State liability for acts and omissions of police and prison officers: recent developments in Namibia

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Abstract

Soon after constitutional democracy came to Namibia in 1990, the courts began to propound and develop a human rights culture and jurisprudence. Missing, however, from the resulting wealth of case law, were cases relating to government liability. In effect, there was no corresponding development of the law of state liability in Namibia until recently when claims for delictual damages for the acts and omissions of police and prison authorities alleging breaches of fundamental rights, started reaching the courts. Although the Namibian Constitution does not, like the South African, expressly mandate the courts to develop the common law so as to reflect the spirit of the entrenched fundamental rights, the Supreme Court has held that the Namibian Constitution and national legislation necessarily authorise the courts to adjudicate having regard to those rights. It then proceeded in *Dresselhaus Transport CC v Government of the Republic of Namibia* 2005 NR 214 (SC) to treat as 'useful guidelines' the constitutional-delict principles enunciated by South African courts in developing Namibia's own government liability law. This presentation argues that, like their counterparts in South Africa, litigants in Namibia do not bring their actions directly under the Constitution seeking compensation for breaches of their fundamental rights, and that pursuing that line of action has its inherent problems and negative implications for vindication of litigants' rights. It suggests a re-think of that approach and practice.

INTRODUCTION

The High Court of Namibia was recently called upon to determine whether prison authorities were liable in negligence for alleged failure to intervene

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in a bizarre 'war' between two prison-gangs.[1] A few years earlier, the Supreme Court was confronted with a claim against the police for standing by and watching a mob storm and loot a consignment of beer transported by the plaintiff for the South African Breweries.[2] In two recent cases, the Supreme Court had to decide whether the state was liable: where it was alleged to have created the risk of suicide of a person in police custody due to the negligence of one of its officers;[3] and where there was unreasonable bureaucratic delay by state officials in releasing a mentally ill patient several months after her having been certified medically fit for release.[4] Vicarious liability of the state was not in issue in any of these cases; that point was either admitted or assumed in the cases and is, therefore, not part of this discussion.

The Namibian Constitution does not include provisions similar to those in the South African Constitution[5] which mandate the courts to develop the common law where it does not accord with the letter and spirit of the Bill of Rights.[6] This notwithstanding, the Supreme Court has held that the Namibian Constitution and the Police Act, not only amplify the common law of delict, they override it where it is inconsistent or inadequate. The Supreme Court further held that although the Namibian Constitution and statute law are the main sources of law on which the Namibian courts must

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1 *Kennedy and Others v Minister of Prisons and Correctional Services* 2008 2 NR 631 (HC).

2 *Dresselhaus Transport CC v Government of the Republic of Namibia* 2005 NR 214 (SC).

3 *Shaanika v Ministry of Safety and Security* [2009] NASC 11 (23 July 2009).

4 *Gawanas v Government of the Republic of Namibia* 2012 2 NR 401 (SC).

5 Section 39(2), Constitution of South Africa 1996.

6 The law of government liability has developed by leaps and bounds in South Africa since the Constitutional Court, interpreting ss 38 and 39(2) of the 1996 Constitution, launched the constitutional/delict approach in *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC); carried it through in *Carmichele v Minister of Safety and Security (1)* 2001 4 SA 938 (CC); as consolidated in *Zealand v Minister of Justice and Constitutional Development and Another* 2008 4 SA 458 (CC) and recently in *Lee v Minister of Correctional Services* 2013 2 SA 144 (CC). See also: *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA); *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 1 SA 389 (SCA); *Minister of Safety and Security v Hamilton* 2004 2 SA 216; *Minister of Safety and Security and Others v Craig and Others* 2011 1 SACR 469 (SCA); *Jaftha v Minister of Correctional Services* [2012] 2 All SA 286 (ECP). The modern law of police negligence has further been extended in the sphere of domestic violence where the police had failed to carry out their duty under the Domestic Violence Act 116 of 1998 – *Minister of Safety & Security v Venter* 2011 1 SACR 67 (SCA). *Venter* like many others in its category illustrates the intersection between criminal liability and delictual liability. See Scott 'Delictual liability of the police flowing from non-compliance with the Domestic Violence Act – *Minister of Safety & Security v Venter* 2011 2 SACR 67 (SCA)' (2012) 75/2 *THRHR* 288.

rely in deciding the legal issues arising in these cases, the South African decisions afford 'useful guidelines' for the Namibian courts.[7] *Dresselhaus Transport* and *Kennedy* thus afforded the courts in Namibia the opportunity of considering in some detail the impact of the Constitution on the law of delict, and they proceeded to apply the constitutionally-induced principles enunciated by South African courts, in developing the law of government liability in Namibia.

Rationalisations for this approach are not far-fetched. First, these two Southern African jurisdictions belong to the same Roman-Dutch common law family whose approach to the determination of liability for negligent acts and omissions differ significantly from how that question is asked and answered in the English courts. South African courts have for decades clearly articulated the differences in phrasing the questions for determination in delictual liability under Roman-Dutch law and the approach of English courts.[8] Namibian courts, on the other hand, have tended to confuse the

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7 *Dresselhaus Transport* n 2 above at 249J–250A–C.

8 The Supreme Court of Appeal took the opportunity presented by *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA) at par 17 to emphasise the improper manner of framing the questions for determination in South African law as '[t]he constant use of the phrase "duty of care" is unfortunate. It is a term that in our legal setting is inherently misleading and its use may have led the trial court somewhat astray.' Harms JA was thereby reiterating his earlier remarks in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority of South Africa* 2006 1 SA 461 (SCA) at pars 12, 14 and 18 that: 'to formulate the issue in terms of a "duty of care" may lead one astray' and '[t]o elevate negligence to the determining factor confuses wrongfulness with negligence and leads to the absorption of the English law of tort of negligence into our law, thereby distorting it'. The point is that the act or omission of the defendant must have been wrongful, negligent and would have caused the loss. The fact that an act was negligent does not in itself make it wrongful, the defendant must have been under a duty to conform to a standard of conduct – Van der Walt & Midgley, *Principles of Delict* (3ed 2005) at par 64. Although foreseeability of damage might be a factor in establishing whether or not a particular act was wrongful, it can never be decisive of the matter – *Government of the Republic of South Africa v Basdoe & Another* 1996 1 SA 355 (A) at 368H. 'Otherwise there would not have been any reason to distinguish between wrongfulness and negligence.' Since, in the words of Harms JA 'foreseeability also plays a role in determining legal causation, it would lead to the temptation to make liability dependent on the foreseeability of harm without anything more, which would be undesirable'. A straightforward illustration of the difference between the South African approach and the English common law requirements for establishing duty of care can be taken from the speech of McLachlin & Major in *Cooper v Hobart* (2001) 206 DLR (4th) 193 at par 29. Thus, when these great judges of the Supreme Court of Canada spoke of 'plus something more' in a-not-totally dissimilar state of affairs as in *Steenkamp*, they were referring to the requirement of 'proximity' as an essential indicia to the existence of a duty of care at common law. In the South African circumstance, on the other hand, 'proximity', like 'foreseeability' or the requirement of a 'special relationship' 'is not essential for wrongfulness' especially where the defendant

matter[9] until recently when Maritz J drew attention to the problem.[10] In the absence of any express opinion from the Supreme Court on the issue, coupled with the fact that 'duty of care' appeared twice in the brief headnote to the *Dresselhaus Transport* report, and once in the judgment of O'Linn AJA,[11] it would appear that this confusion lingers in Namibian law. It must await a vigilant Supreme Court in a future case to set the record straight.

Secondly, and equally crucial to the development of the modern Namibian and South African law of delict in general and government liability in particular, is the existence in both jurisdictions of justiciable Bills of Rights which had given impetus to the prevailing constitutional/delict jurisprudence. In accordance with this approach, the plaintiff alleges breach or breaches of his or her fundamental right(s) and links the infringement to the test for wrongfulness. The issue is then settled on a combination of the

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is the State. This is due to the fact that the constitutional norm of accountability renders a contrary argument illusory. Under the South African constitutional arrangement, a special State/citizen relationship exits or must be taken to exist in any service delivery situation. This much could be garnered from the judgments of Harms JA, *Minister of Safety & Security & Another v Carmichele* 2004 (2) BCLR 133 (SCA) at par 41; and Vivier ADP, *Van Eeden v Minister of Safety & Security* 2003 1 SA 389 (SCA) at par 23.

