

The extent of an employer's vicarious liability when an employee act within the scope of employment

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Abbreviations

BCEA	Basic Conditions of Employment Act 75 of 1998
CILSA	Comparative and International Law Journal of Southern Africa
CC	Constitutional Court
COIDA	Compensation for Occupational Injuries and Diseases Act 130 of 1993
EEA	Employment Equity Act 55 of 1998
GG	Government Gazette
ILJ	International Law Journal
IC	Industrial Court
LC	Labour Court
LAC	Labour Appeal Court
LRA	Labour Relations Act 66 of 1995
ODIMWA	Occupational Diseases in Mines and Works Act 78 of 1973
PEPUDA	Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000
SA MERC LJ	South African Mercantile Law Journal
SAJCJ	South African Journal of Criminal Justice
SALJ	South African Law Journal
SCA	Supreme Court of Appeal
STELL LR	Stellenbosch Law Journal
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UKHL	United Kingdom House of Lords

1 Introduction

Vicarious liability may be described as the strict liability of one person for the delict of another.¹ Employers may be held indirectly or vicariously liable for the delict of their employees subject to the requirements that: (a) an employer / employee relationship exists; (b) that a delict actually took place; and (c) that an employee acted within the scope of employment. Few areas of law are exclusively guided by the common law. Vicarious liability of employers is one such area.² Our *Constitution*³ provides guidance to our courts regarding to what extent our common law should be developed.⁴ Scott states that when interpreting the legal requirements for vicarious liability of employers, difficulties arise especially with the interpretation of the requirement that an employee should act within the scope of his employment.⁵

Interpretation and application of the requirement that an employee should act within the scope of his employment came before the Constitutional Court in the case of *K v Minister of Safety and Security*⁶. The court referred with approval to the “standard test” adopted in the case of *Minister of Police v Rabie*⁷ and adopted the close connection test. In the case of *F v Minister of Safety and Security*⁸ a distinction was drawn between standard cases where employees go about their employer’s business and deviation cases where the wrongdoing takes place outside the course and scope of employment. The court was prepared to develop the common law to include an off-duty police officer on standby, within the definition of scope of employment to found that the employer was vicariously liable.

The *Employment Equity Act* 55 of 1998⁹ includes harassment as a form of unfair discrimination.¹⁰ Section 60 of the EEA creates a form of statutory vicarious liability for employers, subject to certain requirements for acts of unfair discrimination,

1 Knobel (eds) *Law of Delict* 365.

2 Le Roux 2003 *International Law Journal* 1880 - 1882.

3 *Constitution of the Republic of South Africa*, 1996 (hereafter referred to as the Constitution)

4 S 8(3) of the *Constitution*.

5 Scott 2011 *TSAR* 773.

6 *K v Minister of Safety and Security* 2005 6 SA 419 (CC) (hereafter referred to as the *K* case).

7 *Minister of Police v Rabie* 1986 1 SA 117 (A) (hereafter referred to as the *Rabie* case).

8 *F v Minister of Safety and Security* 2011 3 SA 592 (CC) (hereafter referred to as the *F* case) A young lady was also raped by an off-duty police officer while on standby. The state was held vicariously liable.

9 *Employment Equity Act* 55 of 1998 (hereafter the EEA).

10 S 6 of the EEA.

perpetrated by employees "while at work" against fellow employees.¹¹ The requirements for liability include that the contravention should be brought to the attention of the employer¹² and that the employer should take reasonable steps to eliminate the alleged conduct¹³. The employer would be deemed liable for contravention of the EEA inter alia unfair discrimination; unless it could be proven that he had taken reasonable and practicable steps to prevent the contravention.¹⁴ Cooper suggests that section 60 of the EEA, usage of the word "while at work", is a clear indication from the legislature that a wider interpretation is needed than the common law interpretation of "in the scope of employment".¹⁵

Employers may be held liable for the wrongful acts of their employees in terms of the common law principle of vicarious liability or in terms of the statutory provision of the EEA for unfair discrimination. Both the common law and the EEA require that the wrongful acts should be committed by employees "in the scope of their employment" or "while at work". Grogan suggest that jurisprudence developed by our courts in the area of vicarious liability specifically in respect of determining the scope of an employee's employment, is also relevant for social insurance.¹⁶ This is because the *Compensation of Occupational Injuries and Diseases Act 130 of 1993*¹⁷ states that employee's may claim for an occupational disease or illness if it arises "within or in the course of employment".¹⁸ It is therefore important to clarify the requirement that an employee should act within the scope of his employment in order to limit the employer's vicarious liability. What is the extent of an employer's vicarious liability when an employee acts within the scope of employment in terms of the common law and statutory provisions? The clarification would be done with a view to suggest appropriate recommendations to employers' terms and conditions in order to limit their liability with the adoption of relevant, reasonable and pro-active steps.

11 S 60 of the EEA.

12 S 60(1) of the EEA.

13 S 60(2) of the EEA.

14 S 60(4) of the EEA.

15 Cooper 2002 *International Law Journal* 182. "While at work should be interpreted to mean "at the workplace" or "while parties were engaged in activities connected to work".

16 Grogan *Employment Rights* 276.

17 *Compensation for Occupational Injuries and Diseases Act 130 of 1993* (hereafter referred to as COIDA).

18 S 22(4) of COIDA.

2 The basis of the doctrine of employer's vicarious liability

Vicarious liability is a doctrine of no fault liability in terms of which one person is held liable for the unlawful acts of another. No fault liability normally applies in situations where a particular relationship exists between persons. Typically the relationship between an employer and employee may give rise to vicarious liability.¹⁹ The origin of the doctrine of vicarious liability is based on public policy and the notion that a person that has been wrongfully injured should not be left without a claim²⁰

Several theories have been put forward, justifying the principle that an employer may be held liable for the actions of his employee without fault. The first is the notion that an employer's liability is founded on his own fault or *culpa in eligendo*. According to this theory, there is an irrebuttable presumption that an employer was negligent if his employee commits a delict.²¹ The identification theory states that the employee is in fact an extension of his employer's "arm". Therefore if the employee acts, it means that the employer is also acting.²² Another theory, called the solvency theory, relates to the notion that an employer is in general terms in a better financial position than the employee that actually committed the delict.²³ The interest or profit theory suggests that employers who are active in their own economic interest must as a collary of furthering their own interest, also bear responsibility for the harm this may cause to others.²⁴ Van der Walt states that the interest or profit theory is an unacceptable justification for strict liability of employers because this would mean that almost any conduct giving rise to damage may be defined as no fault liability. He further states that business not producing profits may then according to the theory, be excluded from liability and this would be "an absurd state of affairs"²⁵

The risk or danger theory means that where an employee's activities create a considerable risk or danger of causing damage, there is sufficient justification for holding the employer liable even in the absence of fault.²⁶ Scott indicates that the

19 Other examples of relationships that may give rise to claims of vicarious liability include principal and agent, motor car owner and motor car driver and the state and public schools.

20 Le Roux 2003 *International Law Journal* 1879.

21 *Feldman v Mall* 1945 AD 733. The court referred to *culpa in eligendo* as a "hoary explanation".

22 Van Der Walt 1967 *THRHR* 70–76.

23 *De Welzim v Regering of Kwa-Zulu* 1990 2 SA 915 (N) 921.

24 Knobel 356.

25 Van der Walt *Risiko-aanspreeklikheid* 51.

26 Knobel supra.

risk theory should be the foundation of the doctrine of vicarious liability.²⁷ Work entrusted to employees entails certain risks in the sense that wrongful acts may be committed, and the employer should be held liable, for the sake of fairness, if these risks materialise.²⁸ The extent to which a risk is increased within the workplace, to find the employer liable, is often difficult to determine.²⁹ Van der Walt states that the determining whether risk has increased to such an extent as to establish liability should be answered with regard to the community's convictions as evidenced in legislation and case law.³⁰ Furthermore, the employers should only be held liable if the risk was typical of the specific employment activity. A typical risk would be reasonably foreseeable by a reasonable employer.³¹ Van der Walt states that the question as to whether the potential of risk has been increased should be answered with regard to the legal convictions of the community as evidenced by legislation and case law.³² Judge Jansen stated as follows with regard to the creation of risk principle:

By approaching the problem whether Van der Westhuizen acts were done "within the course and scope of his employment" from the angle of risk creation, the emphasis is shifted from the precise nature of his intention and the precise nature of the link between his acts and police work, to the dominant question whether those acts fall within the risk created by the state.³³

The Appellate Division³⁴ stated that the risk theory, as an independent factor in establishing vicarious liability, should not replace the standard test as adopted in the *Rabie case*³⁵. In the recent case of *Grobler v Naspers*³⁶ the court found that the strict application of the standard test should be done away with and the risk of sexual harassment should be taken into account when determining whether an employee acted within the scope of his or her employment.³⁷ A satisfactory scientific test for vicarious liability has not been found. Neethling states that a "flexible approach" is required whereby a judgement is made on a case to case basis.³⁸ Employers should

27 Scott *Middellike Aanspreeklikheid in die Suid-Afrikaanse Reg* 390-391.

28 Scott supra 356.

29 Van der Merwe and Olivier 564.

30 Van de Walt 1968 *CILSA* 55.

31 Scott 48.

32 Van der Walt 1968 *CILSA* 49.

33 *Rabie case* 10.

34 *Minister of Law and Order v Ngobo* 1992 4 SA 822 (A).

35 *Rabie case* at par 10.

36 *Grobler v Naspers* 2004 4 SA 220 (C) (hereafter referred to as the *Naspers case*).

37 *Naspers-case* par 296.

38 Knobel 356.

be held liable for the (intentional) delicts of their employees, if a risk was created through the appointment process or as a result of their employment conditions.³⁹

3 The requirements for vicarious liability

There are three requirements for vicarious liability: (a) An employer / employee relationship should exist at the time when the delict is committed; (b) The employee must commit a delict and (c) The employee must act within the scope of his employment when the delict is committed.

3.1 Employee / employer relationship.

The requirement that an employee / employer relationship should exist to establish employer vicarious liability is less problematic and a more in-depth discussion falls outside the focus of this study. The point of departure in determining whether an employee / employer relationship exists is the definition in terms of the *Labour Relations Act 66 of 1995*⁴⁰ and the *Basic Conditions of Employment Act 75 of 1998*⁴¹. The LRA defines an employee as:

- (a) Any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive, any remuneration; and
- (b) Any person who in any manner assists in carrying on or conducting the business of the employer.⁴²

The dividing line between employee and independent contractor is the main problem in defining an employee.⁴³ The contract of mandate (*locatio conduction operis*) concerns an agreement in terms of which one person undertakes to render services to another without being under the control of the other. A general rule is that an employer would not be held liable for the negligent wrongdoing of an independent contractor unless the employer is in some way personally at fault with regard to the

39 Neethling and Potgieter 2012 *LITNET* 1-25.

40 *Labour Relations Act 66 of 1995* (hereafter referred to as the LRA).

41 *Basic Conditions of Employment Act 75 of 1998* (hereafter referred to as the BCEA).

