THE CONFUSIONS OF K

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I INTRODUCTION

The question in *K* was whether the Minister of Safety and Security was vicariously liable for rapes committed upon Ms K by three policemen in his employ. The Supreme Court of Appeal decided that he was not.[1] The Constitutional Court decided that he was and that it was entitled to set aside the Supreme Court of Appeal's contrary decision.[2] The Constitutional Court's argument was as follows:

(1) The common law contains the following three rules of vicarious liability. (a) The course-and-scope rule: an employer is vicariously liable for a delict committed by an employee if and only if the employee committed the delict while acting in the course and scope of his employment.[3] (b) The intention/connection rule: the fact that an employee's sole intention in committing a delict was to promote his own interests is a reason to conclude that he committed the delict while acting outside the course and scope of his employment. But it is not a conclusive reason. Notwithstanding the fact that an employee's sole intention in committing a delict was to promote his own interests, he nonetheless committed the delict while acting in the course and scope of his employment if his delict was sufficiently closely connected to his employment to justify the imposition of liability for that delict on his employer.[4] (c) The exclusion-of-values rule: when applying the common-law rules of vicarious liability to facts regarding which they are indeterminate, a court may not consider the values underlying them.[5]

(2) Section 39(2) of the Constitution of the Republic of South Africa, 1996 obliges a court to develop the common law applicable to the facts of a

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[1] *K v Minister of Safety and Security* 2005 (3) SA 179 (SCA).
[2] *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).
[3] Ibid at 431F, 433E.
[4] Ibid at 436B-E, 441G-H, 442B-C, 443C-F.
[5] Ibid at 432C-E.

case before it if, and in so far as, it does not accord with the values of the Constitution.[6]

(3) The exclusion-of-values rule does not accord with the values of the Constitution. For the values of the Constitution require a court, when applying the common-law rules of vicarious liability to facts regarding which they are indeterminate, to consider the values underlying the rules as well as the values of the Constitution.[7]

(4) A court deciding a case by applying the common-law rules of vicarious liability to facts regarding which they are indeterminate is therefore obliged to apply, and thereby substitute for the exclusion-of-values rule, the following inclusion-of-values rule: when applying the common-law rules of vicarious liability to facts regarding which they are indeterminate, a court must consider the values underlying them and the values of the Constitution.[8]

(5) The common-law rules of vicarious liability are indeterminate as regards the facts of *K*. While it is clear that the policemen's sole intention in raping Ms K was to promote their own interests, it is not clear whether the rapes were sufficiently closely connected to the policemen's employment to justify the imposition of liability for the rapes on the Minister of Safety and Security.[9]

(6) The Supreme Court of Appeal was therefore obliged, when deciding *K*, to apply, and thereby substitute for the exclusion-of-values rule, the inclusion-of-values rule.[10]

(7) Consideration of the values underlying the rules of vicarious liability and the values of the Constitution yields the conclusion that the policemen's rapes were sufficiently closely connected to their employment to justify the imposition of liability on the Minister.[11] It does so for two reasons. (a) The breach-of-duty ground: when raping Ms K, the policemen simultaneously breached a duty, imposed upon them by their employment and the Constitution, to protect members of the public from crime.[12] (b) The exploitation-of-trust ground: the policemen would not have had the opportunity to rape Ms K but for the trust that she placed in them because they were under a duty, imposed upon them by their employment and the Constitution, to protect members of the public from crime.[13]

(8) Application of the course-and-scope, intention/connection, and inclusion-of-values rules to the facts of *K* therefore yields the

[6] Ibid at 428A-429B, 429G.
[7] Ibid at 432C-D.
[8] Ibid at 433A-C, 441H-J.
[9] Ibid at 429E-F, 432E-F, 443D-E.
[10] This proposition is entailed by propositions (4) and (5).
[11] *K* supra note 2 at 444C, 445D, F.
[12] Ibid at 443B, F-G, 444B, 445E.
[13] Ibid at 443G-444A, 445D-E.

conclusion that the Minister is vicariously liable for the rapes committed by the policemen upon Ms K.[14]

(9) The Supreme Court of Appeal's contrary decision is thus mistaken. Moreover, since the Supreme Court of Appeal's mistaken decision resulted from its failure to meet an obligation imposed upon it by the Constitution, the Constitutional Court is entitled to set the decision aside.[15]

The above argument is invalid. It is invalid because its premises contain six mistakes. Two of the mistakes are to be found in the first premise. Both are mistakes about what the common-law rules of vicarious liability are. According to the first premise, the common-law rules of vicarious liability include the intention/connection and exclusion-of-values rules. As section II explains, that is not so. The common law never determined whether an employee's delict had been committed within the course and scope of his employment by asking whether he had intended only to promote his own interests and, if so, whether there nevertheless was a sufficiently close connection between his delict and his employment. Instead, it always did so by asking whether the employee's delict had been committed in the discharge of a duty imposed by his employer and defining his employment rather than the manner wherein it was to be carried out. And, rather than prohibiting courts from considering the values underlying the common-law rules of vicarious liability when applying those rules to facts regarding which they are indeterminate, the common law permitted it.

The third and fourth mistakes, which appear in the second premise, are mistakes about what s 39(2) of the Constitution requires. According to the second premise, s 39(2) imposes an obligation on courts to develop the common law whenever that would promote the values of the Constitution. As section III explains, the values made relevant by s 39(2) are not — as the second premise would have it — those of the Constitution, but rather those of the Bill of Rights. As section III further explains, the obligation imposed by s 39(2) is not — as is maintained by the second premise — an obligation to develop the common law (whenever that would promote the values of the Bill of Rights), but rather an obligation to promote the values of the Bill of Rights (whenever the common law is being developed).

Mistakes five and six occur in the seventh premise. They concern the application of the intention/connection rule, and specifically of the sufficiently-close-connection condition therein, to the facts of the *K* case. According to the seventh premise, the sufficiently-close-connection condition is satisfied for two reasons. One is the breach-of-duty ground. The other is the exploitation-of-trust ground. According to the former, the policemen's rapes of Ms K were sufficiently closely connected to their employment because they simultaneously breached their duty to protect members of the

[14] Ibid at 445F-G.
[15] Ibid at 430A.

public from crime. According to the latter, the policemen's rapes of Ms K were sufficiently closely connected to their employment because they exploited her trust in them, a trust which had been created by their duty to protect members of the public from crime. As section IV explains, the first of these, namely the breach-of-duty ground, defies common sense. For it entails that the less a person was doing his job (or the less of his job he was doing) when committing a delict, the closer his delict was connected to his job. As section IV also explains, the second of these, namely the exploitation-of-trust ground, makes a mistake about the only theory that could possibly justify the idea that an employee's exploitation of trust could connect a delict committed by him to his employment, namely the theory of enterprise-liability.

II THE COMMON-LAW RULES OF VICARIOUS LIABILITY

In its *K* judgment, the Constitutional Court asserted that the common law had developed the following three rules of vicarious liability:

> '[A]n employer [is] liable for the delicts committed by its employees where the employees are acting in the course and scope of their duty as employees.'[16]
>
> '[To determine whether an employee was acting in the course and scope of his employment] there are two questions to be asked. The first is whether the wrongful acts [of the employee] were done solely for the purposes of the employee. This question requires a subjective consideration of the employee's state of mind. . . . Even if it is answered in the affirmative, however, the employer may nevertheless be liable vicariously if the second question, an objective one, is answered affirmatively. That question is whether, even though the acts done have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee's acts for his own interests and the purposes and the business of the employer.'[17]
>
> '[T]he application of the common-law principles of vicarious liability [is] a matter of fact untrammelled by any considerations of law or normative principle.'[18]

For brevity's sake, this article refers to the first of the three rules as the course-and-scope rule, to the second as the intention/connection rule, and to the third as the exclusion-of-values rule.

This section shows that the Constitutional Court got the common law wrong as regards the second and third of these rules. Contrary to the court's assertion, neither the intention/connection rule nor the exclusion-of-values rule ever was part of the common law.

As authority for its view that the common law had developed the intention/connection rule, the Constitutional Court relied on the case of

[16] Ibid at 431F. See also at 433E.
[17] Ibid at 436C-E. See also at 441G-H, 442B-C, 443C-F.
[18] Ibid at 432C. See also at 432C-E.

Minister of Police v Rabie.[19] However, the court seems to have believed that the rule was, at the very least, consistent with the earlier case of *Feldman (Pty) Ltd v Mall*.[20] The court also asserted that the rule had been applied 'in many cases' subsequent to *Rabie*.[21] Subsection (1) explains that, though the *Rabie* case endorsed the intention/connection rule, it did not do so as part of its ratio. It follows that, if the intention/connection rule was part of the common law, it could only be so by virtue of one or more judgments preceding or succeeding the *Rabie* case. Subsections (2) and (3) conduct an investigation of the pre- and post-*Rabie* judgments of the Appellate Division and Supreme Court of Appeal which dealt with the course-and-scope requirement. The analysis reveals that none of them decided the course-and-scope question raised in it by application of the intention/connection rule. Instead, all decided it by application of the wholly different rule set out below:

> The discharge-of-duty rule: An employee's delict was committed in the course and scope of his employment if and only if he committed it while discharging a duty imposed upon him by his employer and defining his employment rather than the manner wherein it is to be carried out.

To substantiate its claim that the common law contained the exclusion-of-values rule, the Constitutional Court relied upon two assertions, each of which — according to the Constitutional Court — had 'often' been made by 'our Courts'.[22] The first is that the common-law rules of vicarious liability are not to be confused with the reasons for them.[23] The second is that application of the common-law principles of vicarious liability is a matter of fact.[24] As subsection (4) explains, it is true that the Appellate Division and Supreme Court of Appeal made these assertions. However, it is false that their having done so entails the conclusion drawn by the Constitutional Court, namely that the exclusion-of-values rule was part of the common law.

(1) *The* Rabie *case*

There were two judgments in *Rabie*: a majority judgment by Jansen JA and a dissenting one by Van Heerden JA. Both judgments expressly approved the intention/connection rule.[25] However, the fact that a judgment has approved a rule is not enough to make it law. For the approved rule to become law it is necessary, also, that it was a reason for the decision reached by the court or, where the court is split, for the decision reached by a

[19] 1986 (1) SA 117 (A) at 134C-E; referred to in *K* supra note 2 at 436A-C, 441G-H, 442A-B.

[20] 1945 AD 733; referred to in *K* supra note 2 at 434C-F.

[21] *K* supra note 2 at at 436A-B, F.

[22] Ibid at 432B.

[23] Ibid at 432B-C.

[24] Ibid.

[25] *Rabie* supra note 19: see Jansen JA at 134C-E and Van Heerden JA at 131D-E.

majority thereof. That is the difficulty here. It is arguable that Van Heerden JA did rely on the intention/connection rule in order to reach his decision — but his judgment was a dissenting one. Jansen JA's judgment was that of the majority — but, though he approved the intention/connection rule, he placed no reliance upon it in order to make his decision.

On the contrary, Jansen JA drew a distinction between delicts committed by employees deviating from, and delicts committed by employees 'ostensibly embarked' upon, their employment duties.[26] According to Jansen JA, the intention/connection rule had previously been applied, and was appropriate, to determine only whether delicts of the former kind (that is, delicts arising from deviations) had been committed within the course and scope of employment.[27] By contrast, the question whether a delict of the latter kind (that is, one committed by an employee ostensibly carrying out his employment duties) fell within the course and scope of employment was to be determined by applying an altogether different rule: did the delict fall within the risk created by the employment?[28] According to Jansen JA, the delict in the case before him had been committed by an employee ostensibly discharging, rather than deviating from, his employment duties.[29] Consistent with that characterization of the delict, Jansen JA thus made his decision as to whether the delict had fallen within the course and scope of the employee's employment by applying the risk-based rule just mentioned, rather than by applying the intention/connection rule.[30]

So, although the intention/connection rule was expressly endorsed by both of the judgments handed down in the *Rabie* case, neither endorsement had any law-making or precedential effect. It is perhaps worth pointing out that, even if Jansen JA, for the majority, had relied upon the intention/connection rule in order to decide the case, the rule would not have been particularly firmly entrenched in the common law by his doing so. Jansen JA did not believe that the intention/connection rule which he had formulated was a novel one. On the contrary, he believed it to have been applied for many years.[31] That, as shall be seen in the next subsection, was not the case. The fact that a judgment endorses and applies a novel rule in the mistaken belief that it is a well-established one probably does not deprive the judgment of its law-making or precedential force. But it certainly diminishes that force.

(2) *The cases prior to* Rabie

This subsection discusses eight Appellate Division cases that dealt with the course-and-scope requirement prior to the *Rabie* case. The point of doing so

[26] Ibid at 134F-G.
[27] Ibid.
[28] Ibid at 134H-J.
[29] Ibid at 134F-G.
[30] Ibid at 34I-135C.
[31] Ibid at 134D-G.

is to see whether the intention/connection rule already was part of the common law at the time that *Rabie* was decided.

Mkize v Martens:[32] Two boys in the employ of Mkize, a transport driver, while accompanying him on a journey, lit a fire at an outspan for the purpose of cooking their midday meal. As a result of the boys' negligence, the fire spread to Martens' land, where it damaged his grass and trees. In lighting the fire to cook their food, the boys were not disobeying any prohibition imposed upon them by their employer, Mkize.[33] But neither were they, by doing so, discharging any 'of the duties ordinarily assigned to them by [Mkize] while he was with them on the journey'.[34] The court nevertheless found that the boys had been acting within the course and scope of their employment when they lit the fire.

The court's reason for so finding was that, given the circumstances wherein the boys had lit the fire, specifically the fact that Mkize some hours previously had placed them 'in sole charge of the wagon and mules' while he went off in search of a missing mule, 'the ambit of the duties impliedly entrusted to [the boys]' had been temporarily 'enlarged'.[35] Thus, at the time of the outspan, the boys' duties included also the duty to take whatever measures were 'reasonably necessary' to serve the general well-being of the expedition.[36] In lighting the fire to feed themselves, the boys were simply discharging that duty — just as they would have been discharging it by 'prepar[ing] fodder for the mules'.[37] And it was that fact, the fact that when lighting the fire the boys were still discharging a duty imposed — albeit impliedly rather than expressly — upon them by their employment, which placed their lighting of the fire within rather than without the course and scope of their employment.

Estate van der Byl v Swanepoel:[38] A taxi driver in Van der Byl's employ had negligently collided with a horse-drawn cart driven by Swanepoel. At the time of the collision, the taxi driver was returning to the Strand railway station after conveying two fare-paying passengers from there to another destination within the Strand municipal area. The driver had undertaken the trip contrary to an express instruction by Van der Byl that none of his drivers was 'to convey passengers from one point to another within the Strand municipality'.[39] The court held that the driver nonetheless had been acting within the course and scope of his employment when he caused the accident.

