell on torts* 452–453.

36 With regard to the South African law of delict, see in particular the policy factors considered with regard to liability for pure economic loss (*Delphisure Group Insurance Brokers Cape (Pty) Ltd v Dippenaar* 2010 5 SA 499 (SCA) 508–509; *Shell and BP SA Petroleum Refineries (Pty) Ltd v Osborne Panama SA* 1980 3 SA 653 (D); *Greenfield Engineering Works Pty Ltd v NKR Construction (Pty) Ltd* 1978 4 SA 901 (N) 916–917; *Fourway Haulage SA Pty (Ltd) v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) 161–162; *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 3 SA 138 (SCA); *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A) 799; *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 1 SA 1 (CC) 19; *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 4 (A) 500; Neethling and Potgieter "'Vulnerability to risk' as a factor determining delictual liability for pure economic loss" 2015 *THRHR* 636–637; Van der Walt and Midgley *Delict* 138; cf Loubser and Midgley (eds) *Delict* 190–197).

37 Hutchison and Pretorius *The law of contract in South Africa* (2012) 175 referred to by Hawthorne 2013 *Fundamina* 306.

38 See authority cited in fn 36 above.

justice.[39] Aristotle applied corrective justice to voluntary and involuntary transactions, loosely distinguishing between contracts and tort law.[40] Aristotle submitted[41] that it does not matter whether a good man has defrauded a bad man and *vice versa*, nor whether a good or bad man committed adultery, "the law looks only to the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it". Thus, there is a duty to rectify the harm caused by the wrongdoing. The defendant must act wrongfully (*adikei*) and cause harm (*eblapsen*) while the plaintiff must be wronged (*adiketei*) and suffer harm (*beblaptai*).[42] The wrong must be remedied and the equilibrium restored by the adjudicator in providing a remedy.[43]

According to the *Oxford dictionary*, "justice"[44] means "[t]he quality of being fair and reasonable . . . [t]he administration of the law or authority in maintaining this". Rawls[45] submits:

> "The conception of justice which I want to develop may be stated in the form of two principles as follows: first, each person participating in a practice, or affected by it, has an equal right to most extensive liberty compatible with a like liberty for all; and second, inequalities are arbitrary unless it is unreasonable to expect that they will work out for everyone's advantage, and provided the positions and offices to which they attach, or from which they may be gained, are open to all. These principles express justice as a complex of three ideas: liberty, equality, and reward for services contributing to the common good."

According to Rawls, equality and reasonableness are required for justice. The *Oxford dictionary*[46] defines "fair" as "[treating people equally without favouritism or discrimination . . . [j]ust or appropriate in the circumstances . . . [c]onsiderable though not outstanding in size or amount . . . [m]oderately good".

Equality, according to the *Oxford dictionary*,[47] means "[t]he state of being equal, especially in status, rights, or opportunities".

Van Zyl[48] submits that the prerequisites for justice are "reasonableness, generality, equality, certainty and fair process". He[49] points out that the concept of "equity" is subordinate in the legal systems based on Roman law, like South African law. It is resorted to only when existing law does not prescribe a suitable solution or when the solution "causes undue hardship and inequity". In English

39 See Aristotle (bk V ch 4) *The Nicomachean ethics* (1980). Ch 4 deals with corrective justice while ch 3 deals with distributive justice. See also Epstein *Cases and materials on torts* (2004) 86; Fischer "Successive causes and the enigma of duplicated harm" 1999 *Tenn LR* 1136; Posner "The concept of corrective justice in recent theories of tort law" 1981 *J Legal Studies* 189.

40 *Nicomachean ethics* 111–112. See Posner 1981 *J Legal Studies* 189.

41 See Nicomachean ethics 114–115; Posner 1981 J Legal Studies 189.

42 As explained by Posner 1981 *J Legal Studies* 19 194.

43 See Epstein *Torts* 86; Posner 1981 *J Legal Studies* 190.

44 Available at https://bit.ly/2BoIGy2 (accessed on 15 January 2019).

45 "Justice as fairness" 1958 *Philosophical R* 165.

46 Available at https://bit.ly/2UJBQdR (accessed on 15 January 2019).

47 Available at https://bit.ly/2BqrwjU (accessed on 15 January 2019).

48 "The significance of the concepts justice and equity in law and legal thought" 1988 *SALJ* 274.

