

THE CLOSE CONNECTION TEST FOR VICARIOUS LIABILITY

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1 Introduction

The requirements for the vicarious liability of an employer are threefold: an employment relationship, the commission of a delict, and 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 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*.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 article 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 *NK v Minister of Safety and Security*, 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 are then examined, and in conclusion some remarks are made on the possible application of the test in future cases.

2 The decision of the Constitutional Court in *NK v Minister of Safety and Security*

The facts in the *NK* case were as follows: In the early hours of the morning a young woman, the applicant in the case, was stranded without transport. She tried to phone her mother from a garage shop to ask her to come and fetch her

¹ *Mkize v Martens* 1914 AD 382 390

² *Lister v Hesley Hall* [2001] UKHL 22 para 25

³ 2005 26 *ILJ* 1205 (CC)

when three policemen on duty, in uniform and in a police vehicle, offered to take her home. 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 subsequently tried and convicted and the applicant thereafter sued for damages. The High Court dismissed the applicant's claim based on the vicarious liability of the Minister and she appealed to the Supreme Court of Appeal.

The Supreme Court of Appeal⁴ 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”.⁵

This reasoning relied on past South African cases which held that the deviation from authorised duties should not be too drastic. If so, the act would not fall within the scope of employment.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”.⁷

2 1 Policy considerations

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 considerations⁸ 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.⁹

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

⁶ See the minority decision in *Feldman v Mall* 1945 AD 733 and *Viljoen v Smith* 1997 1 SA 309 (A)

⁷ *K v Minister of Safety and Security* *supra* para 8

⁸ These are similar to the policy considerations considered to be the basis for vicarious liability in *Bazley v Curry* 1999 2 SCR 534

⁹ *NK v Minister of Safety and Security* para 22

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”,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”.¹¹

The Constitutional Court held that statements by South African courts¹² 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, cannot be correct.¹³

The Constitutional Court’s dictum that the underlying policy considerations are relevant to the rule is in accordance with the decision in *Feldman v Mall*,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.¹⁵ The courts in *Bazley v Curry*¹⁶ and *Grobler v Naspers*,¹⁷ to mention only two, also investigated the reason for the rule to assist in establishing the scope of the employer’s vicarious liability.

2.2 An omission can bring about a close connection

The Constitutional Court relied on *Feldman v Mall*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.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

¹⁰ Para 21

¹¹ Para 21

¹² See, eg, the judgment in *Ess Kay Electronics v First National Bank* 2001 1 SA 1214 (SCA). In this case the employee, whose normal duties entailed the issuing of banker’s drafts, stole and forged two banker’s drafts. When the third party in another country presented the drafts, these were dishonoured. The third party claimed damages from the bank on the basis of vicarious liability.

¹³ *NK v Minister of Safety and Security* para 22.

¹⁴ 1945 AD 733.

¹⁵ 741.

¹⁶ *Supra* para 26.

¹⁷ 2004 4 SA 220 (C) 278.

¹⁸ *Supra*.

¹⁹ *NK v Minister of Safety and Security supra* paras 47-48.

reasoning in the same case that the greater the deviation, the less justification there can be for holding the employer liable.²⁰

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 Rabie*.²² 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 the *Rabie* case²³ 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 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 in South African courts,²⁶ but also a legal question, thus a question of mixed fact and law.²⁷ The Court did not go into the question of what would factually be 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.

²⁰ Para 5

²¹ *Lister v Hesley Hall supra*.

²² 1986 1 SA 117 (A)

²³ *Supra* 134

²⁴ Eg, in *Grobler v Naspers supra* and *Viljoen v Smit supra*

²⁵ *Commissioner for the SA Revenue Service v TFN Diamond Cutting works* 2005 26 ILJ 1391 (SCA)

²⁶ *Ess Kay Electronics v First National Bank supra* paras 9-10

²⁷ *NK v Minister of Safety and Security supra* para 45

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,²⁸ 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.”²⁹

3 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.”³⁰

Salmond³¹ 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.³² Conduct of this type has often been held to constitute independent acts falling outside the scope of employment.³³ 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.³⁴ 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*³⁵ 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. The argument for the defence was

²⁸ This aspect will be discussed below

²⁹ *NK v Minister of Safety and Security supra* 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

³⁰ See Heuston & Buckley (eds) *Salmond & Heuston on the Law of Torts* 21 ed (1996) 443

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

³⁴ *Rose v Plenty* 1976 1 All ER 97

³⁵ *Supra*

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 therefrom. 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.

The test in the *Bazley* case³⁹ 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

³⁶ Para 41

³⁷ Para 41

³⁸ Para 41

³⁹ *Supra* para 36

⁴⁰ 1999 2 SCR 570

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 behavioral problems sexually abused some of the boys. The House of Lords quoted the decision in *Bazley* case 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 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 Steyn⁴⁷ 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 Clyde⁴⁸ 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

⁴¹ *Jacobi v Griffiths supra* para 83

⁴² Para 79

⁴³ Para 80

⁴⁴ Para 81

⁴⁵ *Supra*.