The court's reasons for so holding were as follows. Van der Byl had imposed upon the taxi driver in question not only the duty that the latter had

[32] 1914 AD 382.
[33] Ibid at 392.
[34] Ibid at 391, also at 386, 396, 397.
[35] Ibid at 391–2, 396, 401.
[36] Ibid at 397, 401, 402.
[37] Ibid at 393.
[38] 1927 AD 141.
[39] Ibid at 144.

breached, namely the duty not to convey passengers within the Strand municipal area, but also the duty 'of driving a motor for hire on behalf of his master' or 'to ply for hire with his master's car, for the benefit of the latter'.[40] These two duties were of a different kind or nature. The latter duty defined the 'work or employment to which [the taxi driver] had been appointed'; it was his 'main duty'.[41] The former, by contrast, merely circumscribed the way wherein the work or employment to which the taxi driver had been appointed was to be done; it merely determined the 'modus or manner in which [the taxi driver] [wa]s to carry out [his main] duty'.[42] This difference was one that mattered to the question before the court, namely whether the taxi driver had been acting within the course and scope of his employment at the time of the collision. According to the court, the driver was at the time of the collision still discharging his main duty, the duty that defined the work or employment to which he had been appointed, namely to drive Van der Byl's motor car for hire. That fact — that is, the fact that the driver was at the time of the collision still discharging his main or employment-defining duty — was sufficient to satisfy the course-and-scope requirement. Conversely, to the question whether the driver's delict fell within the course and scope of his employment, the fact that he was at the time breaching his duty not to convey passengers in the Strand municipal area was irrelevant. It was irrelevant because the duty breached was not a main or employment-defining duty, but merely a duty circumscribing the manner wherein a main or employment-defining duty was to be discharged.

Union Government v Hawkins:[43] A driver of a troop carrier, employed by the Union Government, had collided with and killed the husband of the plaintiff, Hawkins. The driver had been instructed to drive the troop carrier from Voortrekkerhoogte to Quaggapoort by a particular route. He was also under standing orders not to stop the troop carrier in order to give a lift to anyone other than a commissioned officer. When the collision occurred the driver was in breach of both these duties: he had given a lift to a non-commissioned officer, to a destination off the prescribed route, and though he was returning to the prescribed route, he had not yet rejoined it. Notwithstanding the driver's twofold breach of duty, the court decided that he had been acting in the course and scope of his employment at the time of the collision.

In coming to this decision, the court adopted a line of reasoning similar to that in *Estate van der Byl*. That is, it relied on the same distinction between two kinds of employer-imposed duties, namely those defining the job to be done and those circumscribing the means of doing it. And it relied on the idea that, while an employee's breach of the latter kind of duty is insufficient to place his act outside the course and scope of his employment, his discharge

[40] Ibid at 152, 154.
[41] Ibid.
[42] Ibid at 154.
[43] 1944 AD 556.

of the former kind of duty is sufficient to place his act inside it. As the court put it, the driver's 'general function . . . was to drive a troop carrier' and his particular duty on that day was to drive it to Quaggapoort.[44] At the time of the collision, the driver was exercising that general function and discharging that particular duty: he was driving a troop carrier to Quaggapoort. And, that — the fact that the driver was at the time of the collision carrying out his general function and his particular duty — was enough to place his driving at the time of the collision within the course and scope of his employment. It is true that, at the time of the collision, the driver was not driving to Quaggapoort by the prescribed route and had disobeyed a standing instruction not to give anyone other than a commissioned officer a lift. But these breaches of duty were not enough to place his driving outside the course and scope of his employment. For, as the court put it, a servant 'may still be engaged in the business of his master although he has not obeyed the instructions of his master for the conduct of that business'.[45]

Feldman (Pty) Ltd v Mall:[46] The defendant company employed a certain Baloyi as a van driver. On a particular Saturday, Baloyi had been instructed 'to drive the van through the streets of Johannesburg, to deliver [certain] parcels to the customers for whom they were intended and, after that, to deliver the van to [the company's] garage in Sauer Street'.[47] However, '[a]fter delivering the parcels and before delivering the van at Sauer Street [Baloyi] drove the van to Sophiatown on his own business and there drank enough liquor to make him incapable of driving the van safely through the streets'.[48] In this intoxicated state Baloyi left Sophiatown with the van, with the aim of returning it to the garage in Sauer Street. Shortly after commencing his return journey, Baloyi negligently collided with and killed Manack, the father of two minor children on whose behalf the plaintiff, Mall, instituted an action against the defendant. Baloyi's trip to Sophiatown was contrary to his instructions. It was, to put it another way, in breach of a duty imposed upon him by his employer. The court, by a majority of four to one, nonetheless held that Baloyi had been acting within the course and scope of his employment at the time of the collision.

In separate majority judgments, Watermeyer CJ and Tindall JA both applied the rule that had evolved in *Mkize*, *Estate van der Byl* and *Hawkins*. Watermeyer CJ formulated the rule as follows.

> 'Instructions vary in character, some may define the work to be done by the servant, others may prescribe the manner in which it is to be accomplished; some may indicate the end to be attained and others the means by which it is to be attained. Provided the servant is doing his master's work or pursuing his master's ends he is acting within the scope of his employment even if he

[44] Ibid at 562.
[45] Ibid.
[46] Supra note 20.
[47] Ibid at 741.
[48] Ibid.

> disobeys his master's instructions as to the manner of doing the work or as to the means by which the end is to be attained.'[49]

Tindall JA's formulation of the rule is more brief: a servant acts within the course and scope of his employment as long as it can 'reasonably be held that he is still exercising the functions to which he was appointed'.[50]

According to Watermeyer CJ and Tindall JA, Baloyi satisfied the condition imposed by this rule. That is, he was, at the time of the collision, 'doing his master's work or pursuing his master's ends' (Watermeyer CJ) or 'exercising the functions to which he was appointed' (Tindall JA). For the duties imposed upon him by his employer included not only the duty that he had breached, but also the duty to 'keep control of [the van] for his employer and return it to his employer's garage'.[51] The latter duty — that is the duty to keep control of the van with the aim of returning it to the garage in Sauer Street — 'was part of the work entrusted to [Baloyi]'.[52] It was embraced by 'the functions to which he had been appointed'.[53] Moreover, at the time of the collision, Baloyi was still busy discharging that duty: 'He [Baloyi] was still retaining custody and control of the van on behalf of his master, both at the time when he became intoxicated and at the time when the accident occurred, for the ultimate purpose of delivering it at the Sauer Street garage in accordance with his master's instructions.'[54]

It is worth pointing out that Greenberg JA, in his dissent, applied the same rule as was applied by the majority. He agreed that it was a sufficient condition, for Baloyi's negligent driving to have been within the course and scope of his employment, that Baloyi was discharging a duty which defined 'the sphere of [his] employment'.[55] And he agreed that it was not a sufficient condition, for Baloyi's negligent driving to have been outside the course and scope of his employment, that Baloyi was breaching a duty which merely 'deals with conduct within the sphere of [his] employment'.[56] But Greenberg JA disagreed with the majority as to where, in the circumstances of the case, the line between the two kinds of duty was to be drawn. According to Greenberg JA, Baloyi's 'sphere of employment' was defined, not by his duty to drive the van, but rather by his duty to drive the van *for his employer's purposes*. As he put it:

> '[T]o disregard the purposes of the driving and to describe his [Baloyi's] duty as a general one of driving the van appears to me to be a disregard of the contract of employment and of all the circumstances. His was not a function, *in vacuo*, as

[49] Ibid at 736.
[50] Ibid at 756.
[51] Ibid at 757; also at 742.
[52] Ibid at 741.
[53] Ibid at 756.
[54] Ibid at 742–3.
[55] Ibid at 762.
[56] Ibid at 762–3.

> it were, to drive the van, but he had to drive it for particular purposes. To drive the van for those purposes was part of his duties. . . .'[57]

According to Greenberg JA, Baloyi was, at the time of the collision, driving the van not for his employer's purposes, but for a purpose entirely his own, namely to undo the effects of his own misconduct.[58] Thus, Greenberg JA concluded, Baloyi's negligent driving had not been within the course and scope of his employment.

South African Railways and Harbours v Marais,[59] *Carter & Co (Pty) Ltd v McDonald*,[60] *African Guarantee & Indemnity Co Ltd v Minister of Justice*,[61] and *Ngubetole v Administrator, Cape and Another*:[62] There is no need for a detailed discussion of these four cases. In the four pre-*Rabie* cases already discussed, namely *Mkize*, *Estate van der Byl*, *Hawkins* and *Feldman*, the Appellate Division recognized one, and only one, state of affairs as a sufficient condition for an employee's delict to have been within the course and scope of his employment. It was that the employee committed the delict while discharging a duty imposed by his employer and defining his work rather than the manner of its execution. The remaining four pre-*Rabie* cases did not add any further states of affairs to this one.

Two of the cases, namely *Marais* and *Carter*, could not possibly have done so. In *Marais*, the court held that a train driver in the employ of the defendant had acted outside the course and scope of his employment when he transported the plaintiff's deceased husband on the train's engine. In *Carter*, the court held that an employee of the defendant had been acting outside the course and scope of his employment when, while cycling a bicycle provided by the defendant, he collided with the plaintiff. In neither was it suggested, let alone expressly stated, that any state of affairs other than the discharge of an employer-imposed, work-defining duty might be sufficient for an employee's delict to have been within the course and scope of his employment. But even if the court, in either of these cases, had made a statement to that effect, it would have been obiter. It would have been obiter because, given the conclusion reached, namely that the conduct in question was outside the course and scope of employment, the court could not possibly have placed any reliance upon it.

The other two cases, namely *African Guarantee & Indemnity Co* and *Ngubetole*, could have added a further state of affairs to the one recognized in the first four pre-*Rabie* cases. In both, the court concluded that the course-and-scope requirement had been satisfied. It follows that, if the court, in either case, had based its conclusion on a state of affairs other than the discharge of an employer-imposed, work-defining duty, it would thereby

[57] Ibid at 764–5.
[58] Ibid at 781.
[59] 1950 (4) SA 610 (A).
[60] 1955 (1) SA 202 (A).
[61] 1959 (2) SA 437 (A).
[62] 1975 (3) SA 1 (A).

have changed the law. But in neither case did the court do so. In *African Guarantee & Indemnity Co*, the court concluded that two constables in the defendant's employ had been acting in the course and scope of their employment when, in breach of duty, they entered into a race with their police car and consequently crashed it into a motor car belonging to the plaintiff. In *Ngubetole*, the court concluded that a driver in the employ of one of the defendants had been acting in the course and scope of his employment when, contrary to instructions, he handed over the driving of his vehicle to a fellow employee. In the first case, the court's reason for its conclusion was that the constables were still, at the time, 'exercising the functions to which they were appointed', one of those being to keep 'control of the car'.[63] In the second, it was that the driver was still carrying out 'his appointed task', which was to collect the fellow employee from his home in order to transport him to his place of work.[64] In other words, in both these cases, the court reached its decision not by departing from or adding to, but simply by applying, the rule previously developed in *Mkize*, *Estate van der Byl*, *Hawkins* and *Feldman*.

(3) *The cases subsequent to* Rabie

The preceding two subsections have established two facts about the intention/connection rule. First, although the rule was endorsed in *Rabie*, it was not thereby made law. Secondly, the rule had not been made law prior to *Rabie*: in the Appellate Division cases preceding *Rabie*, satisfaction of the course-and-scope requirement had consistently been determined by applying an altogether different rule, one requiring not that the employee's delict was sufficiently closely connected with his employment but rather that it was committed while discharging a duty imposed by his employer and defining his work rather than the manner of its execution. It follows that, were the Constitutional Court's assertion that the common law contained the intention/connection rule correct, it would have to be by virtue of one or more cases subsequent to *Rabie*.

There are five post-*Rabie* (and pre-*K*) judgments of the Appellate Division and eight of the Supreme Court of Appeal dealing with the course-and-scope requirement. As is explained below, none of these judgments abandoned the discharge-of-duty rule that had been established in *Mkize*, *Estate van der Byl*, *Hawkins* and *Feldman* in favour of the intention/connection rule that had been endorsed (but — and this warrants repetition — not made law) in *Rabie*. Nor did any of them, though not altogether abandoning the discharge-of-duty rule, somehow supplement it with the intention/connection one.

Of the thirteen post-*Rabie* cases, there are eight that could not possibly have replaced or supplemented the discharge-of-duty rule with the intention/connection rule. They are *Minister van Wet en Orde v Wilson en 'n*

[63] *African Guarantee & Indemnity Co* supra note 61 at 447F.
[64] *Ngubetole* supra note 62 at 12F.

Ander,[65] *Minister of Law and Order v Ngobo*,[66] *Macala v Maokeng Town Council*,[67] *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd*,[68] *Ess Kay Electronics Pte Ltd v First National Bank of Southern Africa Ltd*,[69] *Minister van Veiligheid en Sekuriteit v Phoebus Apollo Aviation Bk*,[70] *Bezuidenhout NO v Eskom*,[71] and *Costa da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy*.[72] The reason is the one that was explained in the previous subsection, when discussing *Marais* and *Carter*. In every one of these eight cases, as in *Marais* and *Carter*, the court decided that the course-and-scope requirement had *not* been satisfied. If a court decides that a particular requirement is *not* satisfied, then, though it might have made a statement as to the sufficient conditions for the satisfaction of that requirement, it could not possibly have relied on that statement in coming to its decision. If a court makes a statement, but does not rely upon it in reaching its decision, the statement is obiter. Thus, though the intention/connection rule was expressly approved in *Wilson*,[73] *Macala*,[74] *ABSA Bank*,[75] *Bezuidenhout*,[76] and possibly approved in *Ngobo*,[77] that approval had no law-making effect.

That leaves five cases: *Tshabalala v Lekoa City Council*,[78] *Viljoen v Smith*,[79] *Venter v Bophutatswana Transport Holdings (Edms) Bpk*,[80] *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport*,[81] and *Minister van Veiligheid en Sekuriteit v Japmoco Bk h/a Status Motors*.[82] In all of these, the court decided that the course-and-scope requirement had been satisfied. Did it, in any of them, do so by application of the intention/connection rule?

