

# SEXUAL HARASSMENT AND VICARIOUS LIABILITY: A WARNING TO POLITICAL PARTIES

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“Unlimited power is apt to corrupt the minds of those who possess it.”<sup>1</sup>

“Power tends to corrupt, and absolute power corrupts absolutely.”<sup>2</sup>

## 1 Introduction

The allegations that the former ANC chief whip, Mbulelo Goniwe, sexually harassed an administrative assistant working in that party’s parliamentary office has brought to light the immense power the special relationship between a political party and its chief whip bestows upon the latter.<sup>3</sup> Of specific interest is the consideration that, under certain circumstances, the nature of this relationship can result in vicarious liability for the political party if its chief whip’s abuse of political power results in harm to a third party.

This article investigates whether a broader application of the doctrine of vicarious liability can accommodate the special relationship which exists between a political party and its chief whip.<sup>4</sup> Such an investigation, although

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<sup>1</sup> Quotation from a speech held by William Pitt, Earl of Chatham and former British Prime Minister, on 9 January 1770; see Bartlett *Familiar Quotations* 14 ed (1968) 426

<sup>2</sup> Quotation from a letter written by Lord Acton to Bishop Mandell Creighton on 5 April 1887; see Bartlett *Familiar Quotations* 750

<sup>3</sup> The ANC National Disciplinary Committee, chaired by Kader Asmal, held a disciplinary hearing on 14 December 2006 to consider the three charges brought against Goniwe of which the first was the “abuse of office in the ANC and the ANC Caucus in the National Assembly to obtain sexual and other undue advantages from members or others” The other charges dealt with his violation of the expected moral integrity of party members and public representatives, as well as the fact that his actions “provoke[d] serious divisions and a break-down of unity in the organisation” After consideration, the committee found Goniwe guilty of the first two charges and expelled him from the ANC (see “Statement of the ANC National Disciplinary Committee in the Case of Mbulelo Goniwe” (14 December 2006) <http://www.anc.org.za/ancdocs/pr/2006/> (accessed 17 January 2007))

<sup>4</sup> The position of a chief whip of a political party in Parliament is English in origin. The political term was borrowed from fox hunting’s “whipper-in of foxhounds” and has been described by Gladstone as “an undefined offshoot of the constitution” In the traditional sense a chief whip was the unofficial chief of the staff of the leader of a political party and concerned with matters of party management, with “the order of business” as main responsibility Gladstone explained that “[i]n short, the Chief whip held the position of general manager of the party ... [b]ut he was responsible to the chief, and not to the cabinet or (in Opposition) to any conclave of ex-cabinet members or other leading men” (“The Chief Whip in the British Parliament” 1927 *APSR* 519-521) South Africa’s parliamentary system of government, with remnants of its English heritage, considers it the responsibility of the chief whip of a political party in Parliament “to manage other whips within the party to ensure that its members maintain discipline and good conduct and specifically seeks to ensure that party members speak with one voice on matters of policy” Therefore it is a chief whip’s principal duty to realise party unity See “Annual Report on the City of Johannesburg: 2002/03” [http://www.joburg-archiv.co.za/city\\_vision/annualreport2002-03](http://www.joburg-archiv.co.za/city_vision/annualreport2002-03) (accessed 28 November 2006) It must be kept in mind that the chief whip is also a member of the political party. His or her association with the political party as a member is voluntary

controversial, is warranted in the light of the constitutional values and accompanying rights of human dignity, equality and freedom,<sup>5</sup> which are violated by acts of sexual harassment. As Grogan<sup>6</sup> indicated: “harassment cases are not like the run of the mill vicarious liability cases.”

The article first provides a brief introduction to the doctrine of vicarious liability and an overview of the magnitude of the problem of sexual harassment in our society. This sets the scene for a discussion of the problematic common law requirement of the doctrine of vicarious liability that a master-servant relationship must be established. Thereafter an investigation follows into the common law requirement that the wrongful acts for which the master can be held vicariously liable must be committed within the scope of the servant’s employment. Taking into consideration the review of the common law requirements and its application to the special relationship under consideration, it will finally be considered whether the flexible common law nature of the doctrine of vicarious liability is in harmony with the spirit of the Constitution of the Republic of South Africa.<sup>7</sup>

The article does not mainly focus on South African jurisprudence, since it has recently been noted that previous South African decisions regarding vicarious liability rarely prove helpful in untried cases. This is because “many decisions ... are based on stereotyped expressions and generalisations of limited value from which no logical approach can be distilled”.<sup>8</sup> The focus mainly falls on vicarious liability trends in common law countries.<sup>9</sup> As Calitz<sup>10</sup> pointed out, this is especially necessary since traditional South African vicarious liability cases

“were in the past reluctant to hold an employee vicariously liable for acts done outside the employee’s authority and not in furtherance of the employer’s business ... [and therefore] provide no guide-

<sup>5</sup> These values are also granted enforceable power by the Constitution of the Republic of South Africa, 1996 through s 10 (right to human dignity), s 9 (right to equality) and s 12 (freedom and security of the person)

<sup>6</sup> “Vicarious Harassment: Employers Become Reluctant Insurers” 2004 *Employment Law* 3 6

<sup>7</sup> 1996

<sup>8</sup> Calitz “Vicarious Liability of Employers: Reconsidering Risk as the Basis for Liability” 2005 *TSAR* 215 225 In *Grobler v Naspers Bpk* 2004 5 BLLR 455 (C) 506 Nel J noted: “Soos algemeen bekend ... wanneer ’n nuwe situasie hom voordoen het verwysings na vorige beslissings om ’n grensgeval probleem op te los, selde veel waarde In die veld van middellike aanspreeklikheid was daar menige beslissings wat voorgegee het om te steun op geekte uitdrukkings en veralgemenings maar waartuit geen logiese benadering gedistilleer kan word nie Steun op ouerige beslissings is ook problematies”

<sup>9</sup> In *Grobler v Naspers Bpk* 2004 5 BLLR 455 (C) 506-508 Nel J explained: “’n Benadering dat die middellike aanspreeklikheid van ’n werkgewer getoets moet word aan ’n onbuigsame regsreël negeer ontwikkelings gedurende die laaste paar dekades in die sogenaamde ‘common law’ jurisdiksies, nl die VSA, Kanada, die Verenigde Koninkryk, Australië en Nieu-Seeland Ontwikkelings van die ‘reël’ in daardie jurisdiksies is natuurlik van belang vir Suid-Afrika omdat dit deur ons reg vanuit Engeland oorgeeneem is ... [D]ie veranderings in die beskouings oor die erns en omvang van seksuele teistering [het] ’n ommekeer te weeg gebring in die benadering tot die ‘reël’ in die ‘common law’ jurisdiksies Die standaard toetse vir middellike aanspreeklikheid en die redes vir die bestaan daarvan is weer onder oë geneem, en daar is tot die gevolgtrekking gekom dat die gewone toepassing van die ‘reël’ nie tred gehou het met die ernstige vergrype van seksuele teistering in die moderne samelewing nie Dit het gelei tot beslissings dat werkgewers onder sekere omstandighede middellik aanspreeklik is vir die seksuele teistering van hul werknemers deur toesighouers (‘supervisors’) en vir die seksuele teistering van kinders deur persone wat in beheer van hulle aangestel is” Nel J (525) went further to summarise the findings of the common law courts: the scope of the rule has changed through the ages to take into account the changing social and economic circumstances and should continue to do so; the rule has been adjusted by decisions of judges based on considerations of fairness and not by legal principle; when a new problem such as sexual harassment presents itself, the nature of the specific relationship in comparison to others should be analysed Thereafter it must be decided whether, in the light of the relevant characteristics of the relationship, the law finds the unlawful acts sufficiently related to and falling within the risk created or escalated by the relationship to find vicarious liability to be present See also Calitz 2005 *TSAR* 225

<sup>10</sup> 2005 *TSAR* 225

lines, since sexual harassment would always be against the employer's instructions and could not be described as being done in furtherance of the employer's business and therefore not within the scope of the employee's appointment".

### 1 1 The doctrine of vicarious liability

In the seventeenth and eighteenth centuries the maxim *qui facit per alium facit per se* ("he who acts through another acts himself"),<sup>11</sup> also referred to as the *respondeat superior* doctrine,<sup>12</sup> was regarded as reflecting the view that the wrongful or delictual acts<sup>13</sup> of one person acting at the pleasure of another could be attributed to that other, as the latter gave the former the power to act within the scope of their agreement.<sup>14</sup> Simplified, the existence of a special relationship between two parties resulted in A being held indirectly or strictly liable<sup>15</sup> for the damages<sup>16</sup> which C suffered when he or she was the subject of B's wrongful actions (or omissions).<sup>17</sup>

In *Darling Island Stevedoring and Lighterage Co Ltd v Long*,<sup>18</sup> Fullagar J of the High Court of Australia declared, with regard to the common law rationale

<sup>11</sup> Stevens "Vicarious Liability or Vicarious Actions" 2007 *LQR* 30

<sup>12</sup> Sykes "The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines" 1988 *Harv L Rev* 563

<sup>13</sup> Today "liability" rather than "actions" are seen as attributed to an employer. See Stevens 2007 *LQR* 30. In *John Doe v Bennett* 2004 SCC 17 para 17, McLachlin CJ of the Supreme Court of Canada explained that "[t]he doctrine of vicarious liability imputes liability to the employer or principal of a tortfeasor, not on the basis of the fault of the employer or principal, but on the ground that as the person responsible for the activity or enterprise in question, the employer or principal should be held responsible for loss to third parties that result from the activity or enterprise" (emphasis added)

<sup>14</sup> Vicarious liability, as a type of secondary liability, is the preferred route in the situation under discussion, in contrast to that of direct liability, as "[v]icarious liability operates on a no-fault basis, and is predicated entirely upon the status of the ... [political party] as ... [a master and the] ... consequent relationship with" its chief whip as the servant, while direct liability "relates to ordinary personal responsibility for conduct, and may be conveniently described as liability [of the chief whip] for ... personal fault" See Melvor "The Use and Abuse of the Doctrine of Vicarious Liability" 2006 *Comm L World Rev* 268 288

<sup>15</sup> Roederer "The Constitutionally Inspired Approach to Vicarious Liability in Cases of Intentional Wrongful Acts by the Police: One Small Step in Restoring the Public's Trust in the South African Police" 2005 *SAJHR* 575 578 pointed out that "[v]icarious liability is something of an anomaly in the South African law of delict as it is one of the few areas of delict in which one is held strictly liable, or liable without finding any fault on the part of the defendant [seeing that you are held] liable for the conduct of someone else whose conduct satisfied the usual elements of delict (including fault)" In *Majrowski v Guy's and St. Thomas' NHS Trust* 2006 UKHL 34 para 7, the House of Lords also proclaimed that "[v]icarious liability is a common law principle of strict, no-fault liability" Husak "Varieties of Strict Liability" 1995 *Can JL & Juris* 189 213, however, held that it is not "transparently obvious" that vicarious liability is a form of strict liability: "[L]iability is strict when the conditions that need to be satisfied to obtain a conviction allow a defendant to be punished who is substantially less at fault than the typical perpetrator of that offense. In the absence of a judgment about the fault of the paradigmatic offender, no offence can be categorized as an instance of strict liability"

<sup>16</sup> This liability is usually expressed in pecuniary terms, but there are circumstances in criminal law and international criminal law where a party has been held criminally vicariously liable for the wrongful actions of another

<sup>17</sup> Neethling, Potgieter & Visser *Deliktereg* (2002) 400. In our law, as depicted in *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 596-597, there is no general duty on anyone to act and consequently protect another from damage or harm, although society might feel that one is morally obliged to do so. The exception, however, falls on people with a legal duty to prevent such damage or harm from realising. In such circumstances an omission can also be seen as unlawful and punishable. Although actions usually manifest themselves in positive conduct, a person under a legal duty can act wrongfully by way of omission when he or she fails to protect another from harm. In *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 62 the Constitutional Court, referring to the special protective relationship between the State and individuals, and taking into account fundamental values, found that there was a duty on the police to protect the public (as a consequence of the State's constitutional duty to protect the public from human rights infringements). The Court consequently, through extending the scope of "wrongfulness", created a new category of delictual liability by way of omission where said duty is ignored. See also Burchell *Principles of Criminal Law* (2005) 189-193. Throughout the article, reference will only be made to wrongful actions, but it must be kept in mind that such "actions" could also include wrongful omissions

<sup>18</sup> 1957 97 CLR 36

for the doctrine, that liability was “adopted not by way of an exercise in analytical jurisprudence but as a matter of policy”.<sup>19</sup> This finding is in agreement with Laski’s<sup>20</sup> 1916 statement that the “basis of the rule, in fact, is public policy”.

