CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 48/00

ALIX JEAN CARMICHELE Applicant

versus

THE MINISTER OF SAFETY AND SECURITY First Respondent

THE MINISTER OF JUSTICE AND CONSTITUTIONAL

DEVELOPMENT Second Respondent

Heard on : 20 March 2001

Decided on : 16 August 2001

JUDGMENT

ACKERMANN and GOLDSTONE JJ:

The Background

[1] On the morning of 6 August 1995, Alix Jean Carmichele (the applicant) was viciously attacked and injured by Francois Coetzee (Coetzee). The attack took place at the home of Julie Gosling (Gosling) at Noetzie, a small secluded village on the sea some 12 kilometres outside Knysna. Coetzee was convicted of attempted murder and housebreaking in the Knysna regional court and was sentenced to an effective term of imprisonment of twelve-and-a-half years.

[2] The applicant instituted proceedings in the Cape of Good Hope High Court (the High Court) for damages against the Minister for Safety and Security and the Minister of Justice and Constitutional Development. She claimed that members of the South African Police Service and the public prosecutors at Knysna had negligently failed to comply with a legal duty they owed to her to take steps to prevent Coetzee from causing her harm.

[3] In the High Court, the issue of the liability of the respondents was separated from that of damages. At the close of the applicant's case, Chetty J found that there was no evidence upon which a court could reasonably find that the police or prosecutors had acted wrongfully. He granted an order of absolution from the instance in favour of the respondents with costs. With the leave of the High Court, the applicant appealed to the Supreme Court of Appeal (the SCA). The appeal was dismissed with costs.

[4] The applicant now seeks special leave to appeal to this Court from the order of the SCA. In considering the application, we also heard argument on the merits of the appeal. The jurisdiction of this Court to entertain such an application and the requirements for the grant of special leave were considered in S v Boesak. It was pointed out by Langa DP, with reference to section 167(3)(b) of the Constitution, that the issues to be decided must be constitutional matters or issues connected with decisions on constitutional matters. It must in addition be in the interests of justice that the appeal should be heard and in that regard the prospects of success constitute an important factor.

The Deputy President stated, inter alia, that:

"Under s 167(7), the interpretation, application and upholding of the Constitution are also constitutional matters. So, too, under s 39(2), is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights."

In this case we are primarily concerned with the development of the common law delictual duty to act.

The Facts

[5] The facts which emerged from the evidence adduced on behalf of the applicant in the High Court appear from the judgment of Chetty J and from that of Vivier JA who delivered the unanimous judgment of the SCA. It will make the discussion in this judgment more comprehensible if the relevant facts are restated.

[6] Coetzee was born in 1973. He had problems of a sexual nature from about the age of ten years and had sexually molested his niece when in his early teens. His mother, Mrs Annie Coetzee, had been sufficiently concerned to seek advice from their doctor but had been advised that her son was too young to be given medication.

[7] Coetzee passed his matriculation examinations. He sang for some time in a choir that devoted its time to entertaining ill people. He also spent many hours at home reading.

[8] On 3 June 1994, when he was 20 years of age, Coetzee committed an indecent act on a 25 year old acquaintance of his, Beverley Claassen. Late at night, while she was asleep, he climbed through her open bedroom window and lay next to her in her bed. He indecently fondled her until she awoke and gave the alarm. He escaped through the window and ran off. On 6 September 1994, he stood trial on charges of housebreaking and indecent assault arising from that incident. He pleaded guilty and was convicted of both charges. On the housebreaking charge, he was sentenced to 18 months imprisonment conditionally suspended for four years, and on the indecent assault charge he was sentenced to a fine of R600 or six months imprisonment plus twelve months imprisonment conditionally suspended for four years.

[9] Less than six months later, on 4 March 1995, Coetzee attempted to rape and murder E T (E). Coetzee and E were school friends. She was then 17 years old. After a dance at the Hornlee Hotel, Knysna, Coetzee offered to walk E home. She accepted his offer. Along the way he persuaded her to take a detour along a footpath. At a deserted spot he attempted to kiss her and, when she resisted, he threw her to the ground and repeatedly punched and kicked her. He dragged her into tall grass and ripped off her clothes. He forcibly held her down by sitting on her while he repeatedly punched her in the face, throttled her and bit her. He threatened to kill her. She eventually lost consciousness. At his subsequent trial, Coetzee admitted he had wanted to rape E but denied that he had done so. Whether in fact he did rape E after she lost consciousness was not established. He left her for dead and ran back to the Hornlee Hotel.

