CASES / VONNISSE

LIABILITY OF THE STATE FOR RAPE BY A POLICEMAN: THE SAGA TAKES A NEW DIRECTION

Minister of Safety and Security v F 2011 3 SA 487 (SCA)

1 Introduction

The *locus classicus* and trend-setting decision for the vicarious liability of the state for the rape of a woman by a police official, is certainly *K v Minister of Safety and Security* (2005 6 SA 419 (CC); see Scott "K v Minister of Safety and Security 2005 6 SA 419 (CC)" 2006 *De Jure* 471*ff*; Neethling and Potgieter *Neethling-Potgieter-Visser Law of Delict* (2010) 369 fn 143; *contra* Fagan "The Confusions of K" 2009 *SALJ* 156*ff*; Wagener "*K v Minister of Safety and Security* and the Increasing Blurred Line Between Personal and Vicarious Liability" 2008 *SALJ* 673*ff*; and *K v Minister of Safety and Security* 2005 3 SA 179 (SCA), critically discussed by Neethling and Potgieter "Middellike Aanspreeklikheid van die Staat vir Verkragting deur Polisie-beamptes" 2005 *TSAR* 595*ff*). Here the plaintiff (K), a young woman, became stranded late at night. Three on-duty police officials, dressed in full uniform, offered to take her home in a police vehicle. On the way she was raped by all three of them. O'Regan J held that the state was vicariously liable for the conduct of the policemen. According to the standard test for vicarious liability, which was formulated in *Minister of Police v Rabie* (1986 1 SA 117 (A) 134), an employer may only escape vicarious liability if the employee, viewed subjectively, has not only exclusively promoted his own interests, but, viewed objectively, has also disengaged himself from the duties of his contract of employment to such an extent that a sufficiently close connection between the employee's conduct and his employment is absent. Applying this test as informed by the constitutional Bill of Rights, O'Regan J found that although the policemen exclusively promoted their own interests by raping the plaintiff, a "sufficiently close connection" nevertheless existed between the conduct of the police and their work to hold their employer vicariously liable, for the following reasons: there was a constitutional and statutory duty on the state as well as the policemen to prevent crime and to protect members of public; the policemen offered to

help the plaintiff and she acted reasonably by accepting the offer and trusting them; and the conduct of the policemen consisted simultaneously of a *commissio* (the brutal rape) and an *omissio* (their failure to protect her against the rape).

2 Facts of *F*

The plaintiff (F) was raped by a policeman (D) who was on stand-by duty. She was 13 years old at the time and had visited a nightclub with friends. After an argument with one of her friends she decided to go home. In the parking lot D offered her a lift home, and she accepted, noticing a police radio in the vehicle and recognizing one of the other occupants. After dropping the other occupants, D told her he wanted to visit his friends. She became suspicious and ran away but was later found by D who again offered her a lift home. She got in but after a short time D turned off the road. She attempted to escape but D caught her and then severely assaulted and raped her. F alleged that the state was vicariously liable for the assault and rape, since D had acted within the course and scope of his employment.

3 Decision of court *a quo* in *F*

In *F v Minister of Safety and Security* (2010 1 SA 606 (WCC) 619-621) Bozalek J referred to the test in *K* and concluded that it stands to reason that, viewed subjectively, D was pursuing his own objectives. As far as the second leg of the test was concerned, namely whether a sufficiently close connection existed between the conduct of a policeman and his work to hold his employer vicariously liable, the judge stated that although D was off-duty (on standby) during the rape and to this end the state only had an attenuated form of control over him, being on duty is not a necessary requirement for vicarious liability. Moreover, the degree of control exercised by the employer over the employee is but one factor to be considered in determining vicarious liability.

The court (621-623) then embarked on an exposition of the factors connecting D's assault and rape of F with his work as a policeman. First, the single most important connection was his use of a police vehicle which was allocated to him for purposes of fulfilling his stand-by duties. Second, although D went to some lengths to conceal his identity as a police officer, through her own observations F formed the belief that he was indeed a police officer, and this belief operated to some extent to lull her suspicions when she reluctantly accepted the second lift D had offered her. Third, the coincidence between the nature of the assistance which D pretended to offer F in order to lure her into his vehicle, and the normal duty of a police official in such a situation. In accordance with their statutory and Constitutional duties to uphold the law and protect members of the public, in particular vulnerable groups such as women and children, police officers are obliged to come to the assistance of people in need, even if they are off duty.

This approach was according to the court (623-624) also apparent in *K* where O'Regan J found a sufficiently close connection existed between the conduct of the police and their work on three grounds (as pointed out above par 1), all of which were in virtually all respects also applicable in *F* – as in *K*, D's conduct simultaneously constituted a commission (the rape) and an omission (failure, whilst on an attenuated form of duty, to protect P from harm).

In the light of all these factors and considerations Bozalek J held that D's wrongful conduct and his employment as a plain-clothes detective was sufficiently close to render the state vicariously liable for D's delict (assault and rape) against F.

Bozalek J (625-626) nevertheless discussed a further factor which in his opinion strengthened his conclusion, and that is D's fitness for the position as detective with all the responsibility and freedom from direct control it entailed. He continued to work in this position even after having been convicted of two serious offences, as well as a further conviction for assault. In this regard the judge referred to the "creation of risk of harm" approach formulated in *Minister of Police v Rabie* (*supra* 134), and, applying this to *F*, opined that when the SAPS elected, notwithstanding his criminal record, to retain D in its employment, it accepted the risk that his propensity for criminal conduct might continue and cause harm to others. He concluded that "where the State appoints or retains as a guardian and enforcer of the law a police officer who has a record of serious criminal misconduct, this is a consideration which, in appropriate circumstances, may be taken into account in determining the employer's vicarious liability for the officer's subsequent wrongful conduct".

To my mind this authoritative and well-reasoned decision of Bozalek J deserves full support. The trend-setting basis developed in *K* for the vicarious liability of the state for the intentional wrongdoing (*in casu* rape) of an official, received due consideration and the relevant factors in ascertaining whether a sufficiently close relationship existed between the delictual conduct of the official and his employment were applied persuasively (see Neethling "Vicarious Liability of the State for Rape by a Police Official" 2011 *TSAR* 186*ff*). Similarly Scott ("Middellike Aanspreeklikheid van die Staat vir Misdadige Polisie-optrede: Die Heilsame Ontwikkeling Duur Voort" 2011 *TSAR* 135*ff* 145) concludes:

> "Daar word aan die hand gedoen dat hierdie uitspraak onafwendbaar was in die lig van die presedent wat in die baanbrekende beslissing van regter O'Regan in die *K*-saak neergelê is. Die enigste werklike verskil tussen die onderhawige feitestel en die feite in daardie saak, is dat die polisiebeampte in hierdie geval, anders as in dié van *K*, nie voltyds aan diens was nie. Daar kan volle instemming betuig word met die feit dat hierdie verskil nie voldoende rede was om die onderhawige geval van die *K*-saak te onderskei en slegs om daardie rede 'n teenoorgestelde beslissing te vel nie. Die motivering wat regter Bozalek verskaf vir sy hantering van die effek van die feit dat die tweede verweerder ten tyde van delikspleging op blote bystandsdiens was, is myns insiens ten volle geregverdig en lofwaardig."

But the Supreme Court of Appeal in *F* did not agree.

4 Decision of SCA in *F*

4 1 Introduction to vicarious liability

Nugent JA (par 1-2) commenced by stating the facts in *K* and said that the distinction between *K* and *F* is that on this occasion the policeman was not on duty. After a detailed exposition of the facts in *F* (par 2-14), the court embarked on confirming trite law for vicarious liability.

Vicarious liability is in essence the liability of one person for a delict of another, by virtue of the relationship that exists between them, here the employer-employee relationship (see also Neethling and Potgieter *Delict* 365 – Nugent JA cited the 2006 edition of this work, which must be ascribed to the unfortunate state of affairs that the library of the SCA is not up to date as far as the latest editions of legal textbooks are concerned). Nugent JA emphasized that vicarious liability does not call for a duty or fault on the part of the employer – it is thus a form of strict liability (see *Stein v Rising Tide Productions CC* 2002 5 SA 199 (C) 205) – and that liability is secondary in the sense that it arises only if the employee committed a delict (par 15). The critical consideration, which is often problematic, is whether the employee was engaged in the affairs or business of his employer, or whether he was acting in the course or within the scope of his employment when he committed the delict, referred to as the standard test or general principle (par 16-18). It stands to reason that only the problematic cases come before the courts where there is uncertaincy as to whether the employee was engaged in his employer's affairs, or whether he was going about his own private business; they are mainly cases in which the employee, starting out on the business of the employer, deviated from the employer's business to attend to business of his own (eg *Feldman (Pty) Ltd v Mall* 1945 AD 733).

4 2 Standard test, creation of risk of harm and direct liability of employer

Nugent JA (par 19) then discussed *Rabie* where the court formulated and applied the two-tier subjective-objective stages of the standard test (see above par 1). *In casu* a policeman was not on duty but was nonetheless exercising police powers when he unlawfully arrested and assaulted the plaintiff. A majority found the state vicariously liable for his conduct. According to Bozalek J (*F*, court *a quo* 618) *Minister of Police v Rabie* (*supra* 133-134) serves as authority for the proposition that the state does not necessarily escape vicarious liability for a police officer's delicts simply because he is formally off duty, dressed in private clothes and commits the delict purely for his private and selfish purposes. This will be the case where an off-duty policeman, without putting himself on duty, nevertheless *male fide* purported to act as a policeman in committing the delict in question (see also Neethling 2011 *TSAR* 190; and Scott 2011 *TSAR* 139). Nugent JA (par 20-22) continued that in *Minister of Police v Rabie* (*supra* 134), as is well known, the opinion was expressed that vicarious liability may be decided on

the basis of the creation of risk of harm by the employer but this view was rejected in *Minister of Law and Order v Ngobo* (1992 4 SA 822 (A) 828-834; and see also *Macala v Maokeng Town Council* 1993 1 SA 434 (A) 441) as clearly wrong (see also Neethling and Potgieter *Delict* 370-371). In *Minister of Law and Order v Ngobo* (*supra* 832) the court said that

> "whatever *direct* liability may in certain circumstances attach to an employer as a result of a risk created by him, this consideration ... is not a relevant one to be taken into account when the standard test is to be applied in order to decide whether the master is *vicariously* liable".

Be that as it may, Nugent JA (par 23-27) demonstrated that recent cases in Canada and England reflect a principial shift from the standard test by introducing into the enquiry duties on the part of the employer. Cases in which that have occurred all concern intentional acts of employees which are usually difficult to conceive as having been committed within the course of the wrongdoer's employment. Similarly in *Feldman (Pty) Ltd v Mall* (*supra* 741) the rationale underlying the imposition of liability for risk creation was that by creating the risk of harm the employer has a duty to ensure that the harm does not eventuate (par 28). Nugent JA (par 29) pointed out that the true basis for liability in such cases is the failure of the employer, acting through the instrument of the employee, to fulfil the duty that is cast upon the employer to avoid harm occurring through the risk that has been created.

Consequently, Nugent JA (par 46-47) did not agree with the trial court in *F* (see above par 3) that by retaining D in its employ notwithstanding his prior criminal convictions, the state "accepted the risk that his propensity for criminal conduct might continue and cause harm to others". Unlike the trial court, the SCA did not consider this factor as material to determining whether it was vicariously liable. It was rather relevant in ascertaining whether the state was directly liable, for if the state ought indeed not to have retained D in its employ because he had been convicted of crimes, and its breach of that duty was causally connected to the rape, then that might render the state directly liable for the breach.

4 3 Vicarious and direct liability in K

According to Nugent JA (par 30-31) the introduction into the principle of vicarious liability of a duty owed by the employer was taken a step further in *K* (see above par 1), and he made three observations about O'Regan J's findings (par 32): firstly, both the state and the policemen personally were under a duty to protect K, and they omitted to fulfil those duties (by raping K the policemen committed two separate delicts – one was their positive delictual act of raping K, and the other their delictual omission in failing to protect her); secondly, the delict for which the state was held liable was not the rape – for otherwise the policemen's omissions would have been immaterial – but instead their delictual omissions; and thirdly, the conclusion in *K* was expressly founded upon vicarious liability for the delicts of the policemen and not upon direct liability of the state, from which it follows that the policemen must have been considered to be personally liable for their

omissions (for otherwise there would have been no scope for vicarious liability).

The court concluded (par 34-35) that because the state was also under a duty to protect K, it might be that the court could justifiably have found that the state, acting through its employees, was directly liable for its own delictual omission. Nugent JA submitted that that would have been consistent with a line of cases that have been decided in the SCA (*Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA); *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA); *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA); and *Minister of Safety and Security v Carmichele* 2004 3 305 (SCA)) that purported to be founded upon vicarious liability, but might better be said to have been founded upon direct liability of the state, acting through the instrument of its employees.

4 4 Vicarious liability in F

In the present case, the court in *F*, just as in *K*, was concerned with the vicarious and not direct liability of the state – thus in each case with the state's liability for the delictual conduct of the police. According to Nugent JA it is clear that D in *F*, again just as the rapists in *K*, was personally liable for the consequences of his positive delictual acts – the state is not vicariously liable for these acts for if it was, the officers' omission to protect the victim would have been immaterial. Moreover, he continued (par 37),

> "it would seem to me to be rather extreme to find that a policeman is 'engaged in the affairs or business of his employer' when he commits the crime of rape, or that that could 'rightly be regarded as a mode – although an improper mode' of exercising the authorisation conferred by his employment. In the words of Kumleben JA in *Ngobo*, [D] 'cannot be said to have deviated [from his employer's business] for the reason that he was not even remotely engaged in his master's affairs at any relevant stage prior to the commission of the delict.' Or as Watermeyer CJ [in *Feldman*] would have said it, the harm was 'not caused by the servant's abandonment of his master's work but by his activities in his own affairs, unconnected with those of his master'. Or in the words of Tindall JA [in *Feldman*], 'his digression from the business of his employer was so great in respect of space and time that it cannot reasonably be held that he [was] still exercising the functions to which he was appointed'".

Nugent JA (par 38-40) did not agree with Bozalek J's finding in the court *a quo* that the first three factors considered by him (see above par 3; and Scott 2011 *TSAR* 140) were indicative of vicarious liability – seemingly for the positive act of rape. According to Nugent JA it is clear that D was not engaged on police business at the relevant time, and this could not be changed by his unauthorized use of a police vehicle, the knowlege of F that D is a policeman or his offer to drive her home. Although these factors were also present in *K,* they were similarly not sufficient to expose the state to liability for the positive acts of the policemen concerned.

4 5 Duty of the stand-by policeman to protect F

Turning to the duty of the state to protect the victim in *K*, Nugent JA (par 41) had no doubt that the state also had a duty to protect F against harm and that that duty necessarily fell upon the functionaries who execute its duties; this might render the state directly liable if its functionaries omitted to do so. However, the basis for the finding in *K* was that the policemen were also under an equivalent personal duty – thus rendering them personally liable (and the state vicariously liable) – for omitting to fulfil that duty. The question arose whether D was under a similar duty at the time he committed his criminal act, and that depended upon whether the duties that were held to exist in *K* persisted when a police officer was not on duty.

As pointed out (above par 3; see also Neethling 2011 *TSAR* 187-188 190; and Scott 2011 *TSAR* 139), (par 42), Bozalek J opined in *F* that a police officer is never off duty, that his obligations are of a continuing nature and that a police officer who is on stand-by duty is not off duty but is on duty in an attenuated form. According to the judge it would be a mistake to see only a sharp distinction between being on and off duty and then to treat D as being off duty – his status as being on stand-by at the material time fell rather somewhere between the two. But Nugent JA (par 42-43) did not agree. He was of the view (par 43-45) that a detective is on standby to resume duty if duty calls and is off duty until that occurs. While it is true that when a police officer goes off duty his authority to exercise police powers continues; this does not imply that when he is off duty he is obliged to exercise those powers. But where he chooses to exercise them, the state may be vicariously liable for delicts committed in the course of doing so, which was the case in *Rabie* and *Minister of Safety and Security v Luiters* (2006 4 SA 160 (SCA); 2007 2 SA 106 (CC); and see Neethling 2011 *TSAR* 186-187). According to Nugent JA D did not purport to be exercising any police powers. The court (par 48) concluded that otherwise than in *K* where the policemen were on duty and omitted to fulfil their constitutional and statutory police duty to protect K, in *F* D was not on duty and therefore had no duty to protect F. Consequently this case failed the test for vicarious liability.

5 Comment

There can be no doubt that that Nugent JA's clinical analysis of the decision of the Constitutional Court in *K*, especially as regards his distinction between the positive conduct (rape) and omissions (breach of legal duty to protect) on the part of the policemen, as well as that between the vicarious and direct liability of the state, albeit in many aspects *obiter*, is an attempt to guide the development of the vicarious liability of employers for the intentional delicts of their employees in a new direction. This is in sharp contrast with the decisions, also in the SCA, where the subjective-objective standard test for vicarious liability formulated in *Rabie* and applied in *K*, have been followed without further ado (see, *eg*, *Minister of Safety and Security v Luiters supra* (SCA) 165; (CC) 112-113 115; *Minister of Finance v Gore* 2007 1 SA 111

(SCA) 123-124; see also Neethling and Potgieter "Middellike Aanspreeklikheid vir 'n Opsetlike Delik" 2007 *TSAR* 616 ff; and Neethling "Middellike Aanspreeklikheid vir Opsetlike Delikspleging: Is Daar Lig aan die Einde van die Tonnel?" 2006 *De Jure* 197 ff, referred to in *Minister of Finance v Gore supra* 123 fn 6). The emphasis in these cases has been on whether, notwithstanding the fact that the intentional wrongdoing of an employee is the very antithesis of an act in the course and scope of employment, there was a sufficiently close link between the self-directed conduct and the employer's business (see *Minister of Finance v Gore supra* 123). Although Nugent JA emphasized that it would be rather extreme to find that the act of rape of a policeman is an act in the course and scope of his employment, in his dissection of *K* he unfortunately chose to ignore completely the paramount question whether said "sufficiently close link", where policy considerations also play a part, nevertheless existed. An important policy consideration in this respect is, as O'Regan J put it in *K v Minister of Safety and Security* (*supra* 443) (and which Scott 2011 *TSAR* 142 regards as the crux of her decision), that "courts must take account of the importance of the constitutional role entrusted to the police and the importance of nurturing the confidence and trust of the community in the police in order to ensure that their role is successfully performed". Unfortunately Nugent JA's judgment, unlike that of the trial court in *F*, was silent on the importance and applicability of relevant constitutional imperatives.

In *Minister of Safety and Security v Luiters* (*supra* (CC) 116) Langa CJ stated (see also *F,* court *a quo* 619 and 620) that "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 *K* test". Reverting to police officials, the right of control is at its highest level when a policeman is officially on duty (as in *K*), or where an off-duty officer has put himself on duty (as in *Luiters* and *Rabie*), but the level of control is also acceptable where direct control is attenuated or limited because the officer is on stand-by duty (as in *F*) (see Neethling 2011 *TSAR* 190). Scott (2011 *TSAR* 145-147) persuasively argues that in the light of the constitutional imperatives and especially the present, large-scale abuse of its normal functions by the police, a good case may under appropriate circumstances be made out for the vicarious liability of the state for the criminal conduct of even an off-duty policeman (as indicated above in par 3 2, Bozalek J opined in *F* (court *a quo* 618) that *Rabie* serves as such an example). Since Nugent JA declined to accept that D in *F* was under an attenuated level of control and to that extent on duty, his decision is disappointing and a stark reminder of the rather unfortunate decisions of the SCA in *Minister of Safety and Security v Carmichele* (2001 1 SA 489 (SCA); *contra Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening*) 2001 4 SA 938 (CC)) and *K* (see Neethling and Potgieter 2005 *TSAR* 595 ff) concerning female victims of assault and rape, which were later rectified by the Constitutional Court. It is trusted that the same will happen to the SCA's decision in *F*. Seen in this light, the minority judgment of Maya JA (par 73) is

commendable. She opined that D practically identified himself as a police officer and F placed her trust in him for that reason. Thus, by offering to rescue and take her home in a police vehicle, D placed himself on duty, as he was empowed to do, assumed the status and obligations of an on-duty police officer and acted in his capacity as a police officer. According to her this situation is on a par with that of the errant, off-duty, officer in *Rabie* who, actuated purely by malice, arrested a person he very well knew was innocent. For this reason, she would find the state vicariously liable.

Another factor which can be taken into account in determining the state's vicarious liability for an officer's wrongful conduct, is the creation of a risk of harm by an employer (see Neethling and Potgieter *Delict* 370-371; Neethling "Risk-creation and the Vicarious Liability of Employers" 2007 *THRHR* 535-537; and Loubser and Midgley (eds) *The Law of Delict in South Africa* (2010) 378). Although the Appeal Court in *Ngobo* declined to accept risk creation as an independent basis of vicarious liability, the courts have continued to emphasize that risk creation is directly relevant to the inquiry whether the employee acted within the scope of his employment (see, *eg*, *Macala v Maokeng Town Council supra* 441; and *Grobler v Naspers Bpk* 2004 4 SA 220 (C) 297). This was also the approach of Bozalek J in the trial court in *F* (625-626), where he held that when the state elected, notwithstanding his criminal record, to retain D in its employment, it created and even accepted the (heightened) risk that his propensity for criminal conduct might continue and cause harm to others, and that this factor should be taken into account in determining the state's vicarious liability (see also Scott 2011 *TSAR* 143-144; and Neethling 2011 *TSAR* 190-191). However, Nugent JA differed from this view (see also *Minister of Law and Order v Ngobo* (*supra* 832), cited above). According to him this factor was rather relevant in ascertaining whether the state was directly liable, for if the state ought indeed not to have retained D in its employ because he had been convicted of crimes, and its breach of that duty was causally connected to the rape, then that might render the state directly liable for the breach. Be that as it may, it is submitted that risk creation should still serve as a factor when determining, for the purposes of vicarious liability, whether a sufficiently close relationship exists between the wrongful conduct of the employee and his master's business. Even Nugent JA (par 47) accepted that this idea is far from dead, as is apparant from the foreign cases he had cited (see also his reference (fn 59) to Neethling 2007 *THRHR* 527).

The distinction between the vicarious and direct liability of the state also requires closer scutiny. In *K* (see above par 1) O'Regan J held that there was a constitutional and statutory duty on the state as well as the policemen to prevent crime and to protect the members of public. Because the state was also under a duty to protect K, Nugent JA (par 34-35) submitted that it might be that the court could justifiably have found that the state, acting through its employees, was directly liable for its own delictual omission. According to him such an approach would have been consistent with the SCA's decisions in *Van Duivenboden*, *Van Eeden*, *Hamilton* and *Carmichele* (in 2004) that purported to be founded upon vicarious liability, but might better be said to have been founded upon direct liability of the state, acting

through the instrument of its employees. This submission is subject to criticism. Firstly, it seems that the state can only be vicariously liable for the delicts of its employees. Although not the sole foundation of state liability (see, *eg*, s 60(1) of the South African Schools Act 84 of 1996; and Neethling and Potgieter *Delict* 372-373), section 1 of the State Liability Act 20 of 1957, provides that the state is liable for "any wrong committed by any servant of the state acting in his capacity and within the scope of his authority as such a servant". Seen thus, the state is only vicariously liable for the delicts of its employees (*cf* Loubser and Midgley (eds) *Delict* 257-258; Neethling and Potgieter *Delict* 368; *Minister of Police v Rabie* (*supra* 132); *Masuku v Mdlalose* 1998 1 SA 1 (A) 14-16; and *Mhlongo v Minister of Police* 1978 2 SA 551 (A) 567). On the face of it, there does not seem to be any room for direct liability of the state where the state itself committed a wrong or delict acting through its employees. Seen in this light, Nugent JA's submission that the SCA decisions in *Van Duivenboden*, *Van Eeden*, *Hamilton* and *Carmichele* (in 2004), none of which was even based on intentional police wrongdoing, should have been founded upon direct liability of the state acting through the instrument of its employees, cannot be accepted. In this regard Nugent JA made no attempt to explain how the conduct of employees acting as functionaries of the state for the purposes of its direct liability, differs from their conduct acting in the course and scope of their employment for the purposes of the state's vicarious liability. This can only lead to confusion and create legal uncertainty in an area where clarity existed beforehand. Clearly, in all these cases it was the employees who, while acting in the execution of their legislative duties, negligently breached their duty to prevent crime and protect the public. For their wrongs or delicts the state was correctly held vicariously liable.

Of course, if the conclusion is correct that the state may not be directly liable for its delicts, this does not mean that other employers are also excluded from such liability. In this regard reference can be made to an analogous case in *Media 24 Ltd v Grobler* (2005 6 SA 328 (SCA) 349*ff*) which dealt with sexual harassment at the work-place. Here the Appeal Court did not express itself on vicarious liability, but found that the employer was directly liable for the plaintiff's damage on account of its own wrongful and negligent failure to protect her against the harassment. Liability was based on a negligent breach by the employer of a legal duty to its employees which requires an employer to take reasonable steps to prevent sexual harassment of its employees in the workplace and therefore to create and maintain a working environment in which, amongst other things, its employees were not sexually harassed by other employees. On the other hand, the trial court in *Grobler* did base its decision on the vicarious liability of the employer for the delict of an employee (a manager sexually harassing another employee). Here the court took the creation of the risk of sexual harassment by the employer into account in finding that the manager by his intentional conduct acted within the scope of his employment (cf Neethling and Potgieter *Delict* 371 fn 154). In this regard two English decisions can also be mentioned. In *Lister v Lesley Hall* [2001] UKHL 22 the House of Lords held that the vicarious liability of an employer for the sexual abuse of a

person by an employee would depend on whether there was a sufficiently close relationship between the abuse and the employee's employment. Applying this test in *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church* ([2010] EWCA Civ 256), the court found that a sufficiently close relationship existed between a priest's sexual abuse of a young boy and the priest's work to hold the church vicariously liable. It seems that the fact that the risk of sexual abuse was reasonably incidental to the employer's employment, played a part in coming to this decision. The issue of direct liability of the church did not receive any attention.

6 Conclusion

The only difference between *K* and *F* was that in *K* the policemen were on duty when raping K, while in *F* the rapist was on stand-by duty. The core question in *F* was therefore whether a policeman on stand-by duty is on par with a policeman on duty so that according to the standard test for vicarious liability he can be found to have acted within the course and scope of his employment when raping a woman while on stand-by duty. Nugent JA found that he was not on duty, and that should have been the end of the matter. However, the court carried on and expressed itself *obiter* on various aspects regarding the vicarious (and direct) liability of the state for the intentional (and negligent) delicts of its employees. As pointed out, many of these views are subject to criticism and it is hoped that in future courts will scrutinize carefully them before implementing any one as part of our law. To reiterate, it is also trusted that the Constitutional Court will change the *ratio decidendi* of the SCA in *F* and find that the state is indeed vicariously liable for F being raped by a policeman on stand-by duty.

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