

F v MINISTER OF SAFETY AND SECURITY

Vicarious liability and state accountability for the criminal acts of police officers

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The Constitutional Court judgement in F v Minister of Safety and Security¹ is a ground-breaking judgement in two important respects: firstly, it finally does away with the fiction that an employee acts within the course and scope of her employment in the so-called deviation cases in the law of vicarious liability, and secondly it clarifies the normative basis for holding the state vicariously liable for the criminal acts of police officers. In this latter respect it significantly promotes state accountability for the criminal acts of police officers.

In *F v Minister of Safety and Security* the Constitutional Court held the Minister of Safety and Security vicariously liable for damages arising from the brutal rape of a 13-year-old girl by a police officer who was on standby duty. Writing for the majority of the Court, Mogoeng CJ held that the police's obligation to protect citizens and the corresponding trust that the public is entitled to place in the police provide the normative basis for holding the state vicariously liable for the criminal acts of police officers, provided that a sufficiently close link is established between the criminal conduct and the perpetrator's employment as a police officer. In this case the police officer had not been in uniform, his police car had been unmarked and he had not been on duty but on standby. Nevertheless, the Court found that his

use of the police car had facilitated the rape. Furthermore, the 13-year-old girl, Ms F, had identified him as a police officer by virtue of the police docket and the police radio in the car, and had trusted him as a result. The Court held that these factors established a sufficiently close connection between the criminal conduct of the police officer and his employment to justify holding the Minister liable for the damages suffered by Ms F.

This article will begin by setting out the principles of vicarious liability as they have traditionally existed in our common law. It will next discuss the important Constitutional Court judgement in *K v Minister of Safety and Security*.² That judgement developed the common law of vicarious liability in two critical respects: firstly, it laid bare the policy-laden or normative character of vicarious liability and required that the normative

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considerations at play be expressly articulated by the courts. Secondly, it endorsed a new test for the imposition of vicarious liability in the deviation cases, which embraces such normative considerations. It is against this background that the judgement in *F v Minister of Safety and Security* will be discussed. *F* built on the judgement in *K* both in terms of the test for the imposition of vicarious liability in the deviation cases and the implications of this for state liability for the criminal acts of police officers.

VICARIOUS LIABILITY IN THE COMMON LAW

Vicarious liability means the liability of one person for the delict³ of another. This form of liability applies to certain relationships, one of which is the relationship between employer and employee. Thus an employer is liable for the damage caused by the delict of an employee, committed while acting within the course and scope of her duties as an employee. The employer is liable despite the fact that it is the employee who has committed the wrong and the employer is not at fault. Vicarious liability is therefore at odds with a basic norm of our society, namely that liability for harm should rest on fault, either in the form of negligence or intention.⁴

The rationale for vicarious liability is to be found in a number of underlying principles. One of these is the creation of a risk or danger of damage to others. As it was put in the case of *Feldman (Pty) Ltd v Mall*:⁵

[A] master who does his work by the hand of a servant creates [for his own ends] a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy ... he is under a duty to ensure that no one is injured by the servant's improper conduct or negligence in carrying on his work.⁶

Another principle underlying vicarious liability is the desirability of affording claimants effective remedies for harm they have suffered.⁷ A further principle is the need to encourage employers to take active steps to prevent their employees from

causing harm to members of the broader community.⁸

As the Constitutional Court has noted, there is a countervailing principle too: this is that damages should not be borne by employers in all circumstances, but only in those circumstances in which it is fair to require them to do so.⁹

The normative content of the above principles means that vicarious liability is fundamentally a policy-laden concept. Yet despite this, our courts have traditionally asserted (with few exceptions) that the common law rules of vicarious liability are not to be confused with the reasons for them, and that their application remains a matter of fact.¹⁰ Thus, cases of vicarious liability in the common law have been dealt with on the basis that three factual conditions must be met:

- The existence of an employer-employee relationship
- A delict committed by the employee
- The employee acting within the course and scope of her employment¹¹

If these three factual conditions were found to be met, vicarious liability would be imposed. In the vast majority of cases this was done without any reference to, or acknowledgement of, the normative principles underlying vicarious liability.¹²

Of the three conditions, the question of whether the employee was acting within the course and scope of her employment when she committed the delict has proved the most difficult to answer in practice. At one extreme is the delict committed by the employee while going about her employment in the ordinary course. At the other extreme is the delict committed by the employee going about her own business, unconnected to that of the employer, often referred to as the employee 'going on a frolic of her own'.¹³ Between these two extremes lies what the courts have described as 'an uncertain and wavering line.'

