

State Liability and Accountability

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I INTRODUCTION

I wish to pay tribute to Chief Justice Pius Langa by exploring two intersecting themes addressed in his judgments.¹ These are state² liability and accountability. In particular, I wish to examine the relationship between holding the state accountable for its wrongdoing and holding the state liable to pay a monetary sum to a victim of its wrongdoing. The analysis will proceed in three stages. The notion of accountability will be examined first. Thereafter the different kinds of liability that may be imposed on the state in South African law will be distinguished. Finally the evolving relationship between state liability and accountability will be addressed. I shall analyse the current status of our law's development and describe important doctrinal choices that are still to be made. The law regulating state liability could develop in a variety of directions in the future.

This article is written at a time when the need to hold South African public functionaries accountable for wrongdoing is grave. Recent reports of alleged abuses of power by police and correctional services officers, in particular, are widespread. Systemic, unlawful use of excessive force is a serious concern. At the time of writing, the Farlam Commission of Inquiry into the tragic police shooting of striking mineworkers in Marikana and the O'Regan-Pikoli Commission of Inquiry into policing in Khayelitsha were ongoing.

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¹ See eg *Minister of Safety and Security v Luiters* 2007 (2) SA 106 (CC) para 34 (the need to render the exercise of public power accountable is relevant when applying the law of delict to the state) and *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC) paras 60-5 (constitutional damages, rather than delictual damages, may on occasion be awarded against the state).

² In this paper, the term 'state' should be understood broadly to encompass all entities or functionaries (whether or not part of the traditional institutional core of government) which 'exercise a public power or perform a public function' whether in terms of the Constitution of the Republic of South Africa, 1996, a provincial constitution, legislation, other law, or a contract. This 'functional' definition of the scope of the state differs from older 'institutional' definitions, which focused on the nature of institutions rather than on the nature of their functions. Today '[w]hat matters is not so much the functionary as the function': *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) para 141. See also ss 7(2), 8(1), and 239 of the Constitution, s 1(b) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), and *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC) paras 40-1. This 'functional turn' in delineating the boundaries of the state (ie persons and bodies who perform public functions) is not unique to South Africa. English administrative law, for example, has also 'shifted from controlling the *institutions of (central and local) government* to controlling the exercise of *functions of governance* (whatever they may be) whether performed by government or non-government entities': Peter Cane *Administrative Law* 4 ed (2004) 5. See also Peter Cane 'Accountability and the Public/Private Divide' in N. Bamforth and P. Leyland (eds) *Public Law in a Multi-Layered Constitution* (2003).

Institute for Security Studies research indicates that cases of alleged police brutality increased by 313 per cent between 2001 and 2011.³ The Independent Police Investigative Directorate reports that it received 275 complaints of deaths in police custody in the 2012/2013 financial year.⁴ The deaths during protest action of Andries Tatane and Nqobile Nzuzi, to take just two examples, have been much publicised. An understandable reaction to such events – particularly among lawyers and litigators – is to assume that the best way to promote the accountability of the state is to impose on it ever-greater liabilities sounding in money. Nonetheless, I shall argue that the relationship between state accountability and liability is not always straightforward. If novel liabilities are to be imposed on public functionaries, careful thought should be given to the form that these take, whether in the law of delict or on another basis. It should also be considered whether in some contexts more reliable enforcement of existing laws, and better provision of alternative legal and political accountability mechanisms, may help to improve governance as much as, if not more than, stretching the outer-limits of state liability. It is hoped that the following analysis, which focuses on legal doctrine, may contribute to sober debate about these matters.

II ACCOUNTABILITY

What is ‘accountability’? What does it mean to hold the state or indeed anyone ‘accountable’? Must accountability always be ‘to’ another person or body? The notion is often referred to but seldom defined.⁵ It has two interrelated senses. First, to hold people accountable, or ‘to account’, means requiring them to explain or to justify their actions. Accountable governments, for example, have a duty to explain and justify their decisions, actions, and laws to their citizens.⁶ Similarly Cabinet members in South Africa have a duty to account collectively and individually to Parliament for the exercise of their executive powers.⁷ A commission of inquiry with legal powers of subpoena may require persons to

³ Gareth Newham ‘Warning Lights Flashing: Exploring Police Abuses and Performance in South Africa’, paper presented at 4th Annual ISS Conference on National and International Perspectives on Crime and Criminal Justice (2013), available at <http://www.issafrica.org/uploads/2013CrimeConfNewham.pdf> (accessed on 19 April 2014).

⁴ Independent Police Investigative Directorate Annual Report 2012/13, 16, available at http://www.ipid.gov.za/documents/report_released/annual_reports/2013/IPID%20Annual%20Report%202012-13.pdf (accessed on 19 April 2014).

⁵ The Constitution repeatedly refers to accountability: see ss 1(d); 41(1)(c); 55(2)(a); 57(1)(b); 70(1)(b); 92(2); 93(2); 114(2)(a); 116(1)(b); 133(2); 152; 181(5); 195(f); 196(5); 199(8); 215(1).

⁶ See eg Etienne Mureinik ‘Reconsidering Review: Participation and Accountability’ 1993 *Acta Juridica* 35 at 36; Alfred Cockrell ‘Can You Paradigm? – Another Perspective on the Public Law/Private Law Divide’ 1993 *Acta Juridica* 227 at 247; *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) para 75 per O’Regan J.

⁷ Constitution, s 92(2).

give evidence, to account for their conduct, on pain of criminal sanction for disobedience or dishonesty.⁸ Secondly, to hold people to account means to hold them responsible for their actions. The idea of responsibility is the subject of a rich theoretical literature which distinguishes several senses of responsibility.⁹ In the context of responsibility for wrongdoing, the relevant sense for our purposes is ‘liability-responsibility’: that one ought to bear the adverse normative consequences of one’s wrongful conduct. There are a variety of ways, political and legal, to hold persons responsible for wrongdoing in this sense: for example, by voting them out of office; by an official and public declaration of their wrongdoing; or by imposing a sanction on them, such as a punishment, a duty to apologise, or a duty to pay a sum of money to a relevant victim.¹⁰

In South African law, as in many other legal systems, the applicable form of legal liability – that is, the legal mechanism for holding persons responsible and thus accountable – varies according to the kind of legal wrong done. The state – through its constitutive bodies, functionaries, and officials¹¹ – may commit different categories of legal wrong, which trigger different legal responses, securing accountability or liability-responsibility in different ways. In public law, first, crimes may be committed by state officials, like police officers or administrators, who consequently are liable to be criminally punished. Secondly, the state may breach public-law requirements of administrative law, for instance by acting unlawfully by breaching a statutory duty, with procedural unfairness, or by exercising a statutory power unreasonably.¹² Courts in such cases have a discretion to grant a variety of just and equitable remedies, including declarations, mandatory interdicts, prohibitory interdicts, orders setting aside or ‘quashing’ the administrative acts in question, or orders substituting a court’s own decision for that of the original decision-maker.¹³ Thirdly, the state may breach a requirement imposed by the Constitution, for example by violating an individual’s constitutional right or by failing to perform a constitutional duty. Courts then have a duty to

⁸ See eg Commissions Act 8 of 1947, s 6.

⁹ See eg HLA Hart *Punishment and Responsibility* (1968) 211-30; Tony Honoré *Responsibility and Fault* (1999); Peter Cane *Responsibility in Law and Morality* (2002). HLA Hart distinguished between ‘role-responsibility’ (referring to the duties attaching to certain roles or offices or other normative positions), ‘causal-responsibility’ (attributable to any causally-efficacious factor such as human acts or natural events), ‘liability-responsibility’ (the conditions for attributing legal or moral liability to a person), and ‘capacity-responsibility’ (the minimum mental and physical capacities a person must possess if they are to be properly made the subject of attributions of liability-responsibility).

