

The Transformation of South African Private Law after Ten Years of Democracy: The Role of Torts (Delict) in the Consolidation of Democracy

Christopher Roederer*

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ABSTRACT

Although the role of the private law has been largely ignored in studies of transitional justice, private law is a crucial component in South Africa's transition/transformation. Contrary to the views of some commentators, the private law and delict in particular, were tainted by apartheid. Further, even if the private law of South Africa was not infected by the apartheid cancer, it acted as a carrier and facilitator of apartheid values and policies, perpetuating the inequities apartheid. While there is evidence of the cancer in apartheid case law the more serious problem was a failure of delict to progress under apartheid. Several important and progressive developments that took place in the United States during this period did not occur in South Africa. Even if parts of the law of delict were not tainted, the values underlying apartheid delict are inconsistent with the values and aspirations of the new South Africa. As such, the law of delict was in need of transformation. The remainder of the article details the values of the democratic transformation, the constitutional mechanisms for the harmonization of delict with those values, and the developments in the law of delict that have taken place in light of those values. In sum, just as delict was part of the cancer of apartheid it is now part of the cure. The transformation of South Africa has propelled changes in the law of delict and those changes in turn have added fuel to the transformation, helping to further consolidate South Africa's democracy.

* Associate Professor of Law, Florida Coastal School of Law; Senior Research Fellow, University of the Witwatersrand School of Law. The author thanks Amanda Jack and Jodi Sophia at Florida Coastal School of Law as well as Kate Collier and Murray Cox from The University of the Witwatersrand School of Law for their most able research assistance. Thanks also go to Ruti Teitel, Peter Kutner, and Clare Raulson for comments on early drafts of this work and to such authors as Peter Kutner, Karl Klare, Frank Michelman, Richard Abel, Cass Sunstein, and Heinz Klug whose thoughtful work on South Africa has inspired much of my work. Special recognition goes to Justice Dennis Davis's progressive work as both a South African academic and judge. Without his work there would be much less to say about the transformation of South African private law.

I. INTRODUCTION: DOES THE PRIVATE LAW HAVE A ROLE TO PLAY IN CONSOLIDATING DEMOCRACY?

Since the early nineties there has been an ever growing literature on transitional states and transitional justice.¹ This literature, primarily addresses what Samuel Huntington calls the third wave of democracy.² It concerns itself with the question of how states move from totalitarian or authoritarian regimes to “democratic” regimes. As Ruti Teitel states, “In the contemporary period, the use of the term ‘transition’ has come to mean change in a liberalizing direction.”³ It is also concerned with the consolidation of democracy through the establishment of the rule of law and regular free elections.⁴ The focus of the law-related literature has been on public law solutions to the issue ranging from constitutions, mechanisms for criminal punishment, truth and reconciliations commissions, mechanisms for reforming the bureaucracy (illustrations), and mechanisms for providing restitution for victims.⁵

¹ The literature is too extensive to list, but the following bibliographies represent a significant amount of the literature: FORD FOUNDATION, SELECTED BIBLIOGRAPHY ON TRUTH COMMISSIONS AND TRANSITIONAL JUSTICE at http://www.fordfound.org/publications/ff_report/spring2000/truth_biblio.cfm?CFID=761098&CFTOKEN=39985391 (last visited Feb. 20, 2005); GUNNAR THEISSEN, INTERNET BIBLIOGRAPHY ON TRANSITIONAL JUSTICE: A SELECTED BIBLIOGRAPHY WITH SPECIAL FOCUS ON GERMANY AND SOUTH AFRICA (Version 1.1, Jan. 27, 2000) at <http://userpage.fu-berlin.de/~theissen/biblio/> (last visited Feb. 20, 2005); *Reconciliation and Transitional Justice, in CONFLICT TRANSFORMATION AND PEACEBUILDING: A SELECTED BIBLIOGRAPHY* (Catherine Morris ed.) at: <http://www.peacemakers.ca/bibliography/bib26reconciliation.html> (last visited Feb. 20, 2005).

² SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1991).

³ Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2013 (1997) [hereinafter Teitel, *Jurisprudence*]; See also RUTI TEITEL, *TRANSITIONAL JUSTICE* 5 (2000) [hereinafter TEITEL, *JUSTICE*].

⁴ Teitel, *Jurisprudence*, *supra* note 3, at 2011. Teitel notes that the literature on transitions to democracy often focuses on political rights such as voting. TEITEL, *JUSTICE*, *supra* note 3.