In the present day, the *respondeat superior* doctrine manifests itself as the doctrine of vicarious liability<sup>21</sup> as a result of the existence of certain special relationships<sup>22</sup> and the social necessity to hold responsible those who create situations of risk.<sup>23</sup> With regard to the modern doctrine, Fleming<sup>24</sup> stated that

“vicarious liability cannot parade as a deduction from legalistic premises, but should be frankly recognised as having its basis in a combination of policy considerations.”

These policy considerations take into account factors such as the risk of harm to others, fairness and the maintenance of good practice standards by employees, along with financial considerations as rationales for holding an employer vicariously liable.<sup>25</sup> In 2001, Major J of the Supreme Court of

<sup>19</sup> 56-57 See also *Hollis v Vabu (Pty) Ltd* 2001 ATC 4508; 2001 207 CLR 21 para 86

<sup>20</sup> “The Basis of Vicarious Liability” 1916 *Yale LJ* 105 111

<sup>21</sup> The doctrine as found in South African law is of English origin and rooted in the Salmond rule. See Calitz 2005 *TSAR* 217; McIvor 2006 *Comm L World Rev* 271; *Grobler v Naspers Bpk* 2004 5 BLLR 455 (C) 525; *Bazley v Curry* 1999 2 SCR 534 para 15

<sup>22</sup> Individuals are generally only held liable for their own wrongful actions and harm that realises as a direct consequence of such actions. The doctrine of vicarious liability (as a form of strict liability) deviates from this point of view in that it does not necessitate proof that the person, to whom the doctrine finds application, personally committed the wrongful act (see *Ontario Ltd v Sagaz Industries Canada Inc* 2001 SCC 59 para 26). However, “no defendant who is held vicariously liable is selected randomly; the principles used to identify this defendant are not arbitrary ... [therefore] [v]icarious liability is imposed on someone who was in a position to have supervised and thus to have prevented the occurrence of the harm”. See Husak 1995 *Can JL & Juris* 215. See also *Blackwater v Plint* 2005 3 SCR 3 para 69.

<sup>23</sup> In *Bazley v Curry* 1999 2 SCR 534 para 30, McLachlin CJ stated that “[t]he idea that the person who induced a risk incurs a duty to those who may be injured lies at the heart of tort law”.

<sup>24</sup> *The Law of Torts* (1998) 410. Fleming elaborated as to the form in which these policy considerations emerge: “Most important of these is the belief that a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise; that the master is a more promising source of recompense than his servant who is apt to be a man of straw without insurance; and that the rule promotes wide distribution of tort losses, the employer being a most suitable channel for passing them on through liability insurance and higher prices ... [In addition to the] deterrent pressures ... By holding the master liable, the law furnishes an incentive to discipline servants guilty of wrongdoing, if necessary by insisting on an indemnity or contribution”.

<sup>25</sup> *Majrowski v Guy's and St. Thomas' NHS Trust* 2006 UKHL 34 para 7. Prosser & Keeton *Law of Torts* (1984) 500 (with reference to Batty *Vicarious Liability* (1916) 154) also made certain observations concerning the rationale for the existence of the burden imposed by the doctrine of vicarious liability: “A multitude of very ingenious reasons have been offered for the vicarious liability of a master: he has a more or less fictitious ‘control’ over the behavior of the servant; he has ‘set the whole thing in motion’, and is therefore responsible for what has happened; he has selected the servant and trusted him, and so should suffer for his wrongs, rather than an innocent stranger who has had no opportunity to protect himself; it is a great concession that any man should be permitted to employ another at all, and there should be a corresponding responsibility as the price to be paid for it – or, more frankly and cynically, ‘in hard fact, the [real] reason for employers’ liability is – the damages are taken from a deep pocket”’. According to O’Regan J in the Constitutional Court decision of *NK v Minister of Safety and Security* 2005 6 SA 419 (CC) para 21, the foundation for vicarious liability can be identified as the following: “The rationale for vicarious liability is found in a range of underlying principles. An important one is the desirability of affording claimants efficacious remedies for harm suffered. Another is the need to use legal remedies to incite employers to take active steps to prevent their employees from harming members of the broader community. There is a countervailing principle too, which is that damages should not be borne by employers in all circumstances, but only those circumstances in which it is fair to require them to do so”. In *Hollis v Vabu (Pty) Ltd* 2001 ATC 4508; 2001 207 CLR 21 para 35, the High Court of Australia noted that “[e]ach of these particular reasons is persuasive to some degree but, given the diversity of conduct involved, probably none can be accepted, by itself, as completely satisfactory for all cases”. Therefore the relationship existent between a political party and its chief whip cannot be excluded from the scope of the doctrine of vicarious liability, merely because these mentioned underlying principles to the doctrine are not tailor-made for the relationship under consideration.

Canada in *Ontario Ltd v Sagaz Industries Canada Inc*<sup>26</sup> further, and perhaps more accurately, articulated that

“[v]icarious liability describes the event when the law holds one person liable for the misconduct of another *because of their relationship*.”<sup>27</sup>

Major J went on to explain that, although the relationship that exists between a master and servant (nowadays commonly referred to as an employer and employee),<sup>28</sup> is generally the target of the doctrine of vicarious liability, “the categories of relationships in law that attract vicarious liability are neither exhaustively defined nor closed”.<sup>29</sup>

The doctrine therefore has a flexible characteristic which leaves it open to the court to identify new categories of relationships to fall within its scope when society’s political, social and economic atmosphere demands it. In the Canadian judgment of *Boothman v Canada*,<sup>30</sup> reference was also made to the fact that placing a person in a special position of trust carries with it the responsibility of guaranteeing that such person is trustworthy.<sup>31</sup> As a result, by publicly placing trust in a person who is thereby granted some power of representation, for example a chief whip, a political party is acknowledging to the public that their political, social and economic interests are not at risk when dealing with this trustworthy person. In *Bazley v Curry*,<sup>32</sup> the Supreme Court of Canada further declared that

“a meaningful articulation of when vicarious liability should follow in new situations ought to be animated by the twin policy goals of fair compensation and deterrence that underlie the doctrine, rather than by artificial or semantic distinctions”.<sup>33</sup>

In 2004, McLachlin CJ of the same Court in *John Doe v Bennett*<sup>34</sup> referred with approval to the *Bazley* case<sup>35</sup> and further emphasised that in instances where

“prior cases do not clearly suggest a solution, the next step is to determine whether vicarious liability should be imposed in light of the broader policy rationales”.<sup>36</sup>

<sup>26</sup> *Ontario Ltd v Sagaz Industries Canada Inc* 2001 SCC 59

<sup>27</sup> Para 2 (emphasis added)

<sup>28</sup> Throughout this article I am opting to refer to the terms “master” and “servant”, rather than “employer” and “employee”. By reverting to the traditional terminology I wish to show that the relationship between a political party and a chief whip to be considered does not fit perfectly within the modern idea of “employer” and “employee”, but can be described as one akin to the relationship between an employer and employee

<sup>29</sup> *Ontario Ltd v Sagaz Industries Canada Inc* 2001 SCC 59 para 25

<sup>30</sup> 1993 3 FC 381 (TD)

<sup>31</sup> According to *Bazley v Curry* 1999 2 SCR 534 para 20, in *Boothman v Canada* 1993 3 FC 381 (TD) the “unauthorized intentional infliction of nervous shock by supervisory employee on his subordinate found [sic] to invoke vicarious liability for the employer, albeit it based on statutory, as opposed to common law, principles”

<sup>32</sup> 1999 2 SCR 534 This was a case concerning the question whether a non-profit association could be held vicariously liable for a childcare counsellor who sexually assaulted children at a residential care facility where the association operated

<sup>33</sup> Para 36

<sup>34</sup> 2004 SCC 17

<sup>35</sup> *Bazley v Curry* was referred to with approval by the Supreme Court of Canada in *Jacobi v Griffiths* 1999 2 SCR 570 and *KLB v British Columbia* 2003 SCC 51

<sup>36</sup> *Bazley v Curry* 1999 2 SCR 534 para 15 See also *John Doe v Bennett* 2004 SCC 17 para 20

Following this approach to the doctrine of vicarious liability, it will be considered whether a political party, acting through its chief whip in Parliament in the protection of the party's interests, can be held vicariously liable for the wrongful actions (in the form of sexual harassment) of that member, regardless of the fact that the chief whip receives a salary from Parliament and not from the political party.

## 1 2 The context

At this stage it must be noted that this article deliberately focusses on political parties instead of on Parliament as the possible recipient of unwanted liability. This is due to the fact that, in contrast to Parliament, the political party has a closer relationship and more interest vested in its chief whip as one of its high profile and influential members as a result of the power that the party vests in him or her. Consequently, a political party also has more (political) control over a chief whip.

Since a political party cannot be viewed as the employer of its chief whip in the traditional sense, it would appear that the question whether a party can attract vicarious liability should simply be answered in the negative. More specifically, the situation under consideration does not fall within the ambit of section 60 of the Employment Equity Act.<sup>37</sup> Section 60(3) of the Act renders an employee vicariously liable if he or she failed to consult with all the parties involved and did not take the necessary steps to eliminate the alleged harassment and to comply with the provision of the Employment Equity Act. A possible escape route is provided in section 60(4) of the Act, which allows for the opportunity of attestation on the side of the employer that he or she took all reasonably practical measures to prevent such discrimination<sup>38</sup> from occurring.<sup>39</sup>

<sup>37</sup> 55 of 1998 S 1 of the Act defines an employee as "any person other than an independent contractor who... works for another person or the State and who receives, or is entitled to receive any remuneration" (Emphasis added) Regarding situations where an employer can be held liable, s 60 provides as follows:

"(1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer

(2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act

(3) If the employer fails to take the necessary steps referred to in subsection (2), and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision

(4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act

<sup>38</sup> In terms of South African labour law and legislation, sexual harassment is viewed as a form of discrimination American law also regards sexual harassment as a form of discrimination See Grogan *Workplace Law* (2005) 179 According to Carle "Acknowledging Informal Power Dynamics in the Workplace: A Proposal for Further Development of the Vicarious Liability Doctrine in Hostile Environment Sexual Harassment Cases" 2006 *Duke J Gender L & Policy* 85 109, this American "finding that sexual harassment violates anti-discrimination law stems from an implicit policy against the abuse of power obtained or held by virtue of employment, where such an abuse of power is implemented on the basis of the sex of the plaintiff"

<sup>39</sup> *Nisabo v Real Security CC* 2004 1 BLLR 58 (LC) was a sexual harassment case that warranted the application of the Employment Equity Act 55 of 1998 and led to the Labour Court holding the employer liable for damages In this case the applicant endured unwanted attention of a superior (her supervisor) The sexual harassment resulted in her resignation (which the Court regarded as a constructive dismissal) and almost caused her to commit suicide



There are, however, other possible avenues which may lead to imposing vicarious liability in the situation at hand. Lessons from other jurisdictions dealing with volunteers and clergy create interesting alternative possibilities and warrant further investigation as South African jurisprudence has not had the opportunity to deal with the situation under consideration. Canadian and American jurisprudence<sup>40</sup> has had to consider the applicability of the doctrine of vicarious liability in circumstances where a volunteer of a non-profit organisation or church<sup>41</sup> committed a wrongful act. With regard to volunteers, Kahn<sup>42</sup> pointed out the following:

“Volunteers are vital to our society ... [d]iverse in their activities, volunteers donate their time and energy to such fields as ... justice, religion ... and *politics*.”