9 See *per* Hannah J *Namibia Machine Tools (Pty) Ltd v Minister of Works, Transport & Communication* 1997 NR 18 (HC) at 26H/J–27A; Maritz J *Namibia Breweries (Pty) Ltd v Seelenbinder, Henning & Partners* 2002 NR 155 b (HC) at 166A; Hoff J *Lofty-Eaton v Gray Security Services Namibia (Pty) Ltd* 2005 NR 297 at 306C/J–304A–H. Not only that, these judges deployed the 'duty of care' concept in dealing with the cases before them, Maritz J went as far as stating in *Namibia Breweries* (at 163H) that 'our Courts have opted for an "incremental approach"' [citing per Hannah J in *Namibia Machine Tools* (at 26F)] to the development of the duty of care. See generally, Okpaluba & Osode, *Government liability: South Africa & the Commonwealth* (2010) 109–118; Okpaluba, 'The law of bureaucratic negligence in South Africa: a comparative Commonwealth Perspective' (2006) *Acta Juridica* 117 at 122–132; Neethling, Potgieter & Visser *Law of Delict* (6ed 2010) 152–154.

10 In *Kennedy* n 1 above at par 12, Maritz J reverted to Van der Heever JA's unfavourable characterisation of the English law of tort concept of a 'duty of care' relied upon by the plaintiffs in establishing liability for their cause of action as 'a rather nebulous concept which contains a postulate of that which has to be determined' – *Herschel v Mrupe* 1945 3 SA 464 (A) at 485. The trial judge further observed that although the application of a 'duty of care' in the Southern African common law has been condemned in no uncertain terms by Rumpff CJ in *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) at 833, parties have continued so to plead in delictual actions. He held that 'the context within which the plaintiffs pleaded it ('wrongfully and unlawfully and despite a legal duty of care owed to the plaintiffs') raises both the delictual element of wrongfulness and that of negligence – and does so against the matrix of the peculiar common law and statutory relationship subsisting between the Namibian Prison Services, on the one hand, and the inmates being detained in custody at its various correctional institutions, on the other.

11 *Dresselhaus Transport* n 2 above at 251F.

relevant constitutional values, statutory duties or obligations, and delictual principles.[12] In this way, the law of delict in both countries has developed along the lines dictated by the values, norms, and principles embedded in their respective Bill of Rights. A brief discussion of the South African approach which has influenced the development of the modern law of state liability in Namibia, is undertaken below.

THE SOUTH AFRICAN APPROACH

The Supreme Court of Namibia started its deliberations on the law of delict applicable to the *Dresselhaus Transport* case by referring to the ratio of the South African Appellate Division (SAAD) in *Minister of Police v Ewels.*[13] It was held in *Ewels* that a negligent omission will be regarded as unlawful conduct when the circumstances of the case are of such a nature that the omission evokes not only moral indignation, but that the 'legal convictions of the community' require that it should be regarded as unlawful. The SAAD had no hesitation in holding that a legal duty existed, and rested on police officers who refrained from protecting Ewels when he was assaulted at the police station. The court took the following factors into account: the statutory duties of the police; the fact that the assault took place on the police station premises; the particular relationship of protection between a member of the police force and an ordinary person; and the fact that the on-duty police officers could have intervened on behalf of the assaulted plaintiff without any difficulty.

In order to proceed to lay down the modern version of the tests for wrongfulness and the legal convictions of the community as directed by the South African Constitutional Court (SACC) in *Carmichele v Minister* of *Safety and Security*,[14] the SACC had to cast aside the then prevailing trends based on *Minister of Law & Order v Kadir,*[15] and *Knop v Johannesburg City Council.*[16] Both cases had leaned towards the English public interest principle granting the police immunity from liability in the investigation of crime.[17] In line with this reasoning, the SAAD held that society would take account of the fact that the functions of the police in terms of the Police Act

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12 See also *Shaanika* n 3 above; *Gawanas* n 4 above.

13 1975 3 SA 590 (A).

14 2001 4 SA 938 (CC) (*Carmichele (1)*).

15 1995 1 SA 303 (A).

16 1995 1 SA 1 (A).

17 On this principle generally, see Okpaluba 'Public interest immunity for negligent performance of police investigative duties: recent Commonwealth case law (1)' (2008) 71/1 *THRHR* 67.

related to criminal matters. They were not designed for the assistance of civil litigants. Accordingly, the society would not support the idea of holding policemen personally liable for damages arising from what was a relatively insignificant dereliction of duty.

The South African Supreme Court of Appeal judgments in *Minister of Safety and Security v Van Duivensboden,*[18] and *Van Eeden v Minister of Safety and Security,*[19] became the catalysts for the development of the modern law of bureaucratic negligence in South Africa.[20] These two judgments carried through and expanded the reasons earlier advanced by the SACC in *Carmichele (1)* for rejecting certain fundamental flaws and assumptions based on policy determinations, and originating from the English tort law as justifications for absolving the police from liability in the performance of their investigative duties.[21] In both cases, the Supreme Court of Appeal held that the convictions of the community must now be informed by the norms and values of contemporary South African society exemplified by the provisions of the Bill of Rights. These must be taken into account in determining the current law of negligence in terms of which, a negligent act is not necessarily actionable, unless it occurred in circumstances that the law recognises as unlawful.[22]

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18 2002 6 SA 431 (SCA) (*Van Duivenboden*).

19 2003 1 SA 389 (SCA) (*Van Eeden*).

20 Okpaluba 'The law of bureaucratic negligence in South Africa: a comparative Commonwealth perspective' 2006 *Acta Juridica* 117 at 140; Neethling, 'Delictual protection of the right to bodily integrity and security of the person against omissions by the state' (2005) 122/3 *SALJ* 572; Carpenter 'The Carmichele legacy – enhanced curial protection of the right to physical safety: a note on *Carmichele v Minister of Safety and Security; Minister of Safety and Security v Van Duivenboden; and Van Eeden v Minister of Safety and Security'* (2003) 18/1 SAPR/PL 252; Mukheibir 'The impact of the constitutional imperative of the state to avoid harm on delictual liability for an omission' (2003) 24/2 *Obiter* 498; Neethling & Potgieter *Neethling, Potgieter and Visser law of delict* (2010) 16; Okpaluba & Osode *Government liability* at pars 1.6.2 and 5.5.1.

21 See Okpaluba 'Governmental liability for acts and omissions of police officers in contemporary South African public law' (2007) 21/2 *Speculum Juris* 233 at 234–235; Okpaluba 'Public interest immunity for negligent performance of police investigative duties: recent commonwealth case law (2)' (2008) 71/2 *THRHR* 210.

22 *Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another* 2000 1 SA 827 (SCA) at 837G (*Sea Harvest*); *Knop v Johannesburg City Council* 1995 1 SA 1 (A) at 24D–F (*Knop*); *Bayer South Africa (Pty) Ltd v Frost* 1991 4 SA 559 (A) at 568B–C; *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A); PQR Boberg *The law of delict* vol 1 30–4.

Where the lack of due care manifests itself in a positive act that causes physical harm, it is presumed to be unlawful,[23] but that is not so in the case of a negligent omission. Under English common law, the courts generally approach claims of tortious omissions with greater caution than they do in the case of a positive act by a defendant.[24] Similarly, South African courts regard negligent omission as unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm.[25] It is important to keep this concept separate from that of fault. Where the law recognises the existence of a legal duty, it does not follow that an omission will necessarily mean that liability will follow. Such an omission will attract liability only if it was also culpable as determined by the application of the separate test enunciated in *Kruger v Coetzee*[26] and consistently applied by the courts.[27] In other words, the question is whether a reasonable person in the position of the defendant would have foreseen the harm and would also have acted to avert it. While the enquiry as to the existence or otherwise of a legal duty might be conceptually anterior to the question of fault (for the very enquiry is whether fault is capable of being legally recognised),[28] nevertheless, in order to avoid conflating these two separate elements of liability, it might often be helpful to assume that the omission was negligent when asking whether, as a matter of legal policy, the omission ought to be actionable.[29]

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23 *Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) at 497B–C; *Knop* ibid at 26F.