[10] When Coetzee arrived at the Hornlee Hotel, he informed the management that he had just killed a girl and asked them to summon the police. When the police arrived he repeated that he had killed a girl but refused to furnish any further details. He was arrested for being drunk in a public place.

[11] E regained consciousness, gathered her clothes and walked to the house of a neighbour and friend. She arrived there at about 4 am. She reported the attack to her friend and shortly thereafter to her own mother (Mrs T) who summoned the police. E was taken to hospital where the examining doctor noted the extensive injuries inflicted on her.

[12] During that morning (4 March 1995) Mrs T and E went to the Knysna charge office where they reported the attack to the duty officer, Sergeant Beaulah Jantjies (Jantjies). She took a detailed statement from E and Mrs T who informed her that Coetzee had told them he had a previous conviction for rape. For the benefit of the investigating officer, Jantjies noted that information in the investigation diary. Immediately thereafter, the investigating officer, Detective Sergeant David Klein (Klein), took over the matter. He also interviewed E and accompanied her to the scene of the attack where he found a sandal and an item of underwear that E told him belonged to her.

[13] The following morning (5 March 1995), Klein interviewed Coetzee, informing him of the charge. He appeared in court the next day. In his note to the prosecutor, Klein stated that there was no reason to deny Coetzee bail and recommended that be released on warning. Coetzee appeared before Magistrate Von Bratt (the Magistrate) on a charge of rape. The prosecutor, Mr G Olivier (Olivier), did not place before the magistrate any information concerning Coetzee's previous conviction, nor did he oppose Coetzee's release on his own recognisance. Coetzee was unconditionally released and warned to appear again on 17 March 1995.

[14] After his release, Coetzee returned to Noetzie where he was living with his mother. A day or two later, Mrs T called on Gosling, who is a friend of the applicant. Mrs Coetzee worked for Gosling both as a domestic worker and as a general assistant in her business in Knysna. The purpose of Mrs T's visit was to inform Gosling of the attack on E and of Coetzee's previous conviction. In evidence in the High Court, Gosling stated that she was distressed at the news because she thought: "that he would obviously commit this crime again and I felt very scared to be anywhere where he was." She added that she felt: "that he shouldn't maintain a presence in society because my knowledge as a nursing sister and just in life is that a man that has committed two similar crimes is going to do it again."

[15] Because of her concern, Gosling went to speak to Captain Lawrence Oliver (Oliver), a police officer at the Knysna police station. She told him she did not think that Coetzee "should be out on the street" and asked whether he could not be detained pending his trial. Oliver advised her to discuss the matter with the senior prosecutor at Knysna, Ms Dian Louw (Louw). Gosling went to Louw whom she knew well. Her office was in the same building as the Knysna police station. She told Louw that she: "was afraid that Francois would hurt one of my friends or me and that I really thought he would commit this crime again." Louw informed her that there was no law to protect them and that the authorities' hands were tied unless Coetzee committed another offence.

[16] On 10 March 1995, Coetzee called at the T home and told Mrs T that he wanted to talk. She ordered him off the premises and summoned the police. Coetzee ran away. When the police arrived, she reported the incident. She was upset that he was at large.

[17] On 13 March 1995, Mrs Coetzee's relative, Detective Sergeant Grootboom (Grootboom) gave her a lift home. He was also stationed at the Knysna police station. She informed him that she was concerned about Coetzee, who was withdrawn, and she feared he might attempt suicide or "get up to something." She raised these concerns with Grootboom in the hope that he might arrange for her son to be sent to some institution where he could be treated. When they arrived at her home they found that Coetzee had indeed attempted suicide. Grootboom took him to hospital where he was treated. After his discharge, he again returned home to his mother.