Because volunteers voluntarily associate themselves with political parties, the “employment” context of a volunteer is similar to that of a member of a political party. The chief whip of a political party is in fact a voluntary member of that party. Therefore the approach of courts that have dealt with volunteers within the scope of the doctrine of vicarious liability is relevant to this discussion. When dealing with such special relationships, courts have identified that the establishment of vicarious liability demands three common law requirements:

- a wrongful act must be committed by the servant;
- a master-servant relationship must be established; and
- the servant must have committed the wrongful act while acting within the scope of his or her employment.<sup>43</sup>

The first requirement speaks for itself. It calls for the relevant legal principles (as jurisdictionally prescribed) to be applied as dictated by the specific facts of a case. The latter two requirements, however, call for specific consideration.

As section 39(2) of the Constitution places a “general obligation”<sup>44</sup> on courts to develop the common law, regard will first be had to the scope of the common law and its possible application to the problem at hand, whereafter the doctrine of vicarious liability’s flexible nature will be considered within

<sup>40</sup> The emphasis will mainly fall on Canadian jurisprudence. Australian, English and South African case law dealing with the doctrine of vicarious liability will also be considered.

<sup>41</sup> At one stage charitable or non-profit organisations could not be held vicariously liable for the wrongful actions of their employees or volunteers due to their charitable immunity. In America, however, the idea of charitable immunity has now been abolished. For the rationale behind the abolition of charitable immunity, see Kahn “Organizations’ Liability for Torts of Volunteers” 1985 *U Pa L Rev* 1433 1437.

<sup>42</sup> 1985 *U Pa L Rev* 1433 (emphasis added).

<sup>43</sup> Kahn 1985 *U Pa L Rev* 1438.

<sup>44</sup> In *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 39 the Constitutional Court noted that the duty referred to in s 39(2) is of a general nature, “because we do not mean to suggest that a court must, in each and every case where the common law is involved, embark on an independent exercise as to whether the common law is in need of development and, if so, how it is to be developed under s 39(2) ... [but] there might be circumstances where a court is obliged to raise the matter ...” Consequently there might be situations where the common law is flexible enough to usurp a new situation in harmony with the Constitution’s values, whilst in other situations s 39(2) might call upon a court to expand the boundaries of the common law and develop it “beyond existing precedent” so as to harmonise it with the Constitution. See para 40.

the context of values such as human dignity, equality and freedom underlying the Constitution's objective normative system.<sup>45</sup>

However, to create an appropriate backdrop for the examination of these requirements, the importance of curbing the occurrence of sexual harassment first has to be considered.

## 2 The wrongful act of sexual harassment

A person is the subject of harassment when he or she is being attacked, for example by means of intimidation, in a manner that leaves him or her in a worried or troubled state.<sup>46</sup> In terms of South Africa's labour law, harassment is a form of discrimination.<sup>47</sup> As pointed out by Garbers,<sup>48</sup>

"[f]itting harassment into the discrimination mould is a deliberate choice, made judicially or legislatively".

This is, however, not the only legal avenue for a victim of sexual harassment as a civil claim in delict may also be brought to hold an employer vicariously liable.<sup>49</sup> The plaintiff in *Grobler v Naspers Bpk*<sup>50</sup> chose the latter avenue. *In casu*, the Cape High Court found that an employer could delictually assume the risk of vicarious liability for sexual harassment.<sup>51</sup>

As becomes apparent from a reading of the *Grobler* case where the Court considered evidence of the impact of sexual harassment on a victim, such a wrongful act (be it viewed as discrimination or delict) infringes on a person's individual autonomy<sup>52</sup> through the exercise of power by targeting a very vulnerable and personal aspect of a person's identity, namely her sexuality.<sup>53</sup> Such infringement on individual or personal autonomy by way of sexual

<sup>45</sup> At para 56 Ackermann and Goldstone JJ emphasised that "[t]he influence of the fundamental constitutional values of the common law is mandated by section 39(2) of the Constitution. It is within this matrix of this objective normative value system that the common law must be developed"

<sup>46</sup> Procter (ed) *Longman Dictionary of Contemporary English* (1978) S 1(xiii) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 describes harassment as the "unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to sex, gender or sexual orientation; or a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or characteristic associated with such a group"

<sup>47</sup> Basson, Christianson, Garbers, Le Roux, Mischke & Strydom *Essential Labour Law* (2005) 207 S 6(3) of the Employment Equity Act 55 of 1998 prohibits harassment as a form of unfair discrimination

<sup>48</sup> Garbers "Sexual Harassment as Sex Discrimination: Different Approaches, Persistent Problems" 2002 *SA Merc LJ* 371 372

<sup>49</sup> Garbers 2002 *SA Merc LJ* 373 n 7

<sup>50</sup> 2004 5 BLLR 455 (C)

<sup>51</sup> *In casu* a secretary was sexually harassed by a manager of Naspers

<sup>52</sup> Albertyn & Goldblatt "Facing the Challenge of Transformation: Difficulties of an Indigenous Jurisprudence of Equality" 1998 *SAJHR* 248 254 n 21 explain that dignity is an integral element of individual autonomy: "Dignity should be understood as enhancing the value of individual integrity and autonomy within a social world that enriches that autonomy though [sic] relationships with others and not in opposition with them"

<sup>53</sup> "[T]he value of autonomy is tied to the value of self-integration. We don't want to be alien to or at war with ourselves; and it seems that when our intentions are not under our own control, we suffer from self-alienation ... When an individual [declares that she has the right to live autonomously] she ... is denying that anyone else has the authority to control her activity within this sphere; she is saying that any *exercise of power* over this activity is illegitimate unless she authorizes it herself" (Emphasis added) See "Personal Autonomy" *Stanford Encyclopedia of Philosophy* <http://plato.stanford.edu/entries/personal-autonomy> (accessed 16 March 2007)



harassment can be the result of physical conduct,<sup>54</sup> verbal conduct<sup>55</sup> or non-verbal conduct.<sup>56</sup> The effect or (social) impact of certain forms of conduct on the recipient can also assist in identifying three types of harassment: *quid pro quo* harassment, sexual favouritism<sup>57</sup> and harassment in a hostile working environment.<sup>58</sup> It is the first of these forms of harassment that is of interest in the situation under consideration:

“[T]he *quid pro quo* harassment ... occurs where a man or woman is forced into surrendering to sexual advances against his or her will – the reason here being the fear of losing a job-related benefit ... This form of harassment usually occurs in a relationship of actual power<sup>59</sup> in the hands of one party; a party powerful enough to affect job-related benefits ...”<sup>60</sup>

Power, or the abuse thereof, as present in the mentioned type of harassment, is a constant feature in sexual harassment cases. As Zippel<sup>61</sup> noted:

“Sexual harassment serves as a vivid example of heated struggles over sexuality, power, and gender equality on both sides of the Atlantic, because it fuses the issues of ... sexuality, and workplace equality.”

Although sexual harassment can theoretically be viewed as a gender-neutral term, seeing that both men and women can be the victims of such unwanted attention, the truth is that it usually materialises with the woman being the victim. This results from the fact that men in power and authority positions<sup>62</sup> tend to view women in the workplace as the weaker sex and treat

<sup>54</sup> Examples of physical conduct range from a mere suggestive touch to rape. See Basson et al *Essential Labour Law* 207.

<sup>55</sup> Examples of verbal conduct include “innuendoes, suggestions and hints, sexual advances, comments with sexual overtones, sex-related jokes or insults, graphic comments about a person’s body made to that person or in their presence, enquiries about a person’s sex or even whistling at a person or group of persons” See Basson et al *Essential Labour Law* 207.

<sup>56</sup> Examples of non-verbal conduct include “gestures, indecent exposures or the display of sexually explicit pictures and objects” See Basson et al *Essential Labour Law* 207.

<sup>57</sup> “[S]exual favouritism ... occurs where a person in authority rewards only those who respond to his or her sexual advances” See Basson et al *Essential Labour Law* 207-208.

<sup>58</sup> “[H]ostile working environment harassment occurs when an abusive working environment is created in which an employee finds it difficult to work. This hostile working environment could be created by jokes, sexual propositions or other sexual innuendoes which are offensive to an employee but not necessarily directed against that employee as a person ... This means that this form of harassment does not depend on a relationship of actual power in the workplace – it commonly takes place between employees at the same level ...” See Basson et al *Essential Labour Law* 208. See also Welsh “Gender and Sexual Harassment” 1999 *Annu Rev Sociol* 169-170.

<sup>59</sup> In instances of sexual harassment, the harasser can also abuse informal power. See Carle 2006 *Duke J Gender L & Pol’y* 104. Grogan 2004 *Employment Law* 5 explained, with reference to the Canadian Supreme Court in *Entrot v BASF Corporation* 2003 WL 1792115, that an important consideration with regard to power in sexual harassment is whether the victim reasonably perceived the harasser to hold such (actual or informal) power. The author further stated that “[t]his approach shifts the focus from whether power is actually exercised by the harasser, to how it is perceived by the victim... it suggests that victims are induced to suffer the unwanted attentions of harassers for fear that their working lives will be adversely affected by denial of some benefit or some prejudicial consequence if they protest”.

<sup>60</sup> Basson et al *Essential Labour Law* 207 (emphasis added). See also Welsh 1999 *Annu Rev Sociol* 170.

<sup>61</sup> *The Politics of Sexual Harassment: A Comparative Study of the United States, the European Union, and Germany* (2007) 1 (emphasis added).

