

K v MINISTER OF SAFETY AND SECURITY AND THE
INCREASINGLY BLURRED LINE BETWEEN PERSONAL
AND VICARIOUS LIABILITY

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An employer's delictual liability can be either personal or vicarious. Vicarious liability is a form of secondary liability. It is liability for the *delict* of an *employee* committed within the *course and scope of her employment*. Its conceptual ambit

is thus limited in three ways. In considering whether an employer should be held *personally* liable, none of these limitations holds. All that is asked is whether the employer wrongfully and negligently caused the plaintiff's injury.

In the case of *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) the Constitutional Court held the state vicariously liable for the raping of the applicant by three on-duty policemen. By finding that this delict was committed within the course and scope of the police officers' employment, the court has significantly widened the ambit of the state's liability for delicts committed by police officers. It also represents an about-face from South African law's traditional reluctance to impose vicarious liability for delicts involving an intentional abandonment by the employee of her employment duty (see, for example, *Ess Kay Electronics Pte Ltd v First National Bank of Southern Africa Ltd* 1998 (4) SA 1102 (W); *Absa Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* 2001 (1) SA 372 (SCA); *Minister van Veiligheid en Sekuriteit v Phoebus Apollo Aviation BK* 2002 (5) SA 475 (SCA); *Costa da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy* 2003 (4) SA 34 (SCA) and *K v Minister of Safety and Security* 2005 (3) SA 179 (SCA)).

In coming to its conclusion the court confused personal and vicarious liability. Although it is now three years since *K* was handed down, subsequent cases and literature have overlooked this flaw. Thus, this note will discuss three related aspects of the decision which demonstrate this confusion. The first is the court's emphasis on the state's (as opposed to its employees') legal duties to establish liability. The second is the court's reliance on s 39(2) of the Constitution of the Republic of South Africa, 1996 as a (specious) reason for developing the 'course and scope of employment' test. The third is the court's reliance on the English House of Lords decision in *Lister v Hesley Hall Ltd* [2002] 1 AC 215, which similarly confused these two forms of delictual liability.

DUTIES OF THE STATE AND DUTIES OF ITS EMPLOYEES

The first and most obvious indication that the *K* decision confused personal and vicarious liability is the language of the judgment itself. At various points it lapses into discussing the state's duties (as opposed to its employees' duties) as relevant to its finding. O' Regan J, writing for a unanimous court, considered it necessary to provide a remedy to 'vindicate the applicant's constitutional rights and to correspond to the respondent's [the state's] alleged constitutional duties' (para 14), and found that the errant policemen had borne 'a statutory and constitutional duty to prevent crime and protect the members of the public' (para 51) and that this duty also rested 'on their employer and they were employed by their employer to perform that obligation' (ibid, my emphasis). The judge also quoted the following lengthy passage from *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), and stated that the import thereof was of equal relevance to the case at bar, notwithstanding that *Carmichele* concerned wrongfulness and not vicarious liability (para 18):

‘In addressing these obligations in relation to dignity and the freedom and security of the person, few things can be more important to women than freedom from the threat of sexual violence. As it was put by counsel on behalf of the *amicus curiae*:

“Sexual violence and the threat of sexual violence goes to the core of women’s subordination in society. It is the single greatest threat to the self-determination of South African women.”

...
 South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights. The police is one of the primary agencies of the State responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime.’

There are two things being emphasized in this quotation that need to be separated and considered in turn: the importance of the protection of women’s rights under the Constitution, and the state’s duties in terms of those rights. The potential relevance of the first of these to determining delictual liability will be discussed below. For now the following question must be answered: What role can a breach of an employer’s own duties play in determining its delictual liability?

A breach of an employer’s duties, in this case the state’s alleged constitutional ones, can only affect its personal liability. The breach of its duty cannot make any difference to its vicarious liability, which is concerned with the duties of the tortfeasant employee; that is, her delictual duties and her employment duties. Her delictual duties define whether she acted wrongfully, a finding of which being a necessary condition for her liability (and her liability being a necessary condition for her employer’s vicarious liability). Her employment duties define the course and scope of her employment, within which her delict needed to be in order to hold her employer vicariously liable.

VICARIOUS LIABILITY AND THE BILL OF RIGHTS

The second indication of this confusion between personal and vicarious liability in *K* is the court’s reliance on the Bill of Rights to develop the ‘course and scope of employment’ test. It is now accepted that the Bill of Rights can affect personal liability outcomes. A legal duty falls on certain persons (at the very least, the state itself) not to perform an act that infringes a person’s fundamental rights (and in certain instances to act positively to protect persons from such infringements from other sources). The Bill of Rights had been invoked in such a way in *Carmichele* (supra), *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) and *Minister of Safety and Security v Van Eeden* 2003 (1) SA 389 (SCA) to find that employees of the state had owed the respective plaintiffs a legal duty to take positive steps to prevent their fundamental rights from being infringed.