⁴⁶ Para 20

⁴⁷ Para 20

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*.

satisfied. In the *Bazley* case⁵¹ 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 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*,⁵² 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.⁵³ This liability is similar to vicarious liability in that it also does not require fault.⁵⁴ Only one⁵⁵ 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 J⁵⁶ said the following:

“[T]he 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 J⁵⁷ 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)*,⁵⁸ decided a few years after the *Bazley* and *Jacobi* cases, the Canadian Supreme Court found that the educational 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.⁵⁹ The employee, although resid-

⁵¹ *Supra*

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

⁵⁹ Para 57

ing on the premises of the school where the pupils also lived, “had no position of power, trust or intimacy with respect to the children”.⁶⁰

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 now be analysed against the background of the preceding discussion of its development in common law countries.

4 The constitutional basis of the close connection test formulated in *NK v Minister 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*⁶¹ and *Minister of Safety and Security v Van Duivenboden*⁶² 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*.⁶³ 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 Lewis⁶⁴ 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.

⁶⁰ Para 51

⁶¹ In *Carmichele v Minister 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

⁶² 2002 6 SA 431 (SCA)

⁶³ 2003 2 SA 34 (CC)

⁶⁴ “Reaching the Pinnacle: Principles, Policies and People for a Single Apex Court in South Africa” 2005 *SAJHR* 509

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 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.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,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;
- 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

⁶⁵ Lewis 2005 *SAJHR* 519-522

⁶⁶ *Supra* para 33

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 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.”⁶⁸

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.

⁶⁷ *NK v Minister of Safety and Security* *supra* para 23

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

5 The applicability of the Constitutional Court's test to "non-constitutional" cases

It is clear that the 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. 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.

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 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.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 society⁷² 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,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?

⁶⁹ *NK v Minister of Safety and Security supra* para 45

⁷⁰ *NK v Minister of Safety and Security supra* para 22

⁷¹ See the requirements for such a duty in the discussion of the *Lepore* case *supra*

⁷² See the discussion of *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) in para 15 of the *NK* case

⁷³ *NK v Minister of Safety and Security supra* para 20

6 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 *NK* case.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 *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.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 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 Court⁷⁷ 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

⁷⁴ *Supra* para 51

⁷⁵ *NK v Minister of Safety and Security supra* para 50

⁷⁶ Para 82

⁷⁷ The Constitutional Court in *NK v Minister of Safety and Security supra* 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 supra* para 86

⁷⁹ *Supra*

considerations of adequate compensation and deterrence. The argument is that it is fair that the employer who places the risk in the 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 (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.⁸⁰

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.⁸¹ 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

“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”.⁸²

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

⁸⁰ *NK v Minister of Safety and Security supra para 41*

⁸¹ *NK v Minister of Safety and Security supra para 57*

⁸² *NK v Minister of Safety and Security supra para 57*

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 Minister 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 Minister is held liable, while it would be served if the Minister is held liable in the third scenario.

7 South African cases decided since the decision in *NK v Minister of Safety and Security*

7.1 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

⁸³ 2007 3 BCLR 287 (CC)

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

7.2 Fraud

In *Minister of Finance v Gore*,⁸⁵ 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 did state that "the difficulties these cases raise make it important to bring to the fore the policy reasons that warrant 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.⁸⁶ 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".⁸⁷

The court further stated that

"[h]owever 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".⁸⁸

Surprisingly, the Supreme Court of Appeal in this case only 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.⁸⁹ The Court did not mention the development of the test by the court in the *NK* case.

⁸⁴ Para 36

⁸⁵ 2007 1 SA 111 (SCA)

⁸⁶ *Minister of Finance v Gore supra* n 10

⁸⁷ *Supra* para 28

⁸⁸ *Supra* para 30

⁸⁹ *Supra* para 27

The factual closeness of their wrongful acts to their employment apparently forged the necessary close connection. It is clear that the guidance which the Constitutional Court purported to provide by its close connection test in two parts was not followed.⁹⁰

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 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.

9 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-

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

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.

OPSOMMING

Hierdie artikel ondersoek die toets vir middellike aanspreeklikheid wat deur die Konstitusionele Hof in *NK v Minister of Safety and Security* ontwikkel is vir gevalle van opsetlike wangedrag deur 'n werknemer. In hierdie saak het drie polisiemanne 'n jong vrou verkrag terwyl hulle aan diens was. In die verlede was hierdie tipe gevalle problematies omdat sodanige gedrag as buite die diensbestek beskou is. Die hof hang egter nie 'n eng siening van diensbestek aan nie en steun op die nou verbandtoets (*close connection test*) wat onlangs in verskeie ander gemeenregtelike jurisdiksies toegepas is. Dis 'n objektiewe toets wat 'n nou verband tussen die gedrag van die werknemer en sy pligte vereis.

Die Konstitusionele Hof het egter in hierdie saak die nou verbandtoets ontwikkel om konstitusionele norme te reflekteer. In die *NK* saak is bevind dat die werkgever aanspreeklik is omdat daar 'n nou verband tussen die daede van die polisiemanne en hulle konstitusionele pligte bestaan. Die probleem met hierdie toets is dat die hof 'n algemene toets vir middellike aanspreeklikheid by opsetlike wangedrag neergelê het, maar nie 'n aanduiding gegee het oor hoe dit aangewend moet word in gevalle waar konstitusionele regte en pligte minder prominent is nie. Daar word aan die hand gedoen dat die opsetlike verbreking van 'n plig teenoor 'n sekere persoon of persone die nou verband tussen plig en daad daar sal stel. Om die nou verbandtoets deur 'n konstitusionele bril te beskou is verwarrend en bring nie noodwendig meer gewenste resultate mee nie.