42 S 213 of the LRA.

43 Grogan *Employment Rights* 16.

conduct of the contractor.⁴⁴ In the case of *Langley Fox Building Partnership v De Valence*⁴⁵ the defendant was busy with a construction project to a building and employed the services of various independent contractors. The plaintiff sustained major head injuries after she had struck her head against a wooden beam on a sidewalk. The contractor had failed to take the necessary precautionary measures. Judge Goldstone held that a mandator⁴⁶ would be held liable for the unlawful acts of the mandatory if an inherent risk or danger is created as a consequence of the specific nature of a project. The court reasoned that the correct approach in finding the employer liable for the negligence of an independent contractor is by applying the fundamental rule of law that obliges a person to exercise that degree of care which the circumstances require.⁴⁷ Whether the circumstances demand the exercise of care will depend upon proof that the employer owed the plaintiff a duty of care and that the damage suffered was not too remote. The judge stated that this enquiry into liability presupposes three questions:

1. Would a reasonable man have foreseen the risk of danger as a consequence of the work he employed the contractor to perform?
2. Would a reasonable man have taken steps to guard against the danger?
3. Were such reasonable steps taken?

The oldest test for identifying the contract of employment is the control test. The control test is based on the notion that the employer has a right to direct to the employee the manner in which he or she should perform his work and the reciprocal duty of employees to follow the direction of their employer.⁴⁸ In the case of *Midway Two Engineering & Construction Services v Transnet Bpk*⁴⁹ the court found that the

44 *Stein v Rising Tide Productions* CC 2002 5 SA 199 (C) 205. An employer would not be able to shelter behind the fact that the wrongdoer was an independent contractor or hired through a temporary employment services company if it is established that the employer itself is responsible for safety. It is suggested that the courts may utilize the "control test" in determining whether the manner in which the independent contractor worked was under the control of the employer.

45 *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 1 SA (A).

46 The employer of the independent contractor is defined as the "mandator".

47 *Cape Town Municipality v Paine* 1923 AD 207 at 217 Judge Innes states that: "the question whether, in given circumstances, a reasonable man would foresee the likelihood of harm and governed his conduct accordingly, is one to decide in each and every case upon consideration of all circumstances. Once it is clear that the danger would have been foreseen and guarded against by diligent paterfamilias, the duty to take care is established and it only remains to ascertain whether it has been discarded."

48 Grogan 16.

49 *Midway Two Engineering & Construction Services v Transnet Bpk* 1998 3 SA 17 (SCA).

traditional control test used to distinguish between an employee and independent contractor was obsolete and simplistic. The court stated that what is required is a multi-faceted test that takes into consideration all relevant factors in determining whether an employee / employer relationship exists. Grogan states that the problem with the test is that the degree of control, actually exercised over employees, varies from employer to employer.⁵⁰

A second test that was developed to supplement but not replace the control test is the organisation or integration test. This test entails whether an employee is integrated into the employers' organisation, and acknowledges the fact that working environments are increasingly depersonalised. It also makes provision for the roles employees play in larger corporate entities. The test has subsequently been rejected by our courts.⁵¹ A more pragmatic approach was adopted in formulating the dominant impression test. The test poses the question whether the characteristics of the employer / employee relationship investigated in a more holistic manner resembles a true employee / employer relationship.⁵² The courts perform a balancing act, weighing the factors that indicate a true employee relationship against factors indicating an independent contractor relationship. In the case of *SA Broadcasting Corporation v McKenzie*⁵³ the LAC formulated a list of six factors to distinguish between a contract of employment and a contract of work. The factors include:

- (a) The aim of the contract and if it is for the rendering of personal service or the performance of a specific task or production of a specific result.
- (b) Whether the employee would be performing the work personally - independent contractors may perform work through others such as assistants etc.
- (c) Services rendered are at the disposal of the employer. Independent contractors are usually required to perform specific tasks, producing specific results within certain timeframes.
- (d) Employees are usually subordinate to their employer. Independent contractors are equal to their principals.

50 Grogan 16.

51 *Smit v Workmans Compensation Commissioner* 1979 1 SA 207 (A).

52 Grogan 17.

53 *SA Broadcasting Corporation v McKenzie* 1999 20 ILJ 1936 (LAC).

- (e) The death of an employee terminates the employment relationship against the fact that the death of independent contractors does not terminate the contract of work.
- (f) A contract of employment terminates on expiration of the period of service. A contract of work terminates on the production of a specific result.

The importance of the founding document, ie employment contract, to establish the true relationship between parties, should not be underestimated. The legislature also introduced a statutory presumption of employment in terms of which a list of factors is stipulated.⁵⁴ Subject to the earning threshold⁵⁵, any worker that could show that one of the listed factors is present is presumed to be an employee⁵⁶. A guideline was also issued by NEDLAC to determine whether a person that earns more than the earning threshold should be considered an employee.⁵⁷ The guideline was published in the form of a Code of Good Practice⁵⁸ and is in effect only a summary of the current legal position.

Establishing the status of workers as employees is the point of departure in determining a true employer. Situations do arise where employees need to prove the true identity of employers. Difficulties may arise in situations where an employee works for a group of companies and or subsidiaries to determine who the true employer is.⁵⁹ The court would look at the entity that the employee "assist(s) in conducting" the business of the employer as the true employer.⁶⁰ If the true employer tries to avoid liability by hiding behind a corporate entity, the court would "pierce the corporate veil" in determining the true employer.⁶¹ An employee may also have more than one employer in certain circumstances.⁶²

54 S 200A of the LRA and S 83A of the BCEA.

55 S 200A(2) of the LRA.

56 S 200A (1) of the LRA.

57 S 200A (4) of the LRA.

58 Code of Good Practice: Who is An Employee? Gen Not 1774 in GG 29445 of 1 December 2006.

59 *Board of Executors Ltd v McCafferty* 1997 18 ILJ 949 (LAC). The employee was held to be an employee of all three employers because his productive capacity was available to all three.

60 *Pearson v Sheerbonnet SA (Pty) Ltd* 1999 20 ILJ 1580 (LC).

61 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 4 SA 790 (A).

62 *Footwear Trading CC v Mdlalose* 2005 26 ILJ 443 (LAC). The court held that the concept of separate legal entities may be disregarded in circumstances where a subsidiary is a mere "alter ego or conduit of the principal company".

3.2 The employee's conduct must constitute a delict.

The general definition of delict is the wrongful and culpable act of a person that causes harm to another. The requirement of wrongfulness, fault, causation and harm must be present in order to classify conduct as a delict.⁶³ Vicarious liability of an employer for the wrongful acts of its employees is an exception to the rule because the employer's liability is a liability without fault. An employer may raise any defence which is available to the employee.⁶⁴ An employee and employer are regarded as joint wrongdoers against the prejudice party but the right of recourse is only available to the employer.⁶⁵ Again this requirement is not the focus of the proposed study and is only discussed so as to put the requirement that an employee should act within the scope of employment into perspective.

3.3 An employee should act within the scope of employment.

3.3.1 Historical development of vicarious liability.

The doctrine of vicarious liability was unknown to Roman and Roman-Dutch law and was inherited from English Law.⁶⁶ Our courts concentrated on a set of rules in establishing employer liability. Salmond⁶⁷ stated that a master is responsible for the wrongful acts authorised by him and that:

A master is liable even for acts which he has not authorized, provided they are so connected with acts he has authorized that they may be regarded as modes - although improper modes - of doing them. On the other hand if the authorized and wrongful act is co connected with the authorized act as the mode of doing it, but is an independent act, the master is not responsible; for in such case the servant is not acting in the course and scope of his employment, but has gone outside of it.

Pothier and Voet's writings showed similarities with the Salmond rule but could not provide adequate guidance to modern industrialised societies and the application of vicarious liability thereon.⁶⁸ The inflexibility of the rule formulated in the Salmond case did not make provision for intentional wrongdoing of employees. An employee therefore could not be held liable for intentional wrongdoing because these actions

63 Knobel 4.

64 *De Welzim v Regering van Kwa-Zulu* 1990 2 SA 915 (N).

65 *Botes v Van Deventer* 1966 3 SA 182 (A).

66 Van der Merwe and Olivier 505.

67 Salmond JW *The Law of Torts* 83.

68 Scott 8.

fell outside the course and scope of his employment. This is illustrated by the dictum of Judge Innes in the case of *Mkize v Martens*⁶⁹ which stated as follows:

We may, for practical purposes, adopt the principle that a master is answerable for the torts of his servant committed in the course of his employment, bearing in mind that an act done by a servant solely for his own interest and purpose and outside his authority is not done in the course of his employment even though it may have been done during his employment.⁷⁰

It will become apparent that it is difficult to establish general rules with regard to employers' vicarious liability in general but more specifically with regard to the requirement that an employee should act within the scope of employment.⁷¹

3.3.2 Development of the common law principle of vicarious liability.

An employee acts within the scope of his employment if he acts in the execution or fulfilment of his duties in terms of his employment contract.⁷² In finding employers vicariously liable, a distinction should be drawn between when an employee acts within the scope of his employment and when the wrongdoing takes place outside the course and scope of employment. Judge Mogoeng stated in the case of *F v Minister of Safety and Security*⁷³ that two different tests should be applied in determining employer's vicarious liability. The first test, referred to as the standard test, finds application when an employee acts within the scope of his employment. Grogan states that when employees are "performing their master's bidding", employers may be held liable because the employee is under the control and acting for the benefit of the employer.⁷⁴ The second test is used in situations when an employee commits a delict outside the course and scope of employment generally referred to as deviation cases.

Our courts have held that if an employee is acting within the course and scope of his duties, or are "engaged with the affairs of his master", the employer would be held

69 *Mkize v Martens* 1914 AD 382 (hereafter referred to as the *Mkize case*).

70 *Mkize case* 382.

71 Calitz 2005 TSAR 218.

72 Knobel 368.

73 *F case* par 41.

74 Grogan 239.

liable if a delict is committed by the employee.⁷⁵ Judge O' Reagan states in the *K case*⁷⁶ that

There is a deep-seated sense of justice that is served by the notion that in certain circumstances a person in authority will be held liable to a third party for injuries caused by a person falling under his or her authority.⁷⁷

Many vicarious liability cases are straight forward, but difficulties may arise in the so-called deviation cases. Deviated actions of employees may be defined as such actions performed against the approval of or in prohibition to the employer's instruction.⁷⁸ If the deviation is intentional, the difficulty is particularly pronounced. In the case of *Feldman (Pty) Ltd v Mall*⁷⁹ an employee delivering parcels as instructed by his employer attended to his personal matters and consumed alcohol which significantly impaired his driving capacity. Subsequently he negligently collided with another vehicle and killed a man with minor children. Judge Watermeyer held the employer vicariously liable and explained the rationale for holding an employer vicariously liable even if the employee intentionally deviated from his or her duty as follows:

A master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy; that, because he has created this risk for his own ends he is under a duty to ensure that no one is injured by the servant's improper conduct or negligence in carrying on his work and that the mere giving by him of direction or orders to his servant is not a sufficient performance of that duty. It follows that if the servant's acts in doing his master's work or his activities incidental to or connected with it are carried out in a negligent or improper manner so as to cause harm to a third party the master is responsible for that harm.⁸⁰

In *African Guarantee and Indemnity Co Ltd v Minister of Justice*⁸¹ the court found that because the digression of the employees was short in time and space, they did not intend to abandon their duties and were still exercising their duties within the scope of their employment. In the case of *Viljoen v Smith*⁸² an employee, while on duty, attended to personal matters, and caused a fire negligently on a neighbouring farm. Despite an instruction by his employer, the employee climbed through a fence,

75 *Estate Vanderbijl v Swanepoel* (1927) AD 141.