[18] On the following day, 14 March 1995, Grootboom took Coetzee to Louw. She interviewed him and took notes of the interview. According to the notes, he told her that he did not know why he committed the offence against E and that at the time he was not aware of what he was doing. He told her that he had a problem because when he saw a girl in a bathing suit he could not control himself. When that happened he would run home and masturbate. He said that this condition had begun when he was about 10 years old. Concerning the attack on E, Coetzee told Louw he was walking her home when they came to a dark passage where it "just happened" ("toe het dit net gebeur"). Afterwards he just saw her lying there. He jumped up and ran to the Hornlee Hotel where he asked the owner to call the police. When the police arrived he handed himself over to them. He said that it was as if a "superhuman, unnatural force" overcame him and he then committed an act of which he had no knowledge.

[19] As a result of this interview, Louw decided that Coetzee should be referred for psychiatric observation. He was brought before the court on 15 March 1995. At the request of the prosecutor and with his consent, Coetzee was referred in custody to Valkenberg Hospital in Cape Town for 30 days observation in terms of section 77(1) of the Criminal Procedure Act. The purpose of a referral under that provision is to ascertain whether an accused person is by reason of mental illness or mental defect incapable of understanding trial proceedings so as to make a proper defence. On the same day Louw prepared a report for the hospital authorities in which she included the details of the attack on E, a reference to his previous conviction, a description of the events thereafter and a rendition of her interview with Coetzee.

[20] On 18 April 1995, on his return from Valkenberg Hospital, Coetzee again appeared in the Knysna magistrate's court. The prosecutor was again Olivier and the presiding magistrate a Mr Goosen. According to the report from Valkenberg Hospital Coetzee was found to be mentally capable of understanding the proceedings and able to make a proper defence, and was also found to have been mentally capable at the time of his attack on E. The criminal charges were put to Coetzee and he pleaded not guilty. He gave as his reason his doubt as to whether he had raped the complainant. The case was postponed to 2 May 1995 pending the attorney-general's decision whether to proceed in the High Court. There is no reference in the record to the question of bail having been raised. Coetzee was warned to appear on 2 May 1995. On that date the trial was further postponed.

[21] The applicant frequently stayed at Gosling's home in Noetzie. On one such occasion towards the end of June 1995, Gosling left for work in the morning. Shortly after she had left, the applicant noticed Coetzee snooping around the house, looking in at a window and trying to open it. The applicant called to him and asked what he was doing there. He replied that he was looking for Gosling. He then left. The applicant telephoned Gosling and reported the incident. Gosling informed

the applicant that Coetzee's excuse was false as he must have seen her driving away in her motor vehicle.

[22] At the request of the applicant, Gosling again went to the Knysna police station and reported the incident to Captain Oliver who again referred her to Louw. According to Gosling's evidence "I said Dian you've got to do something about this guy, there must be some law to protect society, not necessarily me or people at Noetzie and she said to me that there was nothing she could do." On 2 August 1995 both the applicant and Gosling again broached the matter with Louw when she visited them at Gosling's business premises. Again, according to Gosling, Louw claimed she was powerless to do anything about Coetzee.

[23] On Sunday, 6 August 1995 the applicant went to Gosling's home where they had arranged to meet. Gosling had not yet arrived. The applicant went into the house and was confronted by Coetzee who had apparently broken in. He immediately attacked her with a pick handle. His blows were directed at her head and face. When she lifted her arm to protect herself, one of the blows struck and broke her arm. He threatened her and dragged her around the house. He repeatedly ordered her to turn around. She refused to do so. He discarded the pick handle and lunged at her with a knife. He stabbed her left breast and the blade of the knife buckled as it hit her breastbone. He lunged at her again and she kicked him. He lost his balance and she managed to escape through a door. She ran along the beach where someone came to her assistance. Coetzee was charged on a number of counts including one of attempting to murder the applicant.

[24] The prosecution of Coetzee on the charge of raping E came to trial on 11 September 1995. He admitted that he had assaulted her but denied rape. He was convicted of attempted rape and sentenced to seven years imprisonment. On 13 December 1995 he was prosecuted for the attack on the applicant and was convicted of attempted murder and of housebreaking. As mentioned above, he was given an effective sentence of twelve-and-a-half years imprisonment.

The Applicant's Cause of Action

[25] The applicant's claim is founded in delict. The direct cause of the damages she suffered was the assault by Coetzee. However, the applicant wishes to hold the respondents liable because of the alleged wrongful acts or omissions of the police officer (Klein) or the prosecutors (Louw and Olivier) at times when they were acting in the course and scope of their employment with the State. In order to succeed, the applicant would have to establish at the trial that:

(a) Klein or the prosecutors respectively owed a legal duty to the applicant to protect her;

(b) Klein or the prosecutors respectively acted in breach of such a duty and did so negligently;

(c) there was a causal connection between such negligent breach of the duty and the damage suffered by the applicant.