In each of these cases although the state was held vicariously liable, vicarious liability had not been in issue. This was because its employees had clearly been acting within the course and scope of their employment. (In *Van Eeden* (supra) the state had gone so far as to concede vicarious liability in its pleadings.) What was very much in issue was whether the state employees had been under a legal duty to take steps to prevent the respective plaintiffs' fundamental rights from being infringed. While this still seems highly questionable and it looks rather like it was the state itself which owed these higher duties (see, for example, *Carmichele* (supra) paras 27–8, 30, 33, 44, 57, 61–2; *Van Duivenboden* (supra) para 20; and *Van Eeden* (supra) paras 23–4, where the respective courts reasoned from the state's constitutional imperatives, rather than those — such as they were — of the relevant state employees), one can at least see how the Bill of Rights could affect the answer to the question. In order to determine whether a duty arose in the law of delict, the constitutional duty described above would have had to be balanced against such considerations as the threat that imposing such liability would negatively affect the efficient functioning of the police and other public authorities (*Carmichele* (supra) para 49).

In *K* there could have been no question whether the police officers had been under a legal duty not to rape the applicant, and that in doing so they committed a delict. What was in issue was whether that delict was committed within the course and scope of their employment and thus whether vicarious liability could be imposed on the state.

O'Regan J considered the issue of the protection of Ms K's rights to be 'of profound constitutional importance' (para 18) and that to the extent that it did not establish vicarious liability on the facts, the common-law test for course and scope of employment should be developed to accord more fully with the spirit, purport and objects of the Constitution. This, she said, did not mean that liability would be imposed simply because the injuries suffered were horrendous, but rather that 'the courts, bearing in mind the values that the Constitution seeks to promote, will decide whether the case before it is of the kind which in principle should render the employer liable' (para 23).

The Bill of Rights is a statement of the priority of a certain set of interests. For a delict to have been committed within the course and scope of the harmdoer's employment, there needs to be a sufficiently close link between the delict and the defendant employer's business. This is the objective leg of the *Rabie* test (*Minister of Police v Rabie* 1986 (1) SA 117 (A)). This enquiry arises whenever it cannot be established that the employee subjectively intended to further the aims of her employer's business.) The nature of the interest infringed cannot make a delict closer to or further away from the harmdoer's employment. What matters to the question is rather the nature of what the harmdoer was asked to do, in terms of her employment contract, and the nature of her tortious act. On the reasoning of O'Regan J, however, we come to the counter-intuitive conclusion that the infringements of *different types* of interests will be either closer within or further outside the course and scope of employment; also, that the *degree* of the infringement of a particular interest will affect the answer to this question.

To illustrate the nonsensicality of this proposition, in terms of it, if one were employed to drive a truck across town and, in negligently colliding with another car, one merely caused damage to the car, one's actions could be regarded as being further outside the course and scope of one's employment than if, in identical circumstances, one caused another bodily injury. Also, within the category of causing bodily injury, the greater the degree of the injury, the closer within the course and scope of employment one's actions could be regarded as being. For example, causing a person to lose an arm would be further outside the course and scope of one's employment than causing a person to lose an arm and a leg would be.

To demonstrate this point further with reference to the case itself, imagine the exact same set of facts except that instead of raping Ms K, the police officers stole a piece of her jewellery. The principles of course and scope of employment should yield the same outcome. In both cases the policemen's tortious conduct would have constituted a crime, and in both cases their employment duties were to prevent it; but, on the distinction made, the hypothetical scenario may be regarded as being further outside the course and scope of their employment than the actual one.

Thus, logically, the Bill of Rights can only affect personal liability outcomes, and is irrelevant to vicarious liability. It seems, however, that more was at play here than a strictly logical deduction of the relevant principles. The Constitutional Court has no jurisdiction to overrule the Supreme Court of Appeal on a decision on a question of fact or on a question of law that does not have a constitutional aspect (*S v Boesak* 2001 (1) SA 912 (CC) para 15; *Phoebus Apollo Aviation CC v Minister of Safety and Security* 2003 (2) SA 34 (CC) para 9). Making the Bill of Rights relevant to answering the question before it was therefore essential to establishing jurisdiction. As this conclusion was a logical fraud, the court appears to be deciding by fiat what sort of claims it will hear. If the course and scope of employment test can be labelled a constitutional issue, then anything can be labelled a constitutional issue, and the Constitutional Court is overreaching its mandate of adjudicating on strictly constitutional matters and is a short, dangerous step away from handing itself a general jurisdiction.

RELIANCE ON *LISTER v HESLEY HALL*

The third indication of this confusion between personal and vicarious liability is the court's reliance on the English decision of *Lister v Hesley Hall* (supra). It is generally considered to be the most important decision on vicarious liability yet handed down by the House of Lords. The owner of a school for emotionally and psychologically disturbed boys was held vicariously liable for sexual abuse inflicted on several of the boys by the warden of the school's boarding house. The decision's most striking aspect is its abandonment of the Salmond test, which had been applied for over a century to determine whether an employee's tort was committed within the course and scope of her employment: 'An employee's wrongful conduct is

said to fall within the course and scope of his or her employment where it consists of either (1) acts authorized by the employer or (2) unauthorized acts that are so connected with acts that the employer has authorized that they may rightly be regarded as modes — although improper modes — of doing what has been authorized’ (J W Salmond *The Law of Torts* (1907) 83). In its place it introduced the more generalized criterion of ‘whether . . . the torts were so closely connected with [the] employment that it would be fair and just to hold the employers vicariously liable’ (para 28, per Steyn LJ). Endorsing the reasoning in *Lister*, O’Regan J saw fit to quote the following from Lord Millett’s speech (para 36):

‘The school was responsible for the care and welfare of the boys. It entrusted that responsibility to the warden. He was employed to discharge the school’s responsibility to the boys. For this purpose the school entrusted them to his care. . . . He abused the special position in which the school had placed him to enable it to discharge its own responsibilities, with the result that the assaults were committed by the very employee to whom the school had entrusted the care of the boys.’