76 *K case* at 25.

77 *K case* at 434.

78 Grogan 240.

79 *Feldman v Mall* 1945 AD 733.

80 *Feldman case* supra 741.

81 *African Guarantee and Indemnity Co Ltd v Minister of Justice* 1959 2 SA 437 (A).

82 *Viljoen v Smith* 1997 18 ILJ 61 (A).

walked 600 m and caused a fire on the applicant's farm. The employer was found vicariously liable because the court decided that the employee has not entirely abandoned his employment. The decision was reached on a factual basis whereby the court established that the degree of digression was not to such an extent that it could be inferred that the employee abandoned his employment.

The case of *Bezuidenhout NO v Eskom*⁸³ provides an example that illustrates that an employer can limit the scope of employment of employees. An employee provided a lift to a hitchhiker in a clearly marked vehicle of Eskom against the clear instruction from his employer not to do so without express authority from his superiors. The employee was on call and negligently caused an accident, which resulted in the hitchhiker suffering severe head injuries. The court stated that an employee's task should be viewed broadly and not reduced to specific activities. Eskom was subsequently not found liable because the employee acted against instruction. Therefore the employee's act had no bearing on his employer's interest. Judge Hefer also took into consideration factors such as that the vehicle was clearly marked and that the passenger was under no illusion that he was in the vehicle without the consent of the owner or that a general duty of care was owed towards him by the owner.⁸⁴ The subjective state of the mind of the employee and the absence of an objective link between the employee's act in his own interest and the interest of the employer indicated to the learned judge that the employee exceeded the scope of employment.⁸⁵

The reluctance of our courts to find an employer vicariously liable for the intentional wrongdoing of his employee could be illustrated in the case of *Ess Kay Electronics v First National Bank of Southern Africa*⁸⁶. An employee of FNB, whose task involved the issuing of bank drafts, forged and stole two bankers' drafts. The appellant company suffered damage because the bank dishonoured the drafts. The legal question before the court was whether the employee acted within the course and scope of his employment when he stole and forged the drafts. The court held that the employee did not act within the course and scope of employment because "an act

83 *Bezuidenhout v Eskom* 2003 3 SA 83 (SCA) (hereafter referred to as the *Eskom case*).

84 Le Roux 2003 *International Law Journal* 1879-1882.

85 Le Roux supra 1880.

86 *Ess Kay Electronics v First National Bank of Southern Africa* 2001 22 ILJ 1070 (T) (hereafter referred to as the *Ess Kay Electronics case*).

done solely for the employee's own interest and purposes, and outside the employer's authority, is not done in the course and scope of employment, even if done during employment"⁸⁷. The court further stated that the *Rabie* case was incorrectly interpreted with regard to notion of risk creation, by confusing the standard test and the principle of risk creation.

In the case of *Costa da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy*⁸⁸ the judge cautioned against the term "frolic of his own"⁸⁹ when referring to the conduct of an employee that falls outside the scope of employment. The judge stated that an employer would not always escape liability by showing that an employee is on a "frolic of his own". The SCA held that the restaurant was not vicariously liable because the employee abandoned his duties before the assault occurred. The court stated the following:

It was a personal act of aggression done neither in furtherance of his employer's interest. Nor under his express or implied authority, not as an incident or in a consequence of anything Goldie was employed to do. The reason for and the circumstances leading up to the assault may have arisen from the fact that Goldie was employed by the restaurant as a barman, but personal vindictiveness leading to the assault on patrons does not render the employer liable.⁹⁰

As illustrated in the *Eskom* case, an employee can simultaneously be on a "frolic of his own" and be performing his duties. Le Roux states that the *Eskom* and *Costa da Oura Restaurant* cases illustrates that vicarious liability has a very narrow application and that it would not automatically follow all wrongful acts committed by an employee on duty.⁹¹ Calitz states that these cases illustrate the difficulty of accommodating cases of intentional wrongdoing under the Salmond rule, because acts done contrary to employers' interest and authority, could never find an employer vicariously liable under this out-dated rule.⁹²

87 *Ess Kay Electronic case* 1073.

88 *Costa da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy* 2003 24 ILJ 1337 (SCA). The facts of the case were that an employer operated a tavern and employed a person as a barman. The employee was instructed by his employer to treat customers with courtesy and not to get involved in incidents, report potential incidents to management and to refrain from situations resulting in altercations. Mr Reddy made comments about the employee's level of service, which the employee reported to management. Management instructed the employee to allow another barman to serve Reddy and not to involve himself with the situation. After Reddy left the restaurant the employee followed and assaulted him.

89 *Feldman case*.

90 *Costa da Oura Restaurant case* 1343.

91 Le Roux 1881.

92 Calitz 221.

The case of *ABSA Makelaars (Edms) Bpk v Santam Versekeringsmaatskappy Bpk*⁹³ illustrate the court's endeavour to reconcile the judgement of the *Ess Kay Electronics* case with the possibility that an employer may be held liable for the wilful wrongdoing of employees. This case related to two ABSA employees who stole investment money from their employer's clients. ABSA stated that they are vicariously liable to their clients and claimed the losses from SANTAM which insured them. The court examined the fraudulent transaction and found that a sufficiently close connection existed between the wrongful acts and employees' authorised acts.

The case of *Grobler v Naspers*⁹⁴ departed from the initial narrow interpretation of the requirement of "scope of employment". Mrs Grobler (employee) worked as a secretary to the production manager and the trainee manager. The employee alleged that she was sexually harassed by the trainee manager; where after the trainee manager was dismissed. The employee was harassed to such a degree that she suffered an emotional breakdown and could not continue working. The employee instituted a claim against her employer on the principle of vicarious liability. The court referred to the case of *Costa da Oura v Reddy*⁹⁵ in interpreting whether the acts of the trainee manager fell inside the scope of his employment. The court remarked that if it should follow the interpretation of *Costa da Oura* case, the acts of the perpetrator would fall outside the scope of employment. In finding the employer vicariously liable, the court stated that the strict application of the standard test should be done away with and that the risk of sexual harassment should be taken into consideration in establishing whether an employee acted within the scope of his employment.⁹⁶

The court held that if vicarious liability for the sexual harassment of an employee cannot be founded on the creation of risk, the Constitution obliges courts to establish liability. Reference was also made to the interpretation clause of the Bill of Rights and the court stated that the principle of vicarious liability should be interpreted to reflect the values of human dignity, equality and freedom.⁹⁷ Mrs Grobler led evidence which stated that the harm that she had suffered was caused by a specific incident

93 *ABSA Makelaars (Edms) v Santam Versekeringsmaatskappy Bpk* 2003 ILJ 1484 (T).

94 *Grobler v Naspers Bpk* 2004 4 SA 220 (C) (hereafter referred to as the *Naspers-case*).

95 *Costa da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy* 2003 24 ILJ 1337 (SCA).

96 Neethling, Potgieter and Scott *Case Book on Law of Delict* 1025.

97 Sec 39(1) (a) of the Constitution.

that occurred outside working hours at her flat.⁹⁸ Media 24 (Naspers) argued that the culprit employee did not act within the course and scope of his employment and therefore they could not be held liable.⁹⁹ The SCA subsequently found the employer directly liable and not on the principle of vicarious liability. It stated that an employer's common law duty to protect its employees against harm also included psychological harm caused by sexual harassment.¹⁰⁰ The employer (Media 24) thus had a legal duty to:

Protect and maintain a working environment in which, among other things, its employees were not sexually harassed by other employees in the working environment.¹⁰¹

The legal convictions of the community¹⁰² require an employer to take reasonable steps to prevent sexual harassment in the workplace and employees should be compensated if an employer negligently fails to do so.¹⁰³ It was also stated that if a statutory provision fails to protect an employee against harassment, the common law should be utilised and developed to do so. The failure of Media 24, according to the SCA, to "deal with the matter when the respondent reported it to him was culpable".¹⁰⁴ The failure of the manager to act and report the alleged harassment, according to Judge Farlam, held Media 24 "clearly vicariously liable".¹⁰⁵ Grogan states that Media 24 was liable despite the fact that the main act of harassment occurred outside the workplace and working hours. The reason he suggested was that management could have, through reasonable intervention, prevented the sexual harassment from escalating.¹⁰⁶ In the *Media 24* case the court therefore acknowledged the fact that an employer would only be held liable, if it was aware of the harassment, and did not take reasonable action in the preventing it.

98 The wrongdoer acknowledges that he visited the complainant's flat because he was interested in purchasing the property.

99 *Media 24 Ltd & another v Grobler* 2005 26 ILJ 1007 (SCA) (hereafter referred to as *Media24 case*).

100 *Media 24 case* par 62.

101 *Media 24 case* par 64.

102 *J v M Ltd* 1989 10 ILJ 755 (IC).

103 *Media 24 case* par 68.

104 *Media 24 case* par 70.

105 *Media 24 case* supra.

106 Grogan 238.

3.3.3 *The close connection test*

Occasionally employees' deviates from their duties, and in the process commits a delict. The close connection test entails the question whether a close link exist between the wrongful conduct of the employee and the business of the employer, or the nature of the employment. When interpreting the Bill of Rights, a court, tribunal or forum must promote the values imposed by the Constitution, must consider international law and may consider foreign law.¹⁰⁷ The Constitution provides for the inherent jurisdictions of courts to develop the common law in line with the interest of justice.¹⁰⁸ In developing the rules for vicarious liability, our courts have looked at the development in other common law countries such as England and Canada. The discussion that follows would indicate how the close connection test was developed by other common law countries.

3.3.3.1 Development of the doctrine of vicarious liability in common law jurisdictions

In the case of *Bazley v Curry*¹⁰⁹ a warden of a school for troubled boys sexually abused some of them. The Supreme Court of Canada had to answer the question as to whether the employer could be held liable for these acts. Judge McLaghlin stated that the question whether an employer should be held liable must be answered openly without obscuring the questions "beneath semantic discussions of scope of employment and mode of conduct".¹¹⁰ The court stated that the central question was whether the wrongful act is sufficiently related to conduct authorised by the employer to justify vicarious liability of the employer.¹¹¹ Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of risk and the wrongful act that occurs as a result thereof.¹¹² The court reasoned that in holding the employer liable, two policy considerations would be served. The first is that it would provide for an adequate remedy for the victims. It would also act as deterrence and encourage employers to take pro-active preventative steps in the prevention of wrongful acts committed by their employees.

107 Sec 39(1)(a) – (c) of the Constitution.

108 Sec 173 of the Constitution.

109 *Bazley v Curry* 1999 2 SCR 534 (hereafter referred to as the *Bazley case*).

110 *Bazley case* par 41.

111 In the *Bazley case* the employee had to take care of children physically, mentally and emotionally. Bathing children and tucking them in at bedtime was part of his duties.

112 *Bazley case* par 41.

Calitz¹¹³ criticised this Canadian approach and states that the liability of the employer would be too wide if risk is regarded as the basis for liability. The court did qualify its notion on the creation of risk by stating that if the wrong can only be “coincidentally linked to the activity of the employer” the employer may not be vicariously liable.¹¹⁴ In determining the “sufficiency” of the connection between the employer’s creation of risk and the wrong, the court considered relevant factors.

