

BLIND FAITH: A RESPONSE TO PROFESSORS NEETHLING
AND POTGIETER

ANTON FAGAN

W P Schreiner Professor in the Faculty of Law, University of Cape Town

In a recent note, ‘Wrongfulness and negligence in the law of delict: A Babylonian confusion?’ (2007) 70 *THRHR* 120, Professors J Neethling and J M Potgieter raise several objections to the analysis of wrongfulness and negligence that Brand JA presented in his inaugural lecture at the University of the Free State and which he adopted in his judgment in the case of *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA). (The inaugural lecture, entitled ‘Die jongste ontwikkelings in deliktuele aanspreeklikheid vir lates en vir suiwer ekonomiese verlies’, has since been published as ‘Reflections on wrongfulness in the law of delict’ (2007) 124 *SALJ* 74.) Since Brand JA’s views on wrongfulness and negligence largely coincide with my own, and since I defended those views in an article published in the *SALJ* two years ago (‘Rethinking wrongfulness in the law of delict’ (2005) 122 *SALJ* 90), it is appropriate that I offer a response.

Let me start my response by setting out five propositions that are not in dispute between Neethling and Potgieter on the one hand, and Brand JA and me on the other. The first two propositions are substantive in nature:

- S1: In order for a person who unintentionally causes loss to another thereby to commit a delict, it is necessary that his conduct be unreasonable *ex ante* (that is, unreasonable given its probable rather than actual consequences and circumstances).
- S2: A person who unintentionally causes loss to another does not thereby commit a delict, even if his conduct is unreasonable *ex ante*, unless it would be reasonable for the law to impose liability on him.

The next three propositions are terminological:

- T1: The law expresses proposition S1 by saying that in order for a person who unintentionally causes loss to another thereby to commit a delict, it is necessary that his conduct be negligent.
- T2: Many Appellate Division and Supreme Court of Appeal judgments have expressed proposition S2 by saying that a person who unintentionally causes loss to another does not thereby commit a delict, even if his conduct is negligent, unless his conduct is wrongful.
- T3: A few Appellate Division and Supreme Court of Appeal judgments have expressed proposition S2 by saying that a person who unintentionally causes loss to another does not thereby commit a delict, even if his conduct is negligent, unless his conduct is the legal cause of the loss.

If Neethling, Potgieter, Brand JA and I agree that every one of the five propositions set out above is true, what do we disagree about? In part, we

disagree about terminology. As proposition T2 indicates, our courts frequently employ the word ‘wrongfulness’ to express the judgement that it is reasonable to impose liability for negligent conduct, or that it would be reasonable to impose liability for conduct if it were negligent. Brand JA and I believe that it is perfectly acceptable for the courts to do so. Neethling and Potgieter believe that it is not (see ‘A Babylonian confusion?’ op cit at 125–8). In their view, the judgement that it is reasonable to impose liability for negligent conduct, or that it would be reasonable to impose liability for conduct if it were negligent, should never be expressed by saying that the conduct is wrongful. Instead, it should always be expressed by saying that the conduct legally caused the loss (see Johan Potgieter ‘Gedagtes oor die rol van onregmatigheid, nalatigheid en juridiese kousaliteit in die deliktereg’ in T J Scott & Daniel Visser (eds) *Developing Delict: Essays in Honour of Robert Feenstra* (2000) 67 at 71 and 77–8; J Neethling & J M Potgieter ‘Deliktuele aanspreeklikheid weens bevrugting as gevolg van ’n nalatige wanvoorstelling: Die funksies van onregmatigheid, nalatigheid en juridiese kousaliteit onder die loep’ (2000) 63 *THRHR* 162 at 166–7).

If that were all there was to the dispute between Neethling and Potgieter and Brand JA and me, it would be trivial. However, underlying Neethling and Potgieter’s terminological preference is a substantive claim that is all but trivial. Neethling and Potgieter object to the idea that the enquiry into the reasonableness of imposing liability for harm-causing conduct should be conducted under the rubric of wrongfulness because they believe that there is a different enquiry that sometimes is, and always should be, conducted under that rubric. What is that enquiry? It is an enquiry into the reasonableness of the harm-causing conduct judged *ex post facto* (that is, judged with reference to the conduct’s actual rather than probable consequences and circumstances). As Neethling and Potgieter put it:

