Vicarious liability of employers: reconsidering risk as the basis for liability*

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1 *Basis for the doctrine of vicarious liability*

Vicarious[1] liability is a doctrine of liability without fault in terms of which one person is held liable for the unlawful acts of another. In the context of the employment relationship, the employer can be held liable for the unlawful acts of an employee.

Different reasons have been advanced to justify the existence of this doctrine which runs counter to the general principle of no liability without fault. Fleming has stated that the modern doctrine of vicarious liability cannot parade as a deduction from legalistic premises but should be recognised as being based on a combination of policy considerations, the most important of which 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".[2] Other reasons advanced are that the victim should enjoy fair and just compensation (out of the deeper pocket of the employer); that the employer is better equipped to spread the cost of compensating victims by taking out insurance and by price increases;[3] and that employers will take measures to prevent employees from causing damage to third persons if they will be held liable for the acts of their employees (deterrence).[4]

Greenberg AJ has stated that there is no logical basis for vicarious liability,

> "but law is not always logical; on the very question underlying this liability, viz the reason why a master should ever be liable for acts of the servant who are committed in disregard of his express instructions, judges and commentators have found difficulty in finding a logically satisfying basis, and the way in which the rule has been applied is probably a compromise between conflicting considerations".[5]

Atiyah's view is that "on the whole it seems doubtful whether much is to be gained by an examination of the true basis of vicarious liability".[6] These and other statements illustrate a widely-held consensus among a number of authors and judges who have agreed that there is no satisfactory ground or theory for the existence of the rule. It is probably this lack of a sound basis for the

* Paper delivered at the South African Law Teachers' Conference held in Bloemfontein, January 2005.

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[1] The term *vicarius* was used in Roman times to indicate a person acting as a substitute for a high official (X *Encyclopaedia Brittanica* Micropaedia 13 ed 416).

[2] Fleming *The Law of Torts* (1992) 367.

[3] Atiyah *Vicarious Liability in the Law of Torts* (1967) 27.

[4] Deakin, Johnston and Markesinis *Markesinis and Deakin's Tort Law* (2003) 583; Heuston and Buckley *Salmond and Heuston on the Law of Torts* (1996) 431.

[5] *Feldman Pty Ltd v Mall* 1945 AD 733 779.

[6] (n 3) 25-26.

[ISSN 0257 – 7747]

doctrine that has led to a plethora of confusing rules in common law countries for determining whether an employer is vicariously liable or not.

The South African author Scott[7] has indicated persuasively that the risk or danger theory should be the true foundation for the doctrine of vicarious liability. Scott describes risk liability as the liability of a person for damages flowing from the typical risks of a dangerous legal fact for which the responsible person is deemed to be liable.[8] According to this theory the work entrusted to the employee may entail certain risks in the sense that wrongful acts may be committed. Scott argues that employers should on grounds of fairness be held liable for damages suffered by third parties if these risks should materialise. However, the employer should only be held liable if the risk was typical of the specific employment activity.[9] A typical risk would be one that would be foreseeable by the reasonable person.[10] Another prominent South African author, Van der Walt, also proposed that risk provides the only satisfactory basis for no-fault liability.[11]

The theoretical foundation for the vicarious liability of an employer for the delicts of its employee has not received thorough analysis by South African courts. Our courts have accepted that the doctrine was unknown to Roman and Roman Dutch law and was inherited from English law and the courts therefore concentrated on the application of a set of rules in determining the liability of the employer.[12]

2 *Requirements for vicarious liability*

The requirements for an employer's vicarious liability as formulated by South African courts are as follows:[13]

- there must be an employment relationship;
- the employee must have acted unlawfully;
- the act must have led to a third person suffering damages; and
- the act must have taken place within the scope/course of employment.

In the quest for fairness towards both an innocent third party and an innocent employer and the balancing of the rights of these parties, South African courts have grappled with the meaning of the requirement that the act must have been done in the scope or course of employment. This element has especially been relevant in the case of acts in contradiction of the employer's instruction and not in furtherance of the interests of the employer: in other words, conduct that can be described as a deviation from the employer's instructions, or intentional wrongdoing, or a "frolic of his (the employee's) own".[14]

This article will focus on the apparently inconsistent and artificial rules

[7] Scott *Middellike Aanspreeklikheid in die Suid-Afrikaanse Reg* (1983 diss PU) 390-391.
[8] Scott (n 7) 33.
[9] Scott (n 7) 53-54.
[10] Scott (n 7) 55.
[11] Van der Walt "Enkele gedagtes oor die grondslag van deliktuele aanspreeklikheid" 1969 *THRHR* 319 333.
[12] Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1985) 505.
[13] Neethling, Potgieter and Visser *Deliktereg* (2002) 400-407.
[14] *Joel v Morison* (1834) 6 C and P 501 503 referred to by Lord Clyde in *Lister v Hesley Hall* 2001 UKHL 22.

established by South African courts to determine whether an employee acted within or outside the scope of employment in cases where the employee acted against instructions. I will discuss the test for holding an employer vicariously liable involving risk as the basis for vicarious liability, as formulated by the courts in common law countries and in *Grobler v Naspers*,[15] the first South African case on the vicarious liability of an employer for sexual harassment. The possible significance of this development for vicarious liability in cases outside the context of sexual harassment will also be discussed.

3 *History of the doctrine of vicarious liability in South Africa*

The South African doctrine of vicarious liability is largely based on the position in English law. The rule formulated by Salmond constitutes the basis of the doctrine. This rule provides that the master is responsible for wrongful acts authorised by him and that

> "[a] master is liable even for acts which he has not authorized, provided they are so connected with acts which he has authorized that they may rightly be regarded as modes — although improper modes — of doing them. . . . On the other hand if the unauthorized and wrongful act is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible; for in such a case the servant is not acting in the course of his employment, but has gone outside of it."[16]

Writings of Pothier and Voet[17] show a remarkable similarity to Salmond's rule, but could not provide adequate guidance on the application of vicarious liability to an industrialised society. South African courts in some of the earlier cases referred to the well-developed principles of the English doctrine of vicarious liability while formally adhering to principles of Roman Dutch law.[18]

However, it is precisely the rule formulated by Salmond that has been interpreted as not being sufficiently flexible to allow an employer to be held vicariously liable for the intentional wrongdoing (acts done for his/her own purposes) of an employee. In *Mkhize v Martens*[19] Innes JA stated as follows:

> "We may, for practical purposes, adopt the principle that a master is answerable for the torts of his servant committed in the course of his employment, bearing in mind that an act done by a servant solely for his own interests and purposes and outside his authority is not done in the course of his employment, even though it may have been done during his employment."[20]

The implication of this dictum was that an employer could never be held vicariously liable for the intentional wrongdoing (frolic of his own) of an employee since such conduct would be regarded as being outside the scope of employment. However, Watermeyer J admitted that "the dividing line which separates acts within the scope of a servant's employment from those without is one impossible to draw with certainty".[21]

[15] *Grobler v Naspers Bpk* 2004 4 SA 220 (C).
[16] Atiyah (n 3) 175.
[17] Scott (n 7) 8-10.
[18] Scott (n 7) 10.
[19] *Mkhize v Martens* 1914 AD 382.
[20] (n 19) 394.
[21] (n 5) 759.