In navigating this line, the courts, rather than drawing on the normative principles underpinning vicarious liability, have engaged in the somewhat

artificial exercise of attempting to plot the employee's delict on a space/time continuum in relation to her employment. Thus, in *Feldman (Pty) Ltd v Mall*,¹⁵ Tindell JA held that the test to be applied is 'whether the circumstances of the particular case show that the servant's digression is so great in respect of time and space that it cannot reasonably be said that he is still exercising the functions to which he was appointed; if this is the case then the master is not liable.'¹⁶

Also somewhat tortuous is the so-called Salmond test, which asks whether the commission of the delict can rightly be regarded as 'a mode – although an improper mode of exercising the authorisation conferred by the employment.'¹⁷

The artificiality of the traditional approach is revealed by the fact that over the years vicarious liability has been imposed in cases where it is clear from the facts that the employee was not acting within the course and scope of her employment. In *Minister of Police v Rabie*¹⁸ the employee was a mechanic in the employ of the South African Police. He was off duty, dressed in plain clothes, in his private vehicle and acting in pursuance of his private interests when he fraudulently claimed to be a police officer and wrongfully and unlawfully arrested his victim and charged him with house-breaking.¹⁹ In *Minister of Safety and Security v Luiters*²⁰ the employee was an off duty police officer pursuing persons who had attempted to rob him when he shot an innocent third party. In both cases the Minister was held vicariously liable. Cases like this became known as 'the deviation cases.'²¹ Various forms of tortuous reasoning were adopted to demonstrate that employees such as these had in fact been acting within the course and scope of their employment at the time that they committed the delict. Invariably in these cases, powerful normative considerations militated in favour of holding the state vicariously liable, but these were seldom expressly articulated. As a result the basis for the imposition of vicarious liability in the deviation cases was inconsistent and unclear.

All of this changed with the advent of the Constitutional Court judgement in *K v Minister of Safety and Security*.

K v MINISTER OF SAFETY AND SECURITY: THE DEVELOPMENT OF THE COMMON LAW

K was a 20-year-old woman who was stranded at a petrol station in the early hours of the morning when three on duty, uniformed police officers offered to give her a lift home. On route, K was brutally raped by all three police officers and abandoned by the side of the road. The Supreme Court of Appeal held that the Minister of Safety and Security was not vicariously liable for the police officers' conduct. On appeal, the Constitutional Court reversed the Supreme Court of Appeal judgement. In doing so it developed the common law of vicarious liability in certain fundamental respects.

The Constitutional Court held that it was clear that characterising the application of the principles of vicarious liability as a matter of fact, untrammelled by any normative considerations, was not correct.²² To continue with such an approach would be to sterilise the common law test for vicarious liability and purge it of any normative or social or economic considerations.²³ The Court held that given the clear policy basis of vicarious liability, such an approach could not be sustained under the new constitutional order. It stated that:

What is clear ... is that as a matter of law and social regulation, the principles of vicarious liability are principles which are imbued with social policy and normative content. Their application will always be difficult and will require what may be troublesome lines to be drawn by the courts applying them.²⁴

Denying that the principles bear such normative implications will only bedevil the exercise by rendering inarticulate premises that in a democracy committed to openness, responsiveness and accountability, should be articulated.²⁵

The Court endorsed a new test for the imposition of vicarious liability in the deviation cases, which had its roots in some of the common law case

law.²⁶ There are two legs to the test. The first leg looks at the subjective state of mind of the perpetrators and asks whether, subjectively viewed, they were acting in pursuit of their own interests or those of their employer. The second leg of the test is objective. It involves mixed questions of fact and law and asks whether, even if the employees were acting in pursuit of their own interests, there is nevertheless a sufficient connection between their conduct and their employment to justify holding their employer vicariously liable.²⁷ The Constitutional Court held that in applying the second leg of the test the courts should promote constitutional values and expressly articulate the normative considerations at play. The Court held as follows:

The objective element of the test which relates to the connection between the deviant conduct and the employment, approached with the spirit, purport and objects of the Constitution in mind is sufficiently flexible to incorporate not only constitutional norms but other norms as well. It requires a court when applying it to articulate its reasoning for its conclusions as to whether there is a sufficient connection between the wrongful conduct and the employment or not. Thus developed, by the explicit recognition of the normative content of the objective stage of the test, its application should not offend the Bill of Rights or be at odds with our constitutional order.²⁸

The Constitutional Court then applied the test to the facts of the case. On the first leg of the test, the Court held that the police officers were clearly acting in pursuit of their own interests and not those of their employer.²⁹

On the second leg of the test, the Court held that there were three important facts that pointed to the closeness of the connection between the conduct of the police officers and the business of their employer. Firstly, the police officers all bore a statutory and constitutional duty to prevent crime and protect the members of the public.³⁰ Secondly, the police officers had offered to assist *K* and she had accepted their offer, thus placing her trust in them.³¹ Thirdly, the conduct of the

police officers constituted a simultaneous commission and omission. Their commission lay in their brutal rape of *K* and their simultaneous omission lay in their failing to protect her from harm while on duty.³²

The Court concluded that the connection between the conduct of the police officers and their employment was sufficiently close to render the Minister vicariously liable.³³

F v MINISTER OF SAFETY AND SECURITY

The facts in this case were disturbingly similar to those in *K*. In the early hours of one morning, *Ms F*, who was 13 years old at the time, was stranded and was offered a lift home by Mr Van Wyk. At the time Van Wyk was not in uniform, drove an unmarked police car and was not on duty but was on standby.