‘The determination of wrongfulness entails an objective, *ex post facto* weighing up of interests in order to determine whether the defendant acted reasonably or not in the particular circumstances . . .’ (J Neethling, J M Potgieter & P J Visser *Law of Delict* 5 ed (2006) at 40; see also at 34–5, 73–4; and see J Neethling ‘Self-defence: The “unreasonable” reasonable man’ (2002) 119 *SALJ* 283 at 284; J Neethling ‘Actio ad exhibendum: Deliktsaksie sui generis of actio legis Aquiliae?’ in Scott & Visser op cit 215 at 219; J Neethling ‘Wrongfulness in South African law of delict’ in H Koziol (ed) *Unification of Tort Law: Wrongfulness* (1998) 101 at 101–2).

‘[W]rongfulness is determined on the basis of *actual facts* or realities, and negligence on the basis of *probabilities*’ (Neethling, Potgieter & Visser *Law of Delict* op cit at 142, emphasis in the original; see also at 81–2; and see Johann Neethling ‘Fault under South African law’ in P Widmer (ed) *Unification of Tort Law: Fault* (2005) 207 at 211; Johann Neethling & J M Potgieter ‘’n Spesiale verhouding tussen die polisie en misdaadslagoffers: ’n Onontbeerlike faktor vir die bestaan van ’n regsplig op die polisie om misdaadslagoffers te beskerm?’ (2004) 67 *THRHR* 490 at 495; J Neethling & J M Potgieter ‘Die aksie van die teleurgestelde begunstigde kry stukrag’ (2003) 66 *THRHR* 318 at 322; Neethling ‘The “unreasonable” reasonable man’ op cit at 285; Neethling ‘Wrongfulness in South African law of delict’ op cit at 105; J Neethling ‘Onregmatigheid, nalatigheid, regsplig, “duty of care”, en die rol van redelike voorsienbaarheid — Praat die Appèlhof uit twee monde?’ (1996) 59 *THRHR* 682 at 685).

In effect, therefore, Neethling and Potgieter would have us interpose, between S1 and S2 above, a further substantive proposition:

S*: In order for a person who unintentionally causes loss to another thereby to commit a delict it is and should be necessary that his conduct be unreasonable *ex post facto*.

To take account of S*, S2 would then have to be modified to read as follows:

S2*: A person who unintentionally causes loss to another does not thereby commit a delict, even if his conduct is unreasonable ex ante and ex post facto, unless it would be reasonable for the law to impose liability on him.

Neethling and Potgieter's substantive claim explains their terminological preference. Were Neethling and Potgieter's substantive claim correct, the question whether a person who unintentionally caused loss to another thereby committed a delict would turn on three distinct enquiries. Was his act unreasonable ex ante? Was his act unreasonable ex post facto? Would it be reasonable to impose liability upon him if his act were unreasonable both ex ante and ex post facto? It undoubtedly would avoid confusion if each of these enquiries were uniquely designated. Precisely that would be achieved if Neethling and Potgieter's terminological suggestion were followed. For then the first enquiry would be conducted, as it always has been, under the heading of negligence. The second enquiry would be conducted under the heading of wrongfulness. And the third would be conducted under the heading of legal causation.

However, and here's the rub, it is doubtful that Neethling and Potgieter's substantive claim is correct. In order better to assess that claim, it is useful to separate it into two sub-claims, one descriptive and one prescriptive. The descriptive claim is that the law currently makes it a necessary condition for unintentional harm-causing conduct to constitute a delict that the conduct be unreasonable ex post facto. Neethling and Potgieter provide next to no evidence for their descriptive claim. But even if they were able to identify a few judgments that made it a necessary condition for unintentional harm-causing conduct to constitute a delict that it was unreasonable ex post facto, that would not vindicate their descriptive claim. There is a large and ever-increasing number of judgments which clearly do not make it a necessary condition for unintentional harm-causing conduct to constitute a delict that it was unreasonable ex post facto. In the article 'Rethinking wrongfulness in the law of delict' (op cit at 106–15), I provided a detailed account of the many judgments in which the wrongfulness of unintentional harm-causing conduct was made to turn exclusively on whether it would be reasonable to impose liability for the conduct, were it unreasonable ex ante (that is, were it negligent). Since that article was written, the list of judgments taking that approach has grown. It now includes not only the judgment of Brand JA in the *Two Oceans* case (supra) but also his judgment in *Local Transitional Council of Delmas v Boshoff* 2005 (5) SA 514 (SCA), the judgment of Scott JA in *Gouda Boerdery Bk v Transnet* 2005 (5) SA 490 (SCA), and the judgments of Harms JA in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) and *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA). Given the overwhelming number of judgments that did not regard it as a necessary condition for unintentional harm-causing conduct to constitute a delict that