<sup>62</sup> Carle 2006 *Duke J Gender L & Pol’y* 104, with reference to Robbins, pointed out that the terms power and authority are frequently confused: “[A]uthority [is] the right to act, or command others to act ... When we use the term “power”, we mean an individual’s capacity to influence decisions. As such, authority is actually part of the larger concept of power; that is the ability to influence based on an individual’s legitimate position, can affect decisions, but does not require authority to have such influence”.

them accordingly.<sup>63</sup> Sexual harassment therefore flourishes in the presence of power imbalance. This power imbalance is illustrated by the labour market statistics compiled by the Department of Labour,<sup>64</sup> which clearly illustrate the reality that men tend to be the managers with the accompanying power, while women are the subordinate clerks. The 1995 statistics revealed 77.8% of managers to be men, while women ruled the clerical area of the labour market with 63.9%.<sup>65</sup> 2005 saw 69.4% of clerks being women, while men won the manager's race with 70.8%.<sup>66</sup>

This article accordingly bases its argument on the reality that political parties, which bear the democratic responsibility of being the voice of the people, should in particular guard women from gender and power imbalances within their own power spheres. Due to the fact that the doctrine of vicarious liability has previously been identified as a vehicle for the promotion of justice,<sup>67</sup> there is merit in identifying it as a method for legally holding a political party socially responsible for the consequences flowing from a special political power relationship that falls within the ambit of the doctrine of vicarious liability. This approach is plausible in the constitutional context of South Africa's attempts to realise public accountability and further autonomy through declarations of "equality, dignity, freedom, [and] mutual respect".<sup>68</sup>

The realisation of these ideals calls for the conversion of theoretical rights into practical protection through the imposition of vicarious liability, especially when one considers Gqola's<sup>69</sup> accusation that South Africa's stance to and dialogues regarding gender issues are not liberal enough:

"[W]omen's empowerment' is discussed in ways that are not transformative ... women are not empowered. Indicators of disempowerment are ... rampant sexual harassment ... the dominant talk of 'empowerment of women' expects women to conform and become 'honorary men' ... rather than altering the formal workplace into a space that is more receptive to women"<sup>70</sup> ... As South Africans, we need a psychological liberation from patriarchy – to learn to engage as partners across genders, to respect women's bodily autonomy ... But no gender-progressive country, psychological liberation or

<sup>63</sup> Welsh 1999 *Annu Rev Sociol* 176 explained that sexual harassment, when considered through the socio-cultural model of sociological analysis, is viewed as "a product of culturally legitimated power and status differences between men and women... [an explanation which fits with the] 'dominance' model that emphasizes sexual harassment's origins in patriarchal society ... [as it] is perceived to be an outgrowth of the gender socialization process and is a mechanism by which men assert power and dominance over women both at work and in society" The author further stated that "[p]roponents of this approach emphasize gender as a key predictor of who is at risk of harassment, in light of empirical evidence that women experience more harassment than men" Uggen & Blackstone "Sexual Harassment as a Gendered Expression of Power" 2004 *American Sociological Review* 64 84 noted that "MacKinnon's theory and more recent feminist work suggest that power and masculinity explain the social distribution of harassment experiences"

<sup>64</sup> Department: Labour, Republic of South Africa "Women in the South African Labour Market 1995-2005" <http://www.labour.gov.za> (accessed 16 March 2007)

<sup>65</sup> <http://www.labour.gov.za> 14

<sup>66</sup> <http://www.labour.gov.za> 14

<sup>67</sup> Wicke "Vicarious Liability: Not Simply A Matter of Legal Policy" 1998 *Stell LR* 21

<sup>68</sup> Roederer "The Constitutionally Inspired Approaches to Police Accountability for Violence against Women in the U S and South Africa: Conservation versus Transformation" 2005 *Tul J Comp & Int'L L* 91 138

<sup>69</sup> "The Hype of Women's Empowerment" *Mail and Guardian Online* (2006-11-27) <http://www.mg.co.za> (accessed 16 March 2007)

<sup>70</sup> In *R v Morgantaler* 1988 1 SCR 30 par 240 the Court similarly noted that "[t]he history of the struggle for human rights from the eighteenth century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus ... [but] more recent struggle for women's rights has been a struggle to eliminate discrimination to achieve a woman's place in man's world" See also Albertyn "Women's Rights" <http://www.genderstats.org.za/documents/Women'sRights.pdf> (accessed 25 March 2007)

national freed zone will be accessible without an honest look at our society ... We can learn how to value ours and others' freedom and pay attention to the histories that have brought us here."

In present day democratic South Africa, neither the public nor the private sphere of our society has actively shed the historic shackles of double standards and power imbalances which burden women. Our political public figures are all the more to blame for this gender crime due to the opportunity their positions grant them to change societal views and conceptions. Unfortunately, as Mtintso<sup>71</sup> pointed out, "[y]ou find there are comrades who bow to the question of gender equality, but in terms of their own behaviour are quite different".

Where a political party appoints one of its members as its chief whip, it creates "a relationship of actual power in the hands of one party".<sup>72</sup> Therefore, in the words of Carle,<sup>73</sup> the chief whip's

"[c]loseness to the 'power core' results from ... access to or relationships with the key [political party] managers or possession of key organizational information and resources".

Such a relationship specifically creates the possibility of an imbalance of power where the chief whip is a male and the administrative assistants of the party are women. This makes the risk of abuse of power in the form of unwanted and unwelcome sexual advances on which sexual harassment flourishes a reality and therefore threatens transformative empowerment of women as promised by our democratic society if no legal safeguards and constraints, such as an extended or revised doctrine of vicarious liability, are put in place to counter such a risk of abuse.<sup>74</sup>

### 3 Master-servant relationship

The relationship between a political party and its chief whip can arguably be considered to be one akin to that of an employment relationship that exists between a master and servant.<sup>75</sup> This is because the chief whip acts as a representative of the political party in Parliament. One should not halt the enquiry merely because a political party is not traditionally the "master" of its chief whip in terms of employment law. This, however, does not necessarily mean that the inquiry will be an uncomplicated undertaking. As Kahn<sup>76</sup> noted, for

<sup>71</sup> As quoted in *Gqola Mail and Guardian Online* (2006-11-27)

<sup>72</sup> Basson et al *Essential Labour Law* 207

<sup>73</sup> 2006 *Duke J Gender L & Pol'y* 104-105

<sup>74</sup> This implementation of the doctrine of vicarious liability is not that farfetched, as the Supreme Court of the United States declared in *Faragher v City Boca Raton* 1998 524 US 775, in an opinion delivered by Souter J who stated that the rationale for placing harassment within the scope of vicarious liability where supervisory authority is present is found in the consideration of "fairness", because fairness requires that the burden must fall on the employer in such instances where social behaviour of the like is foreseeable. The Court also referred to Harper, James & Gray *Law of Torts* (1986) 40-41 where the authors stated that "the leading Torts treatise has put it, [that] 'the integrating principle' of *respondeat superior* is 'that the employer should be liable for those faults that may be fairly regarded as risks of his business, whether they are committed in furthering it or not'" (Emphasis added)

<sup>75</sup> In *Majrowski v Guy's and St. Thomas' NHS Trust* 2006 UKHL 34 para 7 the House of Lords acknowledged that "[t]o a limited extent vicarious liability may also exist outside the employment relationship, for instance, in some cases of agency"

<sup>76</sup> 1985 *U Pa L Rev* 1440

“those courts that have dealt with respondeat superior doctrine in cases of alleged injuries by volunteers, finding a master-servant relationship has been the most troublesome part of the analysis”.

When dealing with volunteers, and therefore also with members of political parties, three common law conditions have to be met before such a complicated relationship can be established:

- the right to control must lie with the master with regard to his or her servant’s physical conduct;<sup>77</sup>
- it must be ascertained that the master consented<sup>78</sup> to the services offered by the servant;<sup>79</sup> and
- the benefit<sup>80</sup> that the master stands to gain from said services must be foreseeable to him or her.<sup>81</sup>

With regard to the first requirement, it is interesting to note that at one stage in South Africa’s legal history, control was regarded as the decisive consideration in confirming the existence of a special relationship such as that of an employer and employee.<sup>82</sup> In *Midway Two Engineering & Construction Services v Transnet Bpk*,<sup>83</sup> Nienaber JA, however, described the “control test” as a simplistic,<sup>84</sup> outdated, discredited fiction.<sup>85</sup> This description did not oust the consideration of control, but changed its status to but one factor to be considered in the identification of an employment relationship.<sup>86</sup>

In situations where an attempt is made to establish a relationship akin to that of an employment relationship, it is difficult to prove the existence of the right to control when dealing with factual situations involving individuals

<sup>77</sup> Kahn 1985 *U Pa L Rev* 1440. In *Regina v Walker* 1858 27 LJMC 207, Baron Braamwell set out the control test as the original criterion for the establishment of an employment relationship. This test was expressed in *Hôpital Notre-Dame de l’Espérance v Laurent* 1978 1 SCR 605 613 as meaning that “the essential criterion of employer-employee relations is the right to give orders and instructions to the employee regarding the manner in which to carry out his work”. See also *Ontario Ltd v Sagaz Industries Canada Inc* 2001 SCC 59 para 37.

<sup>78</sup> It is not required of the master to clearly and openly consent to the services being offered to establish a special relationship akin to that of an employment relationship. Consent on the master’s side can merely be implied. See Kahn 1985 *U Pa L Rev* 1442.

<sup>79</sup> Kahn 1985 *U Pa L Rev* 1440.

<sup>80</sup> Kahn 1985 *U Pa L Rev* 1442, with reference to *Baxter v Morningside Inc* 1974 521 P 2d 946 949, noted that “[b]y fulfilling a need of the organization, the volunteer’s work benefits the organization”.

<sup>81</sup> Kahn 1985 *U Pa L Rev* 1440.

<sup>82</sup> “Control” in this sense does not only include actual factual control, but can also include circumstances where the capacity or right to control exists. See Neethling et al *Deliktereg* 402.

<sup>83</sup> 1998 3 SA 17 (SCA).

<sup>84</sup> 30 years prior to Nienaber JA’s judgment in *Midway Two Engineering & Construction Services*, Atiyah in his 1967 work, *Vicarious Liability in the Law of Torts* 41, already criticised the control test as having “an air of deceptive simplicity”. See Atiyah as referred to in *Ontario Ltd v Sagaz* 2001 SCC 59 para 38.

<sup>85</sup> See also Neethling et al *Deliktereg* 402. In *Metwa v Minister of Health* 1989 3 SA 600 (D) 605 Nienaber J stated: “The degree of supervision and control which is exercised by the person in authority over him is no longer regarded as the sole criterion to determine whether someone is a servant or something else. The deciding factor is the intention of the parties to the contract, which is to be gathered from a variety of facts and factors. Control is merely one of the *indicia* to determine whether or not a person is a servant or an independent worker”.

<sup>86</sup> Neethling et al *Deliktereg* 402. In *Van der Berg v Coopers and Lybrand Trust (Pty) Ltd* 2001 2 SA 242 (SCA) 258, Smalberger JA proclaimed: “In *Midway Two Engineering and Construction Services v Transnet Bpk* ... this Court indicated a preference for a broader, multi-faceted test that took into account all relevant factors, including questions of policy and fairness, to determine issues of vicarious liability. There is, therefore, no uniform or universal principle that governs each and every case involving vicarious liability, although the element of control remains an important factor”.

not receiving a salary from the master.<sup>87</sup> It is helpful that only the presence of such a right is required according to American jurisprudence.<sup>88</sup> The result is that it need not be proved that the master, being the political party in the situation under consideration, exercises the right to control.<sup>89</sup> Furthermore, even though the position of members can be terminated in a similar manner as those of employees receiving a salary, that is not the decisive consideration when proving the master's right of control over the former group.<sup>90</sup> Therefore, the fact that Parliament signs the chief whip's pay check need not be seen as an insurmountable obstacle. Instead, courts consider whether specific instructions were provided by the master<sup>91</sup> and determine the nature of the agreement between the parties to the special relationship when establishing the presence of the right to control.<sup>92</sup> In the past, courts have also considered how the public perceives the master's right to control acts of the servant and what steps the master took after the servant's wrongful act had occurred.<sup>93</sup> In this regard it is undeniable that the public perceives the chief whip of a political party as acting at the party's pleasure and according to its doctrines and orders. The Supreme Court of Canada, in *John Doe v Bennett*,<sup>94</sup> was of the view that the bishop exercised control over the priest accused of misconduct in that case.<sup>95</sup> The Court considered this to be so seeing that the bishop, in addition to the fact that he had the power to remove the priest, also had the power to determine the priest's assignment and to discipline the priest.<sup>96</sup> This gave the bishop extensive control over the priest and created a sufficiently close relationship.<sup>97</sup> In the same manner, a political party assigns the chief whip his "voice" in Parliament and has the power to discipline him.