In deciding whether to grant the respondents' application for absolution from the instance the trial court and the SCA dealt with issue (a) only. Having found against the applicant in respect of that issue, it became unnecessary to consider whether there was sufficient evidence on the remaining two issues to place the respondents on their defence.

The Test for an Order of Absolution from the Instance

[26] Both the trial judge and SCA applied the appropriate test for the grant of absolution from the instance at the close of the plaintiff's case, viz. whether a court, applying its mind reasonably to the evidence, could or might (not should or ought to) find that the police or prosecutors at Knysna owed a legal duty to the applicant to protect her.

The Argument in this Court in Relation to the Duty to Act

[27] In her particulars of claim the applicant contended that the relevant members of the South African Police Services and the prosecutors owed her a duty to:

". . . ensure that she enjoyed her constitutional rights of inter alia the right to life, the right to respect for and protection of her dignity, the right to freedom and security, the right to personal privacy and the right to freedom of movement."

[28] Counsel for the applicant submitted that both the High Court and the SCA erred in not applying the relevant provisions of the Constitution in determining whether Klein or the prosecutors owed a legal duty to the applicant to protect her. In particular, counsel relied upon the constitutional obligation on all courts to "develop the common law" with due regard to the "spirit, purport and objects" of the Bill of Rights. He submitted that, had the common law been so developed, the High Court and the SCA would have found that there existed a legal duty to act.

[29] It was further contended for the applicant that the common law duty to act should be developed in the light of the provisions of the Bill of Rights in the interim Constitution (IC) which was in operation at all times relevant to the applicant's cause of action. Counsel relied on the following provisions of the IC:

"8. Equality.—(1) Every person shall have the right to equality before the law and to equal protection of the law.

(2) No person shall be unfairly discriminated against, directly or indirectly, and without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

(3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

(b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.

(4) Prima facie proof of discrimination on any of the grounds specified in subsection

(2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

9. Life.—Every person shall have the right to life.

10. Human dignity.—Every person shall have the right to respect for and protection of his or her dignity.

11. Freedom and security of the person.—(1) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.

(2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.

13. Privacy.—Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications." Counsel relied further on the provisions of section 215 of the IC, which read:

"The powers and functions of the Service shall be–

(a) the prevention of crime;

(b) the investigation of any offence or alleged offence;

(c) the maintenance of law and order; and

(d) the preservation of the internal security of the Republic."

More specifically, so the submission ran, the IC imposed a particular duty on the state to protect women against violent crime in general and sexual abuse in particular. The Court was referred to the following statement of the SCA in S v Chapman:

"Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution [in a footnote there is reference, inter alia, to sections 10, 11 and 13 of the IC] and to any defensible civilisation. Women in this country are entitled to the protection of these rights."

[30] It was submitted further that the police and prosecution services are among the primary agencies of the state responsible for the discharge of its constitutional duty to protect the public in general and women in particular against violent crime. It was conceded by counsel for the applicant that it does not follow that any such failure in that duty entitles the victim to damages in delict. It was contended, however, that on the facts of this case, the applicant is entitled to such damages.

[31] Despite the failure by the applicant to rely directly upon the provisions of either section 35(3) of the IC or section 39(2) of the Constitution in the High Court and SCA, counsel for the respondent did not object to this issue being raised in this Court. If covered by the pleadings, and in the absence of unfairness, parties are ordinarily not precluded from raising new legal arguments on appeal.11 In constitutional matters, however, courts have an interest in a constitutional issue being raised timeously. The relevance of this omission in the present case is dealt with later in this judgment.12

[32] Neither the trial court nor the SCA had regard to these provisions of the Bill of Rights in the IC or the Constitution. They also did not to have regard to section 39(2) of the Constitution, which requires all our courts to develop the common law with due regard to the "spirit, purport and objects" of the Bill of Rights.