it be *ex post facto* unreasonable, Neethling and Potgieter cannot hope to justify their descriptive claim by producing one or two judgments that did so regard it. Neethling and Potgieter's descriptive claim is a claim about what the law is. The law, in this instance, is made by the cases. When twenty cases apply a particular rule, and only two cases apply its antithesis, it would require an ingenious argument to show that the law is made by the two rather than the twenty. That is all the more so if some of the twenty postdate the two.

Neethling and Potgieter's prescriptive claim is that the law *ought* to make it a necessary condition for unintentional harm-causing conduct to constitute a delict that the conduct was unreasonable *ex post facto*. It is possible that Neethling and Potgieter's prescriptive claim is valid even though their descriptive claim is false. That is, it might be that, even though the law does not make it a condition for unintentional harm-causing conduct to constitute a delict that the conduct was unreasonable *ex post facto*, it should do so. Of course, it should do so only if doing so would in some way improve the law. As was explained earlier, the law already imposes two conditions for unintentional harm-causing conduct to constitute a delict. One is that the conduct was unreasonable *ex ante* — this condition is invariably expressed by saying that the conduct has to be negligent. The other is that it would be reasonable to impose liability for the conduct, assuming that it was unreasonable *ex ante*. While this condition most often is expressed by saying that the conduct has to be wrongful, it occasionally is expressed by saying that the conduct must have legally caused the loss. The challenge facing Neethling and Potgieter is to explain why the law would be improved if it were to add to the two existing conditions the further condition that they propose: the condition that the conduct be unreasonable *ex post facto*.

There are two ways in which Neethling and Potgieter could attempt to explain how the law would be improved by the addition of this further condition. One would be to argue that the addition of that condition would produce better outcomes. As far as I am aware, Neethling and Potgieter have never developed an argument of that kind. Their failure to do so is surprising given the fact that, in 'Rethinking wrongfulness in the law of delict' (op cit at 127–32), I explained that the addition of the condition which they propose, far from producing better outcomes, would in fact produce worse ones. I will not repeat the details of that explanation here. The nub of it is that the addition of the condition which Neethling and Potgieter propose would have the result that persons who had caused harm to others by conduct that was unreasonable *ex ante* would on occasion escape liability when they should not.

An example would be where A performs an act that has a low probability of conferring a small benefit upon B but a high probability of imposing a large burden on C. Fortunately for all concerned, the act in fact imposes only a small burden on C. It is possible, in this scenario, that A's act is unreasonable *ex ante*, yet reasonable *ex post facto*. As the law currently stands, A could be

held liable to C even if that were the case. However, A would definitely not be held liable to C if the law were altered in the way that Neethling and Potgieter propose, by making it a necessary condition for unintentional harm-causing conduct to constitute a delict that it also be unreasonable *ex post facto*. That A should escape liability to C simply because C suffered less harm than was probable is — on the face of it at least — irrational. If a person would have received compensation had his entire herd of two hundred cows been poisoned, or all ten his fingers cut off, why should he be denied compensation because, serendipitously, he lost only ten cows or two fingers?

The other way in which Neethling and Potgieter could attempt to explain how the law would be improved by the addition of the condition that they propose, that is, the condition that the conduct be unreasonable *ex post facto*, would be to argue that the addition of that condition renders the law more coherent. Neethling and Potgieter have never, to my knowledge, explicitly invoked coherence as a justification for their claim that unreasonableness *ex post facto* should be made a necessary condition for unintentional loss to constitute a delict. However, it is likely that their claim is motivated, at least in part, by coherence-based reasons, even if they have never clearly articulated them. To see why that is so, we have to turn our gaze for a moment from unintentionally caused loss to intentional infringements of right. To put it another way, we have to shift our focus momentarily from *damnum iniuria datum* to the *iniuriae*.