49 *Idem* 277–278.

law, the concept constitutes a body of law that has developed beside the common law, whereas in South Africa the concept has played a role separately or with the concepts of "reasonableness", "fairness" and "justice". However, the English and South African use of the concept of "equity" is not similar, as the South African concept was developed from Roman and Greek law. Van Zyl[50] states that closely linked to the concept of morality, in relation to justice, are the *boni mores* which "more or less, approximates to the 'public policy' of English and South African law". He[51] submits that the concepts, justice and equity are distinct but closely linked to the *boni mores*, public policy and reasonableness. Van Zyl states:[52]

> "'Justice' . . . may be described as the state of harmony . . . which comes into existence after a conflict of interests in a particular society between particular interest-bearing persons . . . has been resolved . . . 'Equity', on the other hand, is indicative of those principles of law which have evolved to mitigate the harshness of the existing law . . . Concepts such as justice, equity, good faith and boni mores contain strongly subjective elements when they pertain to a particular person or group of persons. It has equally strong links, however, with surrounding circumstances and with general considerations relating to these concepts . . . Such considerations require to be assessed, alongside the relevant personal circumstances and surrounding circumstances, as objectively as possible in resolving any conflict . . . he means to achieve this end . . . is to apply the (objective) criterion of 'right reason' (ratio recta) or reasonableness."

Just as equality plays a multifaceted and complex role in law[53] so do reasonableness and fairness. Equality plays a central role in protecting rights and ensuring equal treatment to all.[54] In terms of equity, individuals and their interests must be treated equally, that is, without bias. Justice is thus served when the parties are treated fairly and equally. In order to reach a fair judgment, the criterion of objective reasonableness is applied.

3 3 *Boni mores* (legal convictions of the community)

According to the jurist Florentinus, *mores* in Roman law referred to the following two things: *consuetudo*, meaning "local legal customs and usages"; and *boni mores huius civitatis*, meaning "local social-moral standards of a community".[55] Conduct which was *contra bonos mores*, producing delictual obligations, was actionable in a court of law.[56] The adjudicator was the interpreter of the *boni mores* of the informed sector of the community.[57] As the concept *boni mores* developed in Roman law, it became associated with the doctrine of "public policy".[58] Ferreira[59] submits that public policy construes the Latin term *boni mores* which currently refers to good morals or a good moral standard.

50 *Idem* 284.
51 *Idem* 289–290.
52 *Idem* 290.
53 Moran *Reasonable person* 169–170 fn 15 refers to the vast literature on this concept and the debate about its exact scope and importance.
54 *Idem* 169 fn 11 and the authority cited.
55 Plescia "The development of the doctrine of boni mores in Roman law" 1987 *RIDA* 269.
56 *Idem* 270 278.
57 *Idem* 285.
58 *Idem* 269. Plescia refers to *boni mores* and in brackets public policy.
59 *Fundamental rights and private law in Europe: The case of tort law and children* (2013) 108.

Van Gerven *et al*[60] point out with reference to the requirement of *boni mores* in the German law of delict, that the concept is flexible, ever-changing and "refers to a minimal set of legal-ethical principles (*rechtsethische Minimum*) seen as a set of legal value assessments (*rechtliche Wertungen*)". Conduct which is *contra bonos mores* is behaviour which to a large extent offends "morally acceptable conduct towards persons with whom one is in a legal relationship".[61]

Currently the concept of *boni mores* in the South African law of delict is influenced by constitutional norms and values,[62] customary law values,[63] social, moral, ethical, religious[64] and other pertinent values[65] which are ever-changing.[66] It serves as a criterion in determining whether the defendant's conduct in question is delictually wrongful.[67] In determining wrongfulness, according to the *traditional approach*,[68] the question is – "whether, according to the legal convictions of the community and in light of all the circumstances of the case, the defendant infringed the interests of the plaintiff in a reasonable or unreasonable manner".[69] The courts refer to the criterion of reasonableness or the *boni mores* as a benchmark in determining wrongfulness.[70] According to the more *recent approach* to determining

60 Tort law (2000) 231.

61 *Grundanschauungen loyalen Umgangs unter Rechtsgenossen*: BGH 2 June 1981, 2184–2185 quoted by Canaris and referred to in Van Gerven *et al Tort law* 231.

62 The Constitution of the Republic of South Africa, 1996. See *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 962–963; *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as amicus curiae)* 2003 1 SA 389 (SCA) 396–397; *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) 444–448; *Le Roux v Dey* 2011 3 SA 274 (CC) 315; *DE v RH* 2015 5 SA 83 (CC) 101; Neethling "Delictual protection of the right to bodily integrity and security of the person against omissions by the state" 2005 *SALJ* 580.