4 *Interpretation of "scope of employment" in South African cases*

There is no general rule for establishing the liability of an employer that can be applied to all South African cases involving vicarious liability. The question whether the act falls within or outside the scope of employment has been described as a question of law, but it has also been said that each case will depend on its own facts.[22] This indicates that the rules formulated are perhaps not satisfactory and rather ad hoc and that the outcome of a given case may accordingly be very uncertain. Certain sub-rules have been developed by the courts for different types of actions of employees.[23] For example, a different set of rules has been developed in each of the following circumstances: deviation cases in which the employee deviated from the instructions (route) prescribed by the employer; intentional misconduct (wilful wrongdoing) where the employee did not act in furtherance of the employer's business; and cases where the employee has transported unauthorised passengers in the employer's vehicle. Rules formulated in these categories will be discussed below. It should be stressed that these examples constitute only a selection of judicial tests formulated to establish whether the act was done within the scope of employment.

4.1 Deviation cases: degree of deviation

The courts have developed sub-rules for the so-called deviation or digression cases where the employee deviated from the route (instructions) that the employer specified. In these cases the employer was held liable if the employee did not totally abandon his/her work.[24] The courts took the degree of the deviation into account. It has been stated that it is not possible to lay down a hard and fast rule "for so much depends on the facts of the particular case".[25] The act would be regarded as having been done within the scope of employment if the employee did not deviate too far from acts authorised by the employer.[26] If the employee subjectively completely abandoned his/her work, but there was objectively still a close connection between his/her employment and the act which caused damage, the act would still be regarded as being within the scope of employment.

In *Feldman v Mall*,[27] Tindall JA considered the degree of deviation in terms of space and time as conclusive, while Davis AJA criticised the degree criterion as a test and suggested that whether the employee's act is outside the scope of employment should be a question of the type of act and not of the degree of deviation.[28]

In *African Guarantee and Indemnity Co Ltd v Minister of Justice*[29] the court held that the digression of the employees was short in terms of space and time and that they did not intend to abandon their duties. For this reason they were

[22] Wicke *Vicarious Liability in Modern South African Law* (1997 LLM thesis US) 250; *Phoebus Apollo Aviation CC v Minister of Safety and Security* 2003 2 SA 34 (C).
[23] See a discussion in Mishcke "Vicarious liability: when is the employer liable for the wrongful acts of employees?" 2002:2 *Contemporary Labour Law* 12; Wicke (n 22) 83-129.
[24] (n 5) 743.
[25] *Union Government v Hawkins* 1944 AD 556 564.
[26] (n 5) 742.
[27] (n 5) 757.
[28] (n 5) 785.
[29] *African Guarantee and Indemnity Co Ltd v Minister of Justice* 1959 2 SA 437 (A) 447.

still exercising the function for which they were appointed and the employer was held liable.[30]

In *Viljoen v Smith*[31] an employer was held liable for damages caused to a neighbouring farm by a veld fire. An employee started the fire by lighting a cigarette when he went to the neighbouring farm to relieve himself. The employer had specifically forbidden employees to go to the neighbouring farm. The court held that the employer could only escape liability if the employee had entirely abandoned his employment. Whether he had done so was a factual question which had to be decided on the probabilities and then mainly on the basis of the degree of the digression. The court found that the 400 meter digression to the neighboring farm was not such that it could be said that he abandoned his employment.[32] Objectively speaking, therefore, he did not abandon his employment and subjectively speaking he had no intention of doing so. It is submitted, however, that this measuring of the distance of deviation is very superficial. Would another 50 meters have taken the employee outside the scope of employment — and if so, why?

4.2 Intentional wrongdoing: criminal acts not done in furtherance of the employer's business

(a) Assault

In *Minister of Police v Rabie*[33] a sergeant (Van der Westhuizen) employed by the South African Police Force as a mechanic, wrongfully assaulted and arrested someone against whom he had a personal grudge. The employee was off duty at the relevant time, but he identified himself as a policeman when he arrested the person.

The appellate division held the minister of police vicariously liable on the ground that the acts of the policeman fell within the risk created by the state. Jansen JA relied on the following dictum in *Feldman v Mall*:

> "[A] master who does his work by the hand of his servant creates a risk of harm to others, if the servant should prove to be negligent or inefficient or untrustworthy; that because he has created that risk for his own ends he is under a duty to ensure that no one is injured by the servant's improper conduct or negligence in carrying on his work."[34]

The court applied the principles of liability based on risk to the facts in *Rabie* and reasoned as follows:

> "By approaching the problem whether Van der Westhuizen's acts were done 'within the scope of his employment' from the angle of the creation of risk, the emphasis is shifted from the precise nature of his intention and the precise nature of the link between his acts and police work, to the dominant question whether those acts fall within the risk created by the State. By appointing Van der Westhuizen as a member of the Force . . . the State created a risk of harm to others, viz the risk that Van der Westhuizen could be untrustworthy and could abuse or misuse those powers for his own purposes or otherwise, by way of unjustified arrest, excess of force constituting assault and unfounded prosecution. Van der Westhuizen's acts fall within this

[30] (n 29) 447.
[31] *Viljoen v Smith* 1997 18 *ILJ* 61 (A).
[32] (n 31) 67.
[33] *Minister of Police v Rabie* 1986 1 SA 117 (A).
[34] (n 5) 741.

> purview and in the light of the actual events it is evident that his appointment was conducive to the wrongs he committed."

Unfortunately the judge decided, without giving reasons that it was not necessary to define the limits of liability based on the creation of risk (the principle known as "enterprise risk") in the specific context. The absence of some limitation on the liability of the employer is probably the reason why the risk principle only featured in a few cases and was finally rejected by the appellate division in *Minister of Law and Order v Ngobo*.[35]

In *Ngobo* a police constable who was off duty and in plain clothes shot and killed a man with his police firearm. Kumleben JA criticised the decision in *Minister of Police v Rabie*[36] on the ground that the court accepted enterprise risk as a test for vicarious liability. Kumleben JA stated that risk has hitherto never been used as a test for determining the vicarious liability of an employer and that there was no good reason for replacing the standard test (scope of employment) with enterprise risk. However, Kumleben JA did not provide an answer to the problem of a satisfactory test for the vicarious liability of the employer in the case of intentional misconduct. Acts of this kind would with this reasoning always fall outside the scope of employment, the employer would not be held liable and there would be no relief for the innocent third party. From the above decisions it is clear that the state is in the same position as any other employer in respect of vicarious liability.