The Obligation to Develop the Common Law

[33] The Constitution is the supreme law. The Bill of Rights, under the IC, applied to all law.14 Item 2 of schedule 6 to the Constitution provides that "all law" that was in force when the Constitution took effect, "continues in force subject to consistency with the Constitution."15 Section 173 of the Constitution gives to all higher courts, including this Court, the inherent power to develop the common law, taking into account the interests of justice.16 In section 7 of the Constitution, the Bill of Rights enshrines the rights of all people in South Africa, and obliges the state to respect, promote and fulfil these rights. Section 8(1) of the Constitution makes the Bill of Rights binding on the judiciary as well as on the legislature and executive. Section 39(2) of the Constitution provides that when developing the common law, every court must promote the spirit, purport and objects of the Bill of Rights.17 It follows implicitly that where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation.

[34] Under the IC the circumstances in which the common law could be developed by this Court was a complex issue.18 However, under the Constitution there can be no question that the obligation to develop the common law with due regard to the spirit, purport and objects of the Bill of Rights is an obligation which falls on all of our courts including this Court.

[35] In this case the High Court and the SCA were requested to develop the common law, not on a constitutional basis, but in the light of the unusual nature of the applicant's cause of action. The common law, especially in the field of delictual liability, has constantly required development.19 Where a court develops the common law, the provisions of section 39(2) of the Constitution oblige it to have regard to the spirit, purport and objects of the Bill of Rights.

[36] In exercising their powers to develop the common law, judges should be mindful of the fact that the major engine for law reform should be the legislature and not the judiciary. In this regard it is worth repeating the dictum of Iacobucci J in R v Salituro,20 which was cited by Kentridge AJ in Du Plessis v De Klerk:

"Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the judiciary to change the law. . . . In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."

Under our Constitution the duty cast upon judges is different in degree to that which the Canadian Charter of Rights cast upon Canadian judges. In South Africa, the IC brought into operation, in one fell swoop, a completely new and different set of legal norms.22 In these circumstances the courts must remain vigilant and should not hesitate to ensure that the common law is developed to reflect

the spirit, purport and objects of the Bill of Rights. We would add, too, that this duty upon judges arises in respect both of the civil and criminal law, whether or not the parties in any particular case request the court to develop the common law under section 39(2).

[37] The proceedings in the High Court and the SCA took place after 4 February 1997 when the Constitution became operative. It follows that both the High Court and the SCA were obliged to have regard to the provisions of section 39(2) of the Constitution when developing the common law.23 However, both courts assumed that the pre-constitutional test for determining the wrongfulness of omissions in delictual actions of this kind should be applied. In our respectful opinion, they overlooked the demands of section 39(2).

[38] In the High Court and the SCA the applicant relied only on the common law understanding of wrongfulness which has been developed by our courts over many years. Save in one respect referred to in the applicant's heads of argument in the SCA, no reliance was placed on the provisions of the IC or the Constitution as having in any way affected the common law duty to act owed by police officers or prosecutors to members of the public. With regard to the "interests of the community" imposing a legal liability on the authorities, it was submitted by the applicant's counsel that it would "encourage the police and prosecuting authorities to act positively to prevent violent attacks on women." In support of that submission counsel referred to authorities in this Court and the SCA devoted to patterns of discrimination against women. It does not appear to have been suggested that there was any obligation on the High Court or the SCA to develop the common law of delict in terms of section 39(2) of the Constitution.

[39] It needs to be stressed that the obligation of courts to develop the common law, in the context of the section 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in promoting the section 39(2) objectives, the courts are under a general obligation to develop it appropriately. We say a "general obligation" because we do not mean to suggest that a court must, in each and every case where the common law is involved, embark on an independent exercise as to whether the common law is in need of development and, if so, how it is to be developed under section 39(2). At the same time there might be circumstances where a court is obliged to raise the matter on its own and require full argument from the parties.

[40] It was implicit in the applicant's case that the common law had to be developed beyond existing precedent. In such a situation there are two stages to the inquiry a court is obliged to undertake. They cannot be hermetically separated from one another. The first stage is to consider whether the existing common law, having regard to the section 39(2) objectives, requires development in accordance with these objectives. This inquiry requires a reconsideration of the common law in the light of section 39(2). If this inquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the section 39(2) objectives. Possibly because of the way the case was argued before them, neither the High Court nor the SCA embarked on either stage of the above inquiry.