As every South African lawyer knows, an intentional infringement of right constitutes an *iniuria* only if it is wrongful. That is why an intentional application of force to another does not constitute an *iniuria* if it is done in self-defence or defence of another, out of necessity, or in the course of carrying out a lawful arrest. That is also why intentionally defaming another does not constitute an *iniuria* if it is done on a privileged occasion, or qualifies as a fair comment, or satisfies the requirements of the so-called *Bogoshi* defence. What does wrongfulness in the context of *iniuria* turn on? According to Neethling and Potgieter, it turns on whether the intentional infringement of right is unreasonable *ex post facto*. Assume for the moment that they are right. Would that lend any weight to their claim that unreasonableness *ex post facto* should be made a necessary condition for unintentional loss to constitute a delict? On the face of it, it would. All other things being equal, it is good for the law to be more rather than less coherent. And, on the face of it, the law would be more coherent if it set the same conditions for an unintentional loss-causing act to constitute *damnum iniuria datum* as it does for an intentional infringement of right to constitute an *iniuria*.

Precisely how much weight a coherence-based argument of this kind would lend to Neethling and Potgieter's claim that unreasonableness *ex post facto* should be made a necessary condition for unintentional loss to constitute a delict is another matter. In particular, it is unclear whether a coherence-based argument of this kind would be sufficient to defeat the countervailing outcomes-based argument presented above. Even if the law's

coherence would be increased by making it a necessary condition for unintentional loss-causing conduct to constitute *damnum iniuria datum* that it be unreasonable *ex post facto*, would that really be enough to outweigh the irrationality in the outcomes that would be produced as a result?

There is no need to pursue that difficult question any further. Neethling and Potgieter could invoke coherence as a reason to make it a condition for unintentional loss-causing conduct to constitute *damnum iniuria datum* that the conduct be unreasonable *ex post facto*, only if their understanding of wrongfulness in the context of *iniuria* were correct. But it is not. In the context of *iniuria*, the wrongfulness of harm-causing conduct frequently turns, not on whether the conduct is unreasonable *ex post facto*, but rather on whether it is unreasonable *ex ante*. That is clearly demonstrated by the *iniuriae* of assault and defamation.

As mentioned above, a person who intentionally applies force to another does not act wrongfully if the force is applied in defence. In 'Rethinking wrongfulness in the law of delict' (op cit at 97–9), I explained that the cases (with one exception) determined the question whether an intentional application of force constituted an act of defence by considering factors that had to do with its probable rather than actual circumstances and consequences. The conclusion drawn was that in our law, defence negated the wrongfulness of an intentional application of force by showing it to have been reasonable *ex ante* rather than reasonable *ex post facto*. When the article was written there existed no Appellate Division or Supreme Court of Appeal judgment setting out the requirements for defence in the context of delict. That has now changed. In *Mugwena v Minister of Safety and Security* 2006 (4) SA 150 (SCA) the Supreme Court of Appeal had to determine whether a policeman who had intentionally shot and killed someone had done so in self-defence. In making that determination the court clearly accepted the view taken in the earlier cases, that is, the view that defence negates the wrongfulness of an intentional application of force by showing it to have been reasonable *ex ante*. According to the court, whether the policeman had acted in defence depended on whether 'a reasonable person in the position of [the policeman] would have considered that there was a real risk that death or serious injury was imminent' (para 22). The 'true inquiry', said the court, was 'how the risk would have been assessed by a reasonable person in the position of [the policeman]' (para 25). Consistent with these statements, the court concluded that the policeman had not acted in self-defence, because a reasonable person in his position would not have thought that he was in immediate danger of death or serious injury.

That wrongfulness in the context of *iniuria* frequently turns on whether conduct is unreasonable *ex ante*, rather than on whether it is unreasonable *ex post facto*, is confirmed by consideration of the defences available to someone who has intentionally defamed another. Two of those defences, namely qualified privilege and the *Bogoshi* defence, set conditions that have little to do with actual states of affairs, and everything to do with probable ones. To put it another way, both qualified privilege and the *Bogoshi* defence

render intentional defamation lawful by showing it to be *ex ante*, rather than *ex post facto*, reasonable. The point was fully explained in 'Rethinking wrongfulness in the law of delict' (op cit at 99–106). I will therefore say no more about it here.

Enough has been said to show that Neethling and Potgieter's substantive claim is without foundation. The claim that it *is* a necessary condition for unintentional harm-causing conduct to constitute a delict that it be unreasonable *ex post facto* is not borne out by the cases. The claim that it *ought* to be a necessary condition can be justified neither on the basis of the outcomes that would so be produced, nor on the ground that the law would be rendered more coherent as a result.