In *Costa da Oura Restaurant (Pty)Ltd t/a Umdloti Bush Tavern v Reddy* the supreme court of appeal had to decide whether a barman acted inside or outside his scope of employment when he assaulted a patron outside the bar.[37] The reason for the assault was that the patron (Reddy) made remarks about the barman (Goldie)'s efficiency. Reddy afterwards tipped another barman excessively in front of Goldie. Goldie was provoked and followed Reddy when he left the restaurant. He attacked Reddy outside the restaurant. Reddy claimed damages from the restaurant on the ground of vicarious liability. The court *a quo* also applied the degree of deviation test discussed above and held that Goldie's act was committed within the scope of employment for the following reasons:

> "It was not a grudge which Goldie harboured against the plaintiff independently of his work situation. It was a grudge which arose directly out of his work situation. The digression or deviation, if any from what Goldie was employed to do, and what he in fact did was so close in terms of space and time that it can reasonably be held that he was still acting within the course and scope of his employment."[38]

This is an example of the degree of digression used as test in order to establish the vicarious liability of the employer. The court a quo was in fact prepared to hold the employer liable for the intentional wrongdoing of the employee. This decision was, however, overturned on appeal. The supreme court of appeal held that the restaurant was not vicariously liable because the assault occurred after the barman had abandoned his duties. The court stated the following:

[35] 1992 4 SA 822 (A).
[36] Scott (n 7) 390-391.
[37] 2003 4 SA 34 (SCA).
[38] The court of appeal quoted from the decision of the court *a quo* at 41B.

> "It was a personal act of aggression done neither in furtherance of his employer's interests, nor under his express or implied authority, not as an incident to or in consequence of anything Goldie was employed to do. The reasons for and the circumstances leading up to the assault may have arisen from the fact that Goldie was employed by the restaurant as a barman, but personal vindictiveness leading to the assaults on patrons does not render the employer liable."[39]

The appeal court in *Costa da Ouro* relied in its reasoning on the Australian case of *Deatons Pty v Flew*.[40] In the *Deatons* case a waitress requested a customer who was under the influence of liquor to leave the bar. He struck her on the side of the face. She responded by throwing the glass of beer that she was holding at him. The glass slipped out of her hand and struck his face. As a result of his injuries he lost an eye. The Australian high court held that the employer was not vicariously liable for the following reasons:

> "[T]he act of the waitress was an act of passion and resentment done neither in furtherance of her master's interests nor under his express or implied authority nor as an incident to or in consequence of anything the barmaid was employed to do. It was a spontaneous act of retributive justice. The occasion for administering and the form it took may have arisen from the fact that she was a barmaid but retribution was not within the course of her employment as a barmaid."

Here again we see the apparent difficulty in accommodating cases of intentional wrongdoing within the bounds of Salmond's rule. From the dictum above it is clear that an act done contrary to the employer's interests and an act that the employer did not authorise and that was done out of personal vindictiveness could on these principles never result in the employer being vicariously liable.

(b) Fraud and theft

The decision in *Ess Kay Electronics v First National Bank of Southern Africa*[41] provides another example of the reluctance of South African courts to hold an employer liable for the intentional wrongdoing of an employee. An employee of First National Bank whose usual tasks involved the issuing of bank drafts, stole and forged two banker's drafts. The bank subsequently dishonoured the drafts. The result was that the appellant companies suffered damages. The legal question that the court had to answer was whether the employee acted within the scope of his employment when he stole and forged the drafts.

The court held that the employee did not act within the scope of his employment since "an act done solely for the employee's own interests and purposes, and outside the employer's authority, is not done in the course of employment even if done during such employment".[42] This was stated as an absolute rule. Commenting on risk as a basis for vicarious liability, the court stated that the reason for the rule that an employer can be vicariously liable for the acts of an employee (enterprise risk) was mistakenly regarded in *Minister of Police v Rabie*[43] as the rule itself. The court emphasised that the rule and the reason for its existence should not be confused. However, this dictum is in direct

[39] 41H.
[40] (1949) 79 Commonwealth Law Reports 370 discussed in *Costa da Ouro v Reddy* (n 37) 41.
[41] 2001 22 *ILJ* 1070 (T).
[42] (n 41) 1073.
[43] 1986 1 SA 117 (A).

contrast to recent case law on vicarious liability in common law countries where policy considerations (the reason for the rule concerning the risk) influence the test for vicarious liability.[44]

The court in *Ess Kay Electronics* further reasoned as follows: "Unless the requirements of the rule are met, it cannot matter that it is the employer's appointment and work circumstances that place the employee in a position to commit the wrong."[45]

The court held that only a superficially close link was forged between what the employee was authorised to do and what he in fact did. According to the court the question is always: were the acts in the case under consideration in fact authorised; were they in fact performed in the course of the employee's employment?[46]

However, it appears that this formulation is meaningless. The first part seems to indicate that the employer can only be held liable if wilful misconduct has been authorised and the second part begs the question, since it merely restates the requirement that the employer will only be liable if the act was done within the scope (course) of employment. There is no guideline here to establish in what circumstances an act would be deemed to be within the scope of employment.

The remarks of Steyn J in the English case of *Lister v Hesley Hall*,[47] which will be discussed below, are perhaps relevant to a discussion of the principles on which *Ess Kay Electronics* were decided. Lord Steyn remarked that if one mechanically applies the Salmond test, the result may at first glance be thought to be that a bank is not liable to a customer where a bank employee defrauds a customer by giving him only half the foreign exchange which he paid for, the employee pocketing the difference. According to the judge this example indicated that a preoccupation with conceptualistic reasoning may lead to the absurd conclusion that there can only be vicarious liability if the bank carries on business in defrauding its customers. The judge remarked that ideas divorced from reality have never held much attraction for judges steeped in the tradition that their task is to deliver principled but practical justice.[48]

In *ABSA Makelaars (Edms) Bpk v Santam Versekeringsmaatskappy Bpk*,[49] two insurance brokers employed by ABSA committed theft by stealing the money of customers that they had collected for investment purposes. ABSA had been insured by Santam against losses resulting from theft and fraud. ABSA contended that they were vicariously liable for the loss of their clients and claimed the money from Santam. The defendants relied on *Ess Kay Electronics* and contended that the implication of that decision is that the employer could not be held liable for fraudulent acts. They based their argument on the following dictum in *Ess Kay Electronics*: "Were the acts in the case under consideration in fact authorized; were they in fact performed in the course of the employee's employment?"[50]

[44] The Canadian case *Bazley v Curry* (1999)174 DLR (4th) 45 provides one example.
[45] (n 41) 1073.
[46] (n 41) 1074.
[47] *Lister v Hesley Hall* 2001 UKHL 22.
[48] (n 47)17-18.
[49] 2003 24 *ILJ* 1484 (T).
[50] (n 41) 1074.