¹⁰ This set of examples straddles the distinction, drawn by Hart (n 9) 215-27, between ‘moral liability-responsibility’ and ‘legal liability-responsibility’, which refer respectively to the conditions of moral and legal liability.

¹¹ See n 2.

¹² See eg s 6(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), which codifies the grounds of judicial review of administrative action.

¹³ PAJA, s 8.

‘declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency’,¹⁴ but beyond that they, again, have a wide discretion to grant ‘any order that is just and equitable’,¹⁵ including declarations, interdicts, and so forth.¹⁶

These ‘public-law wrongs’ – crimes, breaches of administrative law, and breaches of the Constitution¹⁷ – must be distinguished from ‘private-law wrongs’ such as delicts and breaches of contract. The differences between delicts, breaches of contract, and crimes is well known.¹⁸ More importantly, our courts have repeatedly drawn an explicit distinction between breaches of duty based on constitutional rights and delicts, holding that the former do not necessarily constitute the latter.¹⁹ The same is true of breaches of administrative law: such public-law wrongs do not necessarily constitute delicts, just as they did not in the pre-democratic era.²⁰ Nonetheless, the state is also bound by the private or civil law of delict. Public functionaries, just like individual citizens, may commit delicts and therefore be held delictually liable. This approach to state liability, according to which the ordinary civil law of liability applies to everyone, including the state, may be described as ‘Diceyan’²¹ and is a transplant from England and Wales.²² Also transplanted during the colonial era, however,

¹⁴ Constitution, s 172(1)(a).

¹⁵ Constitution, s 172(1)(b).

¹⁶ See generally Michael Bishop ‘Remedies’ in Stu Woolman and Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (Original Service) 9-i to 9-199.

¹⁷ These categories of public-law wrong sometimes overlap. For instance, a failure to comply with a requirement of administrative law constitutes a violation of the right to just administrative action in terms of s 33 of the Constitution (see *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 37), whereas the crime of murder entails a violation of the constitutional right to life in terms of s 11.

¹⁸ See eg J Neethling, JM Potgieter and JC Knobel *Law of Delict* 6 ed (2010) 6-7.

¹⁹ *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) paras 30 and 57; *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* (n 6) paras 78-81; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) para 30; *Steenkamp NO v Provincial Tender Board, Eastern Cape* (n 17) para 37; *Zealand v Minister for Justice and Constitutional Development and Another* 2008 (4) SA 458 (CC) paras 49-52.

²⁰ See eg *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 597A-E; *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) 319A-C; *Knop v Johannesburg City Council* 1995 (2) SA 1 (A).

²¹ Named after A.V. Dicey, an influential English professor of law, who argued in his *An Introduction to the Study of the Law of the Constitution* 1 ed (1885) (10th ed (1959)) that the rule of law requires that public functionaries should be bound by the same law (ie the ‘ordinary law of the land’ including the private law of tort) as private individuals. The ‘Diceyan’ approach to state liability should be contrasted against the ‘Civilian’ approach prevailing in France and Germany, where state liability is determined by a distinct body of ‘public’ legal rules and principles, not the private law of delict. See eg Robert Rebhahn ‘Public Liability in Comparison – England, France, Germany’ in Helmut Koziol and Barbara C. Steininger (eds) *European Tort Law* (2005) 68 and Duncan Fairgrieve *State Liability in Tort: A Comparative Law Study* (2003).

²² That tort law binds public bodies in England has been established at least since *Mersey Docks and Harbour Board Trustees v Gibbs* (1866) LR 1 HL 93 and *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas 430, which held that statutory bodies exercising statutory functions were, in the absence of a contrary legislative intention, subject to the same common-law liabilities in tort as private persons. The South African colonial courts adopted the same approach (see eg *Port Elizabeth Municipality v Nightingale* (1855) 2 Searle 214 at 216 and 217; *Gifford v Table Bay Dock and Breakwater Management Commission* 1874 Buch 96 at 111) as did the national courts after union in 1910 (see eg *Halliwell v Johannesburg Municipal Council* 1912 AD 659). For a

was the English doctrine of Crown immunity,²³ according to which the executive branch of central government could not be held liable in tort, whether directly or vicariously.²⁴ Local dissatisfaction with the doctrine led to its abandonment by legislation, first colonial then national.²⁵ The current law is set out in the State Liability Act 20 of 1957 which empowers courts to uphold delictual claims against ‘the State’ (replacing ‘the Crown’) on the basis of vicarious liability only.²⁶ But the Act is not the only basis on which public bodies may be held liable in delict, nor does the statutory concept of ‘the State’ include all public bodies. At common law, local and provincial authorities have long been susceptible to both direct and vicarious delictual liability.²⁷ This suggests that ‘the State’ in the 1957 Act should be read as referring only to what formerly fell under ‘the Crown’, ie the executive branch of central government.²⁸ A stronger view has been expressed, however, that notwithstanding the Act even central executive government bodies may in appropriate cases be held *directly* liable in delict,²⁹ but the matter is contested.³⁰

concise history of state liability see Leo Boonzaier ‘State Liability in South Africa: A More Direct Approach’ (2013) 130 *SALJ* 330 at 331-7.

²³ In *Binda v Colonial Government* (1887) 5 SC 284 the Cape Supreme Court explicitly imported the doctrine of Crown immunity to justify its refusal to hold the Cape Government vicariously liable for its officers’ delicts.

²⁴ See eg Cane *Administrative Law* (n 2) 267-9; HWR Wade and CF Forsyth *Administrative Law* 10 ed (2009) chap 21. On the other hand, public bodies not forming part of the central executive, such as local government, had no immunity from tort liability.

²⁵ Crown Liabilities Act 37 of 1888 (Cape); Crown Suits Act 14 of 1894 (Natal); Crown Liabilities Ordinance 51 of 1903 (Transvaal); Crown Liabilities Ordinance 44 of 1903 (Orange River Colony); and after union the Crown Liabilities Act 1 of 1910.

²⁶ Section 1 refers only to delictual claims that arise ‘out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such Servant’. In *Mhlongo and Another NO v Minister of Police* 1978 (2) SA 551 (A) 566H-7A it was held that the Minister’s delictual liability for police delicts must be vicarious.

²⁷ In addition to the cases cited at n 22 see eg *Hume v Divisional Council of Cradock* (1880) 1 Buch EDC 104; *Kimberley Town Council v Von Beek* (1882) 1 Buch AC 101; *Jordaan v Worcester Municipality* (1893) 10 SC 159; *Administrator, Cape v Preston* 1961 (3) SA 562 (A); and more recently *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA); *McIntosh v Premier of Kwazulu-Natal* 2008 (6) SA 1 (SCA); and *Maimela v Makhado Municipality* 2011 (6) SA 533 (SCA). Ironically, then, the remedial legislation preserved, in a limited form, the English distinction between the central executive government (ie the Crown) and other public (local and provincial) functionaries.

²⁸ See Lawrence G Baxter *Administrative Law* (1984) 96. It follows that ‘the State’ in the 1957 Act is a narrower concept than ‘the state’ as generally used in this article (ie to refer to all persons performing public functions): see n 2. In 1993 the Act was amended to accommodate delictual claims against executive branches of provincial government. However it has been accepted at least since 1961 that provincial bodies, like local ones, may be held directly liable in delict: see eg *Administrator, Cape v Preston* 1961 (3) SA 562 (A).

²⁹ See eg *Minister of Safety and Security v F* 2011 (3) SA 487 (SCA) paras 34-5 per Nugent JA; and *F v Minister of Safety and Security and Others* 2012 (1) SA 536 (CC) paras 109ff per Froneman J. Boonzaier (n 22) argues that direct delictual liability of ‘the State’ ought to be available, but appears to accept (at 354 n 134 and 358 n 146) that this is not currently permitted by the 1957 Act. The argument for direct state liability is not new: eg D’Oliviera *State liability for the wrongful exercise of discretionary powers* (unpublished LLD Thesis, University of South Africa, 1976) 477-88.