Also in the Canadian case of *Jacobi v Griffiths*¹¹⁵ children were sexually abused by an employee at his house and outside working hours. The court held that the employer was not vicariously liable because of an absence of a sufficiently close link between the wrongful deeds and employment of the employee. If the abuse took place at the youth club where the employee met the children, a sufficiently close connection would most probably have been established. In conclusion the court remarked that the vulnerability of the boys was a relevant factor but not the determining factor.¹¹⁶ Spafford states with reference to the *Bazley and Jacobi cases* that if the creation of risk is the only ground for vicarious liability, the basis of liability shifts from a vicarious liability to a direct liability of the employer.¹¹⁷ The activity itself, she states, should be the focus of liability. Therefore the creation of risk is not sufficient for imputing vicarious liability because “there must be a relationship between the risk created and the employee's duties”. The scope of vicarious liability goes beyond the traditional scope of employment because if liability finds an independent 'basis in the creation of risk by an employment enterprise', the liability would expand beyond the scope of employment.¹¹⁸ The scope of employment is circumscribed by the risk which is typical of that business.

In the case of *Lister v Hestley Hall*¹¹⁹ the warden of a school also sexually abused some of the boys.¹²⁰ The House of Lords also quoted the *Bazley case*¹²¹ and applied the close connection test. The court did not base its decision on the risk theory but

113 Calitz 2007 *STELL* LR 451 – 468.

114 *Bazley case* par 36.

115 *Jacobi v Griffiths* 1999 174 DLR (4th) 71 (hereafter referred to as the *Jacobi case*).

116 *Jacobi case* par 86.

117 Spafford *The Enterprise Risk Theory* 32.

118 Spafford *supra*.

119 *Lister v Hestley Hall* 2001 UKHL 22 (hereafter referred to as the *Lister case*).

120 The employee had to maintain discipline and supervise boys when they were not at school. The warden was the only member of staff and had to supervise the boys' morning and bedtime routine.

121 *Bazley case supra*.

simply required a close connection between the acts of the employee and the employment. Lord Steyn stated that the test referred to “factual closeness” and remarked as follows:

Here is a very close connection between the torts of the warden and his employment. After all, they were committed in the time and on the premises of the employer, while the warden was also caring for children.¹²²

Calitz further remarks that the close connection test as applied in the *Lister case*, which requires the wrongful act to have a close connection in relation to authorised acts, still illustrates a strict interpretation and does not give guidance on when the close connection requirement would be met.¹²³ There is little difference between authorised acts and risk posed by employment and the court would still need to take the employee’s duties of employment into consideration.¹²⁴

3.3.3.2 Development of the close connection test within the South African context

In the *Rabie case*¹²⁵ the court was confronted with the question as to whether the Minister of Police could be held vicariously liable in the case where an employee clearly deviated from his ordinary tasks¹²⁶ of employment. Judge Jansen held the Minister vicariously liable, despite the fact that the employee deviated from his tasks and reasoned as follows:

It seems clear that an act done by a servant solely for his own purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant’s intention.¹²⁷ The test in this regard is subjective. On the other hand if there is nevertheless a sufficiently close link between the servant’s acts for his own interest and purpose and the business of his master, the master may yet be liable. This is an objective test.¹²⁸

122 *Lister case* par 20.

123 Calitz 457.

124 Calitz 458.

125 The *Rabie case* facts related to the wrongful arrest, assault and detention of the plaintiff by a police mechanic in plain clothes and off-duty. The police mechanic subsequently acted in furtherance to his own interests. In addition the police officer identified himself as a member of the force, took the plaintiff to the police station, filled out a docket and wrongfully charged the plaintiff with wrongful arrest.

126 A police mechanic’s ordinary task would be to maintain and repair police vehicles.

127 *Estate Van der Bijl case* at 150.

128 *Rabie case* par 8.

Judge O' Reagan remarked in the ground-breaking *K case*¹²⁹ that the *Lister case* decided in the United Kingdom resembles similarities to the test developed in the *Rabie case*. The court also "grappled with the question" whether there is a close connection between the wrongful conduct of the employee, the business of the employer and the nature of the employment.¹³⁰ The Canadian court also used the same objective test that should be answered with reference to a range of factors. Judge O' Reagan stated that the jurisprudence used in the United Kingdom and Canada is of value in developing our principles of vicarious liability in general and the close connection test in particular.¹³¹

Judge O' Reagan determined that the test formulated in the *Rabie case* entails two questions.¹³² The first question asks whether the unlawful act, ie delict, was done for the sole purpose of the employee and requires a subjective consideration of the employee's state of mind. This question should be answered with reference to the factual evidence. If the answer is affirmative, the employer may still be found vicariously liable if the second question is found to be answered in the affirmative. The second question asks whether there is a sufficiently close connection between the employee's acts for his "own interest or purpose"¹³³ and the business of the employer.¹³⁴ This question though objective raises consideration of both fact and law. The question of law relates to "what is sufficiently close" to give rise to vicarious liability. In answering the question of law, regard must be given to the spirit, purport and objects of the Bill of Rights. The judge stated as follows:

If one looks at the principle of vicarious liability through the prism of section 39(2) of the Constitution,¹³⁵ one realises that characterising the application of common law principles of vicarious liability as a matter of fact untrammelled by any consideration of law or normative principle cannot be correct. Such an approach appears to be seeking to sterilise the common law test for vicarious liability and purge it of any normative or social or economic considerations.¹³⁶

129 *K case supra*

130 *K case par 44.*

131 *K case supra.*

132 *K case par 32.*

133 Deviated actions.

134 *K case par 32.*

135 Sec 39(2) of the Constitution states that a court, tribunal or forum, when interpreting legislation or developing the common law, must promote the spirit, purport and objects of the Bill of Rights.

136 *K case par 22.*

The principle of vicarious liability as a fact of law is “imbued with social policy and normative content”.¹³⁷ The court should decide, bearing in mind the constitutional values whether in principle the employer should be held liable. The court therefore used the *Rabie* case as a basis and incorporated constitutional norms and other norms into the test.¹³⁸ It should be noted that these constitutional norms should not offend other rights in the Bill of Rights but should pass the limitation clause.¹³⁹ In other words the question whether an innocent employer should be held liable is not only a question of fact but also involves questions of public policy.¹⁴⁰

In the case of *Minister of Safety v Luiters*¹⁴¹ it was found that if it could be established on facts, that an off-duty police officer, while committing a wrongful act, has put himself on duty, he would be acting within the scope of his employment for vicarious liability purposes. Judge Langa stated that it is unnecessary for a variation of the *K* case test in situations where police officers put themselves, through their actions, on duty. He also remarked the following with regard to employer control:

While vicarious liability is not based on the employer’s control over an employee, the level of control exercised by the employer will obviously be a relevant factor in determining whether there was a sufficiently close link between the conduct and the employment when considering the second stage of the test. The level of control is therefore already a relevant consideration. It does not seem necessary or desirable to elevate it to the status of a decisive factor which determines the test that applies.¹⁴²

With regard to employment risks the learned judge remarked as follows:

Variation to the rule, as suggested by the minister, would have the effect of lessening the emphasis on the responsibility of the minister to ensure that police officers are properly trained and carefully screened to avoid the risk that they will behave in a completely improper manner.¹⁴³

In the more recent case of *F v Minister of Safety and Security*¹⁴⁴ Judge Mogoeng stated that despite the fact that an employee’s deviated conduct is “great in respect of space and time” it would not necessarily mean that the employer would not be held vicariously liable. The employer should be held liable if a connection exists

137 *K* case supra par 22.

138 *K* case 44.

139 Sec 36 of the Constitution.

140 Grogan 239.

141 *Minister of Safety and Security v Luiters* 2007 28 ILJ 133 (CC)(hereafter the *Luiters* case).

142 *Luiters* case par 33.

143 *Luiters* case par 34.

144 *F* case supra.

between the unlawful conduct complained of and the business of the employer. The mentioned link must be “real” and a “sufficiently close one”.¹⁴⁵ This case concerned the brutal rape of a fourteen year-old girl by an off duty, but on standby, police officer while giving the victim a lift. The court stated that an important consideration with regard to the objective consideration of the two-stage test is whether a close connection exists between the wrongful conduct and the wrongdoer’s employment.¹⁴⁶ An “explicit recognition of the normative content” is required at this stage of the test.¹⁴⁷

Judge Moegeng reasoned that police officers have a constitutional duty to prevent crime and protect members of the public.¹⁴⁸ Everyone, according to the Constitution has a right to freedom of the person.¹⁴⁹ Vulnerable groups in general and women and children in particular should be especially protected.¹⁵⁰ The state must respect, protect, promote and fulfil the right in the Bill of Rights.¹⁵¹ Constitutional duties of police officers suggest that there is a normative basis for holding the state vicariously liable, even in the event of a of duty police officer that is on standby.¹⁵² The court also suggested that the fact that the victim trusted the police officer to fulfil his constitutional obligation created the connection between the wrongful act and the purpose of his employment.¹⁵³

In the *K* case it was stated:

The opportunity to commit crime would not have arisen but for the trust the applicant placed in them because they were policemen.¹⁵⁴

In both the *K* case and the *F* case it was submitted that the omission of protecting the victim, and the commission of the rape played an important role in finding the state vicariously liable.¹⁵⁵ The omission and commission was seen within the context of the police officer’s constitutional duty. The commission of the unlawful act is

145 *F* case par 48.

146 This principle was originally adopted in the *K* case.

147 *F* case par 50.

148 Sec 205 of the Constitution.

149 Sec 12 of the Constitution.

150 *Carmichele v Minister of safety and Security (Centre for Applied Legal Studies Intervening)* 2001 10 BCLR 995 (CC).

151 Sec 7(2) of the *Constitution*.

152 *F* case par 61.

153 *F* case par 62.

154 *K* case par 57.

155 *F* case par 70.

relevant in establishing the close connection between committing the act and the nature of the employment. In other words the fact that the employee was a police officer provided him with the necessary means to commit the crime. The omission relates to the extent that the police officer failed to protect the victim from harm.¹⁵⁶ Therefore the F case has shifted the focus of deviation case from whether the employee acted within the scope of his employment to whether the connection between the conduct of the employee is sufficiently close to their employment in finding the employer vicariously liable. A normative dimension with regard to Bill of Rights is added in establishing the connection. In the *F- and K* cases this was done with reference to the constitutional duty on the police to prevent crime and protect members of the public.

Wagener¹⁵⁷ criticises the K decision by asking: What role does a breach of an employer's own duties play in determining its delictual liability? He states that the Constitutional Court confused personal and vicarious liability and remarks as follows:

A breach of an employer's duties, in this case the state's alleged constitutional ones, can only affect its personal liability. The breach of its duty cannot make any difference to its vicarious liability, which is concerned with the duties of the tortfeasant employee; that is her delictual duties and her employment duties. Her delictual duties define whether she acted wrongfully; a finding of which being necessary condition for liability (and her liability being necessary condition for her employer's vicarious liability). Her employment duties define the course and scope of her employment, within which her delict needed to be in order to hold her employer vicariously liable.¹⁵⁸

Defining the course and scope of an employee's employment should be done with reference to the employment contract and the nature of the wrongful acts. Furthermore, the suggestion of Judge O' Reagan that certain types of infringements (such as those perpetrated against women and children – *Carmichele* case) would affect the degree of closeness between the wrongful act and the scope of employment, does not make sense. This principle could be enlightened by the example of a driver causing an accident, and stating that damage to another vehicle is further outside the scope of an employee's employment and arguing a bodily injury

156 *F* case par 71.