24 *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL) at 1060 *per* Lord Diplock; *Crouch v Attorney General* [2008] 3 NZLR 728 (SC) at par 80.

25 *Cf Steenkamp* n 8 above; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority of South Africa* 2006 1 SA 461 (SCA) (*Telematrix*); *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 3 SA 138 (SCA) (*Two Oceans*).

26 1966 1 SA 428 (A) at 430E–F.

27 See also *Mkhatshwa v Minister of Defence* 2000 1 SA 1104 (SCA); *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 1 SA 359 (CC); *Shabalala v Metrorail* 2008 3 SA 142 (SCA); *Charter Hi (Pty) Ltd v Minister of Transport* [2011] ZASCA 89; *SA Rail Commuters Corporation Ltd v Thwala* [2011] JOL 27888 (SCA).

28 See also *Cape Town Municipality v Bakkerud* 2000 3 SA 1049 (SCA) at pars 25 and 26.

29 *Per* Nugent JA, *Van Duivenboden* at pars 12 and 16. See also *Viv's Tippers v PHA Phama Staff Services* 2010 4 SA 455 (SCA) at par 6; *Delphisure Group Insurance Brokers (Pty) Ltd v Dippenaar* 2010 5 SA 499 (SCA) at pars 23–25; *Fourways Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 1 SA 150 (SCA) at par 22; *Minister of Safety and Security v Hamilton* 2004 1 SA 216 par 16; *Carmichele (1)* at par 7; *Cape Town Municipal Council v Bakkerud* 2000 3 SA 1049 (SCA) at pars 14–17; *Cape Metropolitan Council v Graham* 2001 1 SA 1197 (SCA) at par 6; *Olitzki Property Holdings v State Tender Board and Another* 2001 3 SA 1247 (SCA) at pars 11 and 13; *BOE Bank Ltd v Ries* 2002 1 SA 39 (SCA) at par 13.

In *Van Eeden,* the Supreme Court of Appeal continued where *Van Duivenboden* had left off in determining the test of the legal convictions of the community *vis-à-vis* the imposition of liability for harm done to the individual by the wrongful act or omission by a public authority in the exercise of governmental powers. It was held that:

The legal convictions of the community test was not concerned with what the community regards as socially, morally, ethically or religiously right or wrong, but whether or not the community regards a particular act or form of conduct as delictually wrongful. The legal convictions of the community must further be seen as the legal convictions of the legal policy makers of the community, such as the Legislature and Judges.[30]

Construed from the point of view of the Constitution, the concept of the legal convictions of the community must necessarily incorporate the norms, values, and principles it embodies. These fundamental values include the protection of human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism, and non-sexism enshrined in section 1(a) and (b) of the 1996 Constitution. There is also section 12(1) which guarantees the freedom and security of the person, including in subparagraph (c), freedom from all forms of violence from either public or private sources.[31] The court, however, hastened to point out that the Constitution cannot be regarded as the exclusive embodiment of the delictual criterion of the legal convictions of the community, nor does it mean that this criterion will lose its status as an agent in shaping and improving the law of delict to deal with new challenges.[32] In any case, the Constitution does not only create the right, it goes further to impose a duty on the State to act positively to prevent harm to the plaintiff if it was reasonably possible to do so. In effect, the very existence of the state's constitutional duty to act in protection of the rights in the Bill of Rights necessarily imposes upon it a further constitutional duty of accountability which assumes an important role in determining whether a legal duty ought to be recognised in a particular case.[33]

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30 *Van Eeden* at par 10.

31 *Id* at par 13. See also *S v Baloyi (Minister of Justice & Another Intervening)* 2000 1 SA 425 (CC) par 13.

32 *Id* at par 12. See also Midgley in Joubert (ed) *The law of South Africa* vol 18 part 1 (first re-issue) at par 52; Visser 'Some remarks on the relevance of the Bill of Rights in the field of delict' 1998 *TSAR* 529 at 535.

33 *Id* at par 17. See also *Van Duivenboden* at par 21.

At the same time, it had to be recognised that the entrenchment of fundamental rights and values in the Bill of Rights enhances their protection and affords them a higher status in law, in that state actions and private law rules, principles, and norms – including those regulating the law of delict – are subjected to, and thus given content in the light of, the basic values in the Bill of Rights.[34] In effect, court decisions and even conduct of natural and juristic persons may be tested against them, taking into account that any limitation of a fundamental right must be in accordance with the limitation clause in the Constitution.[35] *Jaftha v Minister of Correctional Services*[36] discussed below, is a recent application of the foregoing formulations to a case similar in many respects to the Namibian cases discussed in this paper.

Foreseeability of the risk of attack by prison inmate

In *Jaftha,* the plaintiff/prisoner sued the defendant for damages sustained when he was attacked by a fellow inmate in the prison hospital. The plaintiff sustained a severe cut with a surgical scalpel resulting in a wound to his face from the left temporal region down to the jaw line. The issue for determination at trial was whether the prison warders were negligent. The defendant admitted that the attack took place, and he owed a legal duty to ensure the plaintiff's safe custody and physical and psychological integrity, but contended that it had not breached that duty, and pleaded that all reasonable steps had been taken to ensure the safe custody of the plaintiff.[37] The question for determination was whether on the facts negligence on the part of the defendant's employees had been established. In the process, the trial judge set out to discover the test for determining what a reasonable person in the circumstances of the defendant would have done to avert such foreseeable harm.

Goosen J referred to the recognised tests established in *Van Duivenboden* in respect of negligence, omission, and the *diligens paterfamilias*,[38] as applied in *McIntosh v Premier, KwaZulu-Natal*[39] and *Mukheiber v Raath &*

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34 *Van Eeden* at par 12.
35 Neethling, Potgieter & Visser *Law of delict* (6ed 2010) 19.
36 [2012] 2 All SA 286 (ECP).
37 *Id* at pars 3 and 19.
38 *Van Duivenboden* at pars 12 and 23.
39 2008 6 SA 1 (SCA) at par 12, Scott JA held: 'As is apparent from the much quoted dictum of Holmes JA in *Kruger v Coetzee* 1966 1 SA 428 (A) at 430E–F, the issue of negligence itself involves a two-fold inquiry. The first is: was the harm reasonably foreseeable? The second is: would the *diligens paterfamilias* take reasonable steps to guard against such occurrence and did the defendant fail to take those steps? The answer to the second inquiry is frequently expressed in terms of a duty. The foreseeability

Another[40] as modifications of *Kruger v Coetzee.*[41] It was held that the approach to determining foreseeability of harm involves a careful appraisal of the specific facts and circumstances of the case, and, having regard to those circumstances, whether a reasonable person in the position of the defendant would have foreseen the potential for harm.[42] It is thus not necessary that the plaintiff should establish either that the manner in which harm occurred ought to have been foreseen, or that the degree or extent of the harm caused should have been foreseen.[43] And, as Boruchowitz AJA has held,[44] the precise or exact manner in which the harm occurs need not be foreseeable, but only the general manner of its occurrence.[45]

The trial judge found that as a result of an earlier violent altercation between the plaintiff and the inmate, there was risk of further violence for as long as they remained in one another's presence.[46] That this was clear to the warders on duty, is evidenced by the fact that they separated plaintiff from his assailant. It was obvious that the warders on duty must have foreseen that there was a risk of further violence and, accordingly, a risk of harm in the event of their not being segregated. The failure properly to segregate the prisoners, and to ensure that they were sufficiently monitored and guarded until such time as they could be securely segregated, constituted a breach of the legal duty that the defendant owed to the plaintiff.[47] This failure resulted in the plaintiff suffering physical harm in consequence of the violent attack upon him by his fellow prisoner.[48] Therefore, the plaintiff succeeded in

requirement is more often than not assumed and the enquiry is said to be simply whether the defendant had a duty to take one or other step, such as drive a particular way or perform some or other positive act, and, if so, whether the failure on the part of the defendant to do so amounted to a breach of that duty.' See also *Pitzer v Eskom* [2012] ZASCA 44 (29 March 2012) at par 18.