On route *Ms F* noticed a police radio in the car as well as a pile of police dockets bearing the name and rank of Van Wyk. When she asked Van Wyk about this he told her that he was a private detective. *Ms F* understood this to mean that he was a police officer.

Contrary to his undertaking to drive *Ms F* home, Van Wyk drove in a different direction. Van Wyk then stopped the car in a quiet, dark area. *Ms F* became suspicious, jumped out of the car and ran away and hid herself. After some time, Van Wyk drove off.

Ms F then emerged from her hiding place and began hitchhiking. A car stopped next to her. It turned out to be Van Wyk, who again offered her a lift home. Owing to her desperate situation, *Ms F* relented and got into the car. In her evidence *Ms F* stated that the fact that she believed Van Wyk to be a policeman played a role in allaying her fears.

While on their way to her home Van Wyk unexpectedly turned off the road. *Ms F* attempted to escape again but this time Van Wyk overpowered her and brutally assaulted and raped her.

Ms *F* obtained judgement against the Minister of Safety and Security in the High Court but this was reversed in the Supreme Court of Appeal, largely on the basis that Van Wyk had not been on duty at the time that he committed the rape.

The Constitutional Court: applying the *K* test

The Constitutional Court held that since Van Wyk had plainly been acting in his own selfish interests, the first leg of the *K* test did not establish state liability. The Court then turned to the second leg of the *K* test. It noted, as *K* had indicated, that the normative components pointing to liability needed to be expressly articulated. The Court held that the normative components at play in this case were firstly the state's constitutional obligations to protect the public, and secondly the trust that the public is entitled to place in the police. In dealing with the first normative component Mogoeng CJ referred to the scourge of violence against women and held that the state 'through its foremost agency against crime, the police service, bears the primary responsibility to protect women and children against this prevalent plague of violent crimes.'³⁴

In respect of the second normative component, trust, Mogoeng CJ held that this operated both normatively, in laying the basis for holding the state liable for the wrong of an off-duty police officer, and factually, in that it created a connection between the employment and the wrongful conduct. The Court held as follows:

Accordingly, the employment of someone as a police official may rightly be equated to an invitation extended by the police service to the public to repose their trust in that employee. When a policeman abuses the trust placed in him by a vulnerable woman or girl-child, by raping her, a link may well be established between the employee's employment and the delict flowing from the rape.³⁵

The Court held that additional connecting factors were the police car that was issued to Van Wyk precisely because he was on standby duty, and which enabled him to commit the rape, and the

fact that Ms *F* had deduced that Van Wyk was a police officer and that this had allayed her fears when she re-entered the car on the second occasion.³⁶ The Court accordingly concluded that in terms of the second leg of the *K* test, the Minister was indeed vicariously liable.³⁷

OBSERVATIONS

Several commentators who have written about *F* do not appear to have appreciated that the judgement finally does away with the requirement that the employee must be acting within the course and scope of her employment for vicarious liability to be imposed in the deviation cases.³⁸ This is the effect of the test developed in *K* and applied in *F*, but it is also explicitly stated by Mogoeng CJ in his judgement, in the following terms:

Unlike before, when the test in deviation cases was whether the employee acted within the course and scope of employment, the focus now is whether – 'the connection between the conduct of the policemen and their employment was sufficiently close to render the respondent liable.'³⁹

F accordingly makes it abundantly clear that the test is the sufficiency of the connection between the employee's misconduct and her employment, and that the normative considerations at play form part of this enquiry. This is to be welcomed. The reality is that in the deviation cases it has always been a fiction to say that the employee was acting within the course and scope of her employment. In truth, the imposition of vicarious liability in the deviation cases has always been founded on an inarticulate normative premise of one sort or another. The judgements in *K* and *F* have laid this fiction bare and demanded that we articulate the normative principles upon which vicarious liability has always been based.