63 Eg, in *Fosi v RAF* 2008 3 SA 560 (C) para 17, the court stated that in terms of customary law, a child with the financial means has a duty to support a parent in need of financial assistance. It is *contra bonos mores* where a child with the financial means does not support a parent in need. See also Van der Walt and Midgley *Delict* 29.

64 See, eg, *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* [1999] 4 All SA 421 (SCA) para 23 where the court recognised a duty of support "out of a *de facto* monogamous Islamic marriage" as a result of the change in the *boni mores*; *Osman v RAF* 2015 6 SA 74 (GP) paras 21 24 where the court considered Hindu and Islamic cultures (like customary law) which recognise the duty of children to support their parents (Van der Walt and Midgley *Delict* 30–31).

65 Neethling and Potgieter *Delict* 37 fn 24 refer to *Cape Town Municipality v Bakkerud* 2000 3 SA 1049 (SCA) 1053 fn 3 where Marais J questioned what a legal conviction is and stated "what the *law* ought to be". Hefer J in *Minister of Law and Order v Kadir* 1995 1 SA 303 (A) 318–319 referred to "society's notions of what justice demands".

66 See, eg, in *DE v RH* 2015 5 SA 83 (CC), where the Constitutional Court confirmed that an innocent spouse may no longer be entitled to sue a third party in delict for adultery as a result of the public's changing attitude towards adultery.

67 Neethling and Potgieter *Delict* 37 fn 24.

68 The traditional approach is the longstanding approach that has been applied by our courts since the decision of *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 596–597. According to this decision, in order for "conduct to be deemed wrongful, the harm suffered must be caused in a legally reprehensible or unreasonable manner, *contra bonos mores*, in light of all surrounding circumstances" (see Neethling and Potgieter *Delict* 37; Ahmed 2018 *THRHR* 137–140 and the authority cited).

69 Neethling and Potgieter *Delict* 37.

70 See the cases referred to by Neethling *et al Neethling's law of personality* (2005) 54 fn 182.

wrongfulness,[71] the Constitutional Court, for example, in *DE v RH*[72] referred to the *boni mores* which it submitted is about public policy "informed by our constitutional values". It tells us whether a delictual claim may be established – or put differently whether it is "reasonable to impose delictual liability". Thus, in a sense the *boni mores* is used, depending upon whether the *traditional* or *recent* approach is considered in the South African law of delict, to determine whether the defendant's conduct is reasonable or whether it is reasonable to hold him liable in delict, provided all the other elements of a delict are present. In some recent cases, such as *Loureiro v Imvula Quality Protection (Pty) Ltd*,[73] the courts in fact combined the two approaches. If conduct is *contra bonos mores* in the South African law of delict, it generally has the effect of negating the element of wrongfulness.[74]

Hawthorne[75] submits that Hobbes and Locke planted the "seeds of public policy". The modern use of the concept of public policy in South African law stems from the "Roman and Roman-Dutch norm of *boni mores* – standards of good morals and the English law rule of public policy". Hawthorne,[76] upon investigating the origin of the term "public policy" in South African law points out that numerous academic writers and adjudicators currently refer to the concepts *boni mores* and public policy interchangeably, at least in the context of the law of contract. When reference is made to conduct being *contra bonos mores*, it has been referred to as conduct which is contrary to public policy.[77] Hawthorne[78] has considered some academic writers' views in trying to ascertain whether there is a difference between the terms public policy and *boni mores*. She found that the general consensus of the academic writers is that they are not easily distinguishable.[79] Hawthorne[80] refers to *Barkhuizen v Napier*[81] and submits that the Constitutional Court recognised the concept of "public policy" as the yardstick for the concepts of "reasonableness" and "fairness". She states[82] that "combining the norms of *boni mores* and public policy is historically as well as dogmatically

71 The recent approach applied by our courts, stemming from *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 1 SA 461 (SCA) 468 "is that wrongfulness is present when according to policy considerations or public policy, it would be reasonable to hold a person liable, or that wrongfulness turns on 'the reasonableness of imposing liability for conduct that has been shown, or is assumed to be, negligent'" (see Ahmed 2018 *THRHR* 137ff and authority cited).

72 2015 5 SA 83 (CC) 101.

73 2014 3 SA 394 (CC) 410.