³⁰ See eg Johann Neethling ‘Liability of the state for rape by a policeman: The saga takes a new direction’ (2011) 32 *Obiter* 428 at 437 and ‘State (public authority) liability *ex delicto* (1)’ 2012 (75) *THRHR* 627-31.

Remedies securing accountability for ‘private-law wrongs’ such as delicts and breaches of contract vary, again, according to the nature of the legal wrong. As a point of departure,³¹ the ordinary civil law applies. Contractual remedies for breach by public bodies and officials include orders for specific performance of primary contractual duties, cancellation of the contract, restitution of resources transferred pursuant to the contract, or damages designed to place the innocent party in the position she would have occupied had there been no breach.³² Remedies in delict include monetary awards designed to compensate patrimonial loss suffered by the victim under the Aquilian action, or to give satisfaction for non-patrimonial harm under the action for pain and suffering or under the *actio iniuriarum*.³³ A court-ordered apology is an emerging remedy for defamation,³⁴ while prohibitory and mandatory interdicts may be awarded for threatened or continuing delicts.³⁵ A key historical difference between delictual remedies, on the one hand, and constitutional and administrative remedies, on the other, is this. Whereas remedies in public law are a matter for the court’s discretion, delictual damages fully compensating actionable loss are available as of right.³⁶

This short survey of the categories of legal wrong that the state may commit, and the legal responses that follow, shows the wide variety of mechanisms available in South African law to hold the state accountable for its actions. Accountability in both senses may be secured. Public defendants, if they wish to evade an adverse legal outcome, will have to raise a sound defence, whether during pre-court interactions or before the court itself, explaining or justifying the challenged law, decision, or conduct. If they fail to do so, the court will hold them responsible for their wrongdoing.

It is a difficult empirical question to determine which forms of accountability, both legal and political, are most likely to result in improved performance of public functions. The answer is likely to vary over time and from jurisdiction to jurisdiction. Scholars of administrative law, for example, continue to debate the relative merits of formal judicial review and non-court techniques as alternative or supplementary mechanisms to protect and

³¹ Subject of course to the requirements of the Constitution, including the courts’ duty, in terms of s 39(2), to promote the values of the Bill of Rights when interpreting legislation or developing customary or common law.

³² See eg SWJ van der Merwe, LF van Huyssteen, MFB Reinecke and GF Lubbe *Contract: General Principles* 4 ed (2012) chap 11.

³³ See eg J Neethling, JM Potgieter and PJ Visser *Law of Delict* 6 ed (2010) chaps 6-7.

³⁴ See eg *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC) paras 150 and 195-203.

³⁵ See eg Neethling et al (n 33) 254-5.

³⁶ This statement must be qualified in two respects. First, s 172(1)(a) of the Constitution obligates courts to ‘declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency’. Second, it is possible that a court-ordered apology may come to be regarded a sufficient remedy for defamation in certain cases, obviating the need for an award of general damages for the infringement of reputation.

promote good governance.³⁷ The matter is complicated by the many different ways in which the state and its officials could do a bad job, ranging from individual wrongful acts and omissions to widespread, systemic failings and inefficiencies. Questions concerning the constitutional separation of powers are raised, relating to the relative institutional competencies and democratic legitimacy of judicial and non-judicial branches of government. Which matters must be decided by judges and which are best dealt with by the legislature, executive, or administration, by public enterprises, by independent institutions like the Public Protector, Auditor General, Human Rights Commission, National Consumer Tribunal, or Independent Police Investigative Directorate, by public commissions of enquiry, or indeed by citizens via elections or referendums? If a matter is considered appropriate for curial determination, what branch of the law is best applied in which contexts? In many cases this will be clear, as where a police officer negligently shoots and kills an innocent bystander or where a public official decides his or her own application for a liquor licence. But the legal position is not always clear. And it may be sensible, in certain circumstances, to develop or change the legal position. What approach should then be taken?

Of some importance, here, is the distinction of degree drawn by the Constitutional Court between the general character of ‘public’ litigation and remedies and ‘private’ litigation and remedies.³⁸ The Court has stated that, generally-speaking, whereas private litigation tends to be concerned with the determination of a dispute between individuals, relief is specific and often retrospective, and non-parties are seldom directly affected, public litigation tends to deal with more diffuse or amorphous harm, to be more forward-looking in its outlook, and to affect directly a wider range of people. In the well-known case of *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*, a unanimous Court remarked that ‘private law damages claims are not always the most appropriate method to enforce constitutional rights’ and ‘[i]t is important ... that we do not overlook the value of public law remedies as effective and appropriate forms of constitutional relief’.³⁹ But for good measure it added:

³⁷ See eg Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) chap 2; Cora Hoexter ‘The future of judicial review in South African administrative law’ (2000) 117 *SALJ* 484.

³⁸ See eg *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) para 229; *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* (n 6) paras 80-1.

³⁹ *Metrorail* (n 6).

These remarks should not, of course, be understood to suggest that delictual relief should not lie for the infringement of constitutional rights in appropriate circumstances. There will be circumstances where delictual relief is appropriate.

More recently the Court stated that ‘[i]t is well-established that the law of contract and of delict give effect to, and provide remedies for violations of, constitutional rights.’⁴⁰

III STATE LIABILITY

Without doubt, then, imposing liability on the state to pay a monetary sum (or ‘damages’) to the victim of wrongdoing is a well-recognised and appropriate legal means of securing accountability, which rightly co-exists alongside the other legal and political accountability mechanisms summarised above. If it chooses to resist such a claim, the state will have to defend and thereby account for its challenged conduct; if it admits liability or is held liable, the state is thereby held responsible.

Setting aside actions for contractual damages as well as for restitution of unjustified enrichment arising from legal wrongdoing,⁴¹ there are at least four distinct grounds for holding public functionaries liable to pay damages. First is the law of delict. To repeat, bodies falling under ‘the State’ in terms of the State Liability Act may be held vicariously liable for the delicts of their employees,⁴² whereas other public functionaries, including local⁴³ and provincial authorities⁴⁴ as well as public enterprises⁴⁵ and companies performing public functions in terms of contracts, may be held directly or vicariously liable in delict. Secondly, a variety of statutory compensation schemes obligate public functionaries to pay monetary sums to victims of accidents and other misfortunes.⁴⁶ Thirdly, s 8(1)(c)(ii)(bb) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) empowers a court in

⁴⁰ *Loureiro and Others v iMvula Quality Protection (Pty) Ltd* [2014] ZACC 4 para 33.

⁴¹ That is, monetary claims resulting from enrichment by invasion of rights: see eg Jacques du Plessis *The South African Law of Unjustified Enrichment* (2012) chaps 11-12; Daniel Visser *Unjustified Enrichment* (2008) 114-136 and chap 11.

⁴² See the discussion at n 26 above. An example is *F* (n 29) where the majority held the Minister vicariously liable for a rape committed by an off-duty police officer.

⁴³ Eg *Graham v Cape Metropolitan Council* 1999 (3) SA 356 (C).

⁴⁴ Eg *Administrator, Cape v Preston* 1961 (3) SA 562 (A); *McIntosh v Premier of Kwazulu-Natal* 2008 (6) SA 1 (SCA).

⁴⁵ Eg *Harrington NO and Another v Transnet Ltd t/a Metrorail and Others* 2010 (2) SA 479 (SCA).