However, Du Plessis J remarked that to conclude that this quote meant that an employer could never be vicariously liable for unauthorised acts would be based on a superficial reading of *Ess Kay Electronics*. According to the judge the quoted passages should be read in context of vicarious liability. The core question is whether the employee acted in the scope of his employment:

> "Waar die werknemer afwyk van sy opdragte, is die werkgewer steeds aanspreeklik indien 'there is a sufficiently close connection between such capricious and wanton act and other conduct of his in furtherance of his employer's business' . . . dit is duidelik dat die blote feit dat Van Vuuren en Van den Berg bedrieglik, ongemagtig en in hulle eie belang opgetree het nie beteken dat die eiser nie vir hulle optrede aanspreeklik is nie."[51]

Du Plessis J endeavoured to reconcile the judgment in *Ess Kay Electronics* with the possibility that an employer may be held liable for the wilful wrongdoing of an employee. The court stated that whether or not a close connection exists will depend on the facts of each case. It needs to be stressed that in *Ess Kay Electronics* the acts were as closely connected to the employee's authorised acts as could be.

The court in *ABSA* accordingly examined the transactions of the two ABSA brokers in detail and concluded that a sufficiently close link existed in the majority of instances. This case provides one example of where a South African court was prepared to hold the employer vicariously liable for the intentional misconduct of an employee where the acts were criminal acts and not done in furtherance of the employer's business.

4.3 Unauthorised passenger: the dual capacity approach

In *SA Railways & Harbours v Marais*[52] the court had to decide whether the driver of a train was acting within the scope of his employment when, contrary to instructions, he allowed a member of the public (as well as the person's bottle of brandy) to travel on the engine. The train overturned and both the engine driver and the passenger were killed. The court held as follows:

> "The work entrusted to the driver was to drive the engine and he had to do it in such a manner as not to injure anyone by negligence in driving it. It was not the work of the administration to transport passengers on the engine and if the driver chose to do so he was acting outside the scope of his employment. It cannot be said that transporting a passenger on the engine was a negligent way of driving the engine, it has nothing to do with engine driving. The transporting of Marais upon the engine was in my opinion entirely the driver's own act. It was not done for the purpose of furthering his master's interests and was wholly outside the scope of his employment."[53]

The court endorsed the dual capacity approach applied in the English case of *Twine v Beans Express*.[54] In that case the court stated that the employee could simultaneously act within the scope of employment (driving a vehicle) and act outside the scope of employment (carrying an unauthorised passenger). The action outside the scope of employment would preclude the employer's vicarious liability.

[51] (n 49) 1491.
[52] *SA Railways and Harbours v Marais* 1950 4 SA 610 (A).
[53] (n 52) 619.
[54] 1946 1 All ER 202 (KB) referred to by the court in *SAR and H v Marais* (n 52) 622.

The judgment in *SAR & H v Marais*[55] was criticised by several authors, including Cooper[56] and Scott.[57] Scott argued that the vagueness and inconsistency of the rules pertaining to the transport of unauthorised passengers would be addressed by a rule that the employer's liability will depend on whether his or her business created a risk to third persons.[58]

In spite of criticism the court in *Bezuidenhout v Eskom*[59] followed the decision in *SAR & H v Marais*[60] and applied the dual capacity approach. The court had to decide whether Eskom was liable for the injuries suffered by an unauthorised passenger traveling in an Eskom vehicle when it overturned as a result of the negligence of the driver who was an Eskom employee. The court held that since Eskom instructed their employee not to carry passengers, the scope of employment was limited and that he thus acted outside the scope of employment in respect of transporting the passenger. The driver was thus acting within the scope of his employment (driving the car) and simultaneously acting outside his scope of employment in respect of the passenger that he was transporting. The court stated that subjectively the employee was acting outside his scope of employment and objectively there was no close connection with his employment and it was therefore held that the act fell outside the scope of employment.

The court in the *Eskom* case considered, but did not find Scott's criticism of *SAR & H v Marais*[61] persuasive. Heher AJA speculated that the reasonable foreseeability criterion advocated by Scott to limit the employer's liability referred to foreseeability by the employer and rejected this criterion on the ground that the delict is that of the employee and not the employer. "Whether foresight of the employer is relevant must be doubted." However, a thorough reading of Scott's argument indicates that the foreseeability criterion which he advocates is not foreseeability by the employer (the employer would in such a case be directly and not vicariously liable) but foreseeability in the sense of general foreseeability of harm that could typically ensue due to the specific risk created by the employer's business. It appears that Heher J thus rejected Scott's argument for the wrong reason.

From the above discussion of different types of intentional wrongdoing by employees, it is clear that our courts have grappled with the exact scope and meaning of the traditional test for vicarious liability. Instances of intentional wrongdoing, especially where the employee committed a criminal act, remain some of the most problematic cases in this area of the law. Other examples of intentional wrongdoing, namely sexual harassment and rape have received judicial attention in recent times and will be examined more closely below.

5 *Vicarious liability of the employer in a case of sexual harassment*

The underlying policy of the doctrine of vicarious liability as well as the test for employer liability has recently been re-examined in the context of the vicarious

[55] (n 52).
[56] Cooper *Delictual Liability in Motor Law* (1996) 395-398.
[57] Scott (n 7) 174.
[58] Scott (n 7) 57.
[59] 2003 24 *ILJ* 1054 (SCA).
[60] (n 52).
[61] (n 52).

liability of an employer for the sexual harassment of its employee by a supervisor. In *Grobler v Naspers*[62] a trainee manager (Samuels) sexually harassed his secretary (Sonja) who suffered severe trauma. She claimed damages from Naspers on the ground that they were on common law principles vicariously liable for the manager's conduct. The victim did not claim from the employer in terms of section 60 of the Employment Equity Act 55 of 1998, since this act requires that the perpretator and victim should be employed by the same employer. She was employed by Naspers Tydskrifte, while the perpetrator was employed by Naspers Ltd.