[41] There is an obligation on litigants to raise constitutional arguments in litigation at the earliest reasonable opportunity in order to ensure that our jurisprudence under the Constitution develops as reliably and harmoniously as possible. In the result this Court has not had the benefit of any assistance from either court on either stage of the inquiry referred to above. We consider later what

this Court should do in these circumstances. But first it is necessary to deal with the reasons of the SCA for dismissing the appeal.

[42] The SCA, as the High Court had done, had regard and referred to wrongfulness as it has been developed in our common law prior to the operation of the IC. Vivier JA stated the following in his judgment: "The appropriate test for determining the wrongfulness of omissions in delictual actions for damages in our law has been settled in a number of decisions of this Court such as Minister van Polisie v Ewels 1975 (3) SA 590 (A) at 597A–C; Minister of Law and Order v Kadir 1995 (1) SA 303 (A) at 317C–318I; Knop v Johannesburg City Council 1995 (2) SA 1 (A) at 27G–I and Government of the Republic of South Africa v Basdeo and Another 1996 (1) 355 (A) at 367E–H. The existence of the legal duty to avoid or prevent loss is a conclusion of law depending upon a consideration of all the circumstances of each particular case and on the interplay of many factors which have to be considered. The issue, in essence, is one of reasonableness, determined with reference to the legal perceptions of the community as assessed by the Court. In Minister of Law and Order v Kadir (supra) Hefer JA stated the nature of the enquiry thus at 318E–H:

'As the judgments in the cases referred to earlier demonstrate, conclusions as to the existence of a legal duty in cases for which there is no precedent entail policy decisions and value judgments which "shape and, at times, refashion the common law [and] must reflect the wishes, often unspoken, and the perceptions, often dimly discerned, of the people" (per M M Corbett in a lecture reported sub nom "Aspects of the Role of Policy in the Evolution of the Common Law" in (1987) SALJ 52 at 67). What is in effect required is that, not merely the interests of the parties inter se, but also the conflicting interests of the community, be carefully weighed and that a balance be struck in accordance with what the court conceives to be society's notions of what justice demands.'

Hefer JA also stressed the difference between morally reprehensible and legally actionable omissions and warned that a legal duty is not determined by the mere recognition of social attitudes and public and legal policy (at 320A–B). The question must always be whether the defendant ought reasonably and practically to have prevented harm to the plaintiff: in other words, is it reasonable to expect of the defendant to have taken positive measures to prevent the harm (Prof J C van der Walt in Joubert (ed) The Law of South Africa vol 8 1st re-issue part 1 para 56)."

[43][As pointed out in the quotation above, in determining whether there was a legal duty on the police officers to act, Hefer JA in Minister of Law and Order v Kadir referred to weighing and the striking of a balance between the interests of parties and the conflicting interests of the community. This is a proportionality exercise with liability depending upon the interplay of various factors. Proportionality is consistent with the Bill of Rights, but that exercise must now be carried out in accordance with the "spirit, purport and objects of the Bill of Rights" and the relevant factors must be weighed in the context of a constitutional state founded on dignity, equality and freedom and in which government has positive duties to promote and uphold such values.

[44] Under both the IC and the Constitution, the Bill of Rights entrenches the rights to life, human dignity and freedom and security of the person.30 The Bill of Rights binds the state and all of its organs. Section 7(1) of the IC provided:

"This Chapter shall bind all legislative and executive organs of state at all levels of government."

Section 8(1) of the Constitution provides:

“The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.”

It follows that there is a duty imposed on the state and all of its organs not to perform any act that infringes these rights. In some circumstances there would also be a positive component which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.

[45] In the United States, a distinction is drawn between “action” and “inaction” in relation to the “due process” clause of their Constitution, (the 14th Amendment). In DeShaney v Winnebago County Department of Social Services, the majority declined to hold a government authority liable for a failure to take positive action to prevent harm. As stated in the dissent of Brennan J:

“The Court’s baseline is the absence of positive rights in the Constitution and a concomitant suspicion of any claim that seems to depend on such rights.”

The provisions of our Constitution, however, point in the opposite direction. So too do the provisions of the European Convention on Human Rights (Convention). Article 2(1) of the Convention provides that “Everyone’s right to life shall be protected by law.” This corresponds with our Constitution’s entrenchment of the right to life. We would adopt the following statement in Osman v United Kingdom:

“It is common ground that the State’s obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by lawenforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.”