It certainly did not do so in *Tshabalala*, *Venter* or *Jordaan*. There can be no doubt that in every one of these cases the court reached its decision by applying the pre-*Rabie* rule, that is, the discharge-of-duty rule developed in *Mkize*, *Estate van der Byl*, *Hawkins* and *Feldman*. In *Tshabalala*, the court's reason for concluding that a constable in the employ of the defendant had been acting within the course and scope of his employment when he shot the plaintiff was that, in doing so, he 'was performing his duties as a

[65] 1992 (3) SA 920 (A).
[66] 1992 (4) SA 822 (A).
[67] 1993 (1) SA 434 (A).
[68] 2001 (1) SA 372 (SCA).
[69] 2001 (1) SA 1214 (SCA).
[70] 2002 (5) SA 475 (SCA).
[71] 2003 (3) SA 83 (SCA).
[72] 2003 (4) SA 34 (SCA).
[73] Supra note 65 at 927F.
[74] Supra note 67 at 440J-441B.
[75] Supra note 68 at 378G-I.
[76] Supra note 71 at 94F-G.
[77] Supra note 66 at 830D.
[78] 1992 (3) SA 21 (A).
[79] 1997 (1) SA 309 (A).
[80] 1997 (3) SA 347 (SCA).
[81] 2000 (4) SA 21 (SCA).
[82] 2002 (5) SA 649 (SCA).

policeman'.[83] In *Venter*, the court found that a truck driver in the employ of the defendant had been acting within the course and scope of his employment when he collided with a bus owned by the plaintiff, even though the collision had taken place after hours. The court reached its finding without any mention of the *Rabie* case. Although this was not explicitly stated, the court's reason for its finding was that the driver, at the time of the collision, was discharging one of his main duties. According to the court, the truck had broken down some distance away from the defendant's place of business and had been repaired by two technicians also in the defendant's employ. The collision had occurred while the driver was returning the truck to the defendant's place of business after the repair work's completion. As for the approach taken in *Jordaan*, the following passages speak for themselves:

> 'The standard test for vicarious liability is, of course, whether the delict in question was committed by an employee while acting in the course and scope of his employment. The inquiry is frequently said to be whether at the time the employee was about the affairs or business or doing the work of the employer . . . This is no doubt true, but it should not be overlooked that the affairs or business or work of the employer in question must relate to what the employee was *generally employed* or *specifically instructed* to do.'[84]
>
> 'In [a deviation] case, whether the employer is to be held liable or not must depend on the nature and extent of the deviation. Once the deviation is such that it cannot be reasonably held that the employee is still exercising the *functions to which he was appointed*, or still carrying out *some instruction of the employer*, the latter will cease to be liable.'[85]

Only two cases remain: *Viljoen* and *Japmoco*. On the interpretation of these two cases stands or falls the truth of the Constitutional Court's assertion that the intention/connection rule was part of the common law. In support of that assertion, the Constitutional Court placed some reliance on the latter case: it was one of the 'many cases', said the court, which had applied 'the *Rabie* test'.[86] But the court made no reference to the former one. That is not altogether surprising. Whereas the *Viljoen* judgment made only passing reference to the *Rabie* case, the *Japmoco* judgment not only set out in full its formulation of the intention/connection test, but also expressly asserted that it is '[d]ie norm wat moet bepaal of die handeling van die werknemer binne dan wel buite die perke van sy diensbetrekking val'.[87] Since, on the face of it at any rate, the *Japmoco* judgment appears to be the more likely to vindicate the Constitutional Court's assertion, it will be discussed last.

Viljoen: The plaintiff and the defendant were neighbouring farmers. A labourer in the defendant's employ had caused a veld fire to break out on a

[83] Supra note 78 at 31A-B.
[84] Supra note 81 at 24H-J, emphasis added.
[85] Ibid at 25C-D, emphasis added.
[86] *K* supra note 2 at 436n39.
[87] *Viljoen* supra note 79 at 316I, 317I-J; *Japmoco* supra note 82 at 659B-E.

farm belonging to the plaintiff. The labourer had been working in one of the defendant's vineyards when, in order to relieve himself, he wandered over to the plaintiff's adjacent farm. There he attempted to light a cigarette but, instead, set fire to the surrounding veld. Though the defendant's labourers were permitted to relieve themselves in the veld or vineyard on his farm, and to have a smoke while doing so, they were strictly forbidden entry into the plaintiff's farm. The court nevertheless found that the labourer had been acting within the course and scope of his employment.

The court's reasoning was as follows. If (contrary to the actual facts) the labourer had chosen to relieve himself in the veld or vineyard on the defendant's farm, and had lit up a cigarette while doing so, he undoubtedly would have been acting within the course and scope of his employment.[88] The only question therefore was whether, by choosing to relieve himself and have a smoke on the plaintiff's farm, rather than the defendant's, he had placed himself outside the course and scope of his employment.[89] The court concluded that he had not. In coming to that conclusion the court made both a 'subjective' and an 'objective' assessment of the labourer's behaviour. According to the court, nothing much could be learnt from the former. It was unclear why the labourer had chosen to relieve himself on the plaintiff's rather than the defendant's farm. But there was neither evidence nor reason to suspect that he had done so with an ulterior motive.[90] As regards the latter, what mattered was the additional distance that the labourer walked and the extra time that he took in order to relieve himself on the plaintiff's farm rather than the defendant's one. According to the court, both were negligible.[91]

Some may see in this reasoning an application of the intention/connection rule. In particular, they may equate the court's 'objective assessment' of the labourer's behaviour with the 'objective test' in the intention/connection rule which, to recall, enquires whether there was a 'sufficiently close connection' between an employee's delict and his employment.[92] But they would be misinterpreting the judgment. Most obviously, their interpretation fails to explain why the court, when engaged in its 'objective assessment' of the labourer's behaviour, neither referred to *Rabie*, nor mentioned its key phrase: 'a sufficiently close connection'. However, there is a less obvious yet more important objection to the attempt to cast the *Viljoen* judgment into a *Rabie* mould.

Ask yourself the question: Why did the court regard it as self-evident that the labourer would have been acting within the course and scope of his employment, if he had chosen to relieve himself and have a smoke on the

[88] *Viljoen* supra note 79 at 317D-F.
[89] Ibid at 317G.
[90] Ibid at 317I-318A.
[91] Ibid at 318B-E.
[92] For an interpretation along these lines, see Anton Fagan & Eduard Fagan 'Law of delict' 1997 *Annual Survey of South African Law* 256 at 267.

defendant's farm rather than the plaintiff's one? It did so, of course, because the labourer would, in that event, still have been discharging the duties that defined his work. He would still have been performing the function to which he had been appointed. For it would be absurd to imagine that he ceased to discharge those duties or perform that function the second he dropped his pants and resumed them the moment that he re-buckled his belt or zipped up his fly. Consider, by way of comparison, a university professor. Is it plausible to suggest that he stops discharging his work-defining duties as soon as he steps out of his office to go to the toilet or the staff room, and that he starts to discharge those duties again only when he steps back into his office?

Given the fact that the labourer would still have been discharging his work-defining duties, had he chosen to relieve himself and have a smoke on the defendant's farm, an obvious question to ask is this: Does the mere fact that the labourer, contrary to his instructions, wandered onto the plaintiff's farm in order to relieve himself and have a smoke mean that he ceased to discharge his work-defining duties? It was in order to answer this question that the court, in *Viljoen*, conducted its 'subjective' and 'objective' assessments of the labourer's behaviour. And its answer, though not made explicit, was that the labourer had not ceased to discharge his duties. This is a plausible response. To see that, consider again the university professor. Imagine that his Dean had set aside a toilet for the exclusive use of Faculty visitors. If the professor would still have been discharging his work-defining duties while relieving himself in the general staff toilet, he surely would also be doing so if, contrary to instructions, he chose to relieve himself in the visitors' loo (because it was closer to his office or had a better view).

By now it should be apparent why it is a mistake to see the *Viljoen* judgment as applying the intention/connection rule. As explained, the critical question in *Viljoen* was whether the labourer had ceased to discharge his work-defining duties because, contrary to his instructions, he had wandered off onto the plaintiff's farm. This is a question that one would expect to be asked by a Court applying the discharge-of-duty rule long since established in *Mkize*, *Estate van der Byl*, *Hawkins* and *Feldman*. But it is not a question that would be asked by a Court applying the 'objective test' of the intention/connection rule. For the 'objective test' of the latter rule does not aim to determine whether an employee has ceased to discharge his work-defining duties. Instead, it assumes that he has, and then asks whether there nonetheless is a sufficiently close connection between his conduct and the duties which he ought to have discharged, but did not.

Japmoco: Police officials in the employ of the defendant, the Minister of Safety and Security, had issued a number of false motor-vehicle clearance certificates, thereby enabling a syndicate of car thieves to sell eight stolen vehicles to a second-hand car dealer who in turn sold them on to the plaintiff, another second-hand car dealer. The vehicles were subsequently seized by the police. In an action against the Minister, the plaintiff claimed that the issuing of the false certificates by the police officials constituted a

delict against it, that the delict had been committed by the police officials acting within the course and scope of their employment, and that the delict had caused it to suffer a loss of a particular magnitude. The Supreme Court of Appeal found against the plaintiff, on the basis that it had failed to prove the magnitude of its loss. Given that finding, it was unnecessary for the court to determine whether the police officials had been acting within the course and scope of their employment when they issued the false clearance certificates. But it did so anyway. According to the court, the police officials had been acting in the course and scope of their employment when issuing the false certificates, even though their doing so was in direct contravention of certain instructions from their employer concerning the issuing of such certificates.[93]

As noted earlier, the court, in coming to its decision, expressly endorsed the intention/connection rule. As it put it, the intention/connection rule provides '[t]he norm which must determine whether the conduct of the employee falls within or without his employment'.[94] An obvious inference to draw is that the court must have reached its decision by application of that rule. However, close analysis of the judgment reveals that the court, though endorsing the intention/connection rule, did not in fact apply it. The court's real reason for its decision is revealed by the following passage: 'Die polisieklarings mag *vals* gewees het maar hulle was nie *vervals* nie. Die beamptes was steeds besig met hul opgelegde take.'[95] In other words, just as it had done in *Estate van der Byl*, *Hawkins* and *Feldman*, the court here drew a distinction between two duties, both whereof had been imposed upon the police officials by their employer. One was the duty to issue motor-vehicle clearance certificates. The other was the duty, when issuing motor-vehicle clearance certificates, to fill them in truthfully.[96] When committing their delict against the plaintiff, the police officials breached the second of these duties (since the certificates were false). But they did not breach the first (as the certificates were not falsified or forged). On the contrary, they discharged it: as the court put it, 'elkeen van hulle [was] besig om die presiese taak te verrig wat aan hulle opgedra is'.[97] And that fact — that is, the fact that the police officials committed their delict while discharging the exact task that had been assigned to them — was sufficient to place their delict within the course and scope of their employment.[98] Just, one might add for good measure, as the taxi driver's discharge of his duty to 'to ply for hire with his master's car' in *Estate van der Byl*, the troop driver's discharge of his duty to drive a troop carrier to Quaggapoort in *Hawkins*, and the van driver's discharge of his duty to 'keep control of [the van] for his employer and return

[93] *Japmoco* supra note 82 at 656F-G, 659H, 662B.
[94] Ibid at 659B-E (my translation).
[95] Ibid at 661E-F.
[96] Ibid at 660I.
[97] Ibid at 659I; also at 661I-J.
[98] Ibid at 661D-E.

it to his employer's garage' in *Feldman*, were sufficient to place their delicts within the course and scope of their employment.

(4) *The reasons for rules and matters of fact*

According to the Constitutional Court, the common-law rules of vicarious liability that were in existence at the time of *K* included not only the course-and-scope and intention/connection rules, but also the exclusion-of-values one. The exclusion-of-values rule, to recall, maintains that a court may not consider the values underlying the common-law rules of vicarious liability when applying those rules to facts regarding which they are indeterminate. The court's reason for attributing this rule to the common law was not that the Appellate Division or Supreme Court of Appeal had expressly endorsed it — that is unsurprising, since neither had done so. The court's reason, instead, was that the Appellate Division and Supreme Court of Appeal had expressly made two assertions each (or the combination) whereof entailed an endorsement of the exclusion-of-values rule. The first of those assertions, as formulated by the Constitutional Court, was that 'the common-law principles of vicarious liability are not to be confused with the reasons for them'.[99] The second, again in the words of the Constitutional Court, was that 'application [of the common-law principles of vicarious liability] remains a matter of fact'.[100]

The Constitutional Court made no mistake in attributing these two assertions to the Appellate Division and Supreme Court of Appeal. However, as this subsection explains, the Constitutional Court did make a mistake in taking these two assertions to entail an endorsement of the exclusion-of-values rule.

To see why the first assertion — that is, the assertion that the common-law rules of vicarious liability are not to be confused with the reasons for them — does not entail an endorsement of the exclusion-of-values rule, consider an example made famous by H L A Hart and Lon Fuller.[101] The example is that of a rule forbidding one to take a vehicle into a park. Imagine that the park in question has two park keepers, each burdened with the task of applying this rule. One is stationed at the park's north gate, the other at its south gate. Imagine further that the park keeper at the north gate were to prohibit you from taking into the park a knife and a guitar. When you ask him on what basis he is doing so, he answers that he is simply applying the rule prohibiting the taking of vehicles into the park. When you point out that he is not applying the rule, since neither a knife nor a guitar is a vehicle, he responds: 'Au contraire. The reason for the rule is to stop people bringing noisy and

[99] *K* supra note 2 at 432B-C.
[100] Ibid.
[101] H L A Hart 'Positivism and the separation of law and morals' (1958) 71 *Harvard LR* 593; Lon L Fuller 'Positivism and fidelity to law — A reply to Professor Hart' (1958) 71 *Harvard LR* 630.

dangerous objects into the park. Your knife is dangerous. Your guitar is noisy. I rest my case.'

Imagine also that the park keeper at the south gate were to prohibit your son from taking into the park a motorized skateboard, capable of reaching a speed of 75 km/h, which he had just finished constructing in your garage. Imagine further that the park keeper, in response to your son's demand that he explain his decision, were to provide the same reason as the one that his colleague at the north gate gave to justify his decision to prohibit the knife and guitar, namely that he was simply applying the no-vehicles-in-the-park rule. Imagine finally that, when your son objects that his contraption is not a vehicle, the park keeper responds as follows: 'It most certainly is. Not only is it a means of transportation, it also is both noisy and dangerous. And that is what the rule is there to prevent.'

As would be agreed by most legal philosophers, the park keeper at the north gate — the one who prohibits you from taking into the park your knife and guitar — is conceptually confused about the nature of rules and their application (at least if his response is a sincere one).[102] He is conceptually confused because it is not a sufficient condition, for a decision to constitute an application of a rule, that it is justified by the reasons for the rule. It is not a sufficient condition because whether a decision constitutes an application of a rule depends, in part at least, on the conventional meaning of the rule. The fact (assuming it is one) that the reason for the no-vehicles-in-the-park rule is to prevent noisy and dangerous objects from being brought into the park, and that that reason justifies a prohibition of knives and guitars, does not therefore entail that the latter prohibition qualifies as an application of the rule. At best it means that the prohibition may be justified by analogous reasoning from the rule.[103]

What about the park keeper at the south gate — the one who prohibits your son from taking into the park his motorized skateboard? Many legal philosophers would say that, while this park keeper might be making an error, he is not making a conceptual error about rules and their application.[104] The philosophers would point out that, given its conventional meaning, the no-vehicles-in-the-park rule is indeterminate regarding your son's motorized skateboard. It is indeterminate because it neither clearly is the case, nor clearly is not the case, that a motorized skateboard is a vehicle. As Hart might have put it, the motorized skateboard falls within the 'penumbra of debatable cases in which words [here the words 'no vehicles in

[102] See, for example, Fuller op cit note 101 at 670–1; Frederick Schauer *Playing by the Rules* (1992) at 51–2, 54–5, 76, 84–5; Kent Greenawalt *Law and Objectivity* (1992) at 42–4.