Part of the problem facing the court in *Naspers* was that South African courts were in the past reluctant to hold an employer vicariously liable for acts done outside the employee's authority and not in furtherance of the employer's business. South African cases on vicarious liability therefore did not provide guidelines, 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.

The court considered whether the acts of Samuels took place within the scope of his employment. The court referred to *Costa da Ouro v Reddy*[63] and remarked that, should the court apply the rule as interpreted in that case, the acts of Samuels would also fall outside the scope of employment. The reason for this is that the acts of Samuels could, similarly to the acts of Goldie the barman, be classified as acts of personal aggression and passion, not done in furtherance of his employer's business and not authorised by the employer.

Nel J stated that when a new situation (in this case vicarious liability of the employer for sexual harassment) arises, reference to previous court decisions seldom provides a solution, especially in borderline cases. The judge further stated that in the field of vicarious liability there are many decisions that are based on stereotyped expressions and generalisations of limited value from which no logical approach can be distilled. An approach that the vicarious liability of an employer should be tested against a rigid legal rule would negate developments during the last few decades in common law countries such as the United States of America, Canada, the United Kingdom, Australia and New Zealand. The court stated that in view of the seriousness of sexual harassment in modern times, the traditional rules for vicarious liability have been adapted to accommodate vicarious liability of employers for sexual harassment in certain circumstances. The court therefore turned to common law jurisdictions and applied the principles developed in those countries to the facts in the *Naspers* case.

The following part of the discussion will deal briefly with the development of the doctrine in these jurisdictions.

6 *The development of the doctrine of vicarious liability in common law jurisdictions*

6.1 United States

The court in *Faragher v City of Boca Raton* held that the employer should be

[62] (n 15).
[63] (n 37).

liable for conduct that may be fairly regarded as risks of his business.[64] In this case two male lifeguards who acted as supervisors, harassed two female lifeguards. The court held the employer liable since the acts were committed by persons who acted in a supervisory position. *Faragher* and another case, *Burlington Industries Inc v Ellerth*,[65] established a framework for the liability of employers in sexual harassment cases. The court drew a distinction between two types of cases: first, cases where the harassment resulted in a tangible employment action such as dismissal, demotion, etc. In such instances an employer would be strictly liable. In cases where no tangible employment action resulted and the supervisor merely created a "hostile environment", the employer could escape liability by proving that he/she took reasonable care to prevent and correct harassment and secondly the employer would have to show that the victim unreasonably failed to take advantage of corrective opportunities made available to her by the employer.[66] In *Jin v Metropolitan Life Insurance Company* the supreme court of appeal found that the employer should also be held strictly liable in a case where there is apparently no tangible employment action, but where the victim has given in to the demands of the supervisor.[67] In *Suders v Easton* the court held that constructive dismissal could be tantamount to a tangible employment action and therefore the employer could also in these cases be held automatically liable.[68] This has the effect that the employer is deprived of the opportunity to raise the defence available in hostile environment cases.

6.2 Canada

In 1999 two cases involving sexual abuse of children were heard by the Canadian supreme court. In *Bazley v Curry*, a boy in a home for troubled children was sexually abused by Curry who worked for the Children's Foundation and was employed to act as a parent figure for the children.[69] The court held that the employer was vicariously liable since there was a sufficiently "close connection" between the tortuous acts of the employee and the work that was entrusted to him. The employee had to take care of children physically, mentally and emotionally. Bathing the children and tucking them in at bedtime was part of his duties. He started to exploit and abuse children during these activities. It was accepted that in the particular circumstances it was fair that the employer be held vicariously liable although it was not at fault. The court endorsed the "enterprise risk" approach which was described as follows:

> "The employer puts in the community an enterprise which carries with it certain risks. When those risks materialize and cause injury to a member of the public despite the employer's reasonable efforts, it is fair that the person or organization that creates the enterprise and hence

[64] 524 US 775 (1998).
[65] 524 US 724 (1998).
[66] See a discussion of the meaning of these terms in Grosman "When an employee is not formally fired, but effectively forced to leave, is her employer automatically liable for sexual harassment?" http://writ.corporate.findlaw.com/grosman.
[67] See a discussion of this case in Grosman (n 66).
[68] 325F 3d 432, 461 (3rd Cir 2003).
[69] (n 44).

the risk should bear the loss. Fairness in this context depends not on foreseeability of risks from specific conduct, but . . . foreseeability of the broad risks incident to a whole enterprise."[70]

The court stated that previously cases such as these created certain problems since the Salmond test did not cope well with intentional wrongdoing.

The court considered whether the sexual assault could be seen as an improper mode of doing what Curry had been employed to do (according to the Salmond test the employer would only in such circumstances be liable). The court stated that it is difficult to distinguish between an unauthorised mode of performing an authorised act that attracts liability and an independent act that does not, since the Salmond test does not provide any criterion on which to make the distinction.[71]

McLachlin J concluded that in determining whether an employer is vicariously liable for an employee's unauthorised intentional wrongdoing in cases where precedent is inconclusive, courts should apply the following principles:

(1) "They should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of 'scope of employment' and 'mode of conduct'.
(2) The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom . . . . Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections like time and place will not suffice. Once engaged in a particular business it is fair that an employer be made to pay the generally foreseeable costs of that business. In contrast, to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer.
(3) In determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of subsidiary factors may be considered:
    (a) the opportunity that the enterprise afforded the employee to abuse his or her power;
    (b) the extent to which the wrongful act may have furthered the employer's aims;
    (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
    (d) the extent of power conferred on the employee in relation to the victim;
    (e) the vulnerability of potential victims."[72]

In the second of the Canadian cases, *Jacobi v Griffiths*,[73] the court held that the employer was not vicariously liable due to the absence of a sufficiently close connection between the deeds (sexual abuse) and the employment of the employee. The deeds took place at the employee's house and outside working hours. Had the abuse taken place at the youth club where he was employed and where he met the children, a sufficiently close connection with his employment would probably have been established.

The court warned that while the vulnerability of children provides the appropriate context in which the respondent's enterprise is to be evaluated,

[70] (n 44) par 31.
[71] (n 44) par 11.
[72] (n 44) par 41.
[73] (1999) 174 DLR (4th) 71.

vulnerability does not in itself provide the "strong link" between the enterprise and the sexual assault that imposition of no-fault liability would require.[74]

6.3 United Kingdom

In *Lister v Hesley Hall*[75] the house of lords quoted the ratio for the judgment in *Bazley v Curry*[76] with approval. In *Lister* a warden sexually molested boys at a boarding house for boys with emotional and behavioural problems. The warden had to maintain discipline and supervise the boys when they were not at school. He was the only member of staff at the boarding house and had to supervise their bedtime and morning routine.