⁴⁶ See eg the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (s 1 defines ‘employer’ to include ‘the State’); the Road Accident Fund Act 56 of 1996; the Expropriation Act 63 of 1975; and the Animal Health Act 7 of 2002. Of course the state also has social welfare obligations, for instance the duty, under s 4 of the Social Assistance Act 13 of 2004, to make available child support and disability grants. On occasion, the state also makes *ex gratia* payments (see eg the definition of ‘reparation’ in terms of s 1 of the Promotion of National Unity and Reconciliation Act 34 of 1995).

proceedings for judicial review, having upheld a challenge to an administrative act on a ground listed in s 6, to make an order ‘in exceptional cases ... directing the administrator or any other party to the proceedings to pay compensation’. Such ‘PAJA compensation’ has indeed been awarded by our courts.⁴⁷ Finally, public functionaries may be held liable to pay ‘constitutional damages’ for breaching a requirement imposed by the Constitution; that is, a monetary award may on occasion constitute ‘appropriate relief’ and a ‘just and equitable’ order in terms of ss 38 and 172(1)(b) of the Constitution.⁴⁸

These liability regimes potentially overlap. Public functionaries and officials may be bound simultaneously by the law of delict, specific statutory schemes, administrative law, and constitutional law, may wrong individuals by acting unlawfully in these different ways, and therefore could in principle be held liable to pay damages on various grounds. The law of delict, for instance, has evolved over centuries to protect individuals’ common-law rights to dignity, life, personal security, bodily and psychological integrity, liberty, privacy, and property – all of which are interests now also protected by the Constitution. Consequently, for example, police officers are simultaneously bound by (1) delictual duties at common law to take reasonable care to avoid physically injuring us and in more limited circumstances to protect us from injury, as well as by (2) constitutional duties to respect, protect, promote and fulfil our constitutional rights to life and personal security.⁴⁹ Breach of the former duties entitles the victim to a delictual award as of right, whereas breach of the latter entitles the victim to appropriate, just and equitable constitutional relief.⁵⁰ Matters are further complicated by the fact that the precise content and incidence of these two categories of duty – delictual and constitutional – need not always be identical, notwithstanding the overlap in the interests they protect,⁵¹ as well as by the fact that the constitutional duties owed by public functionaries may justifiably differ from those owed by natural and juristic persons, not performing public functions, who are bound by the law of delict as a matter of course.⁵² How

⁴⁷ See eg *Darson Construction Pty (Pty) v City of Cape Town and Another* 2007 (4) SA 488 (C).

⁴⁸ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 60; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* (n 1) paras 60-65; *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) para 33. PAJA damages are sometimes referred to as ‘constitutional damages’ (see eg *Jayiya v Member of the Executive Council for Welfare, Eastern Cape, and Another* 2004 (2) SA 611 (SCA) para 9 and *Darson* (n 47) 502D). This article will refer to the remedies separately to indicate their different formal sources.

⁴⁹ In terms of ss 7(2), 11 and 12(1) of the Constitution.

⁵⁰ In terms of ss 38 and 172(1)(i) of the Constitution.

⁵¹ Recall the repeated finding of the Constitutional Court, cited at n 19 above, that breaches of constitutional rights do not necessarily constitute delicts.

⁵² For instance, the distinction between ss 8(1) and (2) of the Constitution entails that ‘natural and juristic persons’ are not bound by exactly the same constitutional duties as ‘the legislature, the executive, the judiciary and all organs of state’. Furthermore natural persons, and to a more limited extent juristic persons (see s 8(4)),

then does South African law manage the relationship between these various, potentially overlapping branches of law?

The matter is best considered in three stages. Consider, in the first place, potential overlap between the law of delict and statutory compensation schemes. Some statutes establishing compensation schemes expressly preserve a coexisting claim in delict,⁵³ whereas others expressly exclude delictual liability.⁵⁴ Statutes silent on the matter must be interpreted, the presumption being that common-law rights are excluded only by explicit language or by necessary implication,⁵⁵ subject to Constitutional control.⁵⁶ If both a claim in delict and statutory compensation are in principle available, the question arises whether an award of delictual damages must be reduced by any statutory compensation received. This is a question of ‘collateral’ benefits flowing from delicts only some of which reduce damages awards, while others (ie those regarded as *res inter alios acta*) do not.⁵⁷

In the second place, consider the relationship between awards of compensation under PAJA, in administrative law, and delictual damages. It is well-established that a non-fraudulent breach of administrative law, which occasions pure economic loss, is not automatically a delict.⁵⁸ (After all, the possibility of claims in delict for negligently-caused pure economic loss was only first accepted in South Africa in 1979,⁵⁹ and – as in other

benefit from constitutional rights whereas ‘the state’ (s 7(2)) does not. Unsurprisingly the Constitutional Court has drawn an explicit distinction between public functionaries and other persons, holding that the purpose of horizontal application of constitutional rights in terms of s 8(2) ‘is not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights. It is rather to require private parties not to interfere with or diminish the enjoyment of a right’: *Governing Body of Juma Masjid Primary School v Essay NO 2011 (8) BCLR 761 (CC)* para 58. The position is different, of course, where a juristic person undertakes to perform a public function in terms of legislation and/or a contract and thereby falls within the state functionally-defined: *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* [2014] ZACC 12 paras 65-6.

⁵³ Eg Workmen’s Compensation Act 25 of 1914, s 1(1)(b).

⁵⁴ Eg Compensation for Occupational Injuries and Diseases Act 130 of 1993, s 35(1), held to be constitutional in *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC); Road Accident Fund Act 56 of 1996, s 21, held to be constitutional in *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC).

⁵⁵ *Transvaal Investment Co Ltd v Springs Municipality* 1922 AD 337, 347: ‘it is a well-established rule in the construction of statutes that where an Act is capable of two interpretations, that one should be preferred which does not take away existing rights, unless it is plain that such was the intention of the Legislature.’

⁵⁶ Constitution, s 39(2). A recent example is *Mankayi v Anglogold Ashanti Ltd* 2011 (3) SA 237 (CC).

⁵⁷ See generally Daniel Visser ‘Compensation for pecuniary loss – the *actio legis Aquiliae*’ in François du Bois (ed) *Wille’s Principles of South African Law* 9 ed (2007) 1134-5. For instance, compensation awarded under the Compensation for Occupational Injuries and Diseases Act 130 of 1993 has been held to reduce any amount claimable in delict: *Ngcobo v Santam Insurance Co Ltd* 1994 (2) SA 478 (T).

⁵⁸ See eg *Knop v Johannesburg City Council* 1995 (2) SA 1 (A); *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA). Intentional breaches occasioning pure economic loss, on the other hand, do ground delictual liability: *Minister of Finance and Others v Gore NO* 2007 (1) SA 111 (SCA); *South African Post Office v De Lacy and Another* 2009 (5) SA 255 (SCA).

⁵⁹ In *Administrator, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A).

influential legal systems⁶⁰ – our courts sensibly adopt a circumspect attitude towards expanding liability in this field.⁶¹) The Constitutional Court confirmed this approach in *Steenkamp NO v Provincial Tender Board, Eastern Cape*,⁶² which held that an initially successful tenderer, which incurred out-of-pocket expenses in performing its duties under a public contract honestly but unlawfully awarded to it by a tender board, had no delictual claim against the board when the award and contract were subsequently set aside on review by a High Court at the behest of an unsuccessful tenderer. Although understandably not cast in such broad terms, the decision in *Steenkamp* gives a strong indication that, in general, a breach of a requirement of administrative law, which amounts to conduct negligently causing pure economic loss, will not be held wrongful in delict. A strong reason for this approach is the availability of the alternative remedy of compensation under PAJA. Sachs J made the point explicitly:

[T]he existence of this constitutionally based public-law remedy renders it unnecessary and inappropriate to hybridise and stretch the common-law delict of injury beyond its traditional limits in this area.⁶³

This approach is not surprising given that our courts have held that there is no need to allow an action for delictual damages where an alternative remedy, legal or political, is adequate to secure accountability for the state's failures.⁶⁴ It is likely, therefore, that victims of administrative wrongdoing occasioning pure economic loss will be confined to the remedy of PAJA compensation, which in turn is likely to grow in importance. Breaches of administrative law that result in physical injury to person or damage to property, on the other hand, are far more likely to generate delictual liability, in accordance with the ordinary principles of the law of delict.⁶⁵

In the third place, consider the relationship between 'constitutional damages' and delict. As mentioned above, the law of delict is a primary mechanism whereby many

⁶⁰ Eg as in English law (see *Commissioners of Customs and Excise v Barclays Bank plc* [2007] 1 AC 181) and German law. See KZ Zweigert and H Kötz *An Introduction to Comparative Law* 3 ed (1998) (translated by Tony Weir) 625-6.