157 Wagener 2008 SALJ 673-680.

158 Wagener 675.

to a person is closer to the scope of employment. Wagener states that the principle of course and scope of employment should “yield the same outcome”.¹⁵⁹

3.4 Relevant Factors

In determining whether an employee had acted within the scope of employment, regard must be given to certain factors that our courts have taken into consideration in finding employers vicariously liable. The two-stage test as adopted in the *Rabie* case and confirmed by the *K and F* cases, requires factual evidence in establishing the state of mind of the employee in relation to his deviated actions and establishing a close connection with regard to the purpose of employment.¹⁶⁰ As stated the first question is a subjective, based on facts and the second question objective that raises both questions of fact and law. In the *K* case it is obvious that the police officers did not rape the victim on an instruction from their employer ie the state. In viewing the rape subjectively with regard to their instructions and duties, the employees, ie police officers, acted for their own interest. In establishing whether a closeness existed between the unlawful conduct which amounted to rape and the purpose of their employment, certain facts were taken into consideration. The policemen had a constitutional duty to protect members of the public and prevent crime and this was also the reason why they were employed by the state. The police officers were dressed in full uniform and driving a marked police vehicle, therefore they were identified as police officers as a result thereof. Being identified as members of the police, the victim entrusted her safety to the police officers. The court found that even though it is a standing order for police officers not to transport members of the public, it is not a determining factor, but a relevant factor in considering a close connection.¹⁶¹

In establishing a close link in the *F* case considerable weight was given to the fact that the victim had trusted the police officer in giving her a lift. The police officer was not in uniform and driving an unmarked police vehicle.¹⁶² The victim made a deduction from a police radio and dockets in the vehicle that the employee was in

159 Wagener 677.

160 *K* case par 45.

161 *K*-case par 55

162 *F*-case par 81.

fact a police officer; in other words, identified him as a police officer. The victim's deduction that the employee was in fact a policeman reinforced her trust and therefore enabled the employee to commit the crime.¹⁶³

In the *Rabie case*, the court also took factors such as that the police mechanic identified himself as a police officer, the personal opening of a docket and the fact that the employee police mechanic took the claimant to the police station himself, as relevant factors in determining liability.¹⁶⁴

The court stated in the *Naspers case*¹⁶⁵ that a number of factors enlarge the risk of sexual harassment in the workplace, particularly between a secretary and a manager. The court stated the following factors which enlarges the risk for sexual harassment between employees as follows:

- The risk is enlarged in situations where the nature of the relationship is more intense for example between a secretary and manger;
- If employees spent more time together;
- If employees are working in a more physical environment in relation to each other, for example in the same office;
- Whether the employee acts within a group or normally performs her task on a more individual basis;
- Whether the employee is more defenceless against criticism and/or harassment;
- The nature of the job with regard to the question whether an employee can be caught up in their job to which they cannot escape.
- That the work environment increases the possibility of sexual advances.¹⁶⁶

In the *Bazley case*, the following factors were listed by the court, which indicate that the risk for the commitment of a wrongful act by an employee is enlarged:

- The opportunity that the enterprise afforded to the employee to abuse his or her power;
- The extent to which the wrongful acts may have furthered the employee's aims;

163 *F-case* par 81.

164 *Rabie-case* supra.

165 *Naspers-case* supra.

166 *Naspers case* par 296-297.

- The extent to which the wrongful acts was related to friction, confrontation or intimacy inherent in the enterprise;
- The difference in power conferred upon the employee and victim;

The *Eskom* case took into consideration factors such as that a vehicle was clearly marked and that an employee was acting contrary to an instruction into consideration in finding that an employer is vicariously liable. Also in the *Costa da Oura* case, the court considered the fact that an employee acted contrary to an instruction of his employer, when he assaulted a patron, as a relevant factor in determining the employer's liability

The following factors were therefore taken into consideration in determining a close connection between the wrongful acts of the employee and his employment

1. Constitutional and statutory obligations imposed on the employer.
2. The extent of the control exercised over the employee that commits the delict.
3. The notion of trust created and the extent to which this enabled the employee to commit the wrongful act.
4. The extent to which employer assets enabled the employee to commit the delict.
5. Creation of risk.

4 Statutory vicarious liability

The purpose of the EEA is to achieve equality within the workplace.¹⁶⁷ No employee may be unfairly discriminated against on a direct or indirect basis in any employment policy or practice, on the grounds of race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.¹⁶⁸ An "employment policy or practice" is defined to include recruitment procedures, appointment processes, job classification, remuneration, job

¹⁶⁷ Sec 2 of the EEA.

¹⁶⁸ Sec 6(1) of the EEA.

assignments, working environments and facilities, training, performance evaluation, promotion, transfer, demotion, disciplinary measures other than dismissal and dismissal.¹⁶⁹ Applicants of employment are for unfair discrimination purposes, also included in the definition of an employee.¹⁷⁰ In the case of *Piliso v Old Mutual Life Assurance*¹⁷¹ the Labour Court held that where the identity of a perpetrator or stalker is unknown, the employer could not be held vicariously liable in terms of the common law or the EEA. The harassment of an employee on one of the listed grounds is a form of unfair discrimination. Most of the case law referred to below concerns matters of sexual harassment within the workplace, principles drawn with regard to employer liability is equally valid in respect of all forms of unfair discrimination.

4.1 Harassment

The EEA does not contain a definition of harassment except in the case of sexual harassment where a definition is contained in terms of a Code of Good Practice.¹⁷² *The Promotion of Equality and Prevention of Unfair Discrimination Act*¹⁷³ defines harassment as

Unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual threatened adverse consequences and which is related to

- (a) Sex, gender or sexual orientation, or
- (b) A persons membership or presumed membership of a group identified by one or more prohibited grounds or a characteristic associated to such group

Grogan states that it is not clear why the legislature expressly defined harassment as a form of unfair discrimination because harassment can clearly be described as a “practice”.¹⁷⁴ He further states that harassment does not always involve discrimination and therefore the legislature tried to counter claims by employers that harassment of employees does not resort under the prohibition against unfair

169 Sec 1 of the EEA.

170 Sec 9 of the EEA.

171 *Piliso v Old Mutual Life Assurance Co (SA) Ltd & others* 2007 28 ILJ 897 (LC).

172 Code of Good Practice on the Handling of Sexual Harassment Cases Gen Not 1367 in GG19049 of 17 July 1998. The Code identifies three broad forms of sexual harassment which include victimization, quid pro quo harassment and hostile work environment harassment.

173 *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (hereafter referred to as PEPUDA).

174 Grogan 232.

discrimination. Before harassment was included in the EEA, the only option that was left to harassed employees was to resign and claim constructive dismissal.¹⁷⁵

The case of *Ntsabo v Real Security CC*¹⁷⁶ was the first case of sexual harassment that was heard under the EEA. The Labour Court found that an employee was sexually harassed by one of her superiors and that the incidents were reported to a supervisor on numerous occasions. This situation eventually led to the resignation of the employee. The employee claimed for an automatic constructive dismissal and for damages for pain and humiliation and medical expenses. Instead of relying on common law vicarious liability against the employer, Ntsabo used statutory liability in terms of section 60 of the EEA to obtain damages. Ntsabo could not claim for automatic unfair dismissal, the court reasoned, because the dismissal itself could not be link to the definition of discrimination in the LRA.¹⁷⁷ The court found that the offending superior's conduct constituted a contravention of the EEA because his conduct amounted to a contravention of section 6(3) of the EEA¹⁷⁸ which in turn meant that the employee was subjected to unfair discrimination. The employer's failure to consult and take reasonable steps to eliminate the harassment amounted to a contravention of section 60(2) of the EEA.¹⁷⁹ Damages were awarded to Ntsabo because the employer breached an obligation to assist and she proved that the failure to assist was casually linked to the damage that was suffered.¹⁸⁰

4.2 Section 60 of the EEA

Section 60 of the EEA creates a form of statutory vicarious liability by stating that:

1. If it is alleged that an employee or an employee's employers "while at work" contravened any provision of the EEA, the alleged conduct must immediately be brought to the attention of the employer.¹⁸¹
2. The employer must consult all relevant parties and must take necessary steps to eliminate the alleged conduct in line with compliance with the EEA.¹⁸²

175 Grogan 233.

176 *Ntsabo v Real Security* 2003 24 ILJ 2341 (LC).

177 Grogan *Workplace Law* 117.

178 Sec 6(3) of the EEA states that harassment is a form of unfair discrimination.

179 Sec 60 (2) of the EEA.

180 Whitcher 2004 *ILJ* 1907-1924.

181 Sec 60(1) of the EEA.

3. If the employer fails to take the necessary steps to eliminate the conduct that contravenes the EEA, and the alleged conduct is proven, the employer would be deemed to be in contravention of the EEA.¹⁸³
4. An employer would not be liable in terms of the EEA, if it could prove that it took “reasonably practicable” steps to eliminate and prevent contraventions of the act.¹⁸⁴

An employer therefore is rendered liable if one of its employees contravenes a provision of the EEA while at work in respect of another employee and if there is a failure, namely that this conduct is brought to the attention of the employer who fails to take the necessary steps. It could be drawn from the provision of section 60 of the EEA that certain elements must be present or certain requirements should be met before employers may be held liable. Taking into consideration the scope of this study, certain relevant requirements will be discussed under the following: (a) Contravention of the EEA “while at work”; (b) Failure to take necessary or reasonably practicable steps to eliminate or prevent contravention; (c) Employment policy or practice

4.2.1 Contravention of the EEA “while at work”

Contravention of the EEA is a wide concept that may include any of the provisions of the Act. In this context it would normally refer to unfair discrimination as contemplated in section 6 of the EEA.¹⁸⁵ Most of the cases involving statutory vicarious liability of employers relate to unfair racial discrimination or sexual harassment. It is therefore appropriate to draw a distinction between common law vicarious liability of employer’s and statutory vicarious liability. Common law vicarious liability is based on the principle of delict, committed by an employee, who acts within the course and scope of his employment, despite preventative measures that might have been taken by the employer. Common law vicarious liability states that an employee should act within the scope of employment opposed to the EEA that states that the conduct should be committed “while at work”. Le Roux states that

182 Sec 60(2) of the EEA.

183 Sec 60(3) of the EEA.

184 Sec 60(4) of the EEA.

185 Sec 6(1) of the EEA list grounds for unfair discrimination.

the concept of “while at work” is “location-based” rather than the common law notion which is “activity based”.¹⁸⁶ She remarks that the conduct must occur “while at work” irrespective of whether the conduct occurs during the course and scope of employment.¹⁸⁷ Dupper and Garbers states that the use of the phrase “while at work” should be seen as a clear indication from the legislature to depart from the narrow application of the common law requirement “within the scope of employment”. The use of the word “at” indicates:

- A geographical dimension such as a physical presence within the workplace.
- A temporal dimension for example activities done on the employer’s time.
- An employment dimension such as activities done in terms of a contract of employment.¹⁸⁸

It is suggested that the primarily focus of common law vicarious liability is on the employment dimension whereas the concept of “while at work” is wider where mere presence in the workplace or consumption of the employer’s time would be enough”.¹⁸⁹ In the case of statutory vicarious liability the determining factor is not the close connection between the unlawful conduct and the requirements of the job.¹⁹⁰

In the case of *Biggar v City of Johannesburg, Emergency Management Services*¹⁹¹ a black fireman was subjected to continued racist abuse by his colleagues, at a residential complex under the employer’s control. The employee instituted a claim in terms of section 6 of the EEA for unfair discrimination. The fundamental question was whether the employer could be held liable in terms of section 60 of the EEA. The central question the court had to establish was whether the employer took the necessary steps to eliminate the harassment suffered by the employee, after it came to the employer’s attention. The employer had taken some steps to eliminate the racial hostility within the workplace by issuing warning notices and attending to

186 Le Roux 2006 *Obiter* 411 – 428.

187 Le Roux *supra* 414.

188 Dupper and Garbers “*The Prohibition of Unfair Discrimination*” 54.

189 Dupper *supra*.

190 Dupper *supra*.

191 *Biggar v City of Johannesburg Emergency Management Services* 2011 6 BLLR 577 (LC) (hereafter referred to as the *Biggar case*).

incidents as they occur.¹⁹² The employer's inconclusive response to a systematic pattern of racial abuse was according to the court, not adequate.