Lord Steyn in the *Lister* case drew attention to the fact that Salmond stated that "a master is liable even for acts which he has not authorised, provided that they are so connected with acts which he has authorized, that they must rightly be regarded as modes — although improper modes — of doing them". Lord Steyn's view was that the close connection test applied by the Canadian supreme court in *Bazley* was based on the above rule of Salmond. The court held that the narrow approach of earlier cases, in which the applied test was whether the conduct was an unauthorised way of carrying out (a teacher's) duties, should be replaced by a test stressing the importance of finding a sufficient connection between the acts of the employee and the employment.[77]

Lord Steyn further emphasised that English courts have accepted that employers may in certain circumstances be vicariously liable for intentional wrongdoing by employees. *In Lloyd v Grace Smith & Co* a firm of solicitors was held liable for the dishonesty of their managing clerk who persuaded a client to transfer property to him and then disposed of it for his own advantage.[78] Lord Steyn described this as a breakthrough since it finally established that vicarious liability is not necessarily defeated if the employee acted for his own benefit. In *Morris v Martin & Son* the employers were held liable for the act of their employee who stole a fur coat that he had to clean for a customer.[79] The court admitted that Salmond's rule is not ideally suited to cases of intentional wrongdoing, but the court nevertheless deviated from the rule and held the employers vicariously liable for the theft:

> "An honest master does not employ or authorize his servant to commit crimes of dishonesty towards third parties; but nevertheless he may incur liability for a crime of dishonesty committed by the servant if it was committed by him within the field of activities which the employment assigned to him, and although the crime was committed by the servant solely in pursuance of his own private advantage. The servant is a bad servant who has not faithfully served but has betrayed his master; still quoad the third party injured, his dishonest act may fall to be regarded as an ill way of executing the work which has been assigned to him, and which he has been left with power to do well or ill."[80]

[74] (n 73) par 86.
[75] (n 47).
[76] (n 44).
[77] (n 47) par 20.
[78] 1911-13 All ER Rep 51 discussed by Lord Steyn (n 47) par 17.
[79] 1965 2 All ER 725 discussed by Lord Steyn (n 47) par 19.
[80] (n 47) par 47.

Lord Clyde in *Lister v Hesley Hall* stated that cases which concern sexual harassment or sexual abuse committed by an employee should be approached in the same way as any other case where questions of vicarious liability arises since there is no reason to put them into a special category of their own.[81]

Although the court in *Lister* came to the same conclusion as the court in *Bazley v Curry,* the court in *Lister* did not follow the "enterprise risk" approach. In *Bazley* the close connection needed for liability is between the wrong committed and the inherent risks of the enterprise. In *Lister* the close connection is between the employee's wrongful acts and his authorised acts. *Lister* has been criticised for simply replacing one verbal test (the distinction between "authorised acts" and "unauthorised modes") with another verbal test ("sufficient connection" between authorised and unauthorised acts).[82]

The "enterprise risk" approach featured in the more recent decision in *Dubai Aliminium Co Ltd v Salaam*,[83] in which the court stated as follows:

> "The underlying legal policy is based on the recognition that carrying on a business enterprise necessarily involves risk to others. It involves the risk that others will be harmed by wrongful acts committed by agents through whom the business is carried on. When those risks ripen into loss, it is just that the business should be responsible for compensating the person who has been wronged."[84]

This "enterprise risk" approach is preferred to a formalistic approach (followed in *Lister*) by some authors who regard it as encouraging open discussions of the economic and social effects of a finding of vicarious liability.[85]

6.4 Australia

In Australia the break with the traditional test for vicarious liability was not made in a sexual harassment or sexual abuse case, but in a debate on the liability of an employer for the acts of an independent contractor. In *Hollis v Vabu*[86] the employer made use of persons who owned their own bicycles and operated a delivery service. One of the deliverers collided with Hollis who was injured. Hollis sued the company for damages. The company argued that they were not liable since the deliverymen were independent contractors. The court stated as follows:

> "The practice of contracting out work that in former times was done by their employees is nowadays a common practice . . . . [I]f the law of vicarious liability is to remain relevant in the contemporary world, it needs to be developed and applied in a way that will accommodate the changing nature of employment relationships."[87]

The court then quoted with approval passages from the Canadian case *Bazley v Curry* in which the judge stated that courts should turn to policy for guidance when new situations arise and that a person who introduces a risk incurs a duty to those who may be injured. The court in *Hollis* stated that this is a principle

[81] (n 47) par 48.
[82] (n 4) 595.
[83] 2002 UKHL 48.
[84] (n 83) par 21.
[85] Markesini and Deacon (n 4) 595.
[86] 2001 WL 887409 (HCA), 207 CLR 21.
[87] (n 86) par 85.

of fairness which applies to the employment enterprise and hence to the issue of vicarious liability. Courts should not stick to "artificial and semantic distinctions". This is a clear reference to the traditional application of the Salmond rule.

6.5 New Zealand

In *Proceedings Commissioner v Ali Hatem*[88] the two respondents were partners. One partner had primary responsibility for staffing matters. An employee brought a claim for damages against the partnership on the ground that one of the partners sexually harassed her. The question was whether the partnership could be held vicariously liable. The claim was brought under section 15 of the Human Rights Act of 1993 in terms of which it is unlawful for an employer to subject an employee to any detriment by reason of sex. In the course of the judgment the court stated as follows:

> "In the ultimate judgment which has to be made, issues of policy may arise. For example, in the present case, sexual harassment of an employee by one partner, if it is not the responsibility of the firm as a whole, is likely to be less vigorously policed. One purpose of the legislation is obviously to deter sexual harassment and to provide a remedy for its victims. That purpose will be better achieved by holding the firm as a whole liable, rather than just the individual partner. Obviously policy matters cannot lead to a result which is otherwise untenable, but in a case involving matters of degree, as most contested cases will, it is legitimate to keep the purpose of the legislation in mind."[89]

The court in the *Ali Hatem* case further stated that, although sexual harassment cannot be regarded as part of the ordinary course of the firm's business, the perpetrator was acting in the ordinary course of such business when he committed the acts:

> "[E]mployers have the authority to deal with staff in the work environment to the extent necessary. If they deal with them badly, rather than well, they are nevertheless doing something within the ordinary course of the business of the firm. They are doing something generally authorized, albeit they are doing the acts in a tortuous manner."[90]

The court in *Ali Hatem* did not apply the risk principle or the requirement of a sufficiently close connection and adhered to the Salmond rule, but interpreted this rule to be wide enough to make provision for the vicarious liability of an employer for the sexual harassment of an employee. Policy considerations were the guiding factor that led to a new interpretation of an old rule.