The failure of Neethling and Potgieter's substantive claim has implications for their disagreement with Brand JA and me. Most significantly, it deprives their objection to the courts' use of the word 'wrongfulness' of all force. The courts, to recall, frequently use the word 'wrongfulness' to express the judgement that it is or would be reasonable to impose liability for conduct shown or assumed to be negligent. More rarely, the courts express that judgement by describing the conduct as the 'legal cause' of the loss which it caused in fact (or by saying that the loss was not too 'remote' from the conduct). According to Neethling and Potgieter, it would be better if the courts always used the words 'legal causation' and never the word 'wrongfulness' to express the judgement in question. As was explained earlier, were Neethling and Potgieter's substantive claim valid, that preference would have some plausibility. If it really were or ought to be a condition for unintentional harm-causing conduct to constitute a delict that it be unreasonable *ex post facto*, it would avoid confusion if that condition were designated by a particular term. And there is no reason why 'wrongfulness' should not serve as that term. However, given the fact that Neethling and Potgieter's substantive claim is not valid, their terminological preference is wholly arbitrary. Since it neither is nor ought to be a condition for unintentional harm-causing conduct to constitute a delict that it be unreasonable *ex post facto*, what could possibly be gained by getting the courts to stop using the word 'wrongfulness', as they do, to express the judgement that it is or would be reasonable to impose liability for the conduct, given or assuming that it is negligent?

Neethling and Potgieter's disagreement with Brand JA and me does not only concern the question whether it is acceptable for the courts to use the word 'wrongfulness' to express the judgement that it is reasonable to impose liability for conduct shown or assumed to be negligent. It also concerns the question whether it is acceptable for the courts to equate the wrongfulness of negligent harm-causing conduct with the breach of a legal duty to act without negligence. It is uncontroversial that in our law wrongfulness is constituted by the breach of a legal duty. But what is the nature or content of that duty? In 'Rethinking wrongfulness in the law of delict' (op cit at 110–15), I claimed that our courts view the duty, breach whereof renders negligent conduct wrongful, as a duty to act without negligence. I will not

repeat the evidence that I provided for that claim. Suffice it to point out that the truth of the claim has been confirmed by the judgment of Scott JA in *Gouda Boerdery* (supra). It is true that in two recent cases, namely *Telematrix* (supra) and *Steenkamp* (supra), Harms JA criticized the equation of wrongfulness with the breach of a 'duty of care' as potentially misleading. However, it is clear that his objection was to the equation of wrongfulness with the breach of a duty, rather than to the idea that the duty in question is a duty to act without negligence.

Neethling and Potgieter do not dispute the fact that our courts do actually equate the wrongfulness of negligent harm-causing conduct with the breach of a duty to act without negligence. However, in their view it would be preferable if the courts stopped doing so (see 'A Babylonian confusion?' op cit at 123–5; and see also J Neethling 'The conflation of wrongfulness and negligence: Is it always such a bad thing for the law of delict?' (2006) 123 *SALJ* 204 at 212–13). I disagree with Neethling and Potgieter. So, clearly, does Brand JA. As he put it in the *Two Oceans* case (supra) para 12: 'Perhaps it would have been better, in the context of wrongfulness, to have referred to a "legal duty not to be negligent" . . . instead of just to a "legal duty".'

In a sense, our disagreement about the content of the duty, breach whereof renders negligent conduct wrongful, is parasitic on our disagreement about the proper use of the word wrongfulness. Neethling and Potgieter's belief that it is *not* acceptable to equate the wrongfulness of negligent harm-causing conduct with the breach of a duty to act without negligence is premised on their belief that the word 'wrongfulness' should be used only to express the judgement that harm-causing conduct is unreasonable ex post facto. Brand JA's and my belief that it *is* acceptable to equate the wrongfulness of negligent harm-causing conduct with the breach of a duty to act without negligence is premised on our belief that the word 'wrongfulness' may properly be used to express the judgement that it is or would be reasonable to impose liability for harm-causing conduct, proved or assumed to be negligent. Neethling and Potgieter's premise undoubtedly supports their conclusion. If the word 'wrongfulness' should be used only to express the judgement that harm-causing conduct is unreasonable ex post facto, it is unacceptable to equate the wrongfulness of negligent harm-causing conduct with the breach of a duty to act without negligence. But so does Brand JA's and my premise support our conclusion. If the word 'wrongfulness' may properly be used to express the judgement that it is or would be reasonable to impose liability for harm-causing conduct, proved or assumed to be negligent, it is acceptable to equate the wrongfulness of negligent harm-causing conduct with the breach of a duty to act without negligence. It follows that both Neethling and Potgieter's belief and Brand JA's and my belief as to the acceptability of equating the wrongfulness of negligent harm-causing conduct with the breach of a duty to act without negligence, stand or fall by the validity of their premises. Unfortunately for Neethling and Potgieter, their premise is invalid. Brand JA's and my premise, by contrast, is true. As was explained above, since the law does not in fact