The court went further to examine whether the employer may escape liability on the basis that the harassment took place outside the workplace. Judge Legrange states as follows:

It might be argued that, in the strict sense, the harassment by the applicant's fellow employees did not take place when they were at work. However, in my view, it would be an extraordinarily narrow interpretation of the provision of section 6 of the EEA if it were to exclude conduct between fellow employees committed at the common residential premises provided by the employer and attached to their workplace merely because they were not on duty at the time the particular incidents occurred.¹⁹³

The judge stated that courts have in the past taken the view that employees might be subjected to disciplinary action if the conduct has a bearing on the employment relationship.¹⁹⁴ The court stated that the residential circumstances of the wrongdoers and the employee, was so closely linked to their employment as emergency personal that, for all intents and purposes, they remained at the workplace when they were off-duty at their residences on the employers premises.¹⁹⁵

The court's granting of an "appropriate order" that is "just and equitable" in the *Biggar* case is also worth mentioning.¹⁹⁶ The employee claimed the primary relief of being transferred to another department. The court stated that the transfer of the employee would not resolve the root cause of the problem, ie unfair discrimination within the workplace.¹⁹⁷ Therefore the court ordered as follows:

- The employer must pay 2 months' compensation to the employee because of the employer's failure to protect the employee against harassment;
- The employer must pay 1 month's compensation to the employee because the employer only disciplined the applicant for participating in a fight but failed to discipline his white antagonist colleagues;

192 *Biggar* case par 19. The court stated "the only reasonable conclusion that may be drawn is that the employer was essentially reluctant to deal with the real issues and matters were allowed to fester unresolved".

193 *Biggar* case par 20.

194 *Hoescht (Pty) Ltd v Chemical Workers Industrial Union* 1993 14 ILJ 1449 (LAC). Animosity between colleagues who may be subjected to emergency situations is not an ideal circumstance.

195 Freund A, Le Roux P and Thompson C *Current Labour Law* 112.

196 Sec 50(2) of the EEA.

197 *Biggar* case par 24.

- Review of all current available posts for which the employee qualifies and to give him the opportunity to apply for such vacant posts;
- Employer must investigate all new complaints of racial harassment and initiate disciplinary action;
- Employer must initiate immediate disciplinary action for alleged violence that occurred within the workplace
- Employer must pay the employee's cost on an attorney and own client scale.¹⁹⁸

4.2.2 Failure to take reasonable or practicable steps

Section 60(4) of the EEA is aimed at encouraging employers to do as much as possible to eradicate unfair discrimination within the workplace. Le Roux states that:

There comes a point when a diligent employer should be rewarded for its efforts to prevent discrimination and not be held liable for the discriminatory conduct of its employees.¹⁹⁹

It would be attempted to draw a framework as to when a diligent employer would escape liability by taking reasonable and practicable steps. Therefore it should be noted that there are limits to the extent that employers are held vicariously liable for contraventions of the EEA. In the case of *Martins v Marks & Spencer PLC*²⁰⁰ the United Kingdom Court of Appeal refused to hold an employer liable for discrimination because of the preventative measure the employer had taken.

The necessary measure required from an employer, to escape liability, varies on a case to case basis. The case of *SA Transport & Allied Workers Union on behalf of Finca v Old Mutual Life Assurance*²⁰¹ illustrates the dangers of failing to take summary action against employees guilty of harassing others. An employee complained about having to work near to black colleagues to her manager, while using derogatory language.²⁰² After the employees manager had given her a verbal warning, the black employees' union complained about the outcome of the

198 *Biggar case* par 31.

199 Le Roux 413.

200 *Martins v Marks & Spencer PLC* 1998 IRLR 326.

201 *SA Transport & Allied Workers Union on behalf of Finca v Old Mutual Life Assurance CO (SA) Ltd & Another* 2006 27 ILJ 1204 (LC)(hereafter refer to as *Finca case*).

202 The K- word was used.

disciplinary action. Subsequently the employee was dismissed²⁰³ but the decision was overturned²⁰⁴ on appeal by a senior manager. The union approached the Labour Court, claiming that the conduct of the employee and Old Mutual amounted to discrimination, and therefore claimed that the overturning of the dismissal be set aside, compensation be paid and a directive be issued by the court, ordering compliance with the EEA. The court subsequently awarded compensation. Judge Revelas was clearly critical towards Old Mutual's efforts to minimise the incident. The court concluded that the employee's remarks and Old Mutual's delay in taking action against the employee amounted to direct discrimination.

It should be stated that even though the employee uttered a racist remark, it is doubtful whether it would constitute unfair discrimination in terms of section 6(1) of the EEA. Section 60 in this case would only be triggered by the application of section 6 of the EEA. A single racist remark could in my view not be regarded as an employment policy or practices. The conduct was clearly in contravention of the employer's policy and practice. Furthermore taking into consideration the definition of harassment, it is conceivable that the employee's actions may be regarded as harassment in the sense that it created a hostile working environment.²⁰⁵ Judge Revelas remarks as follows with regard to the steps taken by Old Mutual:

The first respondent led undisputed evidence that it has done much by way of training and other means, to eradicate racism. The undisputed evidence was that there was no lack of training in this particular area of human relationship within the first respondent. It was the response to such training which was the problem in this matter. Some mind-sets would not respond to training. Swift disciplinary action and damages or compensation as punitive measures, should be imposed when training has failed as it did fail in this case.²⁰⁶

Therefore it should be stated that Old Mutual was not held liable because of the reasonable practicable steps they took in eliminating discrimination. They were held liable for their sluggish disciplinary response to the complaint. The judgement does not provide further guidelines as to what the extent of reasonable practicable steps should be with regard to the measures that should have been taken by the employer.

203 Old Mutual only intervened with disciplinary action after a period of six months.

204 The reason the manager overturned the dismissal was based on the principle of double jeopardy.

205 Le Roux 423.

206 *Finca case* par 44.

In the case of *Mokoena & Another v Garden Art*²⁰⁷ the court drew a distinction between claims for damages for sexual harassment in terms of the common law and the EEA. An employer may not be held liable in terms of the EEA unless the employer failed to take reasonable steps to halt the harassment. The court held that the employer may not be held liable for a single incident of harassment because it could not have been prevented by the employer. Even though the employer failed to adhere to the provisions of the Code of Good Conduct on Sexual Harassment, it did follow a grievances procedure where after no further incidents of sexual harassment took place.

Also in the case of *Potgieter v National Commissioner of the SAPS*²⁰⁸ the court had to decide whether an employer had done enough to escape liability in terms of the EEA. The claimant was kissed by a colleague and the incident was reported to management. The offending officer was fined and the victim employee was transferred to another department at her request. The employee resigned and claimed that she suffered post-traumatic stress because of the incident and the way in which it was handled. The court noted that the offending employee was disciplined and warned. The court expressed its reluctance to interfere in the disciplinary processes and said that it was not up to the court to second guess the decision of the employer. The judge found that it would have been advisable to suspend or transfer the offender but no fixed rule existed. The court therefore concludes that the employer had fulfilled its obligation under the EEA.

In the case of *Mokone v Sahara Computers*²⁰⁹ the court held an employer liable because of the inadequate response of a manager in handling a complaint of harassment by an employee. The court reasoned as follows:

In my view the fact that her complaint to the manager did not adequately address the sexual harassment, grounds an inference that the defendant's management and disciplinary structures were insufficient to do so. Put differently, the defendant should have had management and disciplinary structures that would immediately

207 *Mokoena & another v Garden Art (Pty) Ltd & another* 2008 29 ILJ 1190 (LC). (hereafter *Mokoena case*).

208 *Potgieter v National Commissioner of the South African Police Services & others* 2009 30 ILJ 1322 (LC). (hereafter the *Potgieter case*).

209 *Mokone v Sahara Computers (Pty) Ltd* 2010 31 ILJ 2827 (GNP) (hereafter referred to as the *Mokone case*).

and effectively have dealt with the plaintiff's complaint. For instance, Stenekamp should have been obliged immediately to have referred the complaint to HR.²¹⁰

All of the abovementioned cases illustrate that employers should deal with complaints of unfair discrimination in an immediate and strong manner. The employer's conduct preceding acts of discrimination would be scrutinised by our courts to establish whether employers had taken reasonable preventive steps. The point of departure would be to establish whether a clear policy is in place. Le Roux states that the mere existence of a policy is not sufficient.²¹¹ Policies should be communicated to employees, including the consequences that may be suffered if these policies are breached. The level of compliance would also differ between small and larger employers. The threshold set for larger employers would be a lot higher and should be evidenced in:

- Continuous training;
- Awareness campaigns;
- Monitoring the effect of training and the impact it has on the attitude of employees in respect of the level of compliance.
- Policies with regard to unfair discrimination and harassment should be clearly defined, specifically with regard to the grievances procedures. The rules of natural justices should be incorporated in the employer's approach.²¹²

4.3 Cause of Action

A distinction should be drawn between direct and vicarious liability of employers for unlawful acts of their employees. Le Roux states that it is clear that section 60 (3) of the EEA imposes liability on the employer, not because of the commitment of the acts of discrimination itself but because of the employer's failure to address equity in the workplace.²¹³ The employer is therefore held liable on a direct basis and not on a statutory vicarious basis. An employee being harassed at work could therefore institute a claim based on delict on the following grounds:

210 *Makone case* 2827.