7 *Creation of risk and a close connection used as test for vicarious liability of the employer in a sexual harassment case*

The court in *Naspers* examined the development of the doctrine of vicarious liability in common law jurisdictions and applied the relevant principles to the facts. The court found that the authority conferred on Samuels as trainee manager gave him the opportunity to create a hostile work environment and

[88] 1999 1 NZLR 305.
[89] (n 88) par 19.
[90] (n 88) par 24.

that his conduct was foreseeable social behaviour. He was regarded by the rest of the staff as someone who could influence the chief manager. This belief of the staff was based on reasonable grounds. Nel J remarked that if the *Naspers* case had to be heard in the United States, the courts would have held Naspers vicariously liable on the mere fact that Samuels was the victim's supervisor. Evidence for the victim indicated that she did complain about Samuels's conduct to different persons in supervisory positions, but to no avail. These circumstances would satisfy the requirements for vicarious liability in a hostile environment case in the United States.

The court in *Naspers* stated that even if the supervisor test could not be used, the courts in Canada, New Zealand and the United Kingdom would have held Naspers liable on the ground that the work relationship created a risk of harassment or enhanced such a risk and that the harassment took place in that employment relationship. The court applied factors suggested in *Bazley v Curry*[91] to establish whether there was a sufficient connection between the creation of risk by Naspers and the wrong complained of. The court investigated the employment relationship between the trainee manager and secretary and found that the intense and personal relationship created an inherent risk of sexual harassment and that the acts of Samuels were sufficiently connected to and fell within the risk that was created. The court held that because there is a sufficiently close connection between the enterprise risk and the wrongful acts, policy purposes (adequate compensation of the victim and deterrence) will be served if Naspers is held vicariously liable for the sexual harassment of the secretary by her manager.

Nel J stated that even if he is wrong and the present application of vicarious liability is not sufficiently flexible to make provision to address the problem of sexual harassment in the workplace, courts are in his view bound by the constitution to adapt rules of vicarious liability to accommodate vicarious liability for sexual harassment. He argues that courts have to protect the inherent dignity of persons,[92] and the right to freedom and security of the person.[93] Section 173 of the constitution grants inherent power to courts to develop the common law, taking into account the interests of justice.[94]

The court in *Naspers* held that a doctrine requiring that the vicarious liability of an employer be tested against a rigid legal rule (Salmond's scope of employment rule), would negate recent developments in common law countries. These countries have already adapted the rule on policy considerations. The court applied the "sufficiently close connection" test in conjunction with the risk principle as developed in common law jurisdictions.

The enterprise risk principle is not alien to South African jurisprudence and has been applied *inter alia* in *Minister of Police v Rabie*.[95] Unfortunately the risk principle as basis for vicarious liability was not thoroughly examined or limited in any way in the *Rabie* case and as a result the risk principle as a basis for vicarious liability was rejected in later decisions.[96] South African authors,

[91] (n 69).
[92] s 10 of the constitution.
[93] s 12 of the constitution.
[94] (n 15) 298.
[95] (n 33).
[96] *R v Ngobo* (n 35) and *Ess Kay Electronics* (n 39).

particularly Scott,[97] support the risk principle as a basis for vicarious liability. Scott proposed that the employer's liability should be limited by the foreseeability that the harm could ensue. Developments in common law countries favour a "sufficiently close connection" of the wrongful act with the risk (general foreseeable costs) created by the enterprise before the employer will be held vicariously liable. This requirement was thoroughly investigated in *Bazley v Curry*.[98] This case laid down guidelines to establish whether a sufficiently close connection exists. Foreseeability of possible harm together with the close connection requirement limits the employers' liability and prevents the employer from being forced into a position of an insurer.

Enterprise risk as a basis for vicarious liability should be preferred to inconsistent rules based on the legalistic formulation of Salmond. The uneasiness of our courts with the vicarious liability of an employer for the intentional wrongdoing of an employee and the contortions of Salmond's rule that have been invoked can be prevented if risk is used as the basis for holding the employer vicariously liable. In *Naspers* the risk principle was applied in a case of sexual harassment and the court clearly intended that the new test was necessitated by the "new" problem of sexual harassment and sexual abuse and did not intend formulating a general rule applicable to all cases of vicarious liability. The principle could however be extended to other cases of vicarious liability in the interests of fairness and of a uniform approach, similar to developments in other jurisdictions that have attempted to marry the requirements of policy considerations and justice in the face of new and unique forms of hazardous conduct by employees.

8 *Kern v Minister of Safety and Security*

Surprisingly the supreme court of appeal made no mention of the test for vicarious liability formulated by the high court in *Naspers* when it had to make a decision on similar facts in *Kern v Minister of Safety and Security*.[99] In that case the supreme court of appeal had to decide whether the state could be held vicariously liable for the rape of a woman by three policemen. The facts were that the victim and her boyfriend had a fight in a club. As a result he refused to take her home. She walked to a nearby garage shop to phone her mother to pick her up. At the shop the attendant told her that the phone could only receive incoming calls. In the meantime three policemen in uniform in a police vehicle pulled up outside. One of them, overhearing the victim's conversation with the attendant, offered to take her home in the police vehicle. She accepted the offer. However, she was not escorted to safety, but raped by all three at knifepoint. She had to be treated for injuries and severe trauma. She subsequently claimed damages from the minister of safety and security. The case turned on the question whether the three policemen were acting in the course and scope of their employment when they raped the plaintiff.

Scott JA classified this case under the so-called deviation cases. The judge stated that the law in this regard is that the inquiry should be "whether the deviation was of such a degree that it can be said that in doing what he or she

[97] Scott (n 7) 390-391.
[98] (n 44).
[99] *Kern v Minister of Safety and Security* case no 456/03 (SCA) (unreported).

did the employee was still exercising the functions to which he or she was appointed or still carrying out some instruction of his or her employer".[100] The court referred to decisions such as *Feldman v Mall*[101] and *Viljoen v Smith*[102] and relied on the decision in *Phoebus Apollo Aviation CC v Minister of Safety and Security*.[103] Scott JA quoted the following statement of Kriegler J in the last-mentioned case with approval:

> "It was also contended in argument that the respondent should be held liable for the wrongful acts of the policemen whether they were acting in the course of their employment or not. No convincing argument was advanced . . . to show why the common law should be developed so as to impose an absolute liability on the State for the conduct of its employees committed dishonestly and in pursuit of their own selfish interest."[104]

Relying on the above judgment, Scott JA dismissed the appeal. He added the following:

> "I have the deepest sympathy for the appellant, as I do for the thousands of women who are raped every year in this country. Ideally they should receive compensation, but that is something for the Legislature and beyond the jurisdiction of this court."[105]

One cannot but conclude that the court's reasoning led to an unjust result. The judgment is typical of a positivist approach where judges see themselves as helpless agents who have to apply unjust laws, thereby abdicating their moral responsibility in promoting justice.