This heavily tautologous passage repeats (several times) the basic conceptual error running through each of their Lordships’ speeches: that the employer was to be held *vicariously* liable because it had entrusted the duty that *it* owed to the claimants, to its employee, which he had subsequently breached. It has already been explained why a breach of an employer’s own duty can have no logical bearing on the vicarious liability enquiry and can only relate to its personal liability.

Those commentators making this criticism of the decision, that it confused vicarious and personal liability (and they include Tony Weir *A Casebook on Tort* 10 ed (2004) 291–3 and *Tort Law* (2002) 102–4; Nicholas McBride ‘Vicarious liability in England and Australia’ (2003) 62 *Cambridge LJ* 255 at 259–60 and Paula Giliker ‘Rough justice in an unjust world’ (2002) 65 *Modern LR* 269 at 275), nevertheless assume that an extraordinary form of personal liability could have been imposed on the facts. It is a personal liability by virtue of a ‘non-delegable duty’ which was breached through the conduct of another, where that other person is the one to whom the employer entrusted the performance of its duty. It might reasonably be asked whether there is any difference between imposing vicarious liability on an employer and saying that it breached a duty of its own that it was absolutely bound to discharge.

In *Quarman v Burnett* (1840) 6 M & W 499 the House of Lords laid down a general principle of vicarious liability for the torts of employees to the exclusion of those of independent contractors. A mere forty years later, in his speech in *Dalton v Angus* (1881) 6 AC 740 (HL), Blackburn LJ invented the doctrine of the non-delegable duty as a means of introducing a form of liability for the acts of independent contractors. He stated (at 829) that

‘a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching to him of seeing that duty performed by delegating it to a contractor’.

Had this dictum been applied literally, it would have entailed liability for every tort committed by an independent contractor in the course of carrying out the task he was employed to do and would thereby have erased the distinction the law had made, for the purposes of imposing vicarious liability, between employees and independent contractors (Glanville Williams 'Liability for independent contractors' (1956) *Cambridge LJ* 180 at 181; P S Atiyah *Vicarious Liability in the Law of Torts* (1967) 332). While it can be assumed that Blackburn LJ did not intend to go so far (and subsequent courts have not interpreted his words as doing so), his dictum has nevertheless been invoked to impose 'personal' liability for the acts of independent contractors (as well as for those of others, including employees — see, for example, *Commonwealth v Introvigne* (1982) 150 CLR 258) in a wide variety of circumstances. There appears to be no a priori category of duties that are 'non-delegable', and Blackburn LJ did not state to which duties the doctrine applied. And (Williams op cit 181),

'[s]ince the judge is left to determine, within the limits of precedent, whether a particular duty is delegable or not, the dictum gives him freedom to decide the case as he wishes, while presenting him with a verbal "reason" that conceals his real motivation; and sometimes perhaps it operates as a hypnotic formula inducing the judge to think that he is required to reach a particular conclusion when in fact he is not.'

As most legal duties are merely ones to exercise reasonable care (*Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A) at 797E-F; *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A) at 570J), they are 'delegable' in the sense that they are discharged by entrusting their performance to an ostensibly competent person. Furthermore, where expertise is required for a particular task, it would constitute a breach of this duty *not* to delegate the task. It cannot be a reason for a decision that a person cannot escape liability for the fulfilment of a duty by entrusting it to another person. To assert such would merely be to assume what has to be proved: that the duty is strict rather than one to exercise reasonable care.

Putting aside the conceptual shortcomings of this form of liability, in practical terms, imposing on someone a personal, 'non-delegable' duty that can be breached through harm caused by another is more onerous than vicarious liability in the sense that the other person need not have committed a delict (merely causing the harm would suffice), have been an employee, or have acted within the course and scope of her employment. This is then offset by its being narrower in another sense: one will only be put in breach of this duty by harm caused by one's 'delegate'. The narrowing feature of this form of liability can be observed in *Lister* (supra) (assuming that the decision can be explained in these terms). The defendant had delegated the performance of the duty that it owed to the claimants to a single person, the warden, Mr Grain, who then put it in breach thereof by his conduct. It cannot, however, be observed in *K*. The court imposes the same sort of liability (para 51: '[this duty also rested] on their employer and they were employed by their employer to perform that obligation'), but in the absence

of any such delegation (unless one wishes to view every police officer on the force as a 'delegate'). It is thus imposing what appears in effect to be a near absolute liability on the state for harm caused by its police officers.