make it a necessary condition for unintentional harm-causing conduct to constitute a delict that it be unreasonable *ex post facto*, and since Neethling and Potgieter provide no reason why it should do so, there is no reason why the courts should use the word ‘wrongfulness’ to express a judgement about the *ex post facto* unreasonableness of conduct rather than the reasonableness of imposing liability.

Neethling and Potgieter’s mistaken view about the propriety of using ‘wrongfulness’ to express a judgement about the reasonableness of imposing liability leads them astray about another matter. As explained in ‘Rethinking wrongfulness in the law of delict’ (op cit at 140), our courts frequently decide whether a harm-doer acted negligently before deciding whether he acted wrongfully. Our courts often determine the wrongfulness of harm-causing conduct by assuming its negligence. And, on a few occasions, our courts have explicitly stated that a particular harm-causing act could be wrongful only if it was negligent. Neethling and Potgieter believe all of this to be unacceptable. (See Neethling ‘The conflation of wrongfulness and negligence’ op cit at 208–9; Neethling ‘Fault under South African law’ op cit at 212; Johann Neethling ‘Delictual protection of the right to bodily integrity and security of the person against omissions by the state’ (2005) 122 *SALJ* 572 at 586–7; Neethling ‘The “unreasonable” reasonable man’ op cit at 285; J Neethling & J M Potgieter ‘Die toets vir deliktuele aanspreeklikheid onder die lig’ (2001) 64 *THRHR* 476 at 480; J Neethling ‘Die regsplig van die staat om die reg op die fisies-psigiese integriteit teen derdes te beskerm: Die korrekte benadering tot onregmatigheid, nalatigheid en feitelike kousaliteit’ (2001) 64 *THRHR* 489 at 493–4; Potgieter ‘Gedagtes oor die rol van onregmatigheid, nalatigheid en juridiese kousaliteit’ op cit at 69–70; Neethling & Potgieter ‘Deliktuele aanspreeklikheid weens bevrugting’ op cit at 164–5). Why? Partly, at any rate, because they believe that conduct should be described as wrongful if and only if it is *ex post facto* unreasonable. Were Neethling and Potgieter’s belief about wrongfulness correct, their criticism of the courts would have some plausibility. Were it so that the wrongfulness of harm-causing conduct turned on its unreasonableness *ex post facto*, it certainly would be a mistake to determine wrongfulness by assuming negligence. It certainly would be a mistake to state that a particular harm-causing act could be wrongful only if it was negligent. And, depending on one’s understanding of negligence, it could indeed be impossible to decide whether conduct was negligent before deciding whether it was wrongful. However, as has been explained, Neethling and Potgieter’s belief about wrongfulness is not correct. That being so, their criticism is baseless.

In this note so far, I have identified three points of disagreement between, on the one hand, Neethling and Potgieter and, on the other, Brand JA and me. The first concerns the courts’ use of the word ‘wrongfulness’ to express a judgement about the reasonableness of imposing liability. The second concerns the courts’ equation of the wrongfulness of negligent harm-causing conduct with the breach of a duty to act without negligence. The third concerns the courts’ view that negligence may be, in the sense explained

above, anterior to wrongfulness. Brand JA and I believe that the courts have got it right in all three of these respects. Neethling and Potgieter believe the opposite. As explained, however, Neethling and Potgieter's objection to the courts' view that negligence may be anterior to wrongfulness is premised upon their objection to the courts' use of the word 'wrongfulness' to express a judgement about the reasonableness of imposing liability. The same is true of their objection to the courts' equation of the wrongfulness of negligent harm-causing conduct with the breach of a duty to act without negligence. As was also explained, Neethling and Potgieter's objection to the courts' use of the word 'wrongfulness' to express a judgement about the reasonableness of imposing liability is in turn premised on their substantive claim. It is premised, that is, on their claim that the law does or ought to make it a condition for unintentional harm-causing conduct to constitute a delict that it be unreasonable *ex post facto*. Ultimately, therefore, every one of Neethling and Potgieter's three objections depends for its validity upon the validity of their substantive claim. As was explained earlier, Neethling and Potgieter's substantive claim is not valid. Neither, therefore, is any one of their three objections.