It is therefore clear that, although difficult, it is possible to establish the existence of a master-servant relationship between a political party and its chief whip, although it does not fit precisely into what is generally considered to be the default mould for an employer-employee relationship. In *Hollis v Vabu (Pty) Ltd*,<sup>98</sup> the Australian High Court noted that where a relationship does not fit precisely into such an established dichotomy

<sup>87</sup> Kahn 1985 *U Pa L Rev* 1440

<sup>88</sup> *Marvel v United States* 719 F 2d 1507 1514 (10th Cir 1983); *Coleman v Board of Education* 1978 383 A 2d 1275 1279 See also Kahn 1985 *U Pa L Rev* 1440

<sup>89</sup> Kahn 1985 *U Pa L Rev* 1440

<sup>90</sup> Kahn 1985 *U Pa L Rev* 1441

<sup>91</sup> In *Baxter v Morningside Inc* 1974 521 P 2d 946 949 the Court found that, for the right to control to vest in the master, direct supervision was not required. It was enough that there was agreement regarding the objective, destination and particulars of the servant-volunteer's task. See also Kahn 1985 *U Pa L Rev* 1441

<sup>92</sup> Kahn 1985 *U Pa L Rev* 1441

<sup>93</sup> Kahn 1985 *U Pa L Rev* 1441

<sup>94</sup> 2004 SCC 17 This case before the Supreme Court of Canada concerned the abuse of a number of boys by a Roman Catholic parish priest. The Court had to consider whether the church could be held vicariously liable for the sexual misconduct of the priest. The Roman Catholic Episcopal Corporation of St George's was held vicariously liable by the trial judge, while it dismissed the claim against the church. On appeal, the Court upheld the dismissal of the action against the latter, but the majority held the former party directly, rather than vicariously, liable.

<sup>95</sup> Para 27

<sup>96</sup> Para 27

<sup>97</sup> Para 27

<sup>98</sup> 2001 ATC 4508; 2001 207 CLR 21 In this case the Court had to consider whether there existed an employment relationship between independent couriers and a courier company

“... it seems a better approach to *develop* the principles concerning vicarious liability in a way that gives effect to modern social conditions ... [seeing that] the genius of the common law is that the first statement of a common law rule or principle is not its final statement ... [as] contours of rules and principles expand and contract with experience and changes in social conditions”.<sup>99</sup>

Therefore it seems arguable that the vicarious liability principles developed in the case of volunteers and non-profit organisations by foreign courts to establish a special relationship akin to that of an employment relationship can in similar fashion be extended to allow for the establishment of such a special master-servant relationship between a political party and its chief whip.

#### 4 Scope of employment

It has been argued above that the special relationship between a political party and its chief whip is akin to that of an employment relationship. In this regard the scope of the chief whip’s services or “employment” is an important consideration.<sup>100</sup> The presence of vicarious liability on the part of the political party will mainly depend on the nature of the chief whip’s activity that brought about the wrong for which the liability could potentially be attributed to the political party.<sup>101</sup> Within the special relationship which exists between a political party and its chief whip it is therefore a complex issue to determine whether a chief whip’s wrongful act of sexual harassment falls within the course or scope of employment. The complexity of this vicarious liability requirement has given rise to judicial creativity as revealed by Corbett JA in *Ngubetole v Administrator, Cape*.<sup>102</sup>

“Because of ... [the] flexibility or lack of precision in the concept of ‘course of employment’ in the sphere of vicarious liability, the Courts ... have devised various tests for determining whether a particular act, or course of conduct, on the part of a servant falls within or without the course of his employment. Some of these tests are of broad, general application, others are more suited to the particular situations for which they were devised.”<sup>103</sup>

The most noteworthy of these tests are the standard test and the risk test. The standard test<sup>104</sup> is traditionally favoured. In terms of this test an employer only incurs vicarious liability for the misconduct of an employee if the misconduct is committed while acting, or attempting to act, for the benefit of the employer.<sup>105</sup> Therefore the misconduct will fall within the scope of employ-

<sup>99</sup> Para 72 (emphasis added) See also *Forstaff Pty Ltd v Chief Commissioner of State Revenue (NSW)* 2004 ATC 4758 para 60

<sup>100</sup> Sykes 1988 *Harv L Rev* 563

<sup>101</sup> Sykes 1988 *Harv L Rev* 563

<sup>102</sup> 1975 3 SA 1 (A) 9

<sup>103</sup> Kahn 1985 *U Pa L Rev* 1442- 1443 similarly explained that “[t]he tests for scope of employment are varied and complex...the emphasis is on how others perceive the relation”

<sup>104</sup> The Supreme Court of Appeal in *Absa Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* 2001 1 SA 372 (SCA) 378 phrased this test as follows: “The standard test for vicarious liability of a master for the delict of a servant is whether the delict was committed by the employee while acting in the course and scope of his employment. The inquiry is frequently said to be whether at the relevant time the employee was about the affairs, or business, or doing the work of, the employer...It should not be overlooked, however, that the affairs of the employer must be related to what the employee was generally employed or specifically instructed to do” See also Whitcher “Two Roads to an Employer’s Vicarious Liability for Sexual Harassment: *S v Grobler Bpk en ’n Ander* and *Nsabo v Real Security CC*” 2004 *ILJ* 1907 1909

<sup>105</sup> *Lister v Hesley Hall Limited* 2001 UKHL 22 para 17



ment if an employee is not acting in his or her own interest.<sup>106</sup> This standard test contains both a subjective and an objective perspective.<sup>107</sup> The subjective element looks towards the intent of the servant that committed the wrongful act, whilst the objective element<sup>108</sup> places the emphasis on the establishment of a causal<sup>109</sup> link between the action of the servant and the business of the master.<sup>110</sup> At this stage, political parties might argue (with the focus on the subjective intent element) that acts of sexual harassment committed by a chief whip do not fall within the duties prescribed to him and therefore a chief whip guilty of such misconduct does so on a “frolic of his own”. The House of Lords in *Lloyd v Grace, Smith & Co*<sup>111</sup> revised this restrictive view, as it is not “in tune with the needs of society”.<sup>112</sup> Judicially therefore a broader view of the “scope of employment”<sup>113</sup> called for “an intense focus on the [objective] connection between the nature of the employment and the tort of the employee”.<sup>114</sup> Therefore, where the wrongful actions of a servant can be sufficiently linked to the general nature of his services it is possible for a master to be held vicariously liable for those actions.<sup>115</sup> Similarly, the Supreme Court of Canada in *John Doe v Bennett*<sup>116</sup> affirmed the fact that churches, dioceses and episcopal corporations can be held vicariously liable for the misconduct of a servant, even where that servant’s actions are in opposition with the entity’s

<sup>106</sup> Para 171; *Minister of Police v Rabie* 1986 1 SA 117 (A) 134 See also Neethling et al *Deliktereg* 404

<sup>107</sup> Neethling et al *Deliktereg* 404

<sup>108</sup> The objective element looks to establish a causal connection between the employment activities associated with the master’s business and the servant’s wrongful action. In this regard Sykes 1988 *Harv L Rev* 571 explained that there is in fact an assumption at work that the business of the master “caused” the wrongful acts committed by the servant. He, however, showed that this assumption did not create an inflexible objective approach as the “cause” is still made dependent of the context of every factual situation. Sykes further noted that a distinction could be drawn between situations where the master’s business fully or partially caused the wrongful acts of a servant. See Seavy *Handbook of the Law of Agency* (1964) 148 as quoted in Sykes 1988 *Harv L Rev* 571-572

<sup>109</sup> Sykes 1988 *Harv L Rev* 571 pointed out that “[t]he legal meaning of the term “cause” depends upon context”. According to Seavy *Handbook of the Law of Agency* 148, wrongful actions fall within the scope of employment if “it can be said rationally that the employment is the primary cause of the [wrongful act or omission]”. See Sykes 1988 *Harv L Rev* 583

<sup>110</sup> Roederer “The Constitutionally Inspired Approach to Vicarious Liability in Cases of Intentional Wrongful Acts by the Police: One Small Step in Restoring the Public’s Trust in The South African Police Service” 2005 *SAJHR* 575 595. In *Minister of Police v Rabie* 1986 1 SA 117 (A) 134 the Appeal Court phrased the standard test as follows: “It seems clear that an act done by a servant ... for his own interest and purposes, although occasioned by his employment, may fall outside the course and scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant’s [subjective] intention ... On the other hand, if there is nevertheless [objectively] a sufficiently close link between the servant’s acts for his own interests and purposes and the business of his master, the master may yet be liable ... And it may be useful to add 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 may rightly be regarded as modes – although improper modes – of doing them ...’ ” See also Neethling et al *Deliktereg* 404

<sup>111</sup> 1912 AC 716 See also *Lister v Hesley Hall Limited* 2001 UKHL 22 para 17

<sup>112</sup> *Lister v Hesley Hall Limited* 2001 UKHL 22 para 17. However, keep in mind that the Court in *Bugge v Brown* 1919 26 CLR 110 117-118 per Isaacs J explained that the “scope of employment” is a phrase used to “to indicate the just limits of a master’s responsibility for the wrongdoing of his servant” as “the law recognizes that it is equally unjust to make the master responsible for every act which the servant chooses to do”

<sup>113</sup> In that an employer may be held vicariously liable for the misconduct of an employee who acts to his own benefit

<sup>114</sup> *Lister v Hesley Hall Limited* 2001 UKHL 22 para 17

<sup>115</sup> Neethling et al *Deliktereg* 406

<sup>116</sup> 2004 SCC 17

religious belief and doctrines.<sup>117</sup> Therefore it can similarly be argued that situations may exist where, regardless of the fact that the chief whip's power was not bestowed on him with the aim of furthering his sexual advances towards other vulnerable persons (such as the political party's female administrative assistants), but rather to further the political party's interest, the party may still be held vicariously liable for the damages suffered by the victim. Moreover, a political party will not succeed in arguing that the personal nature of sexual harassment places it outside the scope of employment. The House of Lords in *Majrowski v Guy's and St Thomas' NHS Trust*<sup>118</sup> pointed out that although

"[i]t is true that this new wrong usually comprises conduct of an intensely personal character between two individuals ... this feature may also be present with other wrongs which attract vicarious liability, such as assault".

Therefore, as stated by the Constitutional Court in *NK v Minister of Safety and Security*,<sup>119</sup>

"an intentional deviation from duty does not automatically mean that an employer will not be liable".

The vicarious liability test found in the risk theory is complementary to this view of the Constitutional Court. In its most simple form the doctrine of vicarious liability can be described as a form of risk allocation.<sup>120</sup> According to this approach, a master who determines the circumstances of employment and thereby creates a risk of wrongful acts occurring, will bear the burden of being vicariously liable for those wrongful acts if committed by his or her servants.<sup>121</sup> Whitcher<sup>122</sup> notes that the cardinal question in determining liability on risk "would be whether, in fairness, the [master] ... could be said to have assumed the specific risk that materialized". This approach has not escaped criticism and has been accused of confusing the actual context of the doctrine with the rationale<sup>123</sup> for its existence.<sup>124</sup> Neethling, Potgieter & Visser<sup>125</sup> nevertheless argue that it should be possible to hold a master vicariously liable for the wrongful actions of a servant if the appointment of that

<sup>117</sup> White "Supreme Court of Canada Brings Clarity to Vicarious Liability of Churches in Canada" 2005 *Church Law Bulletin* <http://www.carters.ca> 1 3 (accessed 1 December 2006)

<sup>118</sup> 2006 UKHL 34 para 25

<sup>119</sup> 2005 6 SA 419 (CC) paras 25-26.