⁶¹ See eg *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) paras 20-1.

⁶² Above n 17, although the Court preferred not to rely solely on the fact that pure economic loss was suffered: para 46.

⁶³ *Steenkamp* (n 17) para 101.

⁶⁴ *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 21, later approved by the Constitutional Court in *Metrorail* (n 6) paras 77-8.

⁶⁵ See eg Neethling et al (n 33).

constitutional rights are protected and violations thereof are remedied.⁶⁶ It protects, inter alia, our rights to dignity, life, personal security, bodily and psychological integrity, liberty, privacy, and property.⁶⁷ Our courts, moreover, develop the common law of delict to promote the spirit and values of the Bill of Rights,⁶⁸ to ensure that the common law is not inconsistent with the requirements imposed by the Constitution and its Bill of Rights,⁶⁹ and to give effect to those constitutional rights that are held to bind natural and juristic persons.⁷⁰ Accordingly, in *Fose v Minister of Safety and Security* the Constitutional Court held:

In many cases the common law will be broad enough to provide all the relief that would be ‘appropriate’ for a breach of constitutional rights. That will of course depend on the circumstances of each particular case.⁷¹

The plaintiff in *Fose* had allegedly been assaulted by police officers, but the Court refused to accept the possibility that *punitive* constitutional damages could be awarded *in addition* to the ordinary delictual remedies for assault, holding that the latter were adequate to vindicate the alleged violation of the plaintiff’s constitutional rights. Nonetheless, the Court did accept that ‘there is no reason in principle why “appropriate relief” should not include an award of [constitutional] damages, where such an award is necessary to protect and enforce [constitutional] rights’,⁷² and subsequently such awards have on occasion been made in lieu of a delictual award.⁷³ Yet constitutional damages are still regarded as a long-stop or subsidiary remedy: in accordance with the constitutional principle of subsidiarity,⁷⁴ constitutional damages ‘might be awarded where no statutory remedies have been given or no adequate common-law remedies exist.’⁷⁵

Consequently, when litigants have sought a monetary award against the state for its wrongdoing, outside the context of non-fraudulent administrative wrongs occasioning pure economic loss, our courts have predominantly relied on the law of delict. Indeed, apart from the decision in *Steenkamp’s* case, in the democratic era the Constitutional Court and Supreme Court of Appeal have significantly extended the scope of the state’s delictual liability in a

⁶⁶ Visser (n 57) 1092.

⁶⁷ See eg the Constitutional Court’s dictum quoted at n 40.

⁶⁸ Constitution, s 39(2). See eg *Carmichele* (n 19).

⁶⁹ Constitution, ss 2 and 8(1).

⁷⁰ Constitution, s 8(2) and (3). See eg *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) para 33.

⁷¹ *Fose* (n 48) para 58.

⁷² *Fose* (n 48) para 60.

⁷³ See eg *Modderklip* (n 1); *Kate* (n 48).

⁷⁴ See eg *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) para 73.

⁷⁵ *Jayiya* (n 48) para 9.

series of ground-breaking judgments. First, the state’s delictual liability for negligently failing to protect individuals against crimes committed by other individuals has been expanded.⁷⁶ It has been thought best, where the state or its employees have breached a positive constitutional duty to protect, promote or fulfil our rights to life or personal security, to develop novel common-law duties in delict to take reasonable positive steps to avoid harm, and thereby to stretch the outer-boundaries of delictual liability for negligent omissions. An alternative approach, preferred in English law,⁷⁷ of using constitutional damages *instead of* a private-law remedy, in at least some such circumstances, has not yet been given serious consideration. Second, the condition for delictual liability that the state’s negligent conduct be a factual cause of the plaintiff’s harm has been relaxed to some extent. The standard test for factual causation – the ‘but for’ test – has been declared ‘flexible’ and, accordingly, liability has been imposed where a plaintiff was able to prove only that a public body’s negligence increased the risk of harm that he later in fact suffered.⁷⁸ Third, the state’s vicarious liability to victims of its employees’ criminal wrongdoing has also been enlarged.⁷⁹ The traditional view – namely that the more improper an employee’s conduct is (eg murder or rape), the less likely it is to fall within the scope of his or her employment – may be losing ground to the opposite view – namely that the more improper a public employee’s conduct is, the greater the need to hold the state accountable.⁸⁰

Given the willingness of our courts to stretch the state’s delictual liability in these various ways, there has been little need to rely on the subsidiary remedy of constitutional damages, which consequently remains relatively under-developed in South African law compared to certain other legal systems.⁸¹ The approach of our courts is partly explained by the strategy of litigants. Plaintiffs, who are understandably attracted by the prospect of full compensatory damages available as of right in private law rather than a discretionary remedy

⁷⁶ See eg *Carmichele* (n 19); *Van Duivenboden* (n 64); *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA); *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA); *Minister of Safety and Security and Another v Carmichele* 2004 (3) SA 305 (SCA); *Minister of Safety and Security v De Lima* 2005 (5) SA 575 (SCA); *Minister of Safety and Security v Venter and Others* 2011 (2) SACR 67 (SCA); *Long v Jacobs* [2012] ZASCA 58.

⁷⁷ Under the Human Rights Act 1998, s 8. See *Van Colle v Chief Constable of the Hertfordshire Police*; *Smith v Chief Constable of Sussex Police* [2009] 1 AC 225.

⁷⁸ *Lee v Minister for Correctional Services* 2013 (2) SA 144 (CC), analysed in Alistair Price ‘Factual causation after *Lee*’ forthcoming in (2014) 131 *SALJ*.

⁷⁹ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC); *F v Minister of Safety and Security* (n 29). Contrast *Phoebus Apollo Aviation CC v Minister of Safety and Security* 2003 (2) SA 34 (CC).

⁸⁰ See eg *Luiters* (n 1) para 34.

⁸¹ See eg the Human Rights Act, 1998 in the United Kingdom; or under the Canadian Charter of Rights and Freedoms as decided in *Vancouver (City) v Ward* [2010] 2 SCR 28; see generally Chuks Okpaluba and Patrick C. Osode *Government Liability: South Africa and the Commonwealth* (2010) chaps 3 and 17.

in public law, have tended to rely primarily on the law of delict and to raise constitutional arguments, if at all, in the alternative or at a late stage.⁸²

Each of the developments described above is of great importance to the law of delict in general, although their immediate and long-term implications are difficult to predict. If the position of ‘private defendants’ (that is, natural or juristic persons not performing public functions) is considered, it may be asked whether liability for negligent omissions or for the crimes of their employees will similarly expand, or whether the requirement of factual causation will be similarly relaxed. For the law of delict is the general law which, following the Diceyan tradition transplanted to South Africa,⁸³ applies in principle to everyone equally. Developments in one context therefore reverberate in other contexts: they have ‘gravitational force’.⁸⁴ On the other hand, it is possible that private defendants (in the above sense) will *not* be subject to an identical expansion of delictual liability. In all of the cases cited above, after all, the courts appealed to constitutional duties owed by the public defendants in question to justify the augmentation of their delictual liability. Is it possible, then, that the courts are in the process of developing a new ‘public’ branch of the common law of delict applicable to public functionaries? To use the apt terminology of Justice Sachs, is the law of delict in fact becoming ‘hybridised’?⁸⁵

IV ACCOUNTABILITY AND A NEW ‘PUBLIC’ LAW OF DELICT?