40 1999 3 SA 1065 (SCA) at 1077E–F, where the test was reformulated thus: 'For the purposes of liability *culpa* arises if – (a) A reasonable person in the position of the defendant – (I) would have foreseen harm of the general kind that actually occurred; (ii) would have foreseen the general kind of causal sequence by which that harm occurred; (iii) would have taken steps to guard against it, and (b) the defendant failed to take those steps.'

41 1966 1 SA 428 (A).

42 *Jaftha* at pars 18–22. See also *Joffe & Co Ltd v Hoskins & Another, Joffe & Co Ltd v Banamour NO & Another* 1941 AD 431 at 451.

43 *Jaftha* at par 23.

44 *Pitzer v Eskom* [2012] ZASCA 44 (29 March 2012) at par 25.

45 See also *Sea Harvest* n 22 above at par 22.

46 *Jaftha* at par 29.

47 *Id* at par 33.

48 *Id* at par 37.

establishing that the defendant was liable to him in damages for the breach of the duty owed to him.[49]

CONSTITUTIONAL AND DELICTUAL BASES FOR DETERMINING GOVERNMENT LIABILITY IN NAMIBIA

In both the South African and Namibian jurisdictions, litigants claiming damages for Bill of Rights breaches tend to prefer the delict/*Lex Aquilia* route[50] rather than the constitutional cause of action.[51] The difference in the two approaches is that the constitutional cause of action involves bringing the claim through a constitutional motion, alleging breach of a fundamental right and asking the court to grant 'appropriate relief' in terms of the South African Constitution,[52] or monetary compensation under the Constitution of Namibia.[53] In a delictual action in terms of the Namibian Constitution, the plaintiff alleges violation of the entrenched fundamental rights and freedoms supported by the values dictated by the constitutional order as the basis for the wrongfulness or legal duty criterion. The breach becomes the factor to be applied in the assessment of the performance of the executive in respect of the rights of the citizens, or in terms of evaluating the reasonableness or fairness of the administrative decision. This fundamentally requires government officials to exercise their authority according to law, and not arbitrarily.[54] The case ultimately falls to be determined on both the Namibian constitutional and delictual grounds.

Take the classic example of *Gawanas*.[55] The appellant was detained as a president's patient in terms of section 77(6) of the Criminal Procedure Act read with Chapter 3 of the Mental Health Act 18 of 1973. In her action for damages, she alleged that she was wrongfully and unlawfully detained in the Mental Health Centre, for the period 13 January 2003 till 15 December 2003. The claim was based on the *Lex Aquilia* and, in the alternative, on the

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49 *Id* at par 38.

50 This is principally due to the optimism expressed in *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) at par 58(*b*) to the effect that: 'South African common law of delict was flexible and under s 35(3) of the interim [1993] Constitution should be developed by the courts with 'due regard to the spirit, purport and objects' of Chapter 3. In many cases the common law will be broad enough to provide all the relief that would be "appropriate" for breach of constitutional rights.'

51 See generally, Okpaluba & Osode, *Government Liability* chapter 3.

52 S 38(1), Constitution of South Africa 1996.

53 Art 25(2), Constitution of Namibia 1990.

54 *S v Mabena* 2007 1 SACR 482 (SCA) at par 2; *Charkaoui v Minister of Citizenship & Immigration* [2007] 5 LRC 95 (SCC) at par 134.

55 *Gawanas v Government of the Republic of Namibia* 2012 2 NR 401 (SC).

infringement of her constitutional rights to personal liberty (article 7);[56] dignity (article 8);[57] the right to be free from arbitrary detention (article 11);[58] and her right to administrative justice (article 18) under the Constitution of Namibia 1990.[59]

The constitutional cause of action

Since the alternative claim in *Gawanas* involved infringements of fundamental rights, the appellant could have, *ab initio*, approached 'a competent court' under article 25(2) to enforce her right as an 'aggrieved person' who claims that her fundamental rights and freedoms enshrined in the Constitution have been 'infringed or threatened'. By the same token, she could have asked the court for such order 'as shall be necessary and appropriate' to secure the enjoyment of the right allegedly infringed.[60]

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56 Article 7 provides that: 'No persons shall be deprived of personal liberty except according to procedures established by law.' See *eg Alexander v Minister of Justice and Others* 2009 2 NR 712 (Parker J), 2010 1 NR 328 (SC).

57 In terms of this article it is provided that: '(1) The dignity of all persons shall be inviolable.' While sub-articles (2)(a) and (b) provides: 'In any judicial proceedings or other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed. No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.' These provisions were interpreted and applied in *Namunjepo & Others v Commanding Officer, Windhoek Prison & Another* 2000 6 BCLR 671 (NmS); *S v Tcoeib* 1996 7 BCLR 996 (NmS); *Ex parte Attorney General: In Re Corporal Punishment by Organs of State* 1991 3 SA 76 (NmS); *S v Sipula* 1994 NR 41 (HC). Manyarara AJ held in *Engelbrecht v Minister of Prisons & Correctional Services* 2000 NR 230 (HC), that placing prisoners in 'leg iron' was unconstitutional and in breach of their rights to dignity under Article 8. This violation was aggravated by keeping the plaintiff in solitary confinement for the first week of his detention, in a block reserved for convicted prisoners, when he was an awaiting trial prisoner. Treatment of prisoners in violation of their rights to human dignity elicited not only condemnations of the High Court of St Vincent and the Grenadines in *Peters v Marksman* [2001] 1 LRC 1 and the Supreme Court of New Zealand in *Taunoa v Attorney General* [2008] 1 NZLR 429 (SC) but also damages were awarded in ventilation of the breaches in both cases.

58 Article 11 provides: (1) 'No persons shall be subject to arbitrary arrest or detention'; (2) 'No persons who are arrested shall be detained in custody without being informed promptly in language they understand of the grounds of such arrest.' On which, see the illuminating judgment of Parker J in *Lielezo v Minister of Home Affairs and Another* [2010] NAHC 1 at par 10.

59 The plaintiff in *Lee v Minister of Correctional Services* 2013 1 SA 144 (CC) at pars 35–36 who was not as prudent as to file an alternative action under the Constitution in a particularly suiting situation learnt at the Constitutional Court that he could not do so at that late stage. But for the more realistic approach of the majority, the plaintiff /appellant who already lost at the SCA would have had the vindication of his rights further delayed and/or probably ultimately denied if the minority approach of remitting the case to the High Court to develop the common law had prevailed.

60 Article 25(3), Constitution of Namibia 1990.

Meanwhile, it has been held by the Privy Council interpreting 'appropriate relief' in the fundamental rights enforcement provisions of the Constitution of Trinidad and Tobago;[61] by the Constitutional Court of South Africa construing 'appropriate relief' and 'just and equitable' order in the enforcement of the Bill of Rights and other constitutional violations, respectively, of the Constitution of South Africa;[62] and the Supreme Court of Canada dealing with an 'appropriate and just' remedy in the Canadian Charter of Rights and Freedoms,[63] that the constitutional damages cause of action is implicit in these generic terms. It therefore follows that a case for constitutional damages as the primary cause of action is even stronger where there is express provision to that effect in the Constitution. This submission is fortified by the power vested in the courts in Namibia to award monetary compensation under article 25(4) of the Constitution, a provision similar only to those found in a few constitutions in the Commonwealth.[64] Under sub-article (4), a court entertaining the application of an aggrieved person may 'award *monetary compensation* in respect of any damage suffered [by that person] in consequence of such unlawful denial or violation of [his or her] fundamental rights and freedoms, where it considers such an award to be appropriate in the circumstances of particular cases'.