<sup>120</sup> White 2005 *Church Law Bulletin* 2

<sup>121</sup> In contrast to the standard test, the risk theory is the more controversial alternative for determining whether the doctrine of vicarious liability finds application. See Whitcher 2004 *ILJ* 1908. In *Minister of Police v Rabie* 1986 1 SA 117 (A) 134, Jansen JA stated (without commenting on the scope and boundaries of the risk theory) that this test shifts the focus of the enquiry from that of the intention of the employee and the nature of the possible link that can be established between the employee's acts and his employment, to the principal object of detecting whether the employer created the risk within which the employee's wrongful act fell. See also Neethling et al *Deliktereg* 406

<sup>122</sup> 2004 *ILJ* 1908 1909

<sup>123</sup> In *John Doe v Bennett* 2004 SCC 17 para 20, McLachlin CJ of the Supreme Court of Canada, commented on the rationale of the doctrine of vicarious liability: "Vicarious liability is based on the rationale that the person who puts a risky enterprise into the community may fairly be held responsible when those risks emerge and cause loss or injury to members of the public. Effective compensation is a goal. Deterrence is also a consideration. The hope is that holding the employer or principal liable will encourage such persons to take steps to reduce the risk of harm in the future."

<sup>124</sup> See also *Minister of Law and Order v Ngobo* 1992 4 SA 822 (A)

<sup>125</sup> *Deliktereg* 407 n 135

servant put him or her in a position that facilitated a wrongful act. Therefore, by empowering the servant, the master created the risk for which it would be reasonable, fair and just to hold him or her vicariously liable.<sup>126</sup> It has also been held that excessive liability as a consequence of the possible broad interpretation of the “scope of employment” can be limited by the identification of an employer’s “zone of risk”.<sup>127</sup>

Neethling et al<sup>128</sup> proclaim that the risk theory should not be regarded as a separate theory to establish master-liability, as it is intrinsically linked to the enquiry that determines whether a servant acted within the scope of his or her employment. As the Supreme Court of Canada in *Bazley v Curry*<sup>129</sup> indicated:

“Applying ... general considerations to sexual abuse by employees there must be a close connection<sup>130</sup> between what the employer was asking the employee to do (the *risk created* by the employer’s enterprise)<sup>131</sup> and the wrongful act. It must be possible to say that the employers significantly increased the *risk of the harm* by putting the employee in his or her position and requiring him to perform the assigned tasks.”<sup>132</sup>

The Court noted further that, in the correct application of this approach, an investigation of “the employee’s specific duties and ... whether they gave rise to sexual opportunities for wrongdoing”<sup>133</sup> has to be undertaken. In this context, “risk” is a factor to be considered (or at most a supplementary test) and does not replace the subjective-objective link to be established.<sup>134</sup>

In *John Doe v Bennett*,<sup>135</sup> the Supreme Court of Canada indicated that the power imbalance<sup>136</sup> between the parish priest and the community created a

<sup>126</sup> Neethling et al *Deliktereg* 407 n 135

<sup>127</sup> According to this argument, vicarious liability could be imposed upon a master whose business could be seen as a factor contributing to the cause of the wrongful act committed by the servant and the deviation from the servant’s instructions or duties in the commitment of that act could be identified as probable given the nature of the servant’s employment. See Sykes 1988 *Har L Rev* 583 n 48

<sup>128</sup> *Deliktereg* 407

<sup>129</sup> 1999 2 SCR 534 para 46. *In casu* the Court rejected the argument that the public interest prescribes that non-profit organisations should be protected from such liability and found that the relationship between the association and the counsellor was sufficiently close and that the misconduct of the counsellor was a manifestation of the risk inherent in the association’s operations. The Court (para 46) summarised its approach to the doctrine of vicarious liability as follows: “[T]he test for vicarious liability for an employee’s sexual abuse of a client should focus on whether the employer’s enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm. The test must not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of vicarious liability – fair and efficient compensation for wrong and deterrence. This requires trial judges to investigate the employee’s specific duties and determine whether they gave rise to special opportunities for wrongdoing. Because of the peculiar exercises of power and trust that pervade cases such as child abuse, special attention should be paid to the existence of a power or dependency relationship, which on its own often creates a considerable risk of wrongdoing.”

<sup>130</sup> This refers to the objective element in the standard test

<sup>131</sup> In the situation under discussion, this can be equated to the furtherance of a political party’s political agenda as well as to the specific role a chief whip plays in this “enterprise” of the political party

<sup>132</sup> Emphasis added

<sup>133</sup> *Bazley v Curry* 1999 2 SCR 534 para 46. See also *LEW v United Church of Canada* 2005 BCSC 564 para 53

<sup>134</sup> Neethling et al *Deliktereg* 407

<sup>135</sup> 2004 SCC 17

<sup>136</sup> With regard to the establishment of vicarious liability, the Supreme Court of Canada in *John Doe v Bennett* para 21 also noted that “[t]he employer’s control over the employee’s activities is one indication of whether the employee is acting on his or her employer’s behalf ... [a]t the heart of the inquiry lies the question of power and control by the employer: both that exercised over and that granted to the employee.” The Court followed by stating that “[w]here this power and control can be identified, the imposition of vicarious liability will compensate fairly and effectively.”

risk that led to the boys in the community being sexually assaulted by their priest. With regard to this risk the Court explained that

“[w]hile Bennett had a particularly forceful personality, the root of his power over his victims lay in his role as a priest, conferred by the bishop”.<sup>137</sup>

Consequently, Bennett’s position gave him enormous power and standing in the community<sup>138</sup> and within this lay dormant the risk of abuse.

In the *Bennett* case, however, the Court was dealing with a salaried priest whose relationship to the bishop was one akin to an employment relationship. Yet in 2005 a case was brought before the Supreme Court of British Columbia in *LEW v United Church of Canada*<sup>139</sup> that concerned the question of a church’s vicarious liability for the acts of sexual abuse against children committed by one of its elders who was also a lay minister and in effect a volunteer. The Court found that the situation *in casu* was distinguishable from that in the *Bennett* case.<sup>140</sup> This was so due to the fact that, unlike the priest in the *Bennett* case who had authority (and therefore also the power) to direct altar boys, the elder’s duties in the *LEW* case were limited to Sunday services before the congregation.<sup>141</sup> Therefore, the fact that the church allowed him to act as a volunteer minister did not create a risk as in the *Bennett* case where he could abuse his power to commit wrongful actions. The importance of this judgment lies in the fact that the church did not escape vicarious liability as a result of the fact that the elder was a volunteer. Liability was diverted due to the fact that the elder’s duties did not give him the power and opportunity to come into direct contact with the children of the congregation more so than any other member of the community. The decisive factor was therefore that the church did not create the risk.

According to a recent statement by the ANC National Disciplinary Committee in December 2006 (as a response to the removal of the party’s chief whip from his position after allegations of sexual harassment), its chief whip’s status

“gave him enormous power and authority ... [as he] effectively ran the parliamentary office, interacted with political parties in the National Assembly, disciplined members of the National Assembly and played a leading role in the Caucus and the Political Committee of Parliament”.<sup>142</sup>

Therefore, following the reasoning of the Supreme Court of Canada in the *Bennett* case, a chief whip’s position, as bestowed upon him or her by a political party, grants that person great power and standing. Lurking behind this status is the risk of abuse of power, such as found in instances of sexual harassment.

<sup>137</sup> Para 31 According to the trial judge (quoted with approval by the Supreme Court of Appeal of Canada), “[t]he awe in which Father Bennett was held by the community at large contributed to his ability to control his victims”

<sup>138</sup> Para 31

<sup>139</sup> 2005 BCSC 564

<sup>140</sup> Paras 69-71

<sup>141</sup> Para 66

<sup>142</sup> “Statement of the ANC National Disciplinary Committee in the Case of Mbulelo Goniwe” (14 December 2006)

Consequently, seeing as both the objective sufficient link requirement and the risk theory targets relevant considerations for the application of the doctrine of vicarious liability to a set of facts, the Supreme Court of Canada (in line with its earlier judgment in the *Bazley* case) opted in *Blackwater v Plint*<sup>143</sup> to follow an approach incorporating the objective element into the risk theory. The Court then identified the following factors to be considered when determining whether a servant acted within the “scope of his employment”:

“Vicarious liability may be imposed where there is a significant connection between the conduct authorized by the employer or controlling agent and the wrong. Having created or enhanced the risk of the wrongful conduct, it is appropriate that the employer or operator of the enterprise be held responsible, even though the wrongful act may be contrary to its desires ... When determining whether vicarious liability should be imposed, the court bases its decision on several factors, which include: (a) the opportunity afforded by the employer’s enterprise for the employee to abuse his power; (b) the extent to which the wrongful act furthered the employer’s interests; (c) the extent to which the employment situation created intimacy or other conditions conducive to the wrongful act; (d) the extent of power conferred on the employee in relation to the victim; and (e) the vulnerability of potential victims.”<sup>144</sup>

In similar fashion, O’Regan J, writing for the Constitutional Court in the *NK* case<sup>145</sup> (while emphasising the right to equality, dignity and freedom and security of the person), noted that the test set in *Minister of Police v Rabie*<sup>146</sup> is very similar to the test employed in common law jurisdictions and proclaimed a preference for the risk theory.<sup>147</sup> The Court further emphasised that this test for vicarious liability should be flexible in its application and

“approached with the spirit, purport and objects of the Constitution in mind [and] ... incorporate ... constitutional norms ... [as the risk test in its application] should not offend the Bill of Rights or be at odds with our constitutional order”.<sup>148</sup>

## 5 The flexible constitutional perspective

Courts have through the years emphasised that the doctrine of vicarious liability is designed to adapt to society’s need for the regulation of certain high risk relationships.<sup>149</sup> In *Lister v Hesley Hall Limited*,<sup>150</sup> the House of Lords articulated that vicarious liability is an imposed legal responsibility that balances the two conflicting policies of social interest and undue burden. Although such a legal responsibility is recognised, its scope is not set in stone, as

<sup>143</sup> 2005 3 SCR 3

<sup>144</sup> Para 20

<sup>145</sup> 2005 6 SA 419 (CC)

<sup>146</sup> 1986 1 SA 117 (A).

<sup>147</sup> See Roederer “The Constitutionally Inspired Approaches to Police Accountability for Violence Against Women in the U S and South Africa: Conservation Versus Transformation” 2005 *Tul J Comp & Int’l L* 91 135

<sup>148</sup> *NK v Minister of Safety and Security* 2005 6 SA 419 (CC) para 44

<sup>149</sup> See *Hollis v Vabu (Pty) Ltd* 2001 ATC 4508; (2001) 207 CLR 21 para 72: “[T]he genius of the common law is that the first statement of a common law rule or principle is not its final statement. The contours of rules and principles expand and contract with experience and changes in social conditions.”

<sup>150</sup> 2001 UKHL 22 para 14. This case referred to the decisions in *Bazley v Curry* 1999 2 SCR 534 and *Jacobi v Griffiths* 1999 2 SCR 570 as landmark decisions that are both “luminous and illuminating”. See also *Grobler v Naspers Bpk* 2004 5 BLLR 455 (C) 514

“[w]hat was once presented as a legal principle has degenerated into a rule of expediency, imperfectly defined, and changing its shape before our eyes under the impact of social and political conditions”.<sup>151</sup>

Therefore, in line with this traditional perspective, value judgments and policy considerations would have informed the development of the doctrine of vicarious liability,<sup>152</sup> but regard must be had to the fact that

“there is [no] reason of principle or policy which can be of substantial guidance in the resolution of the problem of applying the rule in a particular case [as] ... [t]heory may well justify the existence of the concept, but it is hard to find guidance from any underlying principle which will weigh in the decision whether in a particular case a particular wrongful act by the employee should or should not be regarded as falling within the scope of employment”.<sup>153</sup>

As a result of the intrinsic flexibility of the doctrine of vicarious liability, which Corbett JA pointed out in the earlier judgment of *Ngubetole v Administrator, Cape*,<sup>154</sup> the doctrine consequently developed in response to the demands of public interest.