The first sign of a distinct ‘public’ law of delict emerging in South African law is to be found in the court’s reasoning, subsequently applied in several cases,⁸⁶ in *Minister of Safety and Security v Van Duivenboden*,⁸⁷ where the state was held vicariously liable in delict for injuries suffered by the plaintiff when he was shot by a man whom the police knew habitually threatened to shoot himself and others when drunk, after they negligently failed to initiate a statutory inquiry into his fitness to possess a firearm which would probably have resulted in

⁸² See eg *F* (n 29) para 83; *Lee* (n 78) para 35. This, in turn, has led the Constitutional Court at times to consider remitting matters to the High Court for reconsideration in the light of the Constitution: eg *Carmichele* (n 19) and the minority judgments of Yacoob J in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) and of Cameron J in *Lee* (n 78). This technique is criticised in LTC Harms ‘The puisne judge, the chaos theory and the common law’ (2014) 131 *SALJ* 3.

⁸³ See n 21 above.

⁸⁴ Ronald Dworkin *Taking Rights Seriously* (1977) 111.

⁸⁵ François du Bois argues, in ‘State Liability in South Africa: A Constitutional Remix’ (2010) 25 *Tulane European & Civil Law Forum* 139 at 172, that ‘an autonomous South African law of governmental liability’ is emerging.

⁸⁶ Cited at n 76 above.

⁸⁷ Above n 64. In fact, the decision may be seen as giving effect to the earlier suggestion by the Constitutional Court, in *Carmichele* (n 19) at para 57, that ‘it might be easier to cast the net of unlawfulness [in delict] wider because constitutional obligations are now placed on the State to respect, protect, promote and fulfil the rights in the Bill of Rights’.

its confiscation. To justify its conclusion that in the circumstances the negligent failure of several police officers was ‘wrongful’ in delict (ie in breach of a common-law ‘legal duty’ owed in delict not to cause the harm negligently), the court developed and applied a new ‘norm of accountability’,⁸⁸ according to which the Constitution requires the state to be held accountable and the law of delict may be used as a means to this end. More specifically, the court held that where a public body’s conduct ‘is in conflict with its constitutional duty to protect rights in the Bill of Rights’, the norm of accountability requires the conduct to be delictually wrongful, unless either the plaintiff has an alternative remedy to hold the state to account (eg a right of appeal to an administrative tribunal; an effective political process; judicial review of administrative action; socio-economic rights litigation) or another public or legal policy consideration outweighs the need to hold the state to account in the circumstances.⁸⁹

This approach is significant for the following reasons. First, in essence it entails that *the state’s public-law wrongs that happen to occasion actionable harm are prima facie wrongful in delict.*⁹⁰ Public-law and private-law wrongs, in this context, are deliberately conflated since the former are presumed to constitute the latter. Where duties arising from a constitutional right and the law of delict diverge, the courts are effectively instructed to bring the two into line by developing the latter, unless there is an alternative mechanism to hold the state accountable or unless the costs of doing so would outweigh the benefit. Second, since some constitutional and administrative-law duties are owed only by public functionaries and not by private defendants (eg certain positive duties to protect and fulfil constitutional rights),⁹¹ the accountability norm tends to justify imposing novel delictual liabilities specifically on public functionaries and thereby militates in favour of a ‘public’ law of delict. Third, this reasoning appears to be in tension with the circumspect approach of our courts to expanding the boundaries of delictual liability into new areas, such as for negligent omissions, negligent misstatements, or for negligently-caused pure economic loss.⁹² Fourth,

⁸⁸ The norm was articulated in *Faircape Property Developers (Pty) Ltd v Premier of the Western Cape* 2000 (2) SA 54 (C) and approved in *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA) para 31.

⁸⁹ *Van Duivenboden* (n 64) para 21.

⁹⁰ In a concurring judgment in *Van Duivenboden* (n 64) para 34, Marais JA distanced himself from this approach, holding that ‘I doubt that the accountability of which ... the Constitution speaks ... can be regarded as *prima facie* synonymous with liability under the *lex Aquilia* for damages for omissions to act.’

⁹¹ As acknowledged by the Constitutional Court in *Juma Masjid Primary School* (n 52) para 58.

⁹² In this respect, as has been observed by François du Bois in ‘After Carmichele – the emergence of new principles of state liability in delict’ (2002) 3 *The Law of Delict: Sibergramme* 10, the approach to wrongfulness required by the norm of accountability closely resembles the famous two-stage test for duties of care established in *Anns v Merton London Borough Council* [1978] AC 728, which was once described as ‘a massive extension of *prima facie* duty of care restrained only by indefinable considerations which ought to negative, or to reduce or

the reasoning in *Van Duivenboden* has been criticised⁹³ for blurring the distinction between holding the state *vicariously* liable for a delict of its employee, as permitted by the State Liability Act,⁹⁴ and holding it *directly* liable for its own delicts, which apparently is not permitted by the Act.⁹⁵

Perhaps partly for these reasons, our courts have since altered the law. In my view, the Constitutional Court has led a hitherto-unnoticed shift away from the *Van Duivenboden* approach of presumed delictual liability for public-law wrongs, adopting a more flexible, case-by-case assessment of whether recognising novel delictual duties and thereby extending liability will or will not promote accountability. The subtle shift began in *Metrorail*, where the Court agreed that the law of delict could be used to promote state accountability,⁹⁶ but also emphasised the potentially-conflicting constitutional norms of ‘effectiveness’ and ‘responsiveness’⁹⁷ as well as the fact that in certain circumstances public-law remedies may be more appropriate relief than private-law remedies.⁹⁸ The Court accordingly declined to hold Transnet Ltd liable in delict for failing to put in place a reasonable system to guard commuters on its trains against violent crime, instead declaring that it had ‘a public law obligation’, based in statute and the Constitution, to do so.⁹⁹ The shift continued in *Steenkamp’s* case where, to recall, the Court declined to extend the state’s delictual liability into the field of unlawful administrative acts occasioning pure economic loss. The majority judgment in that case did not mention the accountability-based presumption of delictual liability, instead stating that ‘ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies’,¹⁰⁰ while the dissent in effect adopted the more

limit the scope of the duty and the class of person to whom it is owed’: *Sutherland Shire Council v Heyman* (1985) 60 ALR 1. The approach in *Anns* was rejected in South Africa in *Lillicrap, Wassenaar and Partners v Pilkington Bros (SA) (Pty) Ltd* 1985 (1) SA 475 (A) 500D and 503I-505F and has since been abandoned in England: *Caparo Industries plc v Dickman* [1990] 2 AC 605; *Murphy v Brentwood District Council* [1991] 1 AC 398.

⁹³ See Stephen Wagener, ‘*K v Minister of Safety and Security* and the Increasingly Blurred Line between Personal and Vicarious Liability’ (2008) 125 SALJ 673, 676; Anton Fagan ‘Reconsidering *Carmichele*’ (2008) 125 SALJ 659, 669-670; and Boonzaier (n 22). These criticisms would lose force in circumstances where a state employee owes a similar constitutional duty to that owed by his or her employer. For example, it is surely arguable that individual police officers owe, alongside their contractual duties to their employer and their delictual duties to others, certain *constitutional* duties to respect and protect life and personal security. See *K* (n 79) para 53 which suggests as much, as does *F v Minister of Safety and Security* (n 29) paras 72 and 109

⁹⁴ Above n 26.

⁹⁵ See the text at nn 23-30 above.

⁹⁶ Above n 6 para 73.

⁹⁷ Para 78. These norms potentially militate against extending delictual liability, because it is arguable that such an extension may undermine the efficient performance of public functions in some circumstances: see eg *Steenkamp* (n 17) para 55(c).