The *Gawanas* case had all the trappings of a constitutional cause of action, and the ingredients to support a direct constitutional claim seeking compensation as an appropriate award. In support of this argument is Strydom AJA's recognition that this case was founded on strong constitutional foundation. He observed:[65]

> Detention seems to be in a niche of its own as far as foreseeability is concerned. Where a person is unlawfully detained the person causing that

61 See s 6(1), Constitution of Trinidad & Tobago 1976; *Maharaj v Attorney General of Trinidad & Tobago* [1970] AC 385 (PC).

62 See ss 38 and 172(1) respectively of the Constitution of South Africa 1996. See also *Fose v Minister of Safety & Security* 1997 3 SA 786 (CC); *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd* 2005 1 SA 359 (CC); *Zealand v Minister of Justice and Constitutional Development* 2008 4 SA 458 (CC).

63 S 24(1), Canadian Charter of Rights and Freedoms 1982; *Vancouver (City) v Ward* [2010] 2 SCR 28 (SCC).

64 See *eg* s 32(2), Constitution of India; s 46(5)(d), Constitution of Seychelles 1983; s 17, Constitution of the Solomon Islands 1978. In the Commonwealth Caribbean Constitutions, the award of monetary compensation is expressly provided for in the case of unlawful arrest or detention, see *eg* s 3(6), St Christopher, Nevis and Anguilla Constitution 1967; *Attorney General for St Christopher, Nevis and Anguilla v Reynolds* [1980] AC 637 (PC).

65 *Gawanas* at par 43.

> can hardly be heard to say that harm was not foreseeable. The liberty of an individual and protection against arbitrary arrest and detention form the cornerstones of any Constitution based on human rights and respect for the individual. In regard to Namibia this Court has found that the right to liberty, set out in Article 7, gives rise to a substantive right which guarantees personal liberty.[66]

This finding notwithstanding, the claim was settled in terms of *Aquilian* liability for the state's omission to take reasonable steps to secure the release of Ms Gawanas. The Supreme Court, therefore, found it unnecessary to consider the claim for damages based on the Constitution.[67] It was thus held that in the circumstances, a *diligens paterfamilias* would have foreseen the possibility of his conduct causing loss to another person, and would have taken reasonable steps to avoid that possibility.[68] Further, that the respondent was liable in terms of *Aquilian* liability for its omission to take reasonable steps to secure the appellant's release once her medical condition had improved to the point that her doctors considered her continued detention in an institution unnecessary.[69] Since there was no reasonable explanation for the delay to act in order to discharge the appellant, which was a necessary step in the process before a judge could order her release, the respondent was held liable to compensate the appellant for damages under *Lex Aquilia*.

The delictual basis

It was in *Dresselhaus Transport* that the Supreme Court laid the foundation for the constitutional/delict approach in Namibian law. The case involved an equally revered fundamental right – the right to property.[70] Also in issue were the duties and obligations imposed upon the police by the Namibian

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[66] In *Alexander v Minister of Justice and Others* 2010 1 NR 328 (SC) at par 118, the Supreme Court had to decide whether article 7 of the Constitution of Namibia provides for substantive protection of the right to liberty of an individual and whether the provisions of section 21 of the Extradition Act 11 of 1996 infringed or abridged that right. Strydom AJA (Maritz JA & Damaseb AJA concurring) entertained no doubt that the 'right to liberty is one of the cornerstones on which a democratic society is built. Without such right there is no protection for the individual against arbitrary arrest and detention. The importance of the right to liberty was acknowledged in decisions in Namibia and also in decisions prior to independence'. See *eg Katofa v Administrator-General for SWA and Others* 1985 4 SA 211 (SWA) at 220I–221D; *S v Acheson* 1991 NR 1 (HC) at 10A–C; *Djama v Government of the Republic of Namibia* 1992 NR 37 (HC) at 44F–J; *Julius and Another v Commanding Officer, Windhoek Prison and Others* 1996 NR 390 (HC).

[67] *Gawanas* at par 44.

[68] *Id* at par 42.

[69] *Id* at par 44.

[70] Article 16, Constitution of Namibia 1990.

Constitution and national legislation. It is submitted that the ensuing discussion witnesses the coming together of the constitutional rights and statutory responsibilities as the bedrock upon which the delictual duty to prevent foreseeable harm rests.

Failure to protect appellant's property

In *Dresselhaus Transport,* Levy AJ had dismissed the claim against the respondent for damages arising from the theft by members of the public of a consignment of 3744 cases of beer belonging to South African Breweries after appellant/transporter's vehicle had overturned.[71] The grounds upon which the plaintiff based its cause of action against the defendant, were first,

> [s]ubsequent to this accident, members of the police arrived and took charge of the accident scene. Members of the public also arrived on the scene and together with some members of the Namibian police themselves, and in the presence of the Namibian police wrongfully and unlawfully removed, looted and/or stole the entire consignment of beer.

Secondly,

> [d]espite being under a legal duty to do so, the members of the Namibian police present at the scene of the accident failed or neglected to prevent such members of the public and some members of the Namibian police themselves from removing, looting and/or stealing the entire consignment of beer.

Thirdly,

> [t]he conduct of the members of the Namibian police aforesaid constituted a breach of their legal duty to prevent and/or protect the beer consignment from being removed, looted and/or stolen by members of the public and members of the police themselves.[72]

After examining the functions of the Namibian Police under the Police Act 19 of 1990, Levy AJ held that 'even under these circumstances the right to sue for damages was not automatic'.[73] He held, however, that an injured party can sue for damages for breach of a statutory duty if he can prove that the statute concerned intended to give a right of action if there was a breach of duty; the plaintiff is one of the persons for whose benefit the duty was

71 *Dresselhaus Transport CC v Government of the Republic of Namibia* 2003 NR 54 (HC).
72 *Dresselhaus Transport* n 2 above at 216G–217A.
73 2003 NR 54 (HC) at 62E–F.

imposed; the damages were within the contemplation of the statute in respect of the breach; the defendant's conduct constituted a breach of that duty; and the breach caused plaintiff's damages which are claimed.[74] The reasoning for so holding, according to the trial judge, was that failure to prove any one of these facts may lead to non-suit. Furthermore, there was no provision in the Police Act that the victim of a theft was entitled to sue the police for damages for the value of the article stolen. Relying on some earlier South African cases where liability against the police was denied,[75] Levy AJ held that in the interpretation of the Act, the question was whether the duty was imposed for the claimant's benefit or in the interests of the public at large. Since the Act was enacted for the public at large and not for the benefit of individuals, it was never intended that the duties resting on the police could be quantified, and that a breach of duty would *ipso facto* entitle a person to claim damages.[76]

On appeal to the Supreme Court against the judgment of Levy AJ, it was contended for the plaintiff that the police should have foreseen the possibility of the crowd storming and looting, if not from the beginning, then, at least from an earlier stage when far more effective steps could have been taken to prevent it. However,

> even if it could not have been prevented *in toto*, the progressive build-up of the crowd and vehicles at the scene, could have, and should have been prevented; effective steps could have been taken to disperse the crowd at an earlier stage or at least act against the perpetrators by arresting and later prosecuting them and recovering all or most of the stolen goods at a later stage, once the mob had dispersed.[77] ... [and further that] even if the storming and looting were not foreseeable, then it was in any event foreseeable that in the phases that followed the culprits would go free and the loot, the property obtained by the culprits by means of theft, robbery and public violence, would be irretrievably lost to its owners or those that legally acquired their rights, unless effective and reasonable steps were taken by the police in terms of the Constitution and the Police Act to prevent the loss.[78]

In determining whether the police were liable in the circumstances, the Supreme Court began by identifying the duties and obligations of the police

74 2003 NR 54 (HC) at 62F–G/H.

75 See *eg Solomons v Gertzenstein* [1954] 2 All ER 625 at 634; *Lawrie v Union Government* 1930 TPD 402; *S v Thebe & Another* 1981 1 SA 504 (B).

76 2003 NR 54 (HC) at 62H–J.

77 2005 NR 214 (SC) at 241G–I.