The earlier discussion of the common law criteria for the application of the doctrine of vicarious liability indicates that it is indeed sufficiently flexible to accommodate the special relationship which exists between a political party and its chief whip. However, regard must be had to the Constitutional Court’s warning in *Pharmaceutical Manufacturers of SA: In re Ex Parte President of the RSA*.<sup>155</sup> In that case the Court<sup>156</sup> emphasised that the common law cannot be viewed as a law upon its own, separate from the Constitution. South Africa’s new constitutional dispensation requires (as indicated by the approach to vicarious liability in the *NK* case<sup>157</sup>) that the law in force at the time of the commencement of the Constitution be viewed “through the prism of the Bill of Rights”.<sup>158</sup> Section 39(2) grants such a prism, in that it obliges courts, tribunals and forums, “when developing the common law ... [to] promote the spirit, pur-

<sup>151</sup> *Kilboy v South Eastern Fire Area Joint Committee* 1952 SC 280 285 Holmes *Common Law* (1951) 5 also commented that “[t]he reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things: and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career” See also *Lister v Hesley Hall Limited* 2001 UKHL 22 para 34

<sup>152</sup> As noted by Lord Reid in *Stavely Iron & Chemical Co Ltd v Jones* 1956 AC 627 643: “[t]he doctrine of vicarious liability has not grown from any clear, logical or legal principle but from social convenience and rough justice” See also *Lister v Hesley Hall Limited* 2001 UKHL 22 para 35

<sup>153</sup> *Lister v Hesley Hall Limited* 2001 UKHL 22 para 35

<sup>154</sup> 1975 3 SA 1 (A) 9

<sup>155</sup> 2000 2 SA 674 (CC)

<sup>156</sup> Paras 44-49: “There are not two systems of law, each dealing with the same subject-matter, each having similar requirements ... There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control ... The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order it proclaims – thus, the command that law be developed and interpreted by the courts to promote the ‘spirit, purport and objects of the Bill of Rights’”

<sup>157</sup> 2005 6 SA 419 (CC). This was a case where the Constitutional Court held the Minister of Safety and Security vicariously liable for the actions of police officers that kidnapped and raped a woman who approached them for assistance when she found herself stranded

<sup>158</sup> *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty): In Re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 1 SA 545 (CC) para 21. See also *Daniels v Campbell NO* 2004 5 SA 331 (CC) para 44. S 7(1) of the Constitution recognises the Bill of Rights as South Africa’s democratic cornerstone, with intrinsic values of human dignity, equality and freedom



port and objects of the Bill of Rights”.<sup>159</sup> This grants South African courts the opportunity to develop the common law scope of vicarious liability to take into account society’s perspective of the severe problem of sexual harassment.

In the *NK* case,<sup>160</sup> O’Regan J stated:

“[A]s a matter of law and social regulation, the principles of vicarious liability are principles which are imbued with social policy and *normative content*. Their application will always be difficult and will require what may be troublesome lines to be drawn by courts applying to them.”

With regard to the development of common law principles in the law of delict, Ackermann and Goldstone JJ in *Carmichele v Minister of Safety and Security*<sup>161</sup> proclaimed:

“Under section 39(2) of the Constitution concepts such as ‘policy decisions and value judgments’ reflecting ‘the wishes ... and the perceptions ... of the people’ and ‘society’s notions of what justice demands’ might well have to be replaced, or supplemented and enriched by the appropriate *norms of the objective value system* embodied in the Constitution.”<sup>162</sup>

Denying the flexible doctrine of vicarious liability, a constitutional normative context (as indicated by the emphasised abstracts) leaves it foreign to the ideals of a democratic society. Only when this doctrine is clothed in constitutional colours and informed by the Constitution’s objective normative value system will the social and economic rationale underlying the doctrine gain meaning and purpose<sup>163</sup> in situations of sexual harassment such as the one under consideration.

In the 2004 landmark decision of *Grobler v Naspers Bpk*,<sup>164</sup> the Cape High Court took the first steps towards a common law expansion of the scope of vicarious liability in sexual harassment cases that embraces our new constitutional dispensation and its accompanying objective normative system. Although the Court stated that the traditional position (ie that employers can only be held vicariously liable for the wrongful actions of their employees if such wrongful actions were committed “within the course and scope of their employment”) must be interpreted broadly to accommodate legal common law flexibility that allows for changing social and economic circumstances, along with policy considerations,<sup>165</sup> the Court did not lose sight of the Constitution.

<sup>159</sup> In *NK v Minister of Safety and Security* 2005 6 SA 419 (CC) para 22 O’Regan J articulated that even though it is clear that the doctrine of vicarious liability is based on policy considerations, if the furtherance of the constitutional values of human dignity, equality and freedom in a democratic society necessitates it, “the principle of vicarious liability [must be viewed] through the prism of section 39(2) of the Constitution ... [and not merely characterised by] ... the application of the common-law principle of vicarious liability as a matter of fact untrammelled by any considerations of law or normative principle”

<sup>160</sup> Para 22 (emphasis added)

<sup>161</sup> 2001 4 SA 938 (CC) para 56

<sup>162</sup> Emphasis added In *S v Makwanyane* 1995 3 SA 391 (CC) para 88, Chaskalson P also declared that “[p]ublic opinion may have some relevance to ... [an] enquiry [as to constitutionality of the death penalty], but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour”

<sup>163</sup> *NK v Minister of Safety and Security* 2005 6 SA 419 (CC) para 23

<sup>164</sup> 2004 5 BLLR 455 (C)

<sup>165</sup> It must be observed that McLachlin J in *Bazley v Curry* 1999 2 SCR 534 para 27 noted that “[a] focus on policy is not to diminish the importance of legal principle”. See also *Jacobi v Griffiths* 1999 2 SCR 570 para 29 and *Ontario Ltd v Sagaz Industries Canada Inc* 2001 SCC 59 para 27 In *Ontario Ltd v Sagaz Industries Canada Inc* para 30 Major J (with reference to McLachlin J in *Bazley v Curry* 1999 2 SCR 534) explained that the “[i]dentification of the policy consideration underlying the imposition of vicarious liability [however] assists in determining whether the doctrine should be applied in a particular case ...”

The Court stated that, in the event that such a common law extension of its own accord is incorrect, section 39(2) warrants such a development for the promotion and protection of women's right to dignity and freedom and security of person.<sup>166</sup> This stance of the Court in *Grobler v Naspers Bpk*<sup>167</sup> is evidence of the influence the Constitution's objective value system has on legal reasoning in South Africa.

The objective value system imbedded in the democratic South Africa's Constitution is an attempt to correct the injustices and human rights violations that represent the tragedy of apartheid. Apartheid generated and sustained the disempowerment of the majority of South Africa's population. Due to the fact that the apartheid era is intrinsically linked to the reminiscences of abuse of power by authority figures, as well as organs of the State, "[i]t will take many years of strong commitment, sensitivity and labour"<sup>168</sup> to eradicate the intrusions of the past, characterised by the

"intentional and persistent marginalisation, exploitation and oppression ... and the pervasiveness of patriarchy to concretely shape severe patterns of social, economic and political vulnerability and deprivation in South Africa".<sup>169</sup>

Modern day society's need to address the problem of sexual harassment legally gains an extra dimension when viewed in South Africa's historical context.

In the shadows of memories of unrestrained power, power abuse through acts of sexual harassment by public political figures who are supposed to uphold and promote the constitutional values so dear to the democratic society they represent, are all the more worrying. This is especially distressing as women, who are usually the victims, have first hand experience of social, economic and political deprivation through abuse of power. How can the public expect a political authority figure, such as a chief whip, to promote constitutional values in Parliament if he personally has no respect for those values when he infringes the values of and rights to human dignity, equality and freedom of another by making himself guilty of acts of sexual harassment? Therefore, as Roederer<sup>170</sup> stated with reference to the *NK* case,<sup>171</sup> it needs to be considered whether

"the existing law of vicarious liability ... further[s] these goals and the goals of South Africa's democratic transition; ... [whether] it live[s] up to the values and aspirations of the new constitutional order or ... [whether] it need[s] to be developed to further these goals, values and aspirations?"

<sup>166</sup> As articulated by Nel J in *Grobler v Naspers Bpk* 2004 5 BLLR 455 (C) 527: "So ook behoort ons howe, na my mening, die 'reël' aan te pas ten einde uitvoering te gee aan die plig aan hulle opgelê om die reg op die ingebore waardigheid, die reg op vryheid en sekerheid van persoon en die reg op liggaamlike en psigiese integriteit van vrouens in die werkplek te beskerm en te bevorder"

<sup>167</sup> 2004 5 BLLR 455 (C) 527

<sup>168</sup> *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 4 SA 671 (CC) para 43

<sup>169</sup> Pieterse "What Do We Mean When We Talk About Transformative Constitutionalism?" 2005 *SAPL* 155 157 However, as declared by Pieterse 2005 *SAPL* 159, "[o]ne should of course guard against viewing South African history as a fixed, uni-dimensional 'grand narrative' which emphasises only certain aspects of its past in which various forms of societal oppression interacted and overlapped"

<sup>170</sup> 2005 *SAJHR* 578

<sup>171</sup> 2005 6 SA 419 (CC)

As described in the Postamble of the Interim Constitution,<sup>172</sup> our Constitution provides

“a historic bridge between the past of a deeply divided society ... and a future founded on the recognition of human rights, democracy and peaceful co-existence”.

Political figures resorting to degrading and discriminatory practices of sexual harassment post-1994 demolish such a bridge brick by brick in full view of our democratic society. Such conduct clearly does not advance peaceful co-existence irrespective of sex or gender. The elimination of sexual harassment and the development of a peaceful co-existence demand the respect of the constitutional values of human dignity, equality and freedom, but in the words of Albertyn & Goldblatt,<sup>173</sup> “this transformation project [also] involves the eradication of systematic forms of domination” such as the power (and gender) imbalance on which sexual harassment feeds. Seeing as eradication calls for active steps and not just passive abstention, the imposition of vicarious liability on political parties, where their power hungry chief whips threaten the values of our democratic society’s peaceful co-existence, cannot be regarded as too great a burden. The eradication of the domination of women by way of sexual harassment necessitates the promotion and protection of the equal dignity<sup>174</sup> of women as a disadvantaged vulnerable group of victims.

The Constitutional Court in *S v Makwanyane*<sup>175</sup> stated that the importance of personal rights could not be emphasised too strongly:

“Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.”

Turning a blind eye to the abuse of political power by a chief whip by way of acts of sexual harassment disregards the constitutional aim of promoting and protecting the “intrinsic worth of human beings” and women in particular due to their historical suppression by a patriarchal legal system.

The Constitutional Court in *President of the Republic of South Africa v Hugo*<sup>176</sup> also acknowledged equality’s importance as central to our constitutional vision. In South Africa’s democratic history, the value and right of equality has transformed from its mere formal nature<sup>177</sup> to a substantive content.<sup>178</sup> In the light of the constitutional promotion and protection of substantive equality, sexual harassment cannot merely be removed from the

<sup>172</sup> Act 200 of 1993

<sup>173</sup> “Facing the Challenge of Transformation: Difficulties of an Indigenous Jurisprudence of Equality” 1998 *SAJHR* 248 249

<sup>174</sup> In essence the difference between dignity and equality as values and rights are found in the fact that as values they inform the interpretation of other rights, while their status as rights makes dignity and equality also enforceable under the Constitution. The same goes for the constitutional value of freedom and the rights associated with it

<sup>175</sup> 1995 3 SA 391 (CC) para 328

<sup>176</sup> 1997 4 SA 1 (CC) para 74: “[I]n the light of our own particular history, and our vision for the future, a Constitution was written with equality at its centre. Equality is our Constitution’s focus and its organising principle.”