[103] On analogical reasoning from a rule, see Joseph Raz *The Authority of Law* (1979) at 201–6; Cass R Sunstein *Legal Reasoning and Political Conflict* (1996) at 62–100; Larry Alexander *Legal Rules and Legal Reasoning* (2000) at 179–227.

[104] See, for example, Fuller op cit note 101 at 662–5.

the park'] are neither obviously applicable nor obviously ruled out'.[105] The philosophers would point out, further, that it certainly is permissible, and perhaps even is obligatory, to decide cases falling within the 'penumbra' of a rule by considering the reasons for the rule. The philosophers would claim, finally, that the decision reached after consideration of those reasons constitutes an application of the rule.

For present purposes, it does not matter whether the latter view — that is, the view that one may consider the reasons for a rule when applying it to facts regarding which it is indeterminate — is correct. What matters, rather, is that it is intelligible. For it is intelligible only because proposition (1) below does not entail proposition (2):

(1) The fact that a decision is justified by the reasons for a rule is not a sufficient condition for it to constitute an application of the rule.
(2) When applying a rule to facts regarding which it is indeterminate, one may not consider the reasons for the rule.

If proposition (1) above does not entail proposition (2), neither does proposition (3) below entail proposition (4):

(3) The fact that a court's decision to impose vicarious liability on an employer is justified by the reasons for the common-law rules of vicarious liability is not a sufficient condition for it to constitute an application of those rules.
(4) When applying the common-law rules of vicarious liability to facts regarding which they are indeterminate, a court may not consider the reasons for those rules.

Proposition (4) above is, of course, the exclusion-of-values rule. The fact that proposition (3) does not entail proposition (4) therefore has an important implication for the Constitutional Court's attempt to infer, from the Appellate Division and Supreme Court of Appeal's assertion that the common-law rules of vicarious liability are not to be confused with the reasons for them, an endorsement of the exclusion-of-values rule. For it means that the inference would be an invalid one if, by making that assertion, the Appellate Division and Supreme Court of Appeal intended only to assert proposition (3) above.

Precisely that is the case. The assertion that the common-law rules of vicarious liability are not to be confused with the reasons for them was made in three judgments of the Appellate Division and Supreme Court of Appeal: *Carter*,[106] *Ngobo*,[107] and *Ess Kay Electronics*.[108] In every one of the three judgments, the context wherein the assertion was made was an explanation of why a court could not justify the imposition of vicarious liability on an

[105] Hart op cit note 101 at 607.
[106] Supra note 60 at 211H.
[107] Supra note 66 at 831G.
[108] Supra note 69 at 1219C.

employer by reasoning as follows: 'We have to decide this case by applying the common-law rules of vicarious liability. The reason for those rules is the so-called risk-principle. The only way to satisfy the risk-principle in this case is by holding the employer vicariously liable. We thus do so.' To put it differently, the context of the assertion was an explanation of why the imposition of vicarious liability could not be justified by adopting the kind of approach taken by the park keeper at the north gate. The assertion that the common-law rules of vicarious liability are not to be confused with the reasons for them was intended to capture or express the reason why this kind of justification must fail. What is that reason? It is, of course, proposition (3): the fact that a court's decision to impose vicarious liability on an employer is justified by the reasons for the common-law rules of vicarious liability is not a sufficient condition for it to constitute an application of those rules.

So, contrary to what was assumed by the Constitutional Court in *K*, the Appellate Division and Supreme Court of Appeal's assertion that the common-law rules of vicarious liability are not to be confused with the reasons for them does not entail their endorsement of the exclusion-of-values rule. What about the other assertion, the assertion that application of the common-law rules of vicarious liability is a matter of fact? Does this assertion entail an endorsement of the exclusion-of-values rule, as the Constitutional Court believed?

It does not. The assertion that the application of a common-law rule is a matter of fact is ambiguous. It might mean, on the one hand, that a court's application of the rule does not develop it, because the application does not constitute a precedent. So understood, the assertion that the application of a rule is a matter of fact can be contrasted with the assertion that it is a matter of law. The application of the rule is not a matter of law because a court applying the rule is not legally bound to apply it in the same manner as previous courts have done, nor will future courts be legally bound to apply the rule in the same manner as it has done. To put it another way, no court's application of the rule is governed by law created by prior applications of the rule, nor does any court's application of the rule create law governing future applications of the rule. The assertion that the application of a common-law rule is a matter of fact might mean, on the other hand, that a court's application of the rule does not require — or may not involve — evaluative reasoning. So understood, the assertion that the application of a rule is a matter of fact can be contrasted with the assertion that it is a matter of value.

That a rule's application is a matter of fact in the first sense described above does not entail that it is a matter of fact in the second. In other words, a rule's application may be a matter of fact not law, yet *not* be a matter of fact not value. The law of delict demonstrates that. As is explained in detail in the next section, the rules determining negligence, legal causation and the wrongfulness of negligent omissions and negligently-caused pure economic loss are not developed by their application.[109] Their application is thus a

[109] See section III subsection (3).

matter of fact in the first of the two described senses. That is, it is a matter of fact rather than law. However, the application of these rules is not a matter of fact in the second sense. It is not a matter of fact not value, for it does or may involve evaluative reasoning. That has been explicitly acknowledged in the case of negligence. Negligence invariably is made to turn on two enquiries. The first is whether a reasonable person would have foreseen the possibility of harm. The second is whether a reasonable person, having foreseen the possibility of harm, would have taken steps to guard against it. As both the Appellate Division and Supreme Court of Appeal have pointed out, the second enquiry inevitably 'involves a value judgment'.[110] As for legal causation and wrongfulness, both have been said, over and over again, to turn not only on foreseeability but also on policy.[111] Legal causation has been said, in addition, to turn on fairness and justice.[112] Arguments as to policy, fairness and justice clearly are evaluative in nature.

It follows that, contrary to what was assumed by the Constitutional Court in its *K* judgment, the mere fact that the Appellate Division and Supreme Court of Appeal had asserted that application of the common-law rules of vicarious liability is a matter of fact does not entail that they had endorsed the exclusion-of-values rule. Whether, by making that assertion, they were making that endorsement depends on whether they were using the phrase 'a matter of fact' in the first or second sense identified above. It depends on whether they meant fact-not-law or fact-not-value. The Constitutional Court provided no evidence that the Appellate Division and Supreme Court of Appeal were using the phrase in the second sense. Moreover, there is reason to think that they were not. As is explained in the next section, like the rules determining negligence, legal causation and wrongfulness, so also the common-law rules of vicarious liability appear to be the kind of rules that are not developed by their application.[113] It is likely that, when the Appellate Division and Supreme Court of Appeal described the application of the common-law rules of vicarious liability as a matter of fact, they meant no more than to express this fact.

In this subsection so far it has been shown that the Constitutional Court's reason for attributing the exclusion-of-values rule to the common law is

[110] *Pretoria City Council v De Jager* 1997 (2) SA 46 (A) at 55I-J; *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA) at 1203H-I.

[111] For legal causation, see for example *Smit v Abrahams* 1994 (4) SA 1 (A) at 15E-F; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 765A-B; *Road Accident Fund v Sauls* 2002 (2) SA 55 (SCA) at 61G. For wrongfulness, see for example *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) at 833D; *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 498G-I; *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) at 1056E-1057G; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at 444C.

[112] *Smit* supra note 111 at 15E-F; *Standard Chartered Bank* supra note 111 at 765A-B; *Sauls* supra note 111 at 61G.

[113] See section III subsection (3).

invalid. Contrary to what was assumed by the court, the endorsement of that rule by the Appellate Division and Supreme Court of Appeal can be inferred neither from their assertion that the common-law rules of vicarious liability are not to be confused with the reasons for them, nor from their assertion that the application of those rules is a matter of fact. However, as yet no evidence has been presented to support the opposite conclusion. That is, no evidence has been presented to show that the common law rejected the exclusion-of-values rule. Consider, therefore, the following passage from Schreiner JA's judgment in *Carter*:

> 'It is often useful to examine the reason which probably gave rise to the rule, in order to discover the rule's limits, but the reason, even if certainly established, is not the same as the rule.'[114]

Is there any way to understand the words preceding the conjunction, words subsequently repeated in *Ngobo*,[115] other than as a rejection of the exclusion-of-values rule?

III SECTION 39(2) OF THE CONSTITUTION

The previous section showed that the first premise in the Constitutional Court's argument (as that was presented in the introduction to this article) is false. It is false because it gets the common law wrong in two respects. First, at the time of *K*, the common-law rule determining satisfaction of the course-and-scope requirement was not, as the court assumed, the intention/connection rule that had been endorsed in *Rabie*, but rather the discharge-of-duty rule that many years previously had been developed in *Mkize*, *Estate van der Byl*, *Hawkins* and *Feldman*. Secondly, at the time of *K*, the common law did not, as the court believed, contain an exclusion-of-values rule prohibiting a court from having recourse to the values underlying the rules of vicarious liability whenever the latter were indeterminate as regards the facts of a case before it.

This section demonstrates the falsity of the second premise in the Constitutional Court's argument. That premise, to recall, was as follows:

> Section 39(2) of the Constitution obliges a court to develop the common law applicable to the facts of a case before it if, and in so far as, it does not accord with the values of the Constitution.

The premise contains two mistakes. The first, which is discussed in subsection (1), is that it speaks of the values of the Constitution, whereas s 39(2) refers only to the values of the Bill of Rights. The second mistake, which is discussed in subsection (2), is that the premise turns s 39(2) on its head. According to the premise, s 39(2) imposes on all courts a conditional obligation to develop the common law — the condition being that their doing so would promote the values of the Constitution. But that is not what

[114] Supra note 60 at 211H.
[115] Supra note 66 at 831G-H.

s 39(2) says. What it says is more or less the opposite, namely that all courts are under a conditional obligation to promote the values of the Bill of Rights — the condition being that they are developing the common law. As subsection (2) explains, there is no justification for this inversion of s 39(2).[116]

This section has a further aim. It may be objected that to attack the premise set out above is to attack a straw man. For, it may be said, the Constitutional Court in its *K* judgment merely paid lip-service to the wrong-headed idea that s 39(2) imposes an obligation to develop the common law whenever it does not accord with the values of the Constitution. A careful reading of the judgment, it may be said, shows that the court in fact endorsed the contrary and correct idea that s 39(2) imposes an obligation to promote the values of the Constitution whenever the common law is being developed. Subsection (3) offers a response to this objection. It shows that, even if the court in *K* did endorse that interpretation of s 39(2), it still would not have been able to present a valid argument for its twofold conclusion, namely that the Supreme Court of Appeal was wrong to decide that the Minister could not be held vicariously liable and that the Constitutional Court was entitled to set this decision aside.

(1) *The Bill of Rights, the Constitution, and the values of each*

Imagine that a medical professor, in the course of an oral examination, asks the student being examined to explain the function of the heart. Imagine further that the student commences his answer by saying: 'I have been asked to explain the function of the body. Let me therefore start with the liver.' The professor probably would tell the student to answer the question posed, rather than the question which he had just invented. If the student nonetheless persisted with his initial answer, he would in all likelihood fail the examination.

In the *K* case, the Constitutional Court made a mistake similar to that of the medical student in this example. Section 39(2) reads as follows:

> '[W]hen developing the common law . . . every court . . . must promote the spirit, purport and objects of the Bill of Rights.'

In its *K* judgment, the Constitutional Court took the phrase 'spirit, purport and objects of the Bill of Rights', as it appears in s 39(2), to be interchangeable with all of the following: 'the spirit, purport and objects of the Constitution',[117] 'the values of the Constitution',[118] 'the normative framework of the/our Constitution',[119] 'the normative influence of the

[116] This error was brought to my attention by Professor Halton Cheadle at a symposium on the Constitutional Court's judgment in *Carmichele v Minister of Safety and Security and Another (Centre of Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC), held at the Law Faculty of the University of Cape Town on 24 April 2008.

[117] *K* supra note 2 at 428C, 433A-B, 441H-I, 442A-B.

[118] Ibid at 429G, H.

[119] Ibid at 429H-I, 433B.

Constitution',[120] 'the values the Constitution seeks to promote',[121] 'constitutional norms',[122] 'our (new) constitutional order',[123] 'the background of our Constitution'.[124]

It is erroneous to treat these phrases as interchangeable. Just as the heart is not the body, but merely one part thereof, so the Bill of Rights is not the Constitution, but merely one chapter in it. Just, therefore, as it was a mistake for the medical student in our example to equate the function of the body with that of one of its organs, so it was a mistake for the Constitutional Court to equate the values of the Constitution with those of the Bill of Rights. After all, the Constitution comprises fourteen chapters and, in the pocket-book version, runs to 133 pages (if one leaves out the schedules and index, 187 pages if one does not). The Bill of Rights is just one of those chapters, and it consists (again in the pocket-book version) of only nineteen pages. More than that, the other thirteen chapters (or 114 pages) impose many obligations and confer many rights and powers that are nowhere mentioned in the Bill of Rights. It is improbable therefore, and certainly cannot simply be assumed, that the values underlying the Constitution as a whole are identical to the values underlying only the Bill of Rights. It is even less likely that, if one were to take the many sections falling outside of the Bill of Rights (there are 210 of them) and ask in the case of each: 'What values underlie this section?', he would never arrive at an answer differing from the answer to the question: 'What values underlie the Bill of Rights?'.

It may be objected that the Constitutional Court's only error in speaking of 'the Constitution' was verbal carelessness, that, when speaking of 'the Constitution', it really meant the Bill of Rights, and that this destroys the analogy with the medical student: for, when he spoke of 'the body' he really meant it, as is shown by his proceeding to discuss the liver. This objection cannot, however, be reconciled with a critical step later on in the court's argument. Having established, it believed, that the question whether the Minister was vicariously liable for the policemen's raping of Ms K was to be determined by asking whether, bearing in mind the values of the Constitution, the rapes were sufficiently closely connected to the policemen's employment to justify the imposition of liability on the Minister, the court went on to consider the facts. A critical fact, because it was essential to the court's conclusion that the rapes were sufficiently closely connected, was that 'the policemen all bore a . . . constitutional duty to prevent crime and protect the members of the public'.[125] As the court also put it, 'Our Constitution mandates members of the police to protect members of the

[120] Ibid at 430G-H.
[121] Ibid at 433C.
[122] Ibid at 441H-I.
[123] Ibid at 432D-E, 441I-J.
[124] Ibid at 444B-C.
[125] Ibid at 443F-G.

community and to prevent crime.'[126] Now ask yourself the question: What is the basis for this constitutional duty or mandate? It certainly is not the Bill of Rights. Instead it is, as the court itself made plain,[127] a section that appears nine chapters (or, in the pocket-book version, 91 pages) after the Bill of Rights, namely s 205(3):

> 'The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.'