The court in *Naspers*, on the contrary, was not deterred by legalistic principles and developed the common law in the interests of fairness, in line with the constitution and developments in common law countries. In that case the acts of sexual harassment had a devastating effect on the victim but were much less serious than the rape in the *Kern* case. The judge in *Naspers* was nevertheless prepared to develop the rules for vicarious liability in line with the development of the doctrine in common law countries. In these jurisdictions it was repeatedly stated by different judges that the doctrine of vicarious liability is founded on policy considerations as set out above and not on legalistic principles.

The supreme court of appeal in *Kern* declined to hold the employer vicariously liable for the conduct of the policemen, although they were in uniform and on duty and escorting the women home when they committed the crime. Once again the court declined to hold the employer vicariously liable for the intentional wrongdoing of the employee, leaving the plaintiff without redress. Had the court taken the judgment in *Naspers* into account, it is submitted that a more equitable result would have ensued. Had the court required a close connection of the wrongful acts with the foreseeable risks created by the enterprise, the state would no doubt have been held vicariously liable. The "enterprise" of the minister of police did create a foreseeable risk that people would trust policemen, especially those on duty in uniform and in a police vehicle offering assistance to a member of the public. Members of the public

[100] (n 99) 4.
[101] (n 5) 774.
[102] (n 31).
[103] 2003 2 SA 34 (CC).
[104] (n 99) 10 — he refers to 2003 2 SA 34 (CC) 37B.
[105] (n 99) 10.

who would trust policemen because of their function would then place themselves in a vulnerable position *vis-à-vis* the policemen because of their position of trust. This does not mean that the state would be liable in all instances in which policemen cause damage to third persons. The harm must in general be foreseeable and there must have been a close connection between the acts of the employee and the risk created by the enterprise. In this particular case it appears that there is such a close connection. The policemen were on duty, patrolling the area. Part of their authorised duties would be to take care of the safety of citizens and could certainly include escorting someone to safety. Once a close connection has been established, the employer could be held vicariously liable.

In reading this decision one has the impression that the legal system has failed Natasha Kern. The result obtained by rigidly applying the rule of Salmond is inequitable. One is reminded of the following words of the supreme court in the Canadian case of *Bazley v Curry*:

> "The Courts should ask whether an employer should in fairness be held liable and not try to adhere to the legalistic principles, but openly confront the question by admitting that the doctrine of vicarious liability rests on policy considerations and not on legalistic principles."[106]

It is true that the employer in this case (the state) is also an innocent party, but the employer would be adequately protected if liability is limited by requiring that the risk must be an inherent risk (foreseeable) of the type of business operated by the employer and that there must be a sufficiently close connection between the acts of the employee and the risk created.

The legal position will unfortunately remain as set out by the supreme court of appeal. The standard test requiring that the acts of employees must be within the course and scope of employment is still applicable. The difficulties of judging the vicarious liability of employers in the case of intentional wrongdoing by employees have not been solved. However, there is still a ray of hope as Kern obtained leave to appeal to the constitutional court. The outcome of this case will be of great importance to the future application of the doctrine of vicarious liability in South Africa.

SAMEVATTING

MIDDELLIKE AANSPREEKLIKHEID VAN WERKGEWERS: HEROORWEGING VAN RISIKO AS GRONDSLAG VIR AANSPREEKLIKHEID

In *Grobler v Naspers* 2004 4 SA 220 (K) is die tradisionele toets vir middellike aanspreeklikheid van 'n werkgewer, naamlik dat die gewraakte daad van die werknemer "binne die uitvoering van pligte" moes plaasgevind het, vervang met 'n nuwe toets wat in "common law"-jurisdiksies ontwikkel is. In dié saak wat gehandel het oor seksuele teistering, het die hoë hof dit gestel dat daar wêreldwyd kennis geneem word van die nadelige gevolge van seksuele teistering op vroue en kinders. Indien die toets wat tot dusver in Suid-Afrika aangewend is om vas te stel of die werkgewer middellik aanspreeklik is, toepassing moes vind, sou die gedrag van die teisteraar beskou word as synde buite die diensbestek. Hierdie was die eerste saak in Suid-Afrika waarin 'n werkgewer aangespreek is vir seksuele teistering op grond van middellike aanspreeklikheid. Die hof stel dat indien 'n nuwe situasie hom voordoen dit selde help om na vorige beslissings te verwys om 'n grensgeval op te los. Die hof wys daarop dat menige Suid-Afrikaanse beslissing steun op geykte uitdrukkings waaruit geen logiese benadering afgelei kan word nie.

[106] (n 44) par 41.

In navolging van "common law"-jurisdiksies aanvaar die hof in die *Naspers*-saak dat middellike aanspreeklikheid op beleidsoorwegings berus en nie op die starre regsreël dat die daad binne die uitvoering van die diensbetrekking ("scope of employment") moes geskied het nie. Die risiko wat deur die werkgewer se besigheid geskep word ("enterprise risk") vorm die grondslag vir aanspreeklikheid en verder word vir aanspreeklikheid van die werkgewer vereis dat daar 'n noue band ("close connection") tussen die risiko en die dade wat die skade veroorsaak het, moes gewees het. Die risiko-reël is nie vreemd aan die Suid-Afrikaanse reg nie. Dit is gebruik as toets vir middellike aanspreeklikheid in *Minister of Police v Rabie* 1986 1 SA 117 (A) en daar is ook deur Suid-Afrikaanse skrywers, veral Scott, aangetoon dat dit die enigste bevredigende grondslag vir skuldlose aanspreeklikheid bied. Indien risiko as grondslag vir middellike aanspreeklikheid aanvaar word, sou dit 'n eenvormge toets daarstel wat die veelvuldigheid van toetse vir verskillende situasies kan vervang.

Die uitbreiding van middellike aanspreeklikheid soos toegepas in *Grobler v Naspers* is nie in die onlangse saak *Kern v Minister of Safety and Security* (ongerapporteer) nagevolg nie. In dié saak is die klaagster verkrag deur drie polisiemanne terwyl hulle aan diens was. Die hoogste hof van appèl het die standaardtoets van "binne die uitvoering van pligte" gebruik en bevind dat die werkgewer nie middellik aanspreeklik is nie. Verlof tot appèl na die konstitusionele hof is aan die klaagster verleen, welke appèl tans nog hangende is.