78 *Id* at 242A–242BC.

under the Constitution and statute, and weighed these against the fundamental rights allegedly breached. Such constitutional sources included the right to property; the right of access to court to seek the 'necessary and appropriate order'; the plaintiff's entitlement to monetary compensation in appropriate circumstances; the binding force of the fundamental rights on all organs of government in accordance with article 5 of the Constitution; and the power of the National Assembly under article 115 to establish by an Act of parliament, a Namibian Police Force 'with prescribed powers, duties and procedures in order to secure the internal security of Namibia and to maintain law and order'.

On the other hand, the statutory authority included the Police Act 19 of 1990 which, in terms of section 13, mandates the Police to preserve the internal security of Namibia, maintain law and order, investigate any offence or alleged offence, and prevent crime and protect life and property and duties imposed upon the police by section 14(1)(g) and (h) of the Road Traffic and Transport Act 22 of 1999. After a thorough examination of these provisions, the Supreme Court held that by omitting to act, the police failed under the Constitution and the Police Act to maintain law and order, investigate the serious crime of public violence, robbery and theft, prevent crime, protect the property of the plaintiff, and respect and protect the fundamental rights of the appellant.[79]

O'Linn AJA, for a unanimous Supreme Court, held that the police had a legal duty under the Namibian Constitution and the Police Act towards the plaintiff to protect its property. 'The aforesaid legal duty also amounted to a "duty of care" as known in the law of delict.'[80] The police had failed to fulfil these legal duties, and in particular had failed to take reasonable steps to do so. In other words:

> The reasonable steps here contemplated are steps to be taken by the reasonable police persons in the execution of their onerous legal duties imposed by the Namibian Constitution and the Police Act, on the Namibian police force. The reasonable steps are those to be taken by members of a professional police force trained and equipped mentally and materially, for their tasks. The Government cannot escape liability if it failed to take reasonable steps for such training and equipment.[81]

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79 *Id* at 219F–220C.
80 *Id* at 251E–F.
81 *Id* at 251F–H.

It was held that the negligent omission by the Namibian police force to perform their legal duties was a direct cause of the theft of the plaintiff's property and the failure to retrieve it. As a direct consequence of the acts and omissions of the defendant, the plaintiff suffered damages.[82] O'Linn AJA thus concluded that these findings 'accord with the legal convictions of the law-abiding citizens of Namibia'.[83]

Failure to intervene in a 'prison-gangs' war

The principal claim in *Kennedy*[84] was indeed unusual. It was not alleged, as in *Jaftha*,[85] that the prison authorities had been negligent in not preventing an attack on the plaintiff by a fellow inmate in prison. It did not raise the issue of prison conditions through which the authorities failed to prevent the plaintiff from contracting a contagious disease,[86] nor was it about the failure of the prison or police authorities to take care of the well-being of a person in their custody.[87] Rather, the claim was for breach of duty allegedly owed to plaintiffs/prisoners for serious injuries sustained in a gang war inside the prison in which they were held. The subsidiary claim sounded more familiar. It alleged an assault on Kennedy by prison officials, and their failure to provide him with prescribed medication to treat his injuries.[88] Maritz J outlined the issues raised in two broad categories. First, a policy-based, objective, *ex post facto* enquiry into the legal and moral convictions of the community to determine the nature and scope of the legal duty on the Namibian Prison Services and whether it had been wrongfully breached. Secondly, the fact-based stage to establish whether any negligent omission by members of the Namibian Prison Services resulted in the injuries suffered by the plaintiffs.[89]

In order to decide these issues, the court found it expedient to start by establishing

[82] *Id* at 251H/I–J.
[83] *Id* at 251J–252A.
[84] Note 1 above.
[85] Note 36 above.
[86] *Minister of Correctional Services v Lee* 2013 1 SA 144 (CC).
[87] *Minister of Safety and Security and Others v Craig and Others* 2011 1 SACR 469 (SCA); *Geldenhuys v Minister of Safety and Security* 2004 1 SA 515 (SCA).
[88] The trial court (at par 61) allowed these claims of Kennedy because, at least, it was apparent that the level of force used to put him back in his cell smacked of retribution for the damage he caused, and exceeded by far the amount of force necessary to ensure compliance with the order given to him by the warders. Accordingly, the excessive force used constituted an unlawful assault and, given the *sequelae* thereof, justified an award of damages.
[89] *Kennedy* n 1 above at par 13.

> whether the members of the Namibian Prison Services had a legal duty to render such protection in the peculiar circumstances of the case[90] ... [as] ... without there being a legal duty there cannot be unlawfulness.[91]

Coupled with this is the principle that 'no person is generally held liable for not doing anything'.[92] The 'enquiry becomes more complicated when the alleged wrongfulness is not based on a specific act but rather on an omission to act.'[93] The court held that the only settled exception to the law regarding omissions is where, 'given the particular facts and circumstances of a case and the legal nature of the relationship between the persons involved, the one had a legal duty to prevent harm to the other'.[94] Maritz J referred to the often cited passage by Fleming that:

> In the decision whether or not there is a duty, many factors interplay: the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss shall fall. Hence, the incidents and extent of the duties are liable to adjustment in the light of the constant shifts and changes in community attitudes.[95]

Maritz J identified two crucial provisions of the Namibian Prisons Act 1998 to support his finding that a special relationship existed between the Namibian Prison Services and persons under their care at correctional institutions throughout Namibia. The first is section 3(a) which provides that the Prison Services are obliged to ensure that every prisoner is 'secure in a prison in safe custody until lawfully discharged or removed therefrom'. The second is section 25(a) which states that prison officers 'employed in a prison shall be responsible for ensuring the security and safety of all prisoners detained in custody of that prison'. In order to maintain order and discipline, prison officers are authorised by section 30 to use such force against a prisoner as is reasonably necessary in any given circumstance. The trial judge also considered certain provisions of the Constitution as

90 *Id* at par 14.

91 See per Rumpff CJ *Administrator, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) at 833A–B.

92 See *Saaiman and Others v Minister of Safety and Security and Another* 2003 3 SA 496 (O) at 503H; *Graham Barclay Oysters Ltd v Ryan* (2002) 211 CLR 540 at par 146; *Stuart v Kirkland-Veenstra* (2009) 254 ALR 432 (HCA) at par 112–113.

93 *Kennedy* n 1 above at par 14.

94 *Id* at par 14 citing *Carmichele v Minister of Safety and Security* 2001 1 SA 489 (SCA) at 498F–G, *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 1 SA 389 (SCA).

95 Fleming *The law of torts* (7ed 1992) 128. See further: *Ewels* n 13 above at 597A–C; *Minister of Law and Order v Kadir* 1995 1 SA 303 (A) at 318E–G.

important to the present deliberations.[96] For example, article 8(1) protects the dignity of all persons in Namibia, while sub-article (2) guarantees respect for human dignity 'during the enforcement of a penalty', and prohibits 'torture or cruel, inhuman or degrading treatment or punishment'. In terms of article 5, these rights, and all others enshrined in Chapter 3 of the Constitution, 'shall be respected and upheld by the executive, legislature and judiciary and all organs of the Government and its agencies'. Consequently, Maritz J held that

> if a prison authority were to support a prison gang and knowingly allow it to impose its collective will or rules on other inmates by the use of violence, it will constitute a clear breach of its constitutional duty under Article 5 and violate the article 8(2) fundamental rights of the inmates in its custody.[97]

It follows, therefore, that

> in the assessment and interplay of the many factors which a court must objectively consider to determine the legal perceptions of the community, the constitutional guarantees, statutory responsibilities and the corollary duty to respect and uphold them, must be accorded sufficient weight.[98]

All these factors give content to the legal relationship between the prison authority and the prisoners detained in correctional institutions under its control. They require the Namibian Prison Services to ensure the security, safety and human dignity of prisoners in their care. After referring to Corbett,[99] and Ackermann and Goldstone JJ in *Carmichele (1)*,[100] Maritz J held that it is not only

> the interpersonal relationship between guard and prisoner which should be considered in determining the unlawfulness of an omission to prevent an assault by one prisoner on another. Many other considerations bearing on the personal safety of the warders themselves, those of other members and staff and, ultimately, of members of the public at large and of society itself must be considered.[101]

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96 *Kennedy* n 1 above at par 18.
97 *Ibid*.
98 Paragraph 19.
99 Corbett 'Aspects of the role of policy in the evolution of the common law' 1987 *SALJ* 52 at 67.
100 *Carmichele (1)* at 957B–C.
101 *Kennedy* n 1 above at par 21.