It therefore is clear that, when the Constitutional Court in *K* spoke of 'the spirit, purport and objects of the Constitution' or 'the values of the Constitution' or 'the normative framework of the Constitution', it meant what it said. It also therefore is clear that the analogy with the medical student holds good. Just as he mistakenly equated the function of the heart with that of the entire body, so the court mistakenly equated the values of the Bill of Rights with those of the entire Constitution. That the court should have made this mistake in its *K* judgment is not surprising, for it was simply repeating the error which it had previously made in the case of *Carmichele v Minister of Safety and Security*.[128] It was in *Carmichele* that the Constitutional Court first elided the distinction between the Bill of Rights and the Constitution whereof it is but a part. There it held both that s 39(2) requires the common law to be developed in accordance with 'the appropriate norms of the objective value system embodied by the Constitution' and that these norms could be determined by, among other things, s 205(3) of the Constitution and its forerunner in the interim Constitution, s 215.[129]

(2) *The obligation imposed by s 39(2)*

Imagine that I have a daredevil daughter of marriageable age and that she has a boy friend called Laurence. Imagine further that, when Laurence raises with me the possibility of their getting married, I say the following: 'If you marry my daughter, please get her to stop that crazy base jumping.' Imagine, finally, that some time later Laurence comes to me and says: 'I have considered your request that I marry your daughter if that would get her to stop base jumping.' I would, of course, stop him right there and point out that he has misinterpreted my words. I would tell him that he has, as it were, turned my remark upside down. What I did, I would explain, was to make a conditional request that he get my daughter to give up base jumping — the condition being that he marries her. What he has done, I would further explain, is to understand me as making the altogether different conditional request that he marry my daughter — the condition in this case being that his doing so would get her to stop base jumping. What if Laurence were to try to justify his interpretation of my words by saying: 'But you did tell me that I

[126] Ibid at 443H-I. See also at 445D-E.
[127] Ibid at 430B and 430n15.
[128] Supra note 116.
[129] Ibid at 962E-F, 963I-964A and 964n63.

was allowed to marry your daughter', and this was so? I would point out that my acknowledging his ability to marry my daughter did not, because it could not, convert my conditional request that he get my daughter to give up base jumping into a conditional request that he marry her.

Consider a second example. In conversation with Ricky, a local councillor, I say: 'If the Council develops Rondebosch Common, it must develop it in a way that increases the availability of low-cost housing for staff at the Red Cross Children's Hospital.' I would be somewhat taken aback if Ricky were to put it about that I had told him that the Council ought to develop Rondebosch Common if that would (or so as to) increase the availability of low-cost housing for staff at the Red Cross Children's Hospital. For my statement to Ricky is compatible with my believing that the Common should not, for any reason, be developed. That is, I could without contradiction say: 'The Council ought not to develop the Common. However, if it does so, it must at least do it in a way that increases the availability of low-cost housing for staff at the Red Cross Children's Hospital.' Again, the fact that the Council has the power to develop the Common will not make any difference to the meaning of my words. It will not convert my statement that the Council has a conditional obligation to increase the availability of low-cost housing for staff at the Red Cross Children's Hospital into a statement that the Council has a conditional obligation to develop the Common. For I could, without contradicting myself, say the following: 'I know the Council has the power to develop the Common. But it ought not to do so. However, if it does do so, it should do so in a way that increases the availability of low-cost housing for staff at the Red Cross Children's Hospital.'

The point illustrated by these two examples can be more generally stated:

The proposition:

(1) x must y if that would bring about z

is not entailed by the proposition:

(2) If x does y, he/she/it must bring about z

nor by the combination of proposition (2) and the proposition:

(3) x has the power to y.

The relevance of the foregoing to the Constitutional Court's judgment in *K* can be seen by substituting, in propositions (1), (2) and (3), 'a court' for 'x', 'develop the common law' for 'y', and 'greater conformity with the values of the Constitution' for 'z'. The substitution yields:

The proposition:

(4) A court must develop the common law if that would bring about greater conformity with the values of the Constitution

is not entailed by the proposition:

(5) If a court does develop the common law, it must bring about greater conformity with the values of the Constitution

nor by the combination of proposition (5) and the proposition:

(6) A court has the power to develop the common law.

With the above in mind, take another look at premise (2) in the Constitutional Court's argument:

> Section 39(2) of the Constitution obliges a court to develop the common law applicable to the facts of a case before it if, and in so far as, it does not accord with the values of the Constitution.

And compare it to what s 39(2) actually says:

> '[W]hen developing the common law . . . every court . . . must promote the spirit, purport and objects of the Bill of Rights.'

It should be clear that what s 39(2) *explicitly* does is to impose on all courts a conditional obligation to promote the values of the Bill of Rights — the condition being that the court is developing the common law. What the Constitutional Court in *K* took s 39(2) to *imply*, however, is that every court is under a conditional obligation to develop the common law — the condition being that doing so would promote the values of the Constitution. In effect, therefore, the Constitutional Court inferred proposition (4) above from proposition (5). But that, as has been explained, cannot be done. For proposition (5) no more entails proposition (4) than proposition (2) entails proposition (1). To think that it does is to make Laurence and Ricky's first mistake. It is to think, as Laurence did, that my conditional request that he get my daughter to stop base jumping entails a conditional request that he marry her. It is to think, as Ricky did, that a conditional obligation on the Council to increase the availability of low-cost housing for staff at the Red Cross Children's Hospital entails a conditional obligation on it to develop Rondebosch Common.

As authority for its interpretation of s 39(2), the Constitutional Court cited two of its earlier judgments. They are *Carmichele* and *S v Thebus*.[130] As it did in its *K* judgment, the Constitutional Court in the earlier two judgments interpreted s 39(2) to impose on all courts a conditional obligation to develop the common law. As the first judgment put it:

> '[W]here the common law deviates from the spirit, purport and objects of the Bill of Rights the Courts have an obligation to develop it by removing that deviation.'[131]

And the second:

> '[A] rule of the common law . . . may fall short of its [i.e. a specific constitutional provision's] spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the "objective normative rule system" found in the Constitution.'[132]

However, unlike in *K*, the Constitutional Court in the earlier two judgments relied, for that interpretation of s 39(2), upon the combination of s 39(2) and s 173. As the court put it in *Carmichele*:

[130] Supra note 116 and 2003 (6) SA 505 (CC).
[131] *Carmichele* supra note 116 at 954A-B. See also at 955G-H.
[132] *Thebus* supra note 130 at 525E-F.

> '[I]t is implicit in s 39(2) *read with s 173* that when the common law as it stands is deficient in promoting the s 39(2) objectives, the Courts are under a general obligation to develop it appropriately.'[133]

To see whether the Constitutional Court's interpretation of s 39(2) can be justified by the combination of s 39(2) with s 173, one must see what the latter says. It says the following:

> 'The Constitutional Court, the Supreme Court of Appeal and High Courts have the inherent power . . . to develop the common law, taking into account the interests of justice.'

It should be clear that to try to justify the Constitutional Court's interpretation of s 39 (2) by invoking s 173 is, in effect, to attempt to infer proposition (4) above from the combination of propositions (5) and (6). As was explained a moment ago, that is not a valid inference. The combination of propositions (5) and (6) no more entails proposition (4) than the combination of propositions (2) and (3) entails proposition (1). To suppose that it does is to make the *second* of Laurence and Ricky's mistakes. It is to suppose, as Laurence did, that the combination of my conditional request that he get my daughter to stop base jumping and his ability to marry her entails that I was conditionally requesting him to marry her. It is also to suppose, as Ricky did, that the combination of the Council's conditional obligation to increase low-cost housing for staff at the Red Cross Children's Hospital and the Council's power to develop Rondebosch Common entails a conditional obligation on the Council to develop the Common.

(3) *The application and development of indeterminate common-law rules*

The preceding two subsections have identified two errors in the second premise of the Constitutional Court's argument in *K*. The first is its substitution of the values of the Constitution for the values (or spirit, purport and objects) of the Bill of Rights. The second is its inversion of s 39(2): whereas s 39(2) obliges a court to promote the values of the Bill of Rights whenever it is developing the common law, the second premise interprets the section as obliging a court to develop the common law whenever doing so would promote the values of the Constitution.

It may be objected that, whether or not the Constitutional Court made the first of these errors in its *K* judgment, it did not make the second. The basis for this objection is likely to be two paragraphs in the judgment wherein the court discusses what it describes as 'the difficult question of what constitutes "development" of the common law for the purposes of s 39(2)'.[134] In the course of that discussion, the court makes the following claim:

[133] *Carmichele* supra note 116 at 955G, emphasis added. See also at 953E-F; and see *Thebus* supra note 130 at 524n36.

[134] *K* supra note 2 at 429C-I.

> A court develops the common law, and is thus under the obligation imposed by s 39(2), not only when it changes an existing common-law rule or introduces a new one, but also when it applies an existing common-law rule to a set of facts regarding which it is indeterminate.

The court did not, in the two paragraphs in question, spell out precisely what the obligation imposed by s 39(2) is. However, it could not possibly be an obligation to develop the common law — that would be tautologous. So it would have to be an obligation to promote the values of the Bill of Rights. It certainly seems, therefore, that the Constitutional Court, at least in these two paragraphs, was endorsing, not premise (2) in the argument attributed to the court in the introduction to this article, but rather the following proposition:

> Section 39(2) of the Constitution obliges a court to promote the values of the Constitution whenever it is developing the common law.

The fact that the court may have endorsed this proposition in the two paragraphs just discussed does not mean that it did not endorse — and rely upon — premise (2) in the rest of its judgment. Nor does it mean that the court did not make the argument attributed to it in the introduction to this article. All it means is that the court may have contradicted itself. But let us assume, for a moment, that the proposition above reflects the Court's 'true' view of s 39(2). And let us then see whether, if this were the court's 'true' view of s 39(2), it would still have been able to mount an argument for its twofold conclusion, namely that the Supreme Court of Appeal made the wrong decision and that the Constitutional Court had the jurisdiction to set the decision aside.

The only possible argument — which will be called the 'alternative argument' so as to distinguish it from the argument attributed to the Constitutional Court in the introduction to this article — appears to be the following one:

(1) The common law contains the following two rules of vicarious liability: (a) the course-and-scope rule and (b) the intention/connection rule.
(2) Section 39(2) of the Constitution obliges a court to promote the values of the Constitution whenever it is developing the common law.
(3) A court develops the common law whenever it applies an existing common-law rule to a set of facts regarding which it is indeterminate.
(4) A court deciding a case by applying the common-law rules of vicarious liability to facts regarding which they are indeterminate is therefore obliged to apply the rules in a manner that promotes the values of the Constitution.
(5) The common-law rules of vicarious liability are indeterminate as regards the facts of *K*. For it is not clear whether the rapes were sufficiently closely connected to the policemen's employment to justify the imposition of liability for the rapes on the Minister of Safety and Security.
(6) The Supreme Court of Appeal was therefore obliged, when deciding

K, to apply the common-law rules of vicarious liability in a manner that would promote the values of the Constitution.

(7) Application of the common-law rules of vicarious liability to the facts of *K* would promote the values of the Constitution only if it were concluded that the policemen's rapes were sufficiently closely connected to their employment to justify the imposition of liability on the Minister. That is so for two reasons: (a) the breach-of-duty ground and (b) the exploitation-of-trust ground.

(8) Application of the common-law rules of vicarious liability to the facts of *K* would thus promote the values of the Constitution only if it were concluded that the Minister is vicariously liable for the rapes committed by the policemen upon Ms K.

(9) The Supreme Court of Appeal's contrary decision is thus mistaken. Moreover, since the Supreme Court of Appeal's mistaken decision resulted from its failure to meet an obligation imposed upon it by the Constitution, the Constitutional Court is entitled to set the decision aside.

The alternative argument is no more valid than the argument attributed to the Constitutional Court in the introduction to this article. True, the alternative argument avoids two of the errors made by the one outlined in the introduction. It does not, incorrectly, ascribe the exclusion-of-values rule to the common law. And it does not, incorrectly, reverse the order of things in s 39(2). But the alternative argument retains the other four mistakes made by the argument attributed to the Constitutional Court in this article's introduction. Two of those mistakes have already been discussed, namely the incorrect attribution of the intention/connection rule to the common law and the substitution of the values of the Constitution for those of the Bill of Rights. The other two will be discussed in the next section, namely the breach-of-duty and exploitation-of-trust grounds. Moreover, the alternative argument introduces a new error of its own. Premise (3) of the alternative argument claims that a court develops the common law whenever it applies an existing common-law rule to a set of facts regarding which it is indeterminate. This claim is a false one. Since, as was mentioned above, the Constitutional Court actually made this claim in its *K* judgment, it is worth explaining what is wrong with it.

Writing about English law, the legal philosopher Joseph Raz pointed out that where the common law is indeterminate, thus creating what he calls a 'gap' in the law, the following issue of legal principle is raised: 'whether to regard the underdetermined law as a framework for further legal development filling in the gaps and charting out more and more detailed legal guidelines, or whether to hold that the law should remain underdetermined, the decision being left to the court to take afresh in every case'.[135] He further pointed out that, in the English legal system, it is held that 'generally when it

[135] Raz op cit note 103 at 194.

is best to develop the law progressively the job is best done by judges, whereas where it is best to let full discretion reign in each new case the matter is to be entrusted to the jury'.[136] The South African legal system, unlike the English one, has no juries. However, like English law, South African law makes the distinction, alluded to by Raz, between two kinds of common-law rules: those that are developed by their application to facts regarding which they are indeterminate and those that are not.

Some of the most important rules in the South African law of delict are of the latter kind. That is, they are rules which are *not* developed when applied to facts regarding which they are indeterminate. Consider negligence. In *Kruger v Coetzee*, in a passage frequently cited since, the Appellate Division set out what it took to be the then-existing rule for negligence:

> 'For the purposes of liability *culpa* arises if — (a) a *diligens paterfamilias* in the position of the defendant — (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and (ii) would take reasonable steps to guard against such occurrence; and (b) the defendant failed to take such steps.'[137]

Significant for the present discussion is the qualification which the court immediately added:

> 'Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases.'[138]

In other words, according to the court, negligence was to be determined in each future case by direct application of the rule that it had set out. Of course, that would be possible only if the rule which the court had set out were a rule of the second kind, that is, a rule which is not developed every time it is applied to a set of facts regarding which it is indeterminate. Otherwise there would be future cases wherein negligence would be determined, not by direct application of the rule which the court had formulated, but rather by application of one or more mediating rules developed by the application of that rule in one or more cases preceding, and with facts similar to those of, the future ones.