74 An infringement of an interest may be considered *contra bonos mores* and therefore wrongful. The *boni mores* performs an important function in establishing wrongfulness with regard to *iniuria* and the requirement that conduct must not be against the legal convictions of the community – Neethling *et al Neethling's law of personality* 47 54. Eg, a person may consent to the infringement of his body in respect of the risk of injury when partaking in a sporting activity or undergoing medical treatment. However, a person cannot consent to murder or serious bodily harm, as it is considered *contra bonos mores* (Neethling and Potgieter *Delict* 113).

75 2013 *Fundamina* 319.

76 *Idem* 300ff.

77 *Idem* 303–304 and authority cited.

78 *Idem* 304ff.

79 *Idem* 306 and authority cited.

80 *Idem* 303.

81 2007 5 SA 323 (CC) 339.

82 Hawthorne 2013 *Fundamina* 318.

incorrect. It either stretches sound morals beyond recognition or risks turning public policy into moralising paternalism". Hawthorne[83] correctly submits that although the *boni mores* is closely associated with public policy, they are not the same and cannot be used synonymously.

It is evident that South African courts do not draw a clear distinction between the *boni mores*, and public policy in the South African law of contracts. However, in the law of delict, the *boni mores* yardstick is limited to determining wrongfulness, whereas public policy, legal policy, and policy considerations may be considered by the adjudicator in determining other elements of a delict.[84] The "*boni mores*" and "public policy" are both concepts used by the adjudicators in reaching and justifying their decisions. Furthermore, both concepts take into consideration the public interest, which is ever-changing and is usually associated with the concepts of "justice", "reasonableness", "fairness" and "equity".

Public policy does manifest itself in the *boni mores*. For example, Van Zyl J in *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd*[85] stated that

> "public policy, in the sense of the *boni mores*, cannot be separated from concepts such as justice, equity, good faith and reasonableness, which are basic to harmonious community relations and may indeed be regarded as the purpose of applying public policy considerations".

In *Barkhuizen v Napier*,[86] Ngcobo J stated that "[n]otions of fairness, justice and equity, and reasonableness cannot be separated from public policy. Public policy takes into account the necessity to do simple justice between individuals".

4 CONCLUSION

It may be concluded that there is a difference between reasonableness and rationality, but being reasonable encompasses rationality. There is a difference between morality and reasonableness in the sense that moral principles guide what is reasonable, but what is immoral may not be illegal.

Public policy plays a more dominant role in deciding whether a particular element in respect of delictual liability or liability in tort law is present.[87] Policy may also play a role in excluding liability and policy should be reasonable. In South African law, the *boni mores* does encompass moral principles and reflects the public's values, but it is subject to a written constitution which applies equally to all, including the state. A citizen's rights may be limited if it is considered reasonable in terms of section 36 of the Constitution (the "limitation clause").[88]

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83 *Idem* 308.

84 Such as negligence, legal causation and in determining damage.

85 1990 2 SA 520 (W) 529 in the context of the law of delict.

86 2007 5 SA 323 (CC) 339 in the context of the law of contract.

87 Eg, in South African law, particularly whether wrongfulness, negligence or legal causation is present (see fn 36 above).

88 The Constitution of the Republic of South Africa, 1996. S 36 provides that the rights "in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or

continued on next page

Thus in South African law, the *boni mores* reflects reasonableness as it is subject to the limitation clause in the Constitution.

There is a difference between public policy or policy considerations, which may apply to a number of elements of a delict, and the *boni mores* that applies specifically to the element of wrongfulness in determining delictual liability. Public policy if applied in South African law must also be reasonable as it is subject to the limitation clause in the Constitution.

There is a difference between equity, fairness and justice. Justice is the end result, whereby in reaching the result, the criterion of reasonableness is applied as well as equity and fairness. However, reasonableness, fairness, justice, equity, public policy and the *boni mores* are all considered in establishing, excluding or limiting liability. In this sense, they are interrelated. In deciding whether an element is present for delictual liability or liability in tort law, the influence of reasonableness may be explicit or implicit, but in reaching the final decision as to whether liability should be found in delict or tort law, the influence of reasonableness is implicit.

The concept of reasonableness as mentioned[89] developed over time while theories of "justice" were being developed, but is now a well-known independent normative concept which plays an influential role generally in determining delictual liability. The use of this normative concept is vast, multifaceted and complex. As shown above, even though it is an independent concept, it is closely related to the concepts of equity, fairness, justice, public policy and the *boni mores* in South African law. The courts ultimately rely on this normative concept along with other concepts in weighing competing interests and rights, and in exercising their judgment.

in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights".

89 See the first contribution in the series of contributions mentioned in fn 1.