⁵ The International Center for Transitional Justice mission statement reads in part, “...The ICTJ assists in the development of strategies for transitional justice comprising five key elements: prosecuting perpetrators, documenting violations through nonjudicial means such as truth commissions, reforming abusive institutions, providing reparations to victims, and advancing reconciliation...” International Center for Transitional Justice, *Our Mission*, <http://www.ictj.org/aboutus.asp> (last visited on Feb. 20, 2005).

Aeyal M. Gross follows Erin Daily in opening up the terrain of transitional justice to “transformative justice,” which is said to require “metamorphosis at all levels of society.” Gross, *The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel*, 40 STAN. J. INT’L L. 47 n.10 (quoting Erin Daily, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT’L LEGAL PERSP. 73 (2001-02)). While Gross is commended for looking at both property rights and socio-economic rights as part of transitional justice, he does not venture into private law in his article.

For instance, Juan Méndez argues that transitional justice is important for democracy as it “highlights the fundamental character of the new order to be established, an order based on the rule of law and on respect for the dignity and worth of each person.”⁶ He argues that for states in which there have been serious human rights violations, there are four duties that they owe to the victims: to do justice (prosecuting and punishing perpetrators), to grant victims the right to the truth, to grant reparations to victims, and to ensure that perpetrators in the security forces should not continue in their positions under the new regime.⁷

Ruti Teitel’s approach is to try to look at transitional justice from within the transitional context.⁸ While Méndez is primarily concerned with retroactive justice, for Teitel, the question of transitional justice is not only backward looking but also forward looking. She starts her essay with a series of questions: “How is the social understanding behind a new regime committed to the rule of law created? Which legal acts have transformative significance? What, if any, is the relation between a state’s response to a repressive past and its prospects for creating a liberal order?”⁹

Like Méndez, she notes that “[d]ebates about transitional justice are generally framed by the normative proposition that various legal responses should be evaluated on the basis of their prospects for democracy.”¹⁰ Her thesis is that in these contexts, legal responses play an extraordinary constituting role; they are constitutive of the transition. Her argument is that responses to the past inform what it means to adhere to a rule of law; that past injustices impact on what is considered transformative; and what counts as justice is contingent and informed by

⁶ Juan E. Méndez, *In Defense of Transitional Justice*, in TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES 11 (A. James McAdams ed., 1997).

⁷ *Id.* at 11-12. According to Méndez, a democracy that fails to give meaning to these ideals might not be worthy of the name. *Id.* While these are arguably necessary conditions, they are far from sufficient.

⁸ Teitel, *Jurisprudence*, *supra* note 3; TEITEL, JUSTICE, *supra* note 3.

⁹ Teitel, *Jurisprudence*, *supra* note 3, at 2011.

¹⁰ *Id.*

previous injustices.¹¹ In her work she evaluates three areas that she believes most reflect the transformative potential of the law: the rule of law, criminal justice, and constitutional justice.¹²

While these areas of the law demonstrate the clearest impact on political transformation, it does not follow that they are the only areas of the law that have an impact. They are, perhaps, the most public and grand areas of the law, not only in times of transition, but also in times of stability. While it is difficult to dispute their impact on political transformation, they do not have equal impact on economic transformation.¹³ Looking only at public law is missing half of the picture. If the injustices of the past cut across the political, economic, and cultural spheres, then the creation of a just and stable regime will require attention across these different spheres. The usual domain of public law cannot adequately address these other areas. As a result, one needs to look to private law as well.

If what counts as justice is partially dependent on past injustices, and if what counts as a legal act with transformative significance is also, in part, dependent on the legacy of injustice, then it is crucial to determine exactly what that legacy is. Injustices in the economic sphere are

¹¹ *Id.* at 2014.

¹² Teitel's book is broader as it addresses the rule of law as well as criminal, historical, reparatory, administrative, and constitutional justice. TEITEL, *JUSTICE*, *supra* note 3. Nonetheless, she never ventures into the private law.

¹³ There is little, if any, recognition of social and economic rights in Teitel's work. (To her credit she introduced me to the work of Aeyal Gross, who does address social and economic rights in his work. *See* Gross, *supra* note 5.) Ignoring these issues is in keeping with a general privileging in the area of human rights law of civil and political rights over social economic and cultural rights. *See, e.g.*, Scott Leckie, *Another Step Towards Indivisibility: Identifying Key Features of Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 81 (1998). As is noted by the Governance Resource Centre (GRC) of the U.K.'s Department for International Development (DFID), "The transitional justice literature focuses almost exclusively on addressing past civil and political human rights violations and war crimes." GOVERNANCE RESOURCE CENTER, SAFETY SECURITY, AND ACCESