

CASES / VONNISSE

A JUDICIAL NICHE FOR NECESSITY – IS IT REALLY NECESSARY? –

*Rieck v Crown Chicken (Pty) Ltd
t/a Rocklands Poultry [2006] SCA 127 (RSA)*

1 Introduction

Our courts have played strange games in recent years with the elements of delict, the most frequent being that of changing the order of negligence and wrongfulness in the case of an omission and testing for the former before deciding on the latter. (Eg, including, but, not limited to, *Gouda Boerdery Bk v Transnet* 2005 5 SA 490 (SCA); *Eskom Holdings Ltd v Hendricks* 2005 5 SA 503 (SCA); *Coetzee v Fourie* 2004 6 SA 485 (SCA); *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA); *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage Ltd* 2000 1 SA 827 (SCA); *Mkwatsha v Minister of Defence* 2000 1 SA 1 1004 (SCA); and *Goldstein v Cathkin Park Hotel* 2000 4 SA 1091 (SCA).) The latest addition to the conceptual confusion emanating from the Supreme Court of Appeal is that of equating the test for wrongfulness with that of negligence, because of the objective nature of both these tests. This approach, it is submitted, is incorrect because it seems to ignore the fact that these two elements fulfil different conceptual functions. Wrongfulness is concerned with determining the reasonableness of the conduct, whereas fault looks at the blameworthiness of the perpetrator (see the discussion by Neethling, Potgieter and Visser *Law of Delict* 5ed (2006) 141-143 of the distinction between these two elements).

2 Facts and decision

The defendant company carries on the business of a poultry farmer in the Uitenhage district. On the farm is a retail shop, where the plaintiff worked as a cashier. Plaintiff was employed by a labour broker, TMS-Shezi, who paid her salary and who supplied her services to the defendant company. During an armed robbery which took place on the farm on 13 July 2003, plaintiff was taken hostage by the robbers, who forced her to leave the premises with them. Outside the shop the security guards were told to “back off”, otherwise they (the robbers) would shoot the plaintiff. The plaintiff was forced into a car belonging to one of the customers and they sped away. The

security guards fired at the car in an attempt to prevent it from getting away. One of these shots penetrated the rear window and struck the plaintiff on the arm. When the robbers realised that the plaintiff had been injured, they abandoned her in a nearby township and fled. Residents of the township came to her assistance and called the police.

The plaintiff sued the defendant for damages in the amount of R1.5-million, alleging that it was vicariously liable for the conduct of the security guards. The defendant denied liability and in addition brought an application to amend its plea to the effect that the plaintiff was precluded from suing it by virtue of section 35(1) of the Compensation for Occupational Injuries and Diseases Act (130 of 1993) because she was an employee of the defendant company. The court *a quo* allowed the plaintiff's claim for damages and rejected the defendant's application to have its plea amended on the basis that the evidence upon which it relied did not disclose a defence (this judgment was reported as *Rieck v Crown Chickens (Pty) Ltd t/a Rocklands Poultry* [2005] 3 All SA 583 (SE)).

The Supreme Court of Appeal per Nugent JA upheld the claim for damages, on the basis that the security guards had acted both wrongfully and negligently (par 17):

"In the circumstances the causing of bodily harm to Rieck was wrongful (on any jurisprudential approach) in accordance with ordinary principles. The harm was clearly foreseeable, and ought reasonably to have been avoided by refraining from shooting at the vehicle, and in the circumstances it was negligent to have caused it. It follows that the court below was correct in finding that the appellant is vicariously liable for the damage that was caused."

With regard to the defence raised by the defendant in terms of section 35(1) of the Compensation for Occupational Injuries and Diseases Act (130 of 1993) the Supreme Court of Appeal held that the appellant was not an employer for the purposes of this Act. (This matter is not discussed in this case.)

3 Discussion

3 1 The question of wrongfulness

The test for wrongfulness is well established in our law as an objective reasonableness test in terms of which the damage-causing conduct is adjudicated in terms of the legal convictions of society, or the *boni mores*.

It was submitted by the defendant that the conduct of the employee who had fired the shot which injured the plaintiff had been neither wrongful nor negligent. Nugent JA formulated the test for wrongfulness as follows:

"To cause bodily injury to another by a positive act is generally wrongful and will be visited with delictual liability if the actor was negligent. *The positive invasion of bodily integrity falls within what in comparative English law has been described as 'the range of interests which the law sees fit to protect against negligent violation', and which our law classifies as wrongful conduct.* Expressed in the idiom of one variation of the general test for wrongfulness in

our law, it is conduct in relation to which 'public policy considerations demand that ... the plaintiff has to be compensated for the loss caused by [a] negligent act ... of the defendant" (*Own emphasis*).

This formulation is problematic for two reasons:

- (1) It includes a reference to "comparative English law". English tort law, unlike the South African law of delict, is casuistic and does not recognise general principles for liability; instead there are a variety of torts each with its own requirements. The notion of wrongfulness, or an analogous concept does, furthermore, not exist in English tort law. How "comparative" English law therefore can be in this instance begs the question.
- (2) Nugent JA seems to equate a negligent violation of interests with wrongful conduct. However, not all instances of wrongful conduct will necessarily be negligent, for example where a perpetrator of wrongful conduct is not accountable, fault cannot be imputed to such a perpetrator.

3.2 *Negligence*

The well-known test for negligence, namely the so-called "reasonable man" test, was formulated in *Kruger v Coetzee* (1966 2 SA 428 (A) 430 E-F):

"For the purposes of liability culpa arises if -

- (a) a diligens paterfamilias in the position of the defendant -
 - (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
 - (ii) would take reasonable steps to guard against such occurrence; and
- (b) the defendant failed to take such steps."

Justice Nugent's solution for the dilemma of the judicial niche of necessity is the following (par 12 and 13):

"It is not necessary in the present case to question the correct jurisprudential niche that is occupied by necessity in the scheme of delictual liability. Whether it operates to justify conduct that would otherwise be wrongful, or to avoid a finding of negligence, the test for whether it operates at all calls for an objective evaluation ...

... Thus whatever the correct jurisprudential approach, a person who causes bodily injury by a positive act will avoid liability for the harm that he caused, on either approach, *only if a reasonable person in the position in which he found himself would have acted in the same way.*"

According to the judge, the tests for wrongfulness and negligence are both objective, and irrespective of whether necessity serves as a ground of justification or as a defence excluding fault, if the perpetrator's conduct accords with that of the reasonable person in the same position, he will avoid liability. It seems here as if the judge is equating the test for wrongfulness with that of negligence, because of the fact that these tests are both objective. If this is indeed the case, this argument is fatally flawed for the following reasons:

- (1) The test for wrongfulness pertains to conduct (see above) and is an objective reasonableness test. It looks at all the circumstances of the case, not merely those pertaining to the perpetrator (Neethling *et al* 141-142); the negligence test has regard to the personal circumstances of the perpetrator insofar as the reasonable person is placed in the position of the perpetrator to ascertain whether his conduct met the standard of the reasonable person, failing which, he will be regarded as being legally blameworthy. Negligence therefore qualifies the perpetrator (Neethling *et al* 142).
- (2) The test for wrongfulness is purely objective. At this stage of the enquiry the personal circumstances of the perpetrator are not relevant. For this reason putative defences (that is, circumstances where the defendant thought he was acting lawfully, but objectively speaking his conduct was wrongful) do not constitute grounds of justification. The test for negligence, on the other hand, although it is objective in the sense that it compares the plaintiff with a reasonable person, is still “subjective” in the sense that the reasonable person is put in the position of the perpetrator and the personal circumstances of the perpetrator are attributed to the reasonable person to establish whether the defendant in the particular case acted as the reasonable person would have done.
- (3) Negligence presupposes wrongfulness; there cannot be any question of negligence in the absence of a finding of wrongfulness. The fallacious testing for negligence of omissions prior to having established wrongfulness has become prevalent in Supreme Court of Appeal decisions over the last number of years (see the cases cited in the introduction) and has time and time again been subject to academic criticism (see for example Neethling *et al* 109, 142; Mukheibir “The Cart Pulling the Horse – Does the Enquiry as to Wrongfulness Necessarily Precede the Question of Fault?” 2001 *Obiter* 397; Van der Walt and Midgley *Delict* 6). This has no doubt also blurred the conceptual divide between these tests.

3.3 *The question of necessity*

Necessity is recognised in South African law as a ground of justification. A defendant who infringes the rights of an innocent third person while trying to protect his own interests could, if the requirements for necessity are met, escape liability on the basis that his conduct was not wrongful.

The grounds of justification that exclude wrongfulness are based on the general test for wrongfulness and merely represent examples of what the *boni mores* has regarded as justifiable conduct (Neethling *et al* 70; Van der Walt and Midgley *Principles of Delict* 3ed (2005) 125). In the final instance the question is not whether there is a defence but whether the conduct, when viewed against the objective reasonableness test, is wrongful or not.

In this case the court per Nugent recognised the fact that the “niche” for necessity was not certain. This is true with regard to homicide committed under compulsion. In *S v Goliath* (1972 3 SA 1 (A)) the perpetrator, fearing

for his own life, assisted another person to kill a third party. The compulsion was held to be a defence, but Rumpff JA speaking for the majority of the court left open the question whether the necessity in this case amounted to a ground of justification or whether it excluded fault. In his minority judgment Wessels JA held that necessity could not justify killing an innocent person but that it could exclude fault. However, because our law is based on general principles and there is no fixed list of torts, liability is determined in accordance with general principles. There is also no fixed list of defences; the grounds of justification and defences excluding fault are practical manifestations of general principles. Necessity in the form of homicide under compulsion can, depending on the circumstances, therefore constitute either a ground of justification or a defence excluding fault (see generally Neethling *et al* 84 fn 358 and 142-143). Nugent is right when he does not attempt to find a niche for necessity, but his reasons are not correct. It is not that the tests for wrongfulness and negligence are the same; rather, depending on the circumstances, different elements of liability may be excluded.

4 Conclusion

During the course of the third millennium the judges of our highest courts have on several occasions ignored the general principles of the law of delict. In several cases the conceptual order of the elements of wrongfulness and negligence has been ignored, particularly in cases of omissions. In the case under discussion the court seems to have lost track of the fact that these two elements are conceptually different and has almost equated them in an attempt to avoid finding a niche for necessity. Confusion of the elements of delict undermines the conceptual structure of the law of delict, and this in turn results in vagueness, uncertainty and lack of logic. One can only hope that these disturbing trends will not continue in the future.

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