⁹⁸ Para 81.

⁹⁹ Paras 83-4.

¹⁰⁰ Above n 17 para 29.

flexible approach of *Metrorail*.¹⁰¹ In *F v Minister of Safety and Security*,¹⁰² Froneman J adopted the new approach in a minority concurring judgment, holding that the ‘norm of accountability’:

simply provides the proper context within which to determine whether the costs associated with the imposition of delictual liability for negligently caused harm should prevent the imposition of liability or not. Generally, accountability concerns would favour delictual liability, but that is not always the case.¹⁰³

He also held that the accountability norm provides an ‘additional’ reason,¹⁰⁴ presumably reinforcing reasons of justice,¹⁰⁵ for extending the boundaries of delictual liability, an approach that was subsequently approved in passing by a majority of the Court in *Lee’s* case.¹⁰⁶ The sound idea here, sometimes called the ‘ombudsman function’ of tort law,¹⁰⁷ is that one of the potential benefits of holding that a given class of culpable harm-causing conduct by the state should generate delictual liability (ie be held ‘wrongful’) is that a public defendant is compelled to account publicly for its behaviour and failures that might otherwise pass unmarked may be exposed. On this new approach, accountability is no longer viewed as grounding a presumption of liability; instead, it is a potential advantage to be weighed with other costs and benefits of imposing liability.

In addition to this subtle yet important adjustment to the law, certain judges have proposed a further, more radical change. In *F v Minister of Safety and Security*,¹⁰⁸ a majority of the Constitutional Court held the state vicariously liable in delict after an ununiformed police officer, who was off-duty but on standby, raped a 13-year-old girl in the early hours of the morning in an unmarked police vehicle after she accepted a lift home from a nightclub. Froneman J, in a minority judgment, argued that the state ought to be held *directly* liable in delict.¹⁰⁹ He argued that the rule in s 1 of the State Liability Act – namely that ‘the State’ (ie

¹⁰¹ Para 86.

¹⁰² Above n 29.

¹⁰³ Para 123 (footnotes omitted).

¹⁰⁴ Above n 29 para 123 at fn 53, contrasting and rejecting the idea that accountability is an ‘independent’ reason for delictual liability. The contrast appears to be false because a reason can be both ‘independent’ (ie of autonomous force) and ‘additional’ (ie applying alongside other reasons).

¹⁰⁵ Anton Fagan ‘Rethinking Wrongfulness in the Law of Delict’ (2005) 122 SALJ 90, 134.

¹⁰⁶ Above n 78 para 70.

¹⁰⁷ See eg A Linden ‘Tort Law as Ombudsman’ (1973) 51 *Can Bar Rev* 155.

¹⁰⁸ Above n 29.

¹⁰⁹ Paras 109ff.

the executive branch of central government) could only be vicariously liable in delict¹¹⁰ – no longer applied given ss 2 and 8(1) of the Constitution.¹¹¹ He held that a distinction should be drawn between ‘public duties’ owed by the state and/or its employees and ‘purely private’ duties unconnected with a public duty.¹¹² The state may be held *directly* liable in delict for a breach of a public duty (notwithstanding the Act given the Constitution), and *vicariously* liable in delict for its employee’s breach of a purely private duty.¹¹³ On the facts, he held that the police officer came under a public or constitutional duty to protect the girl when he offered to lift her home and she placed her trust in him partly because he was a police officer,¹¹⁴ and that his rape amounted to a negligent breach of that public duty grounding direct state liability.¹¹⁵ In effect, Froneman J approved a suggestion, floated in passing by Nugent JA for a majority of the Supreme Court of Appeal, that a series of judgments imposing vicarious liability on the state could be radically reinterpreted as, in truth, imposing direct liability.¹¹⁶ The majority of the Constitutional Court, however, refused to deal with the issue of direct liability.¹¹⁷

Froneman J and Nugent JA have therefore not yet convinced a binding majority of their judicial colleagues explicitly to develop the law in this direction. If they do, the distinct ‘public’ law of delict that is already implicitly emerging, partly under the influence of an evolving constitutional principle of accountability, will become clearer to see.¹¹⁸

V THE FUTURE OF STATE LIABILITY

When, and on what basis, is it appropriate to hold public functionaries liable to pay a monetary sum to individual victims of wrongdoing? The issue is notoriously difficult in principle. While the law of delict in general is best understood, in my view, as a mechanism

¹¹⁰ See n 26.

¹¹¹ Above n 29 para 110 fn 33.

¹¹² Para 115.

¹¹³ Ibid.

¹¹⁴ This public duty must have been owed in parallel with a ‘purely private’ duty in delict (under the *actio iniuriarum*) not to commit rape, as well as a ‘public’ duty in criminal law not to commit rape.

¹¹⁵ Above n 29 paras 132-149.

¹¹⁶ *Minister of Safety and Security v F* 2011 (3) SA 487 (SCA) para 34, referring to *K* (n 79), *Van Duivenboden* (n 64), *Van Eeden* (n 76), *Hamilton* (n 76), *Carmichele* (n 76), and stating that these cases merely ‘purport to be founded upon vicarious liability, but might better be said to have been founded upon direct liability of the State, acting through the instrument of its employees’; ‘the true basis of liability was direct liability of the State’. Accordingly Froneman J, above n 29 paras 92ff, refers to ‘the *traditional language* of vicarious liability’ (emphasis added).

¹¹⁷ Para 83.

¹¹⁸ It is possible that the decision in *Lee* (n 78) implicitly imposed direct delictual liability on the Minister, for the negligent failure to protect against the contagion of tuberculosis in Pollsmoor Prison, although the direct/vicarious issue was not addressed explicitly.

to give effect in part to notions of corrective justice,¹¹⁹ where awards are paid out of finite public funds additional questions of distributive justice arise. Views differ about the likely consequences of a threat of liability hanging over the performance of certain public functions: will this encourage good governance via a deterrent effect or result in inefficient, overly-defensive decision-making? When should we direct public funds to recompense individual victims and when should such funds rather be spent on improving the fallible state service that failed in the first place for the general good of all? It is no easy matter to decide what the law ought to be.¹²⁰ The regimes regulating state liability around the world differ in important ways¹²¹ and even systems within a similar tradition may at times diverge.¹²² As mentioned, law reform in this context has a direct effect on public finances, but the prime responsibility for this ought to lie with the executive and legislature.¹²³ Judicial law-reform, on the other hand, often labours under the added burden of a dilemma of partial reform.¹²⁴ How, then, should our law of state liability develop in future?

Four points may contribute to answering this question. In the first place, it should not be overlooked that much of the current wrongdoing to individuals allegedly committed by public functionaries in South Africa – including use of excessive force by the police and torture and neglect of detainees by correctional services officials – is clearly regulated by the existing law of delict in conjunction with criminal law, relevant statutory schemes, PAJA, constitutional law, and so forth. Public functionaries are liable in delict, for example, for intentional and negligent shootings or beatings without constitutionally-acceptable justification that occasion death or injury, for other physical assaults, wrongful arrests, malicious arrests, certain failures to protect individuals against foreseeable crimes by third parties, as well as for certain failures to protect those in custody from assault by other

¹¹⁹ See eg John Gardner ‘What is Tort Law For? Part 1: The Place of Corrective Justice’ (2011) 30 *Law and Philosophy* 1.

¹²⁰ Thus Peter Cane, in ‘Tort Law and Public Functions’ in John Oberdiek (Ed) *Philosophical Foundations of the Law of Torts* (2014) 168, argues that ‘mainstream [tort] theory lacks an account of the application of tort law to relationships of juridical inequality between private agents and public agents’.

¹²¹ See eg Rebhan (n 21) and Fairgrieve (n 21) as well as the comparative survey of Ackerman J in *Fose* (n 48) from para 25.