<sup>177</sup> Formal equality demands that all people be treated similarly regardless of their differing circumstances

<sup>178</sup> See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 para 132: “Equality should not be confused with uniformity; in fact uniformity can be the enemy of equality. Equality means treating persons with equal concern and respect across difference. It does not presuppose the elimination or suppression of difference.”

scope of the doctrine of vicarious liability by the argument that all men and women are formally equal in the workplace and theoretically able to protect their own interests equally. The reality of power imbalances makes the impact of uncontested and untamed sexual harassment all the more discriminatory against women due to their historical social oppression. Furthermore the right of women to freedom and security of their person as a personal right is informed by the value of human dignity and goes to the bodily and psychological integrity of a person and is therefore blatantly infringed upon by sexual harassment by way of an attack on the victim's personal autonomy.<sup>179</sup>

In the same transformative narrative that is envisaged by South Africa's constitutional jurisprudence<sup>180</sup> (as informed by the Constitution's objective normative system)<sup>181</sup> the common law doctrine of vicarious liability should merge its traditional elements with the values of human dignity, equality and freedom. Such a process should be undertaken in an attempt to redefine it in harmony with the Constitution. This redefinition needs to be done over time as the relevant circumstances (such as the problem under discussion) present themselves due to the fact that transformation is an enormous and long-term project that necessitates "a complete reconstruction of the state and society".<sup>182</sup>

Along with the values of human dignity, equality and freedom, our courts must not lose sight of the traditional African concept of *ubuntu*<sup>183</sup> as introduced to South Africa's constitutional jurisprudence by the Constitutional Court in *S v Makwanyane*.<sup>184</sup> *Ubuntu* conceptualises the fact that all South Africans are now part of an interdependent democratic community, unified under the Constitution, as

"[I]t recognises a person's status as human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community ... [m]ore importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all [and emphasises] ... [r]espect for the dignity of every person [as] ... integral to this concept".<sup>185</sup>

This is in line with

"the worldview that underlies the risk theory of vicarious liability [that] sees the person as a cooperating member of the community ... who is nurtured by that community and who has duties to the members of that community."<sup>186</sup>

<sup>179</sup> Nedelsky "Violence Against Women: Challenges to the Liberal State and Relational Feminism" in Shapiro & Hardin (eds) *Political Order* (1998) 454-473; 477 pointed out that women cherish their personal autonomy. See *S v Baloyi* 2000 1 BCLR 86 (CC) para 16

<sup>180</sup> In this regard the Constitutional Court in *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) para 8, declared as follows: "[T]o transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring."

<sup>181</sup> The rights of dignity, equality and freedom and security of the person are undeniably part of this system

<sup>182</sup> Albertyn & Goldblatt 1998 *SAJHR* 248-249. See also Pieterse 2005 *SAPL* 159

<sup>183</sup> *Ubuntu* as a traditional African jurisprudential concept is also reconcilable with the doctrine of vicarious liability, as the doctrine does not merely have common law roots, but can also be found in customary law. See *NK v Minister of Safety and Security* 2005 6 SA 419 (CC) para 24 and n 30

<sup>184</sup> 1995 3 SA 391 (CC). Other cases in which the Constitutional Court made specific reference to the concept of *ubuntu* were *Azania Peoples Organisation (AZAPO) v President of the Republic of South Africa* *supra* and *Hoffmann v SA Airways* 2001 1 SA 1 (CC)

<sup>185</sup> *S v Makwanyane* 1995 3 SA 391 (CC) paras 224-225

<sup>186</sup> Roederer 2005 *Tul J Comp & Int L* 136

*Ubuntu*, as pointed out by Pieterse,<sup>187</sup> therefore visualises a society that embraces harmony, instead of individual gain. In contrast to this approach, sexual harassment focuses mainly on individual gain for the harasser at the expense of the inherent human dignity and psychological integrity of the victim. Arguably, political abuse of power is in conflict with the traditional philosophy of *ubuntu* as such power abuse goes towards individual gain instead of the promotion of societal interest. In theory, the promotion of societal interest should be the aim of a political party democratically acting on behalf of the people.<sup>188</sup> Consequently, with regard to the question under consideration, the traditional African concept of *ubuntu* is reconcilable with the risk theory and informs the traditional rationale for the doctrine of vicarious liability to harmonise it with the co-dependence of South Africa's democratic society and its constitutional values of human dignity, equality and freedom.

## 6 Conclusion

If the difficulty that a chief whip is not a salaried employee of a political party can be overcome by establishing a special master-servant relationship, the flexible nature of the doctrine of vicarious liability, as informed by constitutional norms, could result in a political party being held liable for wrongful actions of its chief whip committed within the scope of his employment.

This would be the case where the control, power and authority which the political party bestowed upon the chief whip within the scope of his duty to represent and further the party's interests enabled him to abuse that control, power and authority. Such abuse could arguably be described as a risk that goes with the placement of political party members in prominent public positions. As they are then public figures, it would be in the public interest if a political party could be held liable for the realisation of such a risk.<sup>189</sup> This possibility of vicarious liability ensuing on the side of political parties would in turn make them more observant of and vigilant with regard to the actions of prominent members. Therefore the possibility of incurring vicarious liability should serve as motivation for political parties to keep tight reins on their public political figures, such as a chief whip.

A political party also attracts this potential legal responsibility as a consequence of the relationship between it and its chief whip, as the relationship is one akin to that between an employer and employee. The chief whip is placed

<sup>187</sup> "Traditional African Jurisprudence" in Roederer & Moellendorf (eds) *Jurisprudence* (2004) 438-448

<sup>188</sup> Pieterse "Traditional African Jurisprudence" in *Jurisprudence* 448

<sup>189</sup> In the statement following the former ANC chief whip's disciplinary hearing, the ANC National Disciplinary Committee stated the following with regard to the public's interest in the behaviour of parliamentary staff, such as a chief whip: "[A] representative is a public face ... The more senior the post the greater the authority exercised by that person and the greater the responsibility. Such authority must be exercised with prudence and fairness ... Parliament enjoys a special status in our Constitution. The public is therefore entitled to expect behaviour from its members which is above reproach. Parliamentary staff must treat members with courtesy and respect. Members must therefore show the same consideration. Complaints from staff of bullying or harassment, including any allegation of sexual harassment, or any other inappropriate behaviour on the part of members must be taken seriously and investigated." See "Statement of the ANC National Disciplinary Committee in the case of Mbulelo Goniwe" (14 December 2006)

in his position by the political party to which he voluntarily applied for membership. The chief whip, as voluntary servant, holds office at the pleasure of the political party, as master. Furthermore, the chief whip's primary function is to serve the political party by keeping the members of the political party in line with the will of the party and therefore his instructions as servant is to utilise the power the party has bestowed upon him to further that master's interests. This warrants the inference that the right to control is present in this special relationship and in fact lies with the political party, but it also creates a risk that the power the political party so bestows and controls can be abused by its chief whip and can result in vicarious liability for the political party for misconduct in the form of sexual harassment committed by its chief whip.

If then in future a situation where a political party's accountability for its chief whip's wrongful act of sexual harassment has to be decided by the courts, the flexible scope of the doctrine of vicarious liability should be broadened (as has been done in Canadian jurisprudence in cases involving unpaid volunteers and clergy) in line with the constitutional obligation in section 39(2) to allow for this relationship to attract such liability. Nonetheless, the fact that a political party can be held vicariously liable in certain circumstances for the wrongful actions of its chief whip must not become an insurmountable burden for political parties. In a similar fashion as in section 60 of the Employment Equity Act,<sup>190</sup> where allowance is made for an employer to escape vicarious liability, South African courts should also grant the same escape route to political parties. If a political party "consult[s] all relevant parties and ... take[s] the necessary steps to eliminate the alleged conduct"<sup>191</sup> and "is able to prove that it did all that was reasonably practicable" to prevent the abuse of power by its chief whip, then vicarious liability should not fall upon it.

The threat in ignoring such abuses of power lies in the fact that it will escalate to more such abuses and disregard for the rights and values of the Constitution, because

"domination always appears natural to those who possess it, and the law insidiously transforms the fact of domination into a legal right [as] ... [i]nequality permeates some of our most cherished and long-standing laws and institutions".<sup>192</sup>

Therefore, the advantage of employing the common law doctrine of vicarious liability to fulfil the legal constitutional function of protecting "those whom nature did not place in a dominant position"<sup>193</sup> and make political parties more conscious of the (ab)use of their delegated social power, must not be overlooked. In the words of O'Regan J in *NK v Minister of Safety and Security*,<sup>194</sup> the above discussion

<sup>190</sup> 55 of 1998

<sup>191</sup> S 60(2) Employment Equity Act 55 of 1998

<sup>192</sup> L'Heureux-Dubé J of the Canadian Supreme Court as quoted in *Albertyn & Goldblatt* 1998 *SAJHR* 248 249

<sup>193</sup> L'Heureux-Dubé J of the Canadian Supreme Court as quoted in *Albertyn & Goldblatt* 1998 *SAJHR* 248 249

<sup>194</sup> 2005 6 SA 419 (CC) para 23



“implies that courts, bearing in mind the values the Constitution seeks to promote, will decide [on a case by case basis] whether the case before it is of the kind which in principle should render ... [a political party] liable”.

Courts should, however, keep in mind that the “deep-seated sense of justice”<sup>195</sup> furthered by the doctrine of vicarious liability<sup>196</sup> necessitates a finding that, in circumstances where a chief whip abuses his power to sexually harass a vulnerable administrative assistant of his political party, liability for damages should be borne by the political party. As the main source of the chief whip’s authority, the political party should be held liable for the emotional and pecuniary damages<sup>197</sup> caused by him, as the political party’s servant, if it did not act accordingly to address the problem. If our courts are not willing to recognise that a power-relationship exists between a political party and its chief whip, they will be choosing to

“ignore the values of the Constitution ... human rights, ubuntu, and the overall transformation of South African law and society ... founded on equality, dignity, freedom, mutual respect, and caring cooperation in the achievement of self determination for all South Africans”.<sup>198</sup>

## SUMMARY

This article argues that the South African doctrine of vicarious liability should be extended to bring it in line with international trends, in order to accommodate instances where members of political parties abuse their positions of power in sexual harassment scenarios. The fact that sexual harassment is unquestionably present in our society as well as in the conduct of political figures who abuse their power, necessitates legal transformation in South Africa if the progressive promotion of gender equality is to become a true characteristic of our country.

The flexible doctrine of vicarious liability can help realise this goal by making provision for special relationships, such as that between a political party and its chief whip, in accordance with common law requirements. These requirements include the presence of an employer-employee relationship, and the commission of a wrong by an employee acting within the scope of his employment.

It is argued that the relationship between a political party and its chief whip is akin to that between an employer and employee, in that a chief whip acts in accordance with the will of his political party when fulfilling his duties in Parliament. It is further explained that the mere fact that a chief whip is remunerated by Parliament does not constitute an insurmountable obstacle.

Thereafter, it is argued that the abuse of political power in the form of sexual harassment by a chief whip indeed falls within the scope of his employment. Furthermore, it is shown that if the flexible doctrine of vicarious liability is viewed within the context of constitutional values such as equality, freedom and dignity, as well as the constitutional duty to develop the common law in line with the Constitution in terms of section 39(2), it becomes apparent that the doctrine must be interpreted so as to cover special relationships such as the one discussed.

<sup>195</sup> *NK v Minister of Safety and Security* 2005 6 SA 419 (CC) para 24

<sup>196</sup> As informed by the constitutional values of human dignity, equality and freedom and the promotion and protection of the interests of the democratic South African society

<sup>197</sup> For an example of emotional and pecuniary damages suffered by victims of sexual harassment, see *Grobler v Naspers Bpk* 2004 5 BLLR 455 (C) and *Ntsabo v Real Security CC* 2004 1 BLLR 58 (LC)

<sup>198</sup> Roederer 2005 *SALJ* 606