Some commentators have, however, criticised the policy-laden character of the *K* test. Boonzaier does so in the following terms:

The difficulty is that various policy factors relating to the imposition of liability upon the

state are being considered to determine whether the tortious conduct of the state employee is sufficiently closely connected to his employment with the state, an enquiry with which such factors are indeed 'somewhat at odds'.⁴⁰

The reality, however, is that facts alone have never been determinative of whether or not liability should be imposed on the state for the delicts of its employees, particularly in the deviation cases. The question has always fundamentally been a policy-driven one. Far from being at odds with the enquiry, policy factors relating to the imposition of liability on the state are therefore an integral part of the enquiry. Only once this is acknowledged is it possible to have an honest dialogue about the bases on which employers are held liable for the delicts of their employees in our law. *F* has at last provided clarity and transparency on the normative bases for holding the state vicariously liable for the criminal acts of police officers. These are the police's constitutional obligations to protect the public, and the entitlement of the public to place their trust in the police. These normative considerations are weighty and it will therefore only likely be in cases where there is the most tenuous link between a police officer's criminal act and his employment that the state will not be held vicariously liable. In that respect the Constitutional Court judgement in *F* is a highly significant and welcome development in the promotion of state accountability for the criminal acts of police officers.



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NOTES

1. *F v Minister of Safety and Security*, 2012 (1) SA 536 (CC).
2. *K v Minister of Safety and Security*, 2005 (6) SA 419 (CC).
3. A delict may be defined as follows: 'An unlawful, blameworthy (i.e. intentional or negligent) act or omission which causes another person damage to person or property or injury to personality and for which a civil remedy for recovery of damages is available.' J Burchell, *Principles of delict*, Cape Town: Juta, 1993, 10.
4. *K v Minister of Safety and Security*, para 21.
5. *Feldman (Pty) Ltd v Mall*, 1945 AD 733.
6. *Ibid.*, 741.
7. See *K v Minister of Safety and Security*, para 21 and the authorities cited in endnote 22.
8. *Ibid.*
9. *Ibid.*, para 21.
10. See, for example, *Bezuidenhout NO v Eskom*, 2003 (3) SA 83 (SCA), para 19; *Minister van Veiligheid en Sekuriteit v Japmoco BK h/a Status Motors*, 2002 (5) SA 649 (SCA), para 1; *Absa Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd*, 2001 (1) SA 372 (SCA), para 5.
11. J Neethling, Risk creation and the vicarious liability of employers, *THRHR* 70(4) (2007), 527-528.
12. See the cases cited in note 9 above. See also *Jordan v Bloemfontein Transitional Local Authority and Another*, 2004 (3) SA 371 (SCA), para 3; *Minister van Veiligheid en Sekuriteit v Phoebus Apollo Aviation BK*, 2002 (5) SA 475 (SCA), para 5; *Govender v Minister of Safety and Security*, 2001 (4) SA 273 (SCA), para 3; *Tshabalala v Lekoa City Council*, 1992 (3) SA 21 (A), 28A-B; *Estate van der Byl v Swanepoel*, 1927 AD 141, 146; *Mkize v Martins*, 1914 AD 382, 390.
13. Burchell, *Principles of delict*, 219.
14. J Andrews in *Palsgraf v Long Island Railroad Company*, 59 ALR 1253, cited by C J Watermeyer, *Feldman (Pty) Ltd v Mall*, 1945 AD 733, 750.
15. *Feldman (Pty) Ltd v Mall*, 750.
16. *Ibid.*, 756.
17. The 'Salmond test' for vicarious liability established in JW Salmond, *The law of torts*, London: Stevens and Haynes, 1907, 83.
18. *Minister of Police v Rabie*, 1986 (1) SA 117 (A).
19. In *Minister of Police v Rabie* the Court justified this on the basis of the creation of risk, holding that the dominant question to be asked was whether the employee's acts fell within the risks created by the state and concluding that they had.
20. *Minister of Safety and Security v Luiters*, 2007 (2) SA 106 (CC).
21. *F v Minister of Safety and Security*, para 41.
22. *K v Minister of Safety and Security*, para 22.
23. *Ibid.*, para 22.
24. *Ibid.*, para 22.
25. *Ibid.*, para 23.
26. Notably in *Minister of Police v Rabie*: see J W Salmond, *The law of torts*.
27. *K v Minister of Safety and Security*, para 32.
28. *Ibid.*, para 44.
29. *Ibid.*, para 50.
30. *Ibid.*, para 51.
31. *Ibid.*, para 51.
32. *Ibid.*, para 53.
33. *Ibid.*, para 53.
34. *F v Minister of Safety and Security*, para 57.
35. *Ibid.*, para 64.
36. *Ibid.*, para 81.
37. *Ibid.*, para 81.
38. See in this regard M M Botha and D Millard, The past, present and future of vicarious liability in South Africa, *De Jure* 45(2) (2012), 225. See also L Boonzaier, State liability in South Africa: the need for a more direct approach, *SALJ* 130(2) (2013), 367.
39. *F v Minister of Safety and Security*, para 76.
40. Boonzaier, State liability in South Africa, 367.