211 Le Roux 425.

212 Le Roux 427.

213 Le Roux 414.

- Vicarious liability based on the unlawful conduct of the perpetrator employee. An example hereof would be the *Naspers case*.²¹⁴
- Direct liability based on the negligence of a manager in handling the complaint. An example hereof would be *Media 24 case*.²¹⁵
- Direct liability based on the negligence of management in handling complaints because of inadequate disciplinary and management structures. Example hereof would be the *Makone case*.²¹⁶

Calitz states that an employer may only be held liable, for the actions of managers, if the manager were acting as a "directing mind" of the employer, in terms of law of contract and commercial law principles.²¹⁷ It is therefore required in terms of commercial law principles that the manager must be on the highest level to hold the enterprise liable.²¹⁸ A junior manager with management functions was held to be the "directing mind" in the *Media 24 case* where the employer was held liable for the failure of a manager to deal with a case of sexual harassment complaint. In the case of *Tesco Supermarkets Ltd v Natrass*²¹⁹ the House of Lords decided that a negligent act of a manager of a branch of Tesco did not hold the employer liable because he was not acting as the "directing mind". Lord Reid explained the principle of "directing mind" as follows:

I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intention. A corporation has none of these; it must act through living persons, though not always the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company being vicariously liable. He is not acting as a servant, representative or agent. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability can only be a statutory or vicarious liability.²²⁰

Hence the "directing mind" should be someone that is the final decision maker of a certain department of an enterprise. Calitz states that the conclusion reached in the

214 *Naspers case* 489.

215 *Media-24 case* at par 73.

216 *Makone case* supra.

217 Calitz 2011 SA MERC LJ 287.

218 Benade et al *Ondernemingsreg* 146.

219 *Tesco Supermarkets Ltd v Natrass* 1971 UKHL 1 (HL)(hereafter referred to as the *Tesco case*)

220 *Tesco case* at 3.

*Media 24 case*²²¹ was clearly wrong in finding the employer directly liable because no evidence was led with regard to whether the manager was negligent or the directing mind of the company.²²² The appropriate cause of action should have been based on the vicarious liability principle.

The employer in the *Makone case*²²³ was also held directly liable because of inadequate management and disciplinary structures. This decision was reached without hearing evidence as to what extent these structures were inadequate. The court made an inference based on the omission of the manager to report the incident that the structures were inadequate. Again Calitz remarks that it would have been easier to base the action in the *Makone case* on vicarious liability.²²⁴ Therefore it should be stated that a distinction should be drawn between cases where a manager operated as the 'directing mind' of the company and those claims where the employer is held liable for inadequate structures within the company context. The distinction would assist both employers and employees to clarify their burden of proof and the evidence required to prove a case. This would entail that both employers and employees must formulate their claims and defences after a proper cause of action has been identified.

5 Occupational injuries and diseases.

COIDA defines an "accident" as arising out of or in the course of employment and causes personal injury.²²⁵

5.1 Arising "out of or in the scope of employment"

Grogan states that the principles that have been distilled in the cases for vicarious liability, specifically with regard to the requirement that an employee should act

221 *Media 24 case* supra.

222 Calitz 288.

223 *Makone case* supra.

224 Calitz 289.

225 Sec 1(i) of COIDA.

within the scope of employment, are equally applicable in terms of COIDA.²²⁶ Benjamin states that COIDA covers accidents that:

- Arises out of; and
- In the course of

the employee's employment.²²⁷ "Arising out of" is the wider of the two concepts. An accident arises out of employment if it has a broad casual connection to employment.²²⁸ This requirement is similar to the requirement "while at work" in terms of the EEA. An accident occurs in the course of employment while an employee is performing duties that he or she is contractually obliged to perform.²²⁹ Ancillary actions to employment may be considered to be in the course of employment²³⁰, unless the employee removes himself from the course of his employment by abandoning his duties.²³¹

In the case of *Minister of Justice v Khoza*²³² the court found that a police officer, who negligently shot a colleague, while playing around with a service pistol, was acting in the scope of his employment. However, in the case of *Twalo v Minister of Safety and Security*²³³ a police officer intentionally shot a colleague after been taunted about an extra marital affair. The court found that the employee did not act within the scope of his employment despite the fact that he was on duty. In light of the discussion of the *F-case*; it is debatable whether this decision is correct. Also in the case of *Gunter v Compensation Commissioner*²³⁴ the court found that the commissioner erred in his finding that an employee did not act within the scope of his employment. The employee, a farm manager, was involved in an accident while collecting parts for a combine harvester. Above-mentioned discussion on vicarious liability illustrates the wide application of the requirement that an employee should act within the scope of his employment.

226 Grogan 276.

227 Thompson and Benjamin *SA Labour Law* at H13.

228 *Minister of Justice v Khoza* 1966 1 SA 410 (A). Judge Williamson said that an accident arises out of employment where "it was the actual fact that he was in the course of his employment that brought the workman within the range or zone of the hazard giving rise to the accident causing injury".

229 *Leemhuis & Sons v Havenga* 1938 TPD 524 at 526.

230 For example by having a meal.

231 *Johannesburg City Council v Marine and Trade Insurance CO Ltd* 1970 1 SA 181 (W).

232 *Minister of Justice v Khoza* 1966 1 SA 410 (A).

233 *Twalo v Minister of Safety and Security & another* 2009 30 ILJ 1578 (CK).

234 *Gunter v Compensations Commissioner* 2009 ILJ 2341 (O).

In the case of *Nsabo v Real Security*²³⁵ the court found that an employee being sexually harassed could not claim in terms of COIDA because both the employee and perpetrator was not acting within the scope of employment.²³⁶ In the *Media 24 case*²³⁷ Judge Farlam stated the following in an obiter regarding compensation:

It may well be that employees who contract a psychiatric disorder as a result of acts of sexual harassment to which they are subjected in the course of their employment can claim compensation under section 64 (ie for an occupational disease) but those are not the facts of this case and I need no opinion thereon.²³⁸

COIDA further states that if an accident occurs during the transport of employees, and such vehicle is provided by the employer or driven by an employee, the accident would be seen as arising out of or in the scope of employment.²³⁹ Our courts give the notion of “course and scope of employment” a wide application when applying it to employees travelling in vehicles owned by their employers.²⁴⁰ The performance of emergency services and training associated thereto is also included in the requirement for scope of employment in terms of COIDA.²⁴¹

Olivier²⁴² makes an interesting observation with regard to the traditional definition of employees²⁴³ and the scope of their employment in respect of the scope of application of COIDA. He states that the definition itself of employees and changing patterns of informal workers, especially within the developing world, exclude a large portion of workers from protection for accidents arising out of or in the course and scope of employment. An innovative, principled approach is needed in establishing a new statutory and policy framework in terms of which there is a “definitional and conceptual widening” of the traditional concept of employee and the scope of their employment. This approach has been echoed in vicarious liability and statutory vicarious liability cases of employers in recent developments.

235 *Ntsabo case supra*.

236 Grogan 278 states that this decision is probably not correct in light of the *K-case*.

237 *Media-24 case supra* at 27.

238 *Media-24 case* at 27.

239 Sec 22(5) of COIDA.

240 Grogan 278. Also see *MEC, Department of Public Works, Eastern Cape v Falstein* 2005 26 ILJ 49 (SCA).

241 Sec 25 of COIDA. Provided that the actions are performed with the employers consent.

242 Olivier 2007 *Obiter* 418 – 438.

243 Sec 1(xviii) of COIDA states that an employee means a person who has entered into a contract of employment and includes casual worker, directors, employees of labour brokers and deceased employee’s dependents. The definition excludes members of the SANDF, SAPS, independent contractors and domestic employees.

5.2 Exclusion of liability

Section 35 of COIDA²⁴⁴ states that an employer may not be held liable for an occupational injury sustained or disease contracted by an employee.²⁴⁵ A third party may be held liable by an employee for an occupational injury or disease.²⁴⁶ COIDA therefore provides complete indemnity to employers for all injuries sustained or illness contracted in relevant circumstances.²⁴⁷ In the case of *Jooste v Score Supermarket Trading*²⁴⁸ the Constitutional Court confirmed the constitutionality of section 35 of COIDA. An employee brought a common law claim against her employer based on delict. The employer argued that the employee was barred from instituting a claim because of the prohibition imposed by section 35 of COIDA. The employee contended that section 35 infringed on her constitutional rights to equality, fair labour practices and access to the courts. The Constitutional Court stated that there was a connection between the provision and a legitimate government purpose. It further held that the differentiation between employees and non-employees (who have a claim in terms of the common law) did not amount to unfair discrimination. Rycroft²⁴⁹ criticises the fact that employees are compelled to be compensated in terms of section 56 of COIDA²⁵⁰ notwithstanding that the reality that their employers were negligent. He adds:

The Act thus effectively serves to insulate the negligent employer from the full delictual consequence of that negligence.²⁵¹

In the case of *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck*²⁵² the SCA stated that employees rendering services to an employer other than own employer may still sue the employer to whom they are rendering services for damages.

244 Sec 35 of COIDA.

245 Sec 35 (1) of COIDA.

246 Sec 36 of COIDA.

247 Grogan 285.

248 *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 2 SA 1 (CC).

249 Rycroft A 2004 *South African Journal of Criminal Justice* 141-157.

250 S56 of COIDA., The only sanction that an employer may suffer is a higher assessment as decided by the Commissioner.

251 Rycroft 147.

252 *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 28 ILJ 307 (SCA).

Employers in die mining sector are also indemnified against common law claims for occupational injuries and diseases.²⁵³ In the recent case of *Mankayi v AngloGold*²⁵⁴ the applicant Mr Mankayi contracted tuberculosis and chronic obstructive airways diseases while working in a mine of the respondent. These diseases rendered the applicant unable to work. The applicant claimed compensation which amounted to R16 320 under the ODIMWA²⁵⁵. Applicant instituted a delictual claim against respondent because they breached their legal duty of providing a safe working environment because he was exposed to harmful dust and gases in the workplace.²⁵⁶ Anglo raised an exception to the applicant's claim stating that section 35 of COIDA barred him from instituting a claim. Applicant stated that section 100(2) of ODIMWA excluded him from claiming compensation in terms of COIDA and that section 35(1) of COIDA did not apply. High Court and the SCA upheld Anglo's exception. The court found that because ODIMWA preclude a claim under COIDA, section 35 of COIDA does not apply. Therefore it is decided that the applicant may institute a delictual claim against his employer. The employee should still have to prove negligence and the quantum of the claim against the employer.

6 Recommendations

The common law requirement, which states that "an employee should act within the scope of his employment" to find his employer vicariously liable, has initially been interpreted by our courts in terms of the Salmond rule.²⁵⁷ An employee, according to the rule, was not acting within the scope of employment, if these wrongful actions or conduct was against the employer's instruction or interests. The *Rabie* case developed the standard test to include deviated actions of employees. The *K* case formally introduced the close connection test into the common law principle of vicarious liability. If a close connection between the deviated actions of an employee and the purpose or nature of his employment may be established by certain factual evidence, an employee may be found to be acting within the scope of his

253 S100 in *Occupational Diseases in Mines and Works Act* 78 of 1973 (hereafter referred to as ODIMWA).

254 *Mankayi v AngloGold Ashanti Limited* 2011 5 BCLR 453 (CC).