To conclude this note, I would like to deal with a question raised by my earlier rejection of the possibility that Neethling and Potgieter could make a coherence-based argument for their prescriptive claim, that is, the claim that the law ought to make it a condition for unintentional harm-causing conduct to be a delict that it be unreasonable *ex post facto*. My reason for rejecting that claim, to recall, was that wrongfulness in the context of *iniuria* frequently turns not on the *ex post facto*, but rather on the *ex ante*, reasonableness of conduct. That was sufficient to knock down any attempt to rely on coherence as a ground for introducing *ex post facto* unreasonableness as a condition for the wrongfulness of unintentional harm-causing conduct. But does it not mean that our law is incoherent in another respect? If, as I have argued, the wrongfulness of unintentional harm-causing conduct turns on the reasonableness of imposing liability, but that of an intentional infringement of right frequently turns on the *ex ante* unreasonableness of the infringing conduct, does it not follow that there is a fundamental incoherence between the rules dealing with *damnum iniuria datum* and those dealing with the *iniuriae*?

No, it does not. The substance of the law must not be confused with the terminology by which the law chooses to express it. The fact that the wrongfulness of unintentional harm-causing conduct turns on the reasonableness of imposing liability, but that of an intentional infringement of right frequently turns on the *ex ante* unreasonableness of the infringing conduct, certainly does mean that, at a terminological level, the rules dealing with *damnum iniuria datum* differ from those dealing with the *iniuriae*. However, it does not mean that the rules also differ in substance. In fact there is considerable substantive convergence. Like the rules dealing with the *iniuriae*, so also the rules dealing with *damnum iniuria datum* require that the harm-causing conduct be unreasonable *ex ante*. The only difference is that

the former express that requirement by using the word 'wrongfulness', whereas the latter express it by using the word 'negligence'. Like the rules dealing with *damnum iniuria datum*, so also the rules dealing with the *iniuriae* require that it be reasonable to impose liability. Again, the only difference is in the mode of expression. In the former case, as we have seen, this requirement is expressed using the word 'wrongfulness'. In the latter case it is expressed by the refusal to recognize certain intentional infringements of right (for example, an intentional infringement of another's right to property) as *iniuriae*. It is also expressed by the refusal to recognize, as an *iniuria*, the infringement of another's right by an intentional omission.

Given the substantive convergence between the rules dealing with *damnum iniuria datum* and those dealing with the *iniuriae*, the divergence in terminology is not generally problematic. A possible exception is where an intentional infringement of right results in patrimonial loss. An intentional infringement of right resulting in patrimonial loss, like an unintentional act resulting in patrimonial loss and like an intentional infringement of right not resulting therein, constitutes a delict only if it is *ex ante* unreasonable and it is reasonable to impose liability for it. But which terminology is to be employed to express those two requirements? Since the act is intentional, it would be odd to express those requirements by saying that the act must be negligent and wrongful. Do we do better if we express them by saying that the act must be wrongful and must constitute an *iniuria*? Possibly, when the right infringed is a right to *corpus*, *fama* or *dignitas*; but not when the only right infringed is a right to property, such as where one person intentionally smashes another's car or burns down his house. In the latter case, the way out of the terminological conundrum probably is provided by legal causation. That is, while the requirement that the conduct be *ex ante* unreasonable could be expressed by saying that it has to be wrongful, the requirement that it be reasonable to impose liability could be expressed by saying that the conduct has to be the legal cause of the loss.

As far as I am aware, this is a puzzle which our courts have not yet fully solved. Hopefully Neethling and Potgieter can help them do so. However, for Neethling and Potgieter to assist with this puzzle, they must first recognize its existence. That they cannot do until they give up what, in the absence of a compelling argument for their substantive claim, appears to be little more than an article of blind faith, namely the belief that wrongfulness, always and everywhere, must turn on the *ex post facto* unreasonableness of conduct.