In the final analysis, it is, in essence, 'one of reasonableness, determined with reference to the legal perceptions of the community as assessed by the court'.[102]

The court further found that the situation with which the prison officers were confronted was 'most serious'. There were some 470 prisoners, among whom Namibia's most hard core and dangerous criminals, congregated in the restricted space of F-section's courtyard. Some eighty of them were either members or supporters of the 28 gang who actively participated in the attack on the plaintiffs and pursued them as they tried to avoid injury. Many of them were armed with sharpened spoons, irons, wires and toothbrushes as well as with broomsticks and locks wrapped with cloth.[103]

On the other hand, there were only ten prison officers. Except for one who was armed with a baton, they were unarmed. In effect, they were not battle-ready. In those circumstances, Maritz J held that there would have been a great personal risk to life and of injury had they entered the fray individually or as a group. Further, given the level of noise, the sheer number of prisoners running about, the level of violence, the nature of the dangerous weapons they used, and the type of criminals involved, it would have been sheer folly for the prison officer in command of the section, to order his subordinates into the courtyard to assist the plaintiffs. From a tactical point of view, there were simply not enough prison officers and they were insufficiently equipped to suppress the violent and riotous behaviour of such a large number of armed and dangerous criminals bent on violence and retribution.[104]

The trial judge therefore concluded that the society's notion of what justice demanded under the circumstances did not require of the ten unarmed prison officers to put their lives, the safety of other prison staff, and of the public at risk by entering the courtyard filled with about 270 dangerous criminals, and to intervene physically to protect the plaintiffs from the assaults being perpetrated upon them by some eighty members of the '26 gang', some of whom were armed with dangerous weapons.[105] It was also held that by refusing or omitting to open the barred steel door beyond which they were

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102 *Ibid*, citing *per* Vivier JA in *Carmichele v Minister of Safety and Security* 2001 1 SA 489 (SCA) par 7.
103 *Id* at par 33.
104 *Ibid*.
105 *Id* at par 36.

standing to allow the plaintiffs escape from their assailants, was not unlawful. Walls, doors, and guards are what separate the public from dangerous, imprisoned criminals. Therefore, if by opening the gate to allow one or all of the plaintiffs to slip through, the warders would have been at risk of being overwhelmed and taken hostage by those other prisoners as part of a planned escape, it could not have been unlawful for the warders to keep the door between them and the prisoners locked, notwithstanding the plaintiffs' entreaties.[106] The reasoning is that in an objective assessment of the setting under consideration, the weight to be accorded to the public's safety and protection against dangerous convicted criminals must necessarily take precedence over the personal safety of the four plaintiffs – some of whom, admittedly, through their unlawful conduct aggravated a rival gang and by refusing to return the money exacerbated the already explosive situation. So too, must the personal safety of the prison officers and that of the prison and administrative staff of the institution in my assessment of the legal convictions of the community be preferred above the risk of injury to the plaintiffs. Had the door been unlocked and, as a consequence, the prison officers been taken hostage, they or their keys and uniforms been used to take other prison officers and administrative staff hostage and people have died in the ensuing riot or because dangerous prisoners have escaped, that single act would undoubtedly have been considered both negligent and unlawful and the Prison Services would have had to bear the responsibility for the delictual and other consequences thereof – not to mention the disciplinary ramifications it would have had for the officers concerned.[107]

It would have been different had there been sufficient opportunity to let one or all of the plaintiffs out of the courtyard without a real and substantial risk of the prison officers being overwhelmed. It would, under those circumstances, have clearly been unlawful to turn a blind eye to the plight of the plaintiffs. Society's notion of justice in such a situation would demand that the plaintiffs be allowed refuge behind the door.[108]

Having held that, on the facts established, the Prison Services' failure to protect the plaintiffs from assaults by other inmates was not unlawful in the circumstances, the question arises whether it was negligent in the sense that a reasonable person in the position of the prison officers would have foreseen and guarded against harm to the plaintiffs? The judge held that

[106] *Id* at par 38.
[107] *Ibid*.
[108] *Id* at par 39.

much the same could be said of the reasonableness of the refusal to open the barred door to allow the plaintiffs an opportunity to escape from their assailants. To have opened the door with the warring prisoners only a couple of meters away, would have accorded them an opportunity to rush the door and overpower the prison officers. It would have been contrary to the standing instructions dealing with the conduct of officers faced with such situations, to have heeded the entreaties of the four plaintiffs in respect of opening the barred steel door to allow their escape. It follows, therefore, that there had been no unlawfulness or negligence in the circumstances.[109]

Causation[110]

A finding of the existence of a legal duty and negligence in delict is not often the end of the judicial inquiry as to whether liability should be imposed. There are other issues closely linked to the proof by a plaintiff and determination by a court, of the liability of a defendant in delict. Assume that a plaintiff has successfully shown that a legal duty exists as between himself/herself and the defendant. Assume, further, that such a duty has been breached owing to the fault of the defendant. One of the questions that naturally flows from these assumptions, is the issue of causation.

Was there a causal connection between the wrongful act or omission of the defendant and the injury to the plaintiff?[111] Or, did the act or omission cause the plaintiff's injury? Thus, a plaintiff must prove not only the existence of a legal duty and breach of that duty, he/she must also prove that the breach

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109 *Id* at par 49.

110 See generally, Neethling *et al The law of delict* (5ed) 175–210; Okpaluba & Osode *Government liability: South Africa and the Commonwealth* (2010) par 8.2.

111 In *State of New South Wales (NSW Police) v Nominal Defendant* [2009] NSWCA 225 pars 39, 40, 57, 58 and 64, the New South Wales Court of Appeal held that although it was foreseeable that in the context of a pursuit, a police officer might make an error of judgment in initiating or continuing the pursuit, or in the speed at which the pursuit proceeded the accident was caused by the negligence of the driver of the Commodore and Senior Constable's conduct did not break the chain of causation. The chain of causation will not be broken in those circumstances if the negligence of the person was itself a direct or indirect contributing cause of the intervening act or decision. Even if at some point Senior Constable's conduct became unreasonable, that possibility was encompassed in the duty of care that was owed by the driver of the Commodore. See also *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360; *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22; *Chappel v Hart* (1998) 195 CLR 232; *Medlin v State Government Insurance Commission* (1995) 182 CLR 1; *Bennett v Minister for Community Welfare* [1992] HCA 27, (1992) 176 CLR 408; *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506; *Mahony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522.

or fault caused or materially contributed to his/her injury.[112] In other words, 'whether, but for the negligent act or omission of the defendant the event giving rise to the harm in question would have occurred'.[113] The Constitutional Court of South Africa recently held that where there is a multiple source of the injury suffered by the plaintiff, such as contracting tuberculosis in a crowded prison environment, the law does not require the plaintiff to identify the exact source of his or her infection. It is enough 'to satisfy probable factual causation where the evidence establishes that the plaintiff found himself in the kind of situation where the risk of contagion would have been reduced by proper systemic measures'.[114] The defendant would be liable once it has been shown that there was a causal connection between the negligent omissions of the responsible authority and the plaintiff's tuberculosis infection.[115]

In *Shaanika v Ministry of Safety and Security*,[116] the defendants admitted that there was a legal duty on the Namibian Police to persons in their custody, but argued that in this particular case, the police were under no duty to prevent the deceased from inflicting self-harm. The deceased's suicide was unforeseen and the firearm with which he killed himself was in a closed wardrobe. Further denying liability, the defendants pleaded that the proximate cause of the deceased's death was his own deliberate act of suicide.