255 S100 of ODIMWA

256 Applicant claimed damages of R2.6 million.

257 Refer to the *Eskom* case and *Costa da Oura* case.

employment.²⁵⁸ The requirement “scope of employment” has therefore been given a generous interpretation. The main principle, in my view, on which vicarious liability of employers is based, is on the notion of enterprise risk. Employers create risk by means of their profitable operations and should bear some responsibility in the event that its employees may cause harm to others. Calitz states as follows:

Enterprise risk as a basis for vicarious liability should be preferred to inconsistent rules based on the legalistic formulation of the Salmond test, The uneasiness of our courts with the vicarious liability of an employer for the intentional wrongdoing of an employee and the contortions of the Salmond’s rule that have been invoked can be prevented if risk is used as the basis for holding the employer vicariously liable.²⁵⁹

The EEA has also created a form of statutory vicarious liability for employers in unfair discrimination cases. An employer may be held liable in the event that an employee contravenes any provision of the EEA “while at work”.²⁶⁰ It is suggested that this requirement has a wider application than the common law requirement “within the scope of employment” Employers have been held liable for conduct ranging from racial discrimination²⁶¹ to sexual harassment²⁶². The *Biggar case* illustrated the fact that employers may be held liable even though the discrimination had not actually taken place at the workplace. Except for the fact that an employee should bring conduct relating to unfair discrimination to the attention of the employer, and that the employer should act thereon, it is also important for the employer to take reasonable practicable steps in eliminating this conduct. What is evident is that employers should adapt to the notion that there is a likelihood that they might suffer financial losses through the wrongful acts of their employees.

The point of departure, in eliminating or reducing the risk of an employer based on vicarious, direct or statutory liability should in my opinion be the risk itself. After the identification and assessments of the risk these findings should be transformed into pro-active preventative steps. Preventative steps should then be transformed into policy considerations within the workplace that form part of the employee’s terms of employment.

258 *K case and F case supra.*

259 Calitz 2005 *TSAR* 232.

260 Sec 60 of the EEA

261 *Biggar case*

262 *Ntsabo case*

6.1 Enterprise risk

The process of identifying risk within an enterprise should be done by the categorisation of an enterprise and the risk associated within the specific industry. This would enable the employer to identify certain risks created as a result of the industry in which the employer is engaged. In other word, certain enterprises are associated with certain typical risks. The *Bazley case* and *Jacobi case* for instance illustrate the risk of sexual misconduct when an employee is responsible for the care of young children.²⁶³ Spafford states as follows in respect of typical risks associated with an enterprise:

The connection the wrong needs to have in order to engage vicarious liability is no longer exclusively linked to what the employee was authorised to do but rather, to the nature of the enterprise itself and the risks it enhanced into the community... The employment enterprise is held liable for having created a risk and designed a workplace where the employee was authorized to perform duties related to the activity considered risky.²⁶⁴

In the *Naspers case* an environment was created by the employer in terms of which employees were required to work together in close proximity with each other and therefore the risk of sexual harassment was enhanced by the enterprise's requirements. Also in the *K and F cases* police officers exercising their constitutional duty were placed in a position of trust by their employer, and they used their position of trust by utilising certain state property and resources, to commit rape. Therefore it could be concluded that the state placed them in this position of trust and as a result increased the risks associated with the enterprise, ie the state.

After the identification or classification of risk typical to an enterprise, it is then important for employers to mitigate these associated risks. The mitigation of risk should be done through processes that entail the formulation of policy considerations within the enterprise. These policy considerations should ultimately transpire into concrete pro-active preventative steps that would mitigate the risk of vicarious liability, which employers are faced with.

263 The *Naspers case* also illustrated that a risk of sexual harassment is created in an enterprise where a manager and secretary is working in a close and personal environment.

264 Spafford 17.

6.2 Policy considerations

It is evident from the discussion above that our courts have shown their intention of interpreting the requirement, that “an employee should act within the scope of his employment” or “while at work”, in a generous manner in finding an employer vicariously or directly liable for the wrongful acts of its employees. Employer’s policies and practices should factor in these recent jurisprudential developments. Policies and practices should be developed with the purpose of not only regulating discipline and setting standards within the workplace, but also with the view to mitigate typical risks. From an employer perspective, it should also be noted that most business insurances only provide for claims associated with direct or public liability.

These policies should deal with a wide range of issues, including:

- Employment Equity in general but with unfair discrimination in particular.
- Rules regulating employee’s conduct in respect of the use of company facilities and assets.
- Guidelines in respect of how employees should conduct themselves in relation to each other and the public.

Le Roux states that a good point of departure should be to establish whether a clear policy is in fact in place.²⁶⁵ Mere existence of a policy is not sufficient. There should be evidence of the effective communication of a policy to employees. Furthermore, employees should also be aware of disciplinary or other consequences they might face in the event that the policy is breached. Even though no formal distinction is drawn between smaller and larger employers, it is evident from case law that our courts have a stricter interpretation when it comes to larger employers.²⁶⁶

6.2.1 Employment equity policies.

Employment equity policies should deal with unfair discrimination within the workplace. These policies should not only make provision for direct discrimination,

265 Le Roux 2006 *Obiter* 425.

266 *Finca case supra*.

but must deal with possible liability employers might incur as a result of indirect discrimination.²⁶⁷ Statutory and common law vicarious liability mostly concern claims of direct unfair discrimination.²⁶⁸ Employers are mainly held liable for incidents of racial discrimination and sexual harassment. The UK Employment Appeal Tribunal in the case of *Canlife v East Riding of Yorkshire Council*²⁶⁹ suggested the following approach in cases dealing with unfair discrimination in order to establish whether the employer had taken reasonable and practicable steps in the prevention of the unlawful conduct:

- 1 It should be established whether the employer took any steps in preventing the employee acting within the course and scope of employment from perpetrating the unlawful acts;
- 2 Then it should be established whether the employer could have taken any further steps in preventing the unlawful acts.

From the discussion above it is evident that larger employers did indeed have policies on paper, but the liabilities incurred relate to the fact that they either failed to effectively implement these policies or that they failed to take immediate and strong disciplinary action against perpetrating employees. Policies should be clear on the handling of grievances and must ensure confidentiality.²⁷⁰ If the grievance is dealt with in an efficient and expeditious manner, employer risk will also be limited.²⁷¹

6.2.2 Rules regulating employees' conduct in respect of the use of company facilities and assets.

The courts have recently taken into consideration factors such as the use of company facilities and assets in establishing a close link between deviated actions of employees and the nature and purpose of their employment.²⁷² Again it should be

267 Indirect discrimination claims are mainly statistical in nature that transpires through prima facie neutral policies or practices within the workplaces that have the effect that it prejudices or excludes certain members of societies. See *Griggs v Duke Power Co* 401 US 424

268 *Mokone case supra, Ntsabo case supra and Biggar case supra.*

269 *Canlife v East Riding of Yorkshire Tribunal* 2000 IRLR 55

270 Le Roux 426.

271 See *Mokoena and Potgieter cases supra* where the employer escaped liability.

272 The victim in the *F case* made a deduction from a police radio and dockets that the perpetrator was in fact a police officer, which therefore reinforced her trust. In the *K case* the court had taken into consideration factors such as that the police officers were dressed in full uniform and driving

stated that rules regulating the conduct of employees should be drawn up after the establishment of typical risk associated with the enterprise, for example, employees working in the transport industry have a larger risk of committing a delict within the scope of employment by causing an accident than employees engaged in the textile industry manufacturing clothes. Clear guidelines and policies must be developed regulating conduct in relation to employees' job descriptions. This includes rules and guidelines in relation to the use of:

- Vehicles²⁷³
- Company uniforms²⁷⁴
- Company assets and the use of computers. Internet and email use should be closely monitored and punitive measures taken in the event of contravention thereof.
- Housing facilities provided to employees by employers.²⁷⁵ These facilities under the control of an employer should have adequate rules and guidelines that regulate employee conduct.

6.2.3 Guidelines in respect of how employees should conduct themselves in relation to each other and the public.

Guidelines on how employees should function and conduct themselves are especially important in circumstances in terms of which a statutory or constitutional duty of care exists or is established. This is illustrated by the decision in the *F case* where the Constitutional Court stated that members of the police force have a constitutional duty²⁷⁶ to protect members of the public.²⁷⁷ Enterprises should in an effort to mitigate their liability, implement proper systems to prevent their employees from committing fraud, theft and other unlawful acts.²⁷⁸ Rules regulating employees'

a marked vehicle when establishing a close link between the deviated actions and the nature or purpose of employment.

273 *Eskom case*.

274 *K case*.

275 *Biggar case supra*.

276 Sec 205 of the Constitution.

277 *F case supra*. See also the *Bazley* and *Jacobbi cases* where the court stated that a duty of care was established in relation to the warden which sexually molested children.

278 See a determination made under Sec 28(1) of *The Financial Advisory and Intermediary Services Act 37 of 2001* in *Tshitema v Standard Bank of South Africa* FAIS 01836/10-11/ GP/1. The

stand-by duty should be developed to the extent that unlawful acts committed by employees are limited.

7 Conclusion

Our courts in general, but the Constitutional Court in particular, has shown an interventionist approach in respect of the development of our common law, specifically in relation to the principles of vicarious liability. Principles of vicarious liability and the requirement that an employee should act within the scope of employment was initially interpreted in a strict or narrow manner by our courts. In line with their constitutional mandate, international jurisprudential developments were incorporated into our principles of vicarious liability. Initially the Salmond rule did not make provision for circumstances in which employees deviated from their purpose or nature of employment or their conduct was in contravention of their employer's instruction or interests. The Constitutional Court in the *K* case therefore developed the close connection test in line with the standard test developed in the *Rabie* case. If a close connection can be established between the deviated actions of the employee and the nature or purpose of employment, an employee may be found acting within the scope of employment. Furthermore, constitutional norms and values should be taken into consideration when applying the two-stage test. The *F* case went a step further by finding that off-duty but on standby employees acted within the scope of employment. It is thus evident that the requirement that an employee should act within the scope of his employment has been developed to such an extent that it is given a wide application.

Statutory vicarious liability and the requirement that an employee should commit the unlawful act "while at work" are given an even wider interpretation than the common law requirement. The *Biggar* case illustrated the wide scope of application of this requirement when it found an employer liable for acts of racial discrimination that had taken place at a housing facility that was under the control of the employer, even though not part of the workplace. As stated previously, an employer may be held

ombudsman found Standard Bank liable for unlawful and fraudulent actions of an employee and found that the employee working as a financial advisor acted within the scope of his employment. The employer was ordered to refund the complainant R400 000.

liable for acts of unfair discrimination by its employees, including harassment, if it has failed to take reasonable and practicable preventative steps.

The requirement that an accident should "arise within the course and scope of employment", in terms of COIDA, provides guidance in respect of the interpretation of the requirements for statutory and common law vicarious liability. It should be noted that the requirement in terms of COIDA was developed with the purpose of providing compensation and the provision of social security. Therefore it is suggested that the requirement indeed differs in its application in respect of its underlying purpose. Central to common law and statutory vicarious liability lies the notion of enterprise risk creation. Not only does the creation of risk provide an adequate rationale for no fault liability but it also provides a point of departure when mitigating liability risk for the employer. The point of departure, in my view, in mitigating the risk employers may incur by being held liable on a vicarious basis is the risk itself. The identification of typical risk, associated with employees performing their duties and acting within the scope of their employment, would enable employers to take reasonable practicable steps by the creating of policies and procedure that might mitigate the risk itself. The formulation of these policies should include adequate grievances procedures, as well as immediate effective disciplinary steps that deal with employees that over steps the mark.

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