The view taken by the Appellate Division in the *Kruger* case — that the rule for negligence is not developed every time it is applied to a new set of facts — was echoed by the Supreme Court of Appeal in *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd*.[139] However, the Supreme Court of Appeal formulated the rule for negligence in more abstract terms: 'the true criterion for determining negligence is whether in the particular circumstances the conduct complained of falls short of the

[136] Ibid.
[137] 1966 (2) SA 428 (A) at 430E-F.
[138] Ibid at 430G.
[139] 2000 (1) SA 827 (SCA).

standard of the reasonable person'.[140] Thus, for the Supreme Court of Appeal, the two subsidiary conditions set out by the Appellate Division in *Kruger* (a reasonable person would have foreseen the possibility of harm and would have taken steps to guard against it) serve merely as indicators of negligence: 'Dividing the inquiry into various stages, however useful, is no more than an aid or guideline for resolving the issue [of negligence].'[141] According to the Supreme Court of Appeal, therefore, every time a court has to determine whether conduct was negligent, it must ask itself whether the conduct measured up to the conduct of the reasonable person. And the answer to that question '[i]nevitably . . . will only emerge from a close consideration of the facts of each case and ultimately will have to be determined by judicial judgment.'[142] Again, this would be possible — that is, it would be possible for negligence to be determined, over and over again, by direct application of the reasonable person standard — only if decisions applying that standard do not further develop it, by adding mediating rules governing its application in future cases.

Next consider legal causation. For the purposes of the South African law of delict, conduct legally causes harm if the conduct 'is linked to the harm sufficiently closely or directly for legal liability to ensue'.[143] The approach to be taken in order to determine whether conduct is sufficiently closely linked to harm has repeatedly been said to be a 'flexible' ('elastiese', 'soepele') one.[144] Various factors may be considered: foreseeability, directness, the absence or presence of a novus actus interveniens, legal policy, reasonableness, fairness and justice.[145] But none of these factors is decisive. Thus, for example, the fact that harm was foreseeable is neither necessary nor sufficient for it to have been legally caused.[146] More importantly for the present discussion, the flexible approach is not to be undermined by the development of more concrete mediating rules. As the Appellate Division put it in *Smit v Abrahams*:

> 'The importance and the power of the dominant criterion for resolving questions of legal causation . . . lie precisely in the flexibility thereof. It is my conviction that any attempt to erode the flexibility thereof should be resisted. Comparisons between the facts of the case to be solved and the facts of other

[140] Ibid at 839G.
[141] Ibid.
[142] Ibid at 840G-H.
[143] *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34G. See also *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700H-I; *Smit* supra note 111 at 15E-F; *Standard Chartered Bank* supra note 111 at 764I.
[144] *International Shipping Co* supra note 143 at 701D-E; *Smit* supra note 111 at 14F-G, 15F-G, I-J, 16C-D, H-I, 17E-F, 19F; *Standard Chartered Bank* supra note 111 at 765A-B; *Groenewald v Groenewald* 1998 (2) SA 1106 (SCA) at 1113I; *Sauls* supra note 111 at 61G.
[145] *International Shipping Co* supra note 143 at 701D-E; *Standard Chartered Bank* supra note 111 at 765A-B; *Sauls* supra note 111 at 61G.
[146] *Smit* supra note 111 at 17E-F, 19B-D.

> cases wherein a solution already was found . . . may obviously be useful and valuable, and sometimes may perhaps even be decisive, but one must be careful not to try to distil rigid or generally-applicable rules or principles out of the process of comparison.'[147]

It was on this basis that the Appellate Division in *Smit* rejected the contention, advanced by the defendant in the case, that a rule adopted by the House of Lords in *Owners of Dredger Liesbosch v Owners of Steamship Edison*, namely that loss consisting of expenses brought about by a plaintiff's impecuniosity necessarily is too remote (i.e., is not legally caused), was part of South African law.[148] As the court put it: 'In our law there can in my opinion be no doubt that the *ratio* of *The Edison* has no right to existence. The rigidity thereof is irreconcilable with the flexible approach which is followed in our law.'[149] Responding specifically to the defendant's claim that the rule in *The Edison* had been incorporated into South African law by certain Provincial and Local Division judgments, the court said the following:

> 'In so far as some of the judgments apparently relied upon the *ratio* of *The Edison* in order to reach a conclusion about the question of legal causation, no more meaning can be attached to them, in the light of the flexible test of our law, than that they are merely illustrations of how the question was solved in the specific factual context of the particular case. Everything always depends upon the facts.'[150]
>
> '[The judgments in question] cannot be used as a basis from which a generally-applicable legal rule can be extracted . . . *Ad hoc* views about causation cannot give rise to a rigid policy consideration which is diametrically opposed to the flexibility of our law regarding the criterion by which legal causation is determined.[151]

Consider, finally, wrongfulness. Since the 1970s, the South African law of delict has determined the wrongfulness of negligent omissions and of negligent conduct resulting in pure economic loss by applying the following general test: Do considerations of policy, the criterion of reasonableness, or the legal convictions of the community require the imposition of liability upon the negligent harm-causer?[152] It would appear that, for several decades after its introduction, this test was not regarded as having any developmental function. That is, though (and precisely because) the test was to be applied in

[147] Ibid at 18E-G (my translation).

[148] *Owners of Dredger Liesbosch v Owners of Steamship Edison* [1933] AC 449 (HL); *The Edison* [1933] All ER 144.

[149] *Smit* supra note 111 at 14F-G (my translation).

[150] Ibid at 15I-J (my translation).

[151] Ibid at 16E-F (my translation).

[152] *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597B; *Administrateur, Natal v Trust Bank van Afrika Bpk* supra note 111 at 833D-E. For a detailed discussion of this test, see Anton Fagan 'Rethinking wrongfulness in the law of delict' (2005) 122 *SALJ* 90. See also Anton Fagan 'Blind faith: A response to Professors Neethling and Potgieter' (2007) 124 *SALJ* 285.

every omission or pure economic loss case in which wrongfulness was in dispute, its application was not to bring about the development of any further rules. Evidence for this understanding of the test is provided by the fact that the courts frequently used it to determine no more than that, 'in the particular circumstances of the case', the defendant's conduct was wrongful.[153] There are, moreover, judicial statements to the effect that that is all the test should be used for. In *Minister van Polisie v Ewels*, Rumpff CJ declared it 'impossible to determine in general when . . . a legal duty [thus wrongfulness] would arise'.[154] Similarly, in *Bayer South Africa (Pty) Ltd v Frost*, Corbett CJ asserted that '[t]here is no ready formula for determining unlawfulness' and thus that '[e]ach case must be decided on its own facts'.[155] And, finally, in the case of *Cape Town Municipality v Bakkerud*, Marais JA expressed the view that 'in applying the test of what the legal convictions of the community demand and reaching a particular conclusion, the Courts are not laying down principles of law intended to be generally applicable. They are making value judgments *ad hoc*.'[156] Marais JA's statement is an unambiguous denial that the general test has a developmental function in South African law. The judgment was, moreover, unanimous.

So the Constitutional Court made a jurisprudential mistake. Contrary to what it claimed in *K*, a court does not develop the common law whenever it applies an existing common-law rule to a set of facts regarding which it is indeterminate. The application of a common-law rule to a set of facts regarding which it is indeterminate *may* develop the rule. But, as the foregoing discussion of negligence, legal causation and wrongfulness demonstrated, it does *not necessarily* do so. It follows that premise (3) in the alternative argument presented above is false. It does not follow, however that premise (4) in the alternative argument is false too. Premise (4), to recall, states that a court deciding a case by applying the common-law rules of vicarious liability to facts regarding which they are indeterminate is obliged to apply the rules in a manner that promotes the values of the Constitution. Premise (4) could be true even though premise (3) is false. For it is possible that the common-law rules of vicarious liability are not the same kind of rules as the rules determining negligence, legal causation and the wrongfulness of negligent omissions and negligently caused pure economic loss. That is, it is possible that the common-law rules of vicarious liability are the kind of rules which are developed when applied to facts as regards which they are indeterminate, rather than the kind of rules which are not.

The Constitutional Court, seemingly unaware that the common law contains rules of the latter kind, offered no argument to show that the common-law rules of vicarious liability are rules of the former kind. The

[153] See for example *Ewels* supra note 152 at 597H; *Administrateur, Natal* supra note 111 at 835G.

[154] Supra note 152 at 597E-F (my translation).

[155] 1991 (4) SA 559 (A) at 570E-F.

[156] 2000 (3) SA 1049 (SCA) at 1059J-1060B.

absence of argument matters. For there is evidence to the contrary. That is, there is evidence that the common-law rules of vicarious liability are the kind of rules — like the rules determining negligence, legal causation and wrongfulness — which are *not* developed by their application to facts regarding which they are indeterminate.

Consider the following two passages. The first is from *Hawkins*. The second is from Tindall JA's judgment in *Feldman*.

> 'Even when a servant makes a deviation solely for his own purposes the master may remain liable for any negligence committed by the servant while he is on that deviation. *In each case it is a question of degree and I do not think that it is possible to lay down any hard and fast rule on the matter, for so much depends on the facts of the particular case*.'[157]

> 'In my view the test to be applied is whether the circumstances of the particular case show that the servant's digression is so great in respect of space and time that it cannot reasonably be held that he is still exercising the functions to which he was appointed; if this is the case the master is not liable. *It seems to me not practicable to formulate the test in more precise terms; I can see no escape from the conclusion that ultimately the question resolves itself into one of degree* and in each particular case a matter of degree will determine whether the servant can be said to have ceased to exercise the functions to which he was appointed.'[158]

These passages have been cited, with approval, in several subsequent Appellate Division and Supreme Court of Appeal judgments.[159]

It may be said that these passages concern the discharge-of-duty rule rather than the intention/connection one. And, it may be said, though the discharge-of-duty rule is not developed by its application, the intention/connection rule is, or at least it would be if it were part of the common law. There is reason to doubt even this assertion. For there is nothing inherent in the intention/connection rule that would distinguish it, in this respect, from the discharge-of-duty one. In fact, comparative analysis shows that it is altogether possible for the intention/connection rule to be the kind of rule that is not developed by its application. As was acknowledged by the Constitutional Court in its *K* judgment, the intention/connection rule is similar to the 'close connection test' applied by the Canadian Supreme Court in *Bazley v Curry* and *Jacobi v Griffiths*.[160] In a note on *Bazley* and *Jacobi*, Peter Cane — one of the world's foremost tort scholars — described the close connection test employed in those judgments in a manner which clearly implies that its application does not develop the law:

> '[The close connection test] only gives trial judges a series of questions; and as *Jacobi* shows, reasonable people (including judges) may disagree about the right

[157] Supra note 43 at 563, emphasis added.

[158] Supra note 20 at 756–7, emphasis added.

[159] *African Guarantee & Indemnity Co* supra note 61 at 446E-F; *Viljoen* supra note 79 at 316E-I; *Jordaan* supra note 81 at 25D-E; *ABSA Bank* supra note 68 at 379D-E. See also *Bezuidenhout* supra note 71 at 94C.

[160] *K* supra note 2 at 441F. *Bazley v Curry* (1999) 174 DLR (4th) 45; *Jacobi v Griffiths* (1999) 174 DLR (4th) 71.

> answers to those questions. At the end of the day, the judge must decide, on the facts of the case before the court, whether the connection between the employee's tort and the employer's activity was close enough to justify holding the employer vicariously liable. To this extent, at least, judicial decision-making in such cases is irreducibly "pragmatic" . . . And for this reason, there is little to be gained from a detailed analysis of the way the various judgments in *Bazley* and *Jacobi* proceed from the close connection test through the facts to a conclusion for or against vicarious liability. Each judge must look at the facts and decide personally whether or not they satisfy the close connection test.'[161]

IV THE SUFFICIENTLY-CLOSE-CONNECTION CONDITION

The preceding two sections have identified four mistakes in the Constitutional Court's argument in *K*. Two of the mistakes occur in the first premise of the argument (as it was presented in the introduction to this article) and concern the common-law rules of vicarious liability. The other two mistakes occur in the argument's second premise and concern s 39(2) of the Constitution. This section identifies two more errors in the court's argument. Both are to be found in its seventh premise. And both have to do with the application of the intention/connection rule — and more specifically the sufficiently-close-connection condition therein — to the facts of *K*.

Premise (7), to recall, provides two reasons to conclude that the policemen's rapes of Ms K were sufficiently closely connected to their employment to justify the imposition of liability on the Minister. One is the breach-of-duty ground: when raping Ms K, the policemen simultaneously breached a duty, imposed upon them by their employment and the Constitution, to protect members of the public from crime. The other is the exploitation-of-trust ground: the policemen would not have had the opportunity to rape Ms K but for the trust that she placed in them because they were under a duty, imposed upon them by their employment and the Constitution, to protect members of the public from crime. As is explained in subsection (1) below, the first of these grounds flies in the face of common sense. As is explained in subsection (2), the second is incompatible with the theory of enterprise-liability, which is the only theory that could possibly explain how an employee's exploitation of trust could connect a delict committed by him to his employment.

Before proceeding with the discussion of the breach-of-duty and exploitation-of-trust grounds, it is necessary briefly to deal with two possible preliminary objections. The first is that this article has incorrectly formulated the sufficiently-close-connection condition. As it has been formulated in this article, the sufficiently-close-connection condition requires an employee's delict to be connected with his *employment*. It may be said that, as formulated by the Constitutional Court in *K*, the condition requires an employee's delict to be connected, instead, with his *employer's business* or *purposes*. It may

[161] Peter Cane 'Vicarious liability for sexual abuse' (2000) 116 *LQR* 21 at 25.

be said, further, that this difference is not a trivial one. For it could be true that the breach-of-duty and exploitation-of-trust grounds are not valid grounds for concluding that the policemen's rapes of Ms K were sufficiently closely connected to their employment as policemen, yet false that they are not valid grounds for concluding that the policemen's rapes of Ms K were sufficiently closely connected to the business or purposes of their employer, the Minister of Safety and Security.