The Supreme Court of Namibia agreed with the trial judge's conclusion[117] that the admissions constituted negligence on the part of the defendant, and

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112 *Per* Lord Reid, *Bonnington Castings Ltd v Wardlaw* [1956] 1 All ER 615, [1956] AC 613 (HL); *per* Lord Bridge, *Wilsher v Essex Area Health Authority* [1988] AC 1074 (HL) at 1084. Cf *per* Dixon J, *Betts v Wittingslowe Brothers Ltd* (1945) 71 CLR 637 at 648–9.

113 *Minister of Police v Skosana* 1977 1 SA 31 (A) at 35C–D; *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 1 SA 888 at 915B–H; *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) at 700F–H; *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA) (*Carmichele 2*) pars 54–61; *Minister of Finance v Gore* 2007 1 SA 111 (SCA) pars 32, 34 and 80; *Pitzer v Eskom* [2012] ZASCA 44 (29 March 2012) par 26; *Minister of Correctional Services v Lee* 2012 1 SACR 492 (SCA) pars 45–64.

114 *Per* Nkabinde J *Lee v Minister of Correctional Services* 2013 1 SA 144 (CC) par 60.

115 *Id* par 71. The Constitutional Court thereby overruled the Supreme Court of Appeal which had unanimously held that the complainant/prisoner failed to specify the source of his infection – *Minister of Correctional Services v Lee* 2012 1 SACR 492 (SCA). In the process, the Constitutional Court restored the trial judgment whereby the prison authorities were held liable for the prisoner's infection – *Lee v Minister of Correctional Services* 2011 6 SA 564 (WCC).

116 [2009] NASC 11 (23 July 2009).

117 *Shaanika v Minister of Safety and Security* [2008] NAHC 75 (15 July 2008).

that such negligence materially contributed to the deceased's death which gave rise to this claim by his dependants.[118] In other words, the admissions amounted to the proposition that a *bonus paterfamilias* would have foreseen the reasonable possibility that not locking the firearm away could cause harm, and that it would therefore have guarded against such harm by taking adequate steps which it failed to do.[119] Strydom AJA applied the 'two distinct enquiries' of factual and legal causation analysis and reached the conclusion that the defendant went so far as to admit a causal link between the failure to lock away the firearm and the suicide of the person in police custody. There was therefore no doubt that taking into consideration the whole tenor of the admissions made, it was intended to be a complete admission that the harm caused wrongfully by the employee of the defendant, was causally linked to the damages suffered by the dependants.[120]

CONCLUSION

Although the Namibian cases discussed in this paper were decided on similar principles for establishing wrongfulness and negligence in contemporary South African law of delict,[121] they are, in their own right, distinct contributions to the recurring debate on whether the unlawfulness of the omission is based on the existence of a legal duty in terms of the common law or under the Constitution which, as this study has shown has plagued the law since the coming of the Bill of Rights to Namibia and South Africa. By extending protection to persons in custody in circumstances where the common law does not provide a direct or straightforward answer,[122] *Shaanika* and *Gawanas* have advanced the jurisprudence of the

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118 *Id* at par 26.

119 *Kruger v Coetzee* 1966 1 SA 428 (AD).

120 *Shaanika* at par 27. See also *Constantia Versekeringsmaatskappy Beperk v Victor NO* 1986 1 SA 601 (A) at 611H; *Jameson Minors v Central South African Railways* 1908 TS 575 at 583–585.

121 Neethling, Potgieter & Visser *Law of Delict* (6ed 2010) 33; Van der Walt & Midgley *Delict* (2005) 67; Burchell *Principles of delict* (2004) 38.

122 Contra the maze that is the English common law jurisprudence on this subject as seen through these cases: *R v Deputy Governor of Parkhurst Prison, Ex parte Hague* [1991] 3 All ER 733 (HL); *R v Governor of Brockhill Prison, Ex parte Evans (No 2)* [2000] 4 All ER 15 (HL); *Munjaz, R (on the application of) v Ashworth Hospital Authority* [2006] 4 All ER 736 (HL); *Karagozlu v Commissioner of Police of the Metropolis* [2007] 1 WLR 1881 (CA); *Prison Officers Association v Iqbal* [2010] 2 All ER 663 (CA). See in particular Okpaluba, 'The right to the residual liberty of a person in incarceration: Constitutional and common law perspectives' (2012) 28/3 *SAJHR* 458.

custodial rights of prisoners in the same way as South African courts have done.[123]

In terms of bringing the law of delict to conform with the spirit, purport and objects of the fundamental rights and freedoms entrenched in the Namibian Constitution, *Dresselhaus Transport* and *Kennedy* have aligned the principles of modern Namibian law of delict to those applied in South Africa. But, unlike in the South African jurisdiction where few claims based on constitutional damages are to be found, there is no such litigation in Namibia. This notwithstanding that – unlike the South African situation – the Constitution of Namibia expressly provides for compensation for breaches of fundamental rights and freedoms. While the Supreme Court judgment in *Dresselhaus Transport* sets out to protect the constitutionally guaranteed right to property where the police have failed to do so, *Gawanas* brought home the lesson that bureaucratic delays in deciding personal liberty issues may translate into bureaucratic negligence for which the state will be held accountable.

Again, *Shaanika* illustrates the apparent desperation and vulnerability of a person in custody, and serves as a warning to arresting and detention officers to be extra vigilant by not unwittingly and negligently giving such persons access to firearms, as the police officer did in that case with dire consequences.

As regards judicial articulation of respect for human dignity and personal liberty, the judgment in *Kennedy*[124] compares favourably with that in *Gawanas*.[125] As much as the judgment in *Kennedy* did not favour the plaintiffs, it did not undermine their rights to personal security or liberty in the eyes of the law. The existence of a legal duty and negligence were difficult to establish convincingly where the prisoners had acted unlawfully, dangerously, and uncontrollably. The prisoners could not legitimately invoke the law to justify their unlawful behaviour. Even if reasonable prison officers would have foreseen injury to the plaintiffs when the fracas broke out, it was improbable, if not impracticable, for those same officers to have taken steps to protect them from harm in those circumstances.

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123 See *eg Zealand v Minister of Justice and Constitutional Development and Another* 2008 4 SA 458 (CC); *Lee v Minister of Correctional Services* 2013 2 SA 144 (CC).

124 *Kennedy* n 1 above at par 19.

125 *Gawanas v Government of the Republic of Namibia* 2012 2 NR 401 (SC) at par 43.

This study has shown that all the Namibian cases reviewed involved infringements of fundamental rights and freedoms. The plaintiffs could, therefore, have equally based their claims on the constitutional cause of action. So far, the constitutional-delict approach has served as a veritable avenue for persons whose rights have been infringed to recover damages in ventilation of the rights involved. It is, however, advisable that before approaching the court on the constitutional-delict basis, the prospective plaintiff should weigh his or her options so as to avoid the type of predicament in which the litigant in *Lee v Minister of Correctional Services*[126] found himself in the South African courts. All fifteen judges of the three South African courts – the High Court, the Supreme Court of Appeal, and the Constitutional Court – that heard the case agreed that the entrenched rights of the prisoner were indeed violated by the failure of the prison authorities to provide proper systemic measures to prevent the risk of contagion from tuberculosis in its prison. They were, however, divided on the outcome of the case because of the application of a delictual principle. Whereas the trial judge found for the plaintiff, all five judges of the Supreme Court Appeal adopted an inflexible approach to factual causation and unanimously rejected his claim because, in the face of multiple sources of the tuberculosis infection in the prison, he failed to identify the real source of his contamination. It had to take a majority of five members (as against four) of the Constitutional Court to restore the human dignity of the prisoner by holding that there was a probable chain of causation between the negligent omissions by the responsible authorities, and the plaintiff's infection. In order, therefore, to avoid the possibility of being caught by the vagaries of the law of delict, a prospective plaintiff who can show that his or her right has been breached or threatened, may consider approaching the court through article 25 to enforce his or her fundamental rights and freedoms, and asking the court, in terms of sub-article (4), to award him or her 'monetary compensation in respect of any damage suffered'. Or, at least, at the onset, plead the constitutional cause as an alternative claim in the same pleadings, as was the case in *Gawanas*, but not in *Lee*.

[126] 2013 1 SA 144 (CC).