¹²² Compare eg the decisions, concerning a possible tort of negligent police investigation, in *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (England and Wales) and *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129 (Canada).

¹²³ Peter Cane ‘Damages in Public Law’ (1999) 9 *Otago Law Review* 489, 515.

¹²⁴ As Joseph Raz explains in *The Authority of Law* 2 ed (2009) 197-201, because the law-making power of courts is far more limited than the legislature’s due to the rules of precedent and the facts of specific cases, courts are usually incapable of bringing about radical legal reform in a single decision; instead, they must often choose between conserving current doctrine or making merely a partial reform which introduces conflict, and potential incoherence, into the law. This phenomenon is illustrated by the difficulty of judicially ‘reinterpreting’ a line of cases based on vicarious liability as ‘in truth’ based on direct liability: see n 116.

detainees, self-inflicted harm, and other threats to their health. Many if not all such delicts would simultaneously amount to breaches of constitutional rights, but there is no need for a public-law monetary remedy where private law is adequate to the task. State accountability in South Africa would be significantly enhanced if the law *as it stands* were better enforced without fear or favour in civil and criminal judicial processes as well as in non-curial accountability fora, such as the Public Protector, the SA Human Rights Commission, and the Independent Police Investigative Directorate. In this regard, the judicial commissions of enquiry examining policing at Marikana and in Khayelitsha are to be welcomed and, one hopes, will set valuable precedents.

Secondly, François du Bois has argued persuasively that:

When a legal system recognizes the state as having its own distinctive character and social mission, a distinct notion of governmental liability appears to be needed in order adequately to reflect the implications of such an understanding of the state.¹²⁵

Given the state's distinctive constitutional duties, a distinctive 'public' law of state liability may be needed and, as was explained in the previous section, has in fact started to emerge in the law of delict. This is supplemented by the public liability regime under PAJA. Moreover, arguments have been made, by judges and scholars,¹²⁶ and resisted,¹²⁷ that it is possible to hold all public functionaries – including 'the State' (ie the executive branch of central government) under the State Liability Act – *directly* liable to individuals. As a normative claim about what the law ought to be, this view should be supported. For as Du Bois and Boonzaier have explained,¹²⁸ the traditional delictual model of vicarious liability is not well-equipped to deal with all of the *state's* own duties (as opposed to those owed by its employees) nor with certain collective or systemic or organisational failures by public bodies where no single state employee can sensibly be held to have acted culpably and wrongfully in delict in the course of his or her employment.

Thirdly, however, it is a mistake to assume that novel direct state liabilities must inevitably take *delictual* form. The remedy of constitutional damages, in terms of sections 38 and 172(1)(b) of the Constitution, is available in our law and lies directly against the state for breach of its constitutional duties. An award of constitutional damages is correctly regarded

¹²⁵ Du Bois (n 85) 175.

¹²⁶ See eg the views of Froneman J and Nugent JA summarised at the text to nn 108-118 and Boonzaier (n 22).

¹²⁷ See n 30.

¹²⁸ Du Bois (n 85) 174-5; Boonzaier (n 22) 339ff. See also François du Bois 'Human rights and the tort liability of public authorities' 127 *Law Quarterly Review* 589.

as a subsidiary remedy, which should not be made where adequate statutory or common-law remedies are available. Nonetheless, in cases where the state has breached its own duties, or where harm is suffered as a result of organisational state failures, it is at least an open question whether it is preferable either (1) further to hybridise the law of delict via the judicial development of new ‘public’ delicts when appropriate cases happen to arise or (2) further to develop and refine the existing public-law remedies of constitutional damages and PAJA compensation.¹²⁹ Either approach would be adequate to secure public accountability. Yet their *relative* merits have not been satisfactorily aired by South African courts. Consequently, the latter remedies remain less developed in our law than in some other legal systems.¹³⁰ Placing greater reliance on public-law monetary remedies would avoid the need for courts to ‘reinterpret’ past judgments explicitly holding public functionaries vicariously liable as ‘in truth’ imposing direct delictual liability. It would also side-step the difficulty that s 1 of the State Liability Act seemingly does not permit direct delictual liability of the central executive. I have outlined further benefits of the alternative remedy of constitutional damages elsewhere.¹³¹

Finally, even if the public-law remedy of constitutional damages is further developed, our courts rightly appeal to ‘public accountability’ as a potential benefit, to be weighed with other relevant costs and benefits, when deciding whether a public functionary has acted wrongfully *in delict* (ie in breach of a new legal duty in delict). For private-law litigation against the state may play an ‘ombudsman function’, compelling it to account publicly for its behaviour and holding it responsible for committing delicts. Nonetheless, in the delictual context appeals to accountability are no panacea. As has been explained, there are a variety of alternative mechanisms, legal and political, including *liability* mechanisms, to secure accountability. One should also avoid circular reasoning by concluding that a public functionary has breached a legal duty in delict (ie acted wrongfully) *because* it must be held responsible for its wrongdoing (ie for breaching a duty). It would surely be unjustifiable,

¹²⁹ For a discussion of the functionally-equivalent question in English, Canadian and New Zealand law, see Geoff McLay ‘Tort and constitutional damages: towards a framework’ (2012) *Public Law* 45. Boonzaier (n 22) argues, at 364-5, in effect that delict should be further hybridised on the basis that (i) delict has been used in the past, (ii) it is accepted that delict must give effect to the Constitution, (iii) private law contains experience and can be altered, and (iv) constitutional damages is an untested remedy that can only be awarded for breach of constitutional rights. Accordingly ‘even if constitutional damages can be relied on sometimes, a thorough revision of delictual principles will prove necessary’. Boonzaier appears, then, to take a middle position, accepting that constitutional damages should sometimes be awarded *and* that delict should be further hybridised, indeed thoroughly revised.

¹³⁰ See eg Chuks Okpaluba and Patrick C. Osode *Government Liability: South Africa and the Commonwealth* (2010) chaps 3 and 17.

¹³¹ See Price (n 78).

moreover, to deny a delictual remedy to the first of two plaintiffs, who have both been culpably harmed by public defendants in indistinguishable but separate incidents, if only the first incident has become the subject of, say, a public commission of inquiry by a judge seeking to hold the state to account. For these reasons, appeals to accountability, when drawing the outer-boundaries of the state’s delictual liability, ought to be supplemented by further reasoning including, for example, other public and legal policy considerations¹³² as well as argument by principled analogy from past or hypothetical cases where legal duties in delict have been or would be imposed or denied.¹³³

VI CONCLUSION

In this chapter, I have explored the relationship between holding the state accountable for its wrongdoing and holding it liable to pay money to a victim of its wrongdoing. I have suggested that accountability is promoted by requiring the state to explain or justify its actions and by holding it responsible for its actions. Responsibility for wrongdoing may and should take a variety of forms, both legal and political. Legal liability to pay money is but one of these. There are at least four distinct grounds to hold the state liable in South African law. Our courts have relied most heavily on one of these routes, namely the law of delict. Although historically this branch of law has been primarily conceptualised to apply ‘horizontally’ among normative equals, the courts have started to develop a distinct ‘public’ law of delict by appealing to the distinct responsibilities of the state. Although in principle this is welcome, in future further attention should be given to the possibility that awarding constitutional damages or PAJA compensation as an alternative may on occasion be a better means to hold the state responsible for its distinctive wrongs and thereby to promote its accountability.¹³⁴

¹³² See eg François du Bois ‘Getting Wrongfulness Right: a Ciceronian Attempt’ in TJ Scott & Daniel Visser (eds) *Developing Delict: Essays in Honour of Robert Feenstra* (2000) 1; Fagan (n 105) 109-10.

¹³³ See eg Alistair Price ‘The contract/delict interface in the Constitutional Court’ forthcoming in (2014) 3 *Stell LR*.

¹³⁴ The first steps in this direction were taken by Chief Justice Langa in *Modderklip* (n 1).