It is impossible to tell which of these formulations the Constitutional Court preferred simply by looking at what it expressly said in the *K* judgment. While it on six occasions spoke of a connection with the purposes or business of the employer,[162] it on five occasions spoke of a connection with the wrongdoer's employment.[163] However, there are two reasons to believe that the court in fact had in mind, throughout, the latter. First, several judgments of the Appellate Division and Supreme Court of Appeal contain pronouncements to the effect that, in the context of vicarious liability, the phrases 'his employer's business', 'his employer's purposes' and 'his employer's work' are not meant literally, but refer to what the employee was generally employed or specifically instructed to do.[164] There is no reason to think that the Constitutional Court intended to depart from this usage. Secondly, as was noted at the end of the previous section, the Constitutional Court was of the view that the intention/connection rule, which it attributed to the South African common law, is similar to the 'close connection test' applied by the Canadian Supreme Court in *Bazley* and *Jacobi*. It also, according to the court, is similar to the test applied by the House of Lords in *Lister v Hesley Hall Ltd*,[165] and by the US Court of Appeals for the Eighth Circuit in *Primeaux v United States*.[166] In all four of these cases, satisfaction of the course-and-scope requirement was determined by asking, not whether the employee's tortious conduct was sufficiently closely connected to his employer's business, but rather whether it was sufficiently closely connected to his employment.[167]

The second possible preliminary objection is that the breach-of-duty and exploitation-of-trust grounds do not fully capture the Constitutional Court's reasons for concluding that the policemen's rapes were sufficiently closely

[162] *K* supra note 2 at 436D-E, 441G-H, 442C, 443C-D, 443F and 445F.

[163] Ibid at 441H, 441I, 444C, 444F and 445D.

[164] *Marais* supra note 59 at 618G-H; *Ngubetole* supra note 62 at 10C-D; *Jordaan* supra note 81 at 24H-J; *ABSA Bank* supra note 68 at 378B-C and 383C; *Japmoco* supra note 82 at 660J-661B. See also *Ess Kay Electronics* supra note 69 at 1219E; *Phoebus Apollo* supra note 70 at 482G; *Costa da Oura* supra note 72 at 41H.

[165] [2002] 1 AC 215 (HL), 2001 (2) All ER 769.

[166] 181 F 3d 876 (8th Cir 1999).

[167] See Lord Steyn in *Lister* supra note 165 paras 17, 24 and 28 and Lord Clyde paras 37 and 50; McLachlin J in *Bazley* supra note 160 para 42; McLachlin J in *Jacobi* supra note 160 paras 12 and 20; *Primeaux* supra note 166 at 882 and 886. See also Lord Steyn's subsequent interpretation of *Lister* in *Bernard v Attorney General of Jamaica* [2005] IRLR 398 para 18.

connected to their employment to justify the imposition of liability on the Minister. They do not do so, it may be said, because the court explicitly identified not two, but three, facts or factors which, in its view, 'ma[d]e it plain that viewed against the background of our Constitution . . . the connection between the conduct of the policemen and their employment was sufficiently close to render the [Minister] liable'.[168] The three facts identified by the court are:

> 'First, the policemen all bore a statutory and constitutional duty to prevent crime and protect the members of the public. That duty is a duty which also rests on their employer and they were employed by their employer to perform that obligation.'[169]
>
> 'Secondly . . . the police here had offered to assist the applicant and she had accepted their offer. In so doing, she placed her trust in the policemen although she did not know them personally. One of the purposes of wearing uniforms is to make police officers more identifiable to members of the public who find themselves in need of assistance. . . .
>
> Our Constitution mandates members of the police to protect members of the community and to prevent crime. It is an important mandate which should quite legitimately and reasonably result in the trust of the police by members of the community. . . . In this case, and viewed objectively, it was reasonable for the applicant to place her trust in the policemen who were in uniform and offered to assist her.'[170]
>
> 'Thirdly, the conduct of the policemen which caused harm constituted a simultaneous commission and omission. The commission lay in their brutal rape of the applicant. Their simultaneous omission lay in their failing while on duty to protect her from harm. . . .'[171]

If the above passages contained a third ground — in addition to the breach-of-duty and exploitation-of-trust ones — for the conclusion that the policemen's rapes of Ms K were sufficiently closely connected to their employment to justify the imposition of liability on the Minister, this article would have to invalidate it too. However, there is no third ground hidden in these passages. Whereas the court's description of the second fact expresses, in a roundabout fashion, the exploitation-of-trust ground, its descriptions of the first and third facts express, in combination, the breach-of-duty ground. After all, the duty described in the first passage matters, if at all, only because it was breached by the omission described in the third. Conversely, the omission described in the third passage matters, if at all, only because it was in breach of the duty described in the first. That the three facts constitute only two reasons appears to be recognized by the Constitutional Court itself. At the end of its judgment, when summarizing its reasons for concluding that the policemen's rapes were sufficiently closely connected to their employ-

[168] *K* supra note 2 at 444B-C.
[169] Ibid at 443F-G.
[170] Ibid at 443G-444A.
[171] Ibid at 444A-B.

ment to justify the imposition of liability on the Minister, it said the following:

> 'In sum, the opportunity to commit the crime would not have arisen but for the trust the applicant placed in them because they were policemen . . .. When the policemen — on duty and in uniform — raped the applicant, they were simultaneously failing to perform their duties to protect the applicant.'[172]

(1) *The breach-of-duty ground*

The Constitutional Court's reliance upon the breach-of-duty ground was underpinned by its acceptance of the following proposition:

> A ground for concluding that an employee's delict was sufficiently closely connected to his employment to justify the imposition of liability for that delict on his employer is that the employee, when committing the delict, simultaneously breached a duty imposed upon him by his employer or employment.

This proposition — which will be called the 'general proposition' in order to distinguish it from the breach-of-duty ground which it underpins — was expressly endorsed by the court:

> '[T]he fact that an employee's conduct is, on the face of it, purely in pursuit of the business of the employee, is not necessarily sufficient to ensure that the employer will not be liable. A further question will need to be considered and that is whether in pursuing his or her own interests, the employee will be neglecting the tasks required by the employer. If so, then the employer may nevertheless be liable.'[173]
>
> 'An employee can at the same time be committing a delict for his or her own purposes, and neglecting to perform his or her duties as an employee . . .. The question of the simultaneous omission and commission . . . will also be relevant to determining the question of vicarious liability. In particular, it will be relevant to answering the . . . question . . .: was there a sufficiently close connection between that delict and the purposes and business of the employer?'[174]

The general proposition's central idea, namely that a breach of a duty imposed by an employer upon his employee can forge a connection between a delict committed by the employee and his employment, defies common sense. To get a sense of that, consider first an analogous proposition, to do with the game of chess rather than the phenomenon of employment:

> A ground for concluding that a game is closely connected to the game of chess is that the players are breaking a rule constitutive of the latter.

Imagine now that Boris and Bobby are playing a game resembling chess in all respects but one: they move their pawns backwards as well as forwards. Imagine also that Anatoly and Garry are playing a game resembling chess in

[172] Ibid at 445D-E.
[173] Ibid at 442G.
[174] Ibid at 443A-D.

all respects but four: like Boris and Bobby, Anatoly and Garry move their pawns backwards as well as forwards; but they also move their rooks on the diagonal as well as the straight, their bishops on the straight as well as the diagonal, and their kings not at all. Imagine, finally, that the analogous proposition were true. It would then follow, would it not, that Anatoly and Garry's game would be *more* closely connected to the game of chess than would be Boris and Bobby's. For, if it were so that a game could be connected to the game of chess by virtue of the fact that its players are *breaking* a rule constitutive of the latter, then it would have to follow that the more the players break those rules (or the more of those rules they break), the closer would be the connection between their game and the game of chess. Of course, common sense tells us that the opposite is the case. Common sense, therefore, also tells us that the analogous proposition is false.

Now imagine that the general proposition were true. Imagine, that is, that it really were the case that an employee's breach — when committing a delict — of an employer-imposed duty could serve to connect his delict to his employment. It would follow, by virtue of the same logic as applied in the chess example, that the greater the breach by an employee — when committing a delict — of the duties imposed upon him by his employer, the closer would be the connection between his delict and his employment. Of course, an employee's employment or 'job' is in large part constituted by the duties imposed upon him by his employer. So if the general proposition were true, it would follow that the less an employee does his job (or the less of his job he does), when committing a delict, the closer his delict would be connected to his job. The absurdity of this is demonstrated by the following example.

An employer imposes the following three duties on the drivers of his fleet of trucks: they may not drive faster than 90 km/h; they may not drive after consuming alcohol; and they may not use the trucks for personal business. Driver A commits a delict while breaching only the first duty (he is driving at 100 km/h at the time). Driver B commits a delict while breaching the first duty to a greater extent than does A and breaching the second (he commits the delict while driving at 130 km/h and after having consumed a bottle of wine). Driver C commits a delict while breaching the first and second duties to a greater extent than either A or B, and breaching the third (he is driving at 160 km/h, has consumed three bottles of wine, and is going to visit his girlfriend). Since A, B and C's jobs, in this example, are constituted in part by the three duties in question, it follows that B, when he committed his delict, was doing less of his job than was A, when he committed his. It follows also that C was doing less of his job than was either A or B. Common sense suggests that, since B was doing less of his job than was A, B's delict must have been less closely connected to B's job than was A's delict to A's job. Common sense also suggests that, since C was doing less of his job than was either A or B, C's delict must have been less closely connected to his job than were A and B's delicts to theirs. However, if the breach of a duty could forge a connection between an employee's delict and his employment, as the

general proposition asserts, quite the opposite would be the case. B's delict would be more, rather than less, closely connected with B's job than A's delict with A's job. And the connection would be strongest in the case of C.

The general proposition defies common sense for a second reason. Imagine, again, that the general proposition were true. That is, imagine that it were the case that a breach of duty could establish a close connection between an employee's delict and his employment. An inevitable consequence would be that the probability of vicarious liability being imposed on a conscientious employer would be greater than the probability of its being imposed on a cavalier one. The following example shows that. Employers A and B confer an identical power upon their employees. A, because he is concerned about the harm that the exercise of that power by his employees might do to the public, imposes a host of duties upon his employees in order to constrain their exercise of the power. B, who does not give a damn, imposes none. That is, B confers an unbridled discretion upon his employees to exercise the power as they see fit. All other things being equal, it is more likely that A's employees will act in breach of a duty imposed by their employer than that B's employees will do so. It follows that, if the general proposition were correct — that is, if the breach of a duty really were a reason to conclude that an employee's delict is connected to his employment — employer A (the conscientious one) would be more likely to be vicariously liable than employer B (the unscrupulous one).

It may be objected that the foregoing argument — which sought to invalidate the Constitutional Court's breach-of-duty ground by invalidating the general proposition which underpins it — was misdirected. Why? Because the argument was aimed at the following breach-of-duty ground:

> When raping Ms K, the policemen simultaneously breached a duty, imposed upon them by their employment and the Constitution, to protect members of the public from crime.

That, it may be said, is not the breach-of-duty ground actually relied upon by the Constitutional Court. The court's actual breach-of-duty ground, it may be said, is as follows:

> When raping Ms K, the policemen simultaneously breached a duty, imposed upon them by their employment, to protect members of the public from crime *and* caused the Minister of Safety and Security to breach a duty, imposed upon him by the Constitution, to protect members of the public from crime.

And, it may be said, this breach-of-duty ground — which, to avoid confusion, will be called the 'double-breach-of-duty ground' — is not invalidated by the argument so far presented in this subsection.

There is, admittedly, some textual evidence for the double-breach-of-duty ground. It is provided by the following two passages in the judgment:

> 'That duty [the duty to prevent crime and protect the members of the public] is a duty which also rests on their [the policemen's] employer [the Minister of

> Safety and Security] and they were employed by their employer to perform that obligation.'[175]
>
> 'In so doing [in raping Ms K], their employer's obligation . . . to prevent crime was not met.'[176]

These passages notwithstanding, it is by no means certain that the Constitutional Court really did rely on the double-breach-of-duty ground. For it is not clear whether the court regarded the Minister's breach of duty as essential or merely referred to it in order to add rhetorical force to its conclusion.

However, let it be assumed that the court did regard the Minister's breach of duty as essential. Let it be assumed, in other words, that the court did rely on the double-breach-of-duty ground. Would that mean that the argument of this subsection was misdirected? Certainly not. The double-breach-of-duty ground does not replace the policemen's breach of duty with the Minister's. Instead, it retains the former breach of duty and supplements it with the latter one. To the extent that the double-breach-of-duty ground retains the idea that the policemen's breach of duty is a ground for concluding that their rape was sufficiently closely connected to their employment, the argument of this subsection holds good against it. To the extent that the double-breach-of-duty ground supplements that idea with the idea that the Minister's breach of duty is a ground for concluding that the policemen's rape was sufficiently closely connected to their employment, it introduces a new error.

To comprehend the new error introduced by the double-breach-of-duty ground, consider the following two examples. A cleaner employed by the police, while washing a police car in the street outside a police station, assaults a member of the public who walks past wearing the shirt of the soccer team that two days before thrashed the team ardently supported by the cleaner. A janitor (or groundsman) employed by a state-institution for the care of abused children lures one of the children into his office (or tool shed) and sexually molests him. The cleaner's assault of the passer-by simultaneously causes his employer, the Minister of Safety and Security, to breach his duty to protect the general public from crime. The janitor's molestation of the child simultaneously causes a breach on the part of his employer, the state, of its duty — imposed by s 28(1)*(d)* of the Constitution — to protect every child 'from maltreatment, neglect, abuse or degradation'. Yet no one would contend either that the cleaner's assault of the passer-by or that the janitor's molestation of the child is sufficiently closely connected to his employment for the employer to be held vicariously liable for it. Indeed, the Canadian Supreme Court, in *Jacobi*, and the House of Lords, in *Lister*, seemed to regard the molestation of the child by the janitor or groundsman

[175] Ibid at 443G.
[176] Ibid at 445F.

as paradigmatic of a particular kind of case where a close connection would be lacking.[177]

Why would no one contend that there is a sufficiently close connection in either of the two examples? If the double-breach-of-duty ground were valid, the explanation would have to be something like the following: the fact that the cleaner and the janitor, when committing their delicts, simultaneously caused their respective employers to breach their duties is a reason for concluding that there is a close connection between the cleaner and janitor's delicts and their employment; however, in the particular circumstances, that reason is outweighed by some countervailing reason or reasons. A more plausible explanation, however, is this: the fact that the cleaner and the janitor, when committing their delicts, simultaneously caused their respective employers to breach their duties does not provide any reason at all to conclude that that there is a close connection between the cleaner and janitor's delicts and their employment. For consider: if it were a reason (albeit one of little weight), the cleaner's assault, in our first example, would be more closely connected (even if, for countervailing reasons, not sufficiently so) to his employment than would an identical assault by a cleaner employed to do exactly the same job, but by the Minister of Agriculture rather than Safety and Security. Similarly, the janitor's act of molestation, in the second example, would be more closely connected to his employment than would be an identical act of molestation by a janitor employed to perform the exact same work, but by a private institution caring for abused children rather than a state one.

(2) *The exploitation-of-trust ground*

The Constitutional Court's exploitation-of-trust ground can only be understood as an attempted application of a particular theory about vicarious liability, variously called the theory of 'enterprise-liability', the theory of 'enterprise-risk', or the theory of 'risk-based liability'.[178] Very briefly, this theory provides the following justification for the imposition of vicarious liability upon an enterprise:

> An enterprise, by employing people to do its work, creates a risk to the public. If the risk materializes, it should in fairness be borne by the enterprise (as it benefits from the risk-creating activity) rather than the

[177] *Jacobi* supra note 160 paras 62 and 82; *Lister* supra note 165 paras 16 and 45.

[178] See, for accounts of this theory, *Bazley* supra note 160 paras 30–1; *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 para 21; Gregory C Keating 'The idea of fairness in the law of enterprise liability' (1997) 95 *Michigan LR* 1266; Bruce Feldthusen 'Vicarious liability for sexual torts' in N J Mullany & A M Linden (eds) *Torts Tomorrow: A Tribute to John Fleming* (1998) 221; Paula Giliker 'Rough justice in an unjust world' (2002) 65 *Modern LR* 269; Simon Deakin ' "Enterprise-risk": The juridical nature of the firm revisited' (2003) 32 *Industrial LJ* 97; Douglas Brodie 'Enterprise liability: justifying vicarious liability' (2007) 27 *Oxford Journal of Legal Studies* 493.

hapless victim (as that would in effect cause the victim to subsidize the enterprise's profit-making activity).

The Constitutional Court did not explicitly connect its exploitation-of-trust ground to the theory of enterprise-liability. However, when discussing the South African common law on vicarious liability, it quoted the following passage from the judgment of Watermeyer CJ in *Feldman*:

> '[A] master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy; . . . because he has created this 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 and . . . the mere giving by him of directions or orders to his servant is not a sufficient performance of that duty. It follows that if the servant's acts in doing his master's work or his activities incidental to or connected with it are carried out in a negligent or improper manner so as to cause harm to a third party the master is responsible for that harm.'[179]

Moreover, when discussing the Canadian law of vicarious liability — which, according to the court, undoubtedly would 'be of value in considering the development and application of our own rules of vicarious liability'[180] — the court quoted two passages from the Canadian Supreme Court's *Bazley* judgment. In the first, the Canadian Supreme Court endorsed the theory of enterprise-liability in general.[181] In the second, it applied the theory to the particular facts of the case before it.[182]

But there is a more compelling reason to connect the Constitutional Court's exploitation-of-trust ground to the theory of enterprise-liability. It is that only that theory could hope to explain why the fact that an employee committed a delict by exploiting a relationship of trust created by his employment might be a reason to conclude that his delict was sufficiently closely connected to his employment to justify the imposition of liability on his employer. The explanation is as follows:

> An enterprise, by employing persons to do certain jobs, may induce members of the public to place their trust in those persons. In so far as an enterprise does so, it creates a risk to the public. For an employee could abuse the employment-created trust in order to cause harm to a member of the public. When this risk materializes — that is, when an employee harms a member of the public by abusing the trust created by his employment — it should, in fairness, be borne by the enterprise rather than the harmed member of the public. That is so for two reasons. First, it is the enterprise which gets the benefit of the risk-creating relationship of trust. Secondly, if the materialization of this risk were not borne by the

[179] *Feldman* supra note 20 at 741; quoted in *K* supra note 2 at 435B-C.
[180] *K* supra note 2 at 441F-G.
[181] *Bazley* supra note 160 para 41; quoted in *K* supra note 2 at 439C-E.
[182] *Bazley* supra note 160 para 58; quoted in *K* supra note 2 at 439H-440B.

enterprise, the harmed member of the public would in effect be sponsoring the enterprise's profit-making.

Whether the theory of enterprise-liability — either in general or as applied specifically to exploitations of trust — is a valid one is not a question that will be addressed in this article. There is no need to do so. Even if the theory were valid, it would not vindicate the Constitutional Court's exploitation-of-trust ground. That is, it would not vindicate the court's claim that the policemen's exploitation of Ms K's trust was a ground to conclude that their rapes of her were sufficiently closely connected to their employment to justify the imposition of liability on their employer, the Minister of Safety and Security. To see why not, consider an analogous situation.

The population of some country has for many decades been afflicted by a viral disease. Every year, the disease causes a hundred thousand people to lose their sight. Then a vaccine is discovered. If the Minister of Health were to administer the vaccine to the entire population, the number of people annually blinded by the disease would be reduced from a hundred thousand to one thousand. That is, the incidence of the disease would be reduced by 99 per cent. However, of the thousand people who would still contract the disease every year, a hundred (or 10 per cent) would contract the disease, not from the virus, but from the vaccine itself.

Should the Minister of Health refrain from administering the vaccine? Clearly not. Should the Minister, if he were to administer the vaccine (as he should), be held liable towards the hundred citizens who would contract the disease from the vaccine rather than the virus — on the ground that he had created the risk that someone would be harmed by the vaccine. Again, clearly not. For the risk that matters is not the risk of contracting the disease *from the vaccine* — a risk which clearly would have been introduced by the Minister. The risk that matters is simply the risk of contracting the disease. This risk would not have been created by the Minister's administering of the vaccine. On the contrary, this risk would have been diminished by 99 per cent.

Could it be argued that, unless the hundred who contract the disease from the vaccine were to be compensated by the Minister, they would in effect be made to subsidize the welfare of others, specifically the ninety-nine thousand who, as a result of the vaccine, would have escaped the disease? Once again, clearly not. For it is not so that the Minister, by administering the vaccine, would have increased the risk to the hundred in order to reduce the risk to the ninety-nine thousand. On the contrary, the Minister would have reduced the risk to every one of the country's citizens, including the hundred who contract the disease from the vaccine, by 99 per cent. Since the risk to the hundred would have been reduced no less than the risk to everyone else, there is no sense wherein the hundred can be said to be subsidising the good of anyone else.

Now consider a situation closer to that in *K*. The population of our imaginary country is afflicted not only by disease, but also by violent crime.

Every year, a hundred thousand citizens are raped or assaulted. Then a preventative measure is discovered. If the country's Minister of Safety and Security were to establish a police force, the number of citizens to be raped or assaulted every year would be reduced from a hundred thousand to one thousand. That is, the incidence of violent crime would be reduced by 99 per cent. However, of the thousand citizens who would still be raped or assaulted every year, a hundred (or 10 per cent) would be raped or assaulted by the very policemen that have been employed to protect them.

It is obvious that the Minister of Safety and Security should nevertheless go ahead and establish the police force, just as the Minister of Health should go ahead and administer the vaccine. Indeed, it would be immoral not to do so. Imagine now that the Minister of Safety and Security were to do what he is morally obliged to do: that is, he were to establish the police force. Should he then, in fairness, be held liable towards the hundred citizens who are raped or assaulted, not by ordinary citizens, but rather by the very police who were employed to prevent those crimes? Surely not. Or at least, surely not if the basis for regarding the imposition of liability on the Minister of Safety and Security as fair is that he, by establishing a police force, has created or increased the risk to citizens of being raped or assaulted. For he has done the exact opposite. He has reduced that risk — by 99 per cent.

It is of course so that the Minister, by establishing a police force, has created the risk of being raped or assaulted *by a policeman*. To put it differently, he has changed, in a hundred cases, the identity of the rapist or assaulter from an ordinary member of the public to a policeman. But it is not clear how the fact that the Minister has changed the identity of certain criminals makes it fair to impose liability on him for their crimes — particularly when the change of identity is simply a by-product of his having reduced the number of crimes overall. After all, the Minister of Health — were he to administer the vaccine — would change the cause of the blindness-inducing disease in a hundred cases. But, given that his doing so would simply be a side-effect of his reducing the overall incidence of the disease by 99 per cent, no one would suggest that he should, in fairness, be held liable in those hundred cases. Consider also the following possibility. The Minister of Science and Technology in our imaginary country initiates a space programme. He takes five hundred air-force pilots and re-deploys them as astronauts. By doing so, the Minister would have created a new risk, namely the risk that someone may be raped or assaulted *by an astronaut*. However, the fact that the Minister has created this risk could not possibly be of relevance to the question whether it would be fair to hold him liable for any rapes and assaults committed by those astronauts.

The implications of the foregoing for the *K* case should be clear. All South African women are at risk of being raped. The South African Minister of Safety and Security neither created nor increased that risk by employing a police force. On the contrary, he reduced it from what it otherwise would have been. So it cannot be said that it is fair to impose liability on the Minister for the policemen's rapes of Ms K, because he — by employing a

police force — created or increased the risk to her of being raped. He did not. Of course, the Minister did, by employing a police force, increase the risk to Ms K and every other South African woman of being raped *by a policeman*. But that does not make it fair to impose liability on the Minister for the rapes committed on Ms K by the three policemen in his employ — just as the fact that the Minister of Health in our hypothetical country, were he to administer the vaccine, would increase the risk to every citizen of contracting the disease *from the vaccine* would not make it fair to impose liability on him towards those who did so contract the disease.

The foregoing discussion has shown that the Constitutional Court's exploitation-of-trust ground cannot be justified by the theory of enterprise-liability. It cannot be so justified because the imposition of liability on the Minister of Safety and Security for the three policemen's rapes of Ms K did not in fact achieve a fair distribution of risk between the Minister and Ms K. However, the imposition of liability on the Minister did not only affect the distribution of risk between the Minister and Ms K. It also affected the distribution of risk between Ms K and other rape victims. As is explained below, fairness in the latter risk-distribution — that is, the distribution of risk between Ms K and other rape victims — required that liability *not* be imposed upon the Minister.

To see that, consider again the country afflicted by the viral disease. Administration of the vaccine, to recall, would reduce the number of citizens contracting the disease to a thousand per year. Of these, one hundred would get the disease from the vaccine. The remaining nine hundred would get it from the virus itself. Would it be fair for the state in the imagined country to compensate the hundred who got the disease from the vaccine, but not the nine hundred who got it from the virus? Surely not. Now consider the imagined country's crime problem. The introduction of a police force, to recall, would reduce the number of rapes and assaults to a thousand per year. Nine hundred would be raped or assaulted by ordinary citizens, one hundred by members of the police. Would it be fair for the state to adopt a compensation scheme that pays out those raped or assaulted by the police, but not those raped or assaulted by ordinary citizens? Again, surely not.

Once more, the implications of this for the *K* case should be clear. Estimates of the number of women (and 'women' here must be understood to include girls) raped in South Africa every year vary. They vary because, even though the number of reported rapes can be determined with some accuracy, the ratio of reported to unreported rapes is hard to determine with any degree of precision. For argument's sake, however, let it be assumed (conservatively) that the annual number of rapes is 250 000. It is hard to discover just how many of these rapes are committed by policemen as a result of the fact that their victims reasonably, but regrettably, placed their trust in them. Again for argument's sake, let it be assumed (generously) that the number is 2 500. It may be, as was suggested by the Supreme Court of Appeal in its *K* judgment, that the legislature should impose a general obligation upon the state to compensate every one of the 250 000 rape

victims.[183] However, the Constitutional Court's *K* judgment does not impose that general obligation. Nor does it compel the legislature to impose it. What it does, instead, is to oblige the state to compensate the 2 500 women who happen to be raped by policemen exploiting their trust, while imposing no obligation on the state to compensate the 247 500 women who are raped by their kinsmen, their colleagues or their neighbours, or by strangers breaking into their homes or hijacking them in their motor cars. So to privilege those who happen to be raped by policemen exploiting their trust is arbitrary. Indeed, it is unfair.

V CONCLUSION

This article has shown that the Constitutional Court's *K* judgment is confused in several respects. It is confused about the common-law rules of vicarious liability: neither the intention/connection nor the exclusion-of-values rule ever was part of the common law. It is confused about s 39(2) of the Constitution: this section does not require courts to develop the common law so as to promote the values of the Constitution; instead, it requires them to promote the values of the Bill of Rights when developing the common law. And it is confused about the application of the sufficiently-close-connection condition to the facts of *K*: while the breach-of-duty ground is contrary to common sense, the exploitation-of-trust ground does not produce a fair distribution of risk between Ms K, the Minister of Safety and Security, and other rape victims. The judgment also is confused about the application and development of indeterminate common-law rules: contrary to what is assumed in the judgment, the application of a common-law rule to facts regarding which it is indeterminate does not necessarily develop it.

To point out the Constitutional Court's many mistakes in *K* is not to score a cheap and unimportant trick against it. The court's mistakes are mistakes that matter. They matter, most obviously, because they mean that the court failed to justify both its substantive conclusion and its jurisdictional one. That is, the court failed to justify its conclusion that the Minister of Safety and Security ought to be held vicariously liable towards Ms K as well as its conclusion that it was entitled to set aside the contrary decision of the Supreme Court of Appeal. However, the Constitutional Court's mistakes in *K* matter for reasons that go beyond the parties to the case. The court's erroneous view that the intention/connection rule was part of the common law, as well as its nonsensical assertion that an employee's breach of duty can forge a connection between his delict and his employment — if repeated or followed — will have a considerable impact on future determinations of vicarious liability. The court's misinterpretation of s 39(2) — again if repeated or followed — will have an impact, not only on the laws of vicarious liability and delict in particular, but on private law in general. The

[183] Supra note 1 at 186A.

same holds for the court's erroneous view of the application and development of indeterminate common-law rules (and perhaps for its muddling of the fact/law and fact/value distinctions, as well as its misunderstanding of the relationship between a rule and the reasons for it).

Because the mistakes in *K* matter for reasons that go beyond the parties to the case, the Constitutional Court is obliged to correct them as soon as it is able to do so. In the meantime, how are the Supreme Court of Appeal and the High Courts to deal with these mistakes? Are they bound to repeat them? Are they bound to repeat some of them but not others? Consideration of the doctrines of precedent, as well as of ss 167 and 168 of the Constitution, suggests that the latter is the case. Section 167(3)*(a)* makes the Constitutional Court 'the highest court in all constitutional matters'. That must mean that the Constitutional Court's interpretation of s 39(2), even though mistaken, is binding upon the Supreme Court of Appeal and the High Courts. However, since s 168(3) makes the Supreme Court of Appeal the highest court in all other matters, neither it nor any High Court is bound by the Constitutional Court's mistakes about the common-law rules of vicarious liability. So the Supreme Court of Appeal and the High Courts can continue to determine satisfaction of the course-and-scope requirement by application of the discharge-of-duty rule, rather than the intention/connection one. And they can continue to regard the application of that rule as a matter of fact not law, that is, as having no developmental function. What about the Constitutional Court's mistaken application of the sufficiently-close-connection condition? What, in other words, about the breach-of-duty and exploitation-of-trust grounds? If the Supreme Court of Appeal and the High Courts carry on determining satisfaction of the course-and-scope requirement by application of the discharge-of-duty rule, as they are free to do, these two grounds will simply be irrelevant. For the Constitutional Court only ever conceived of them as having a bearing upon the sufficiently-close-connection condition, and never as having a bearing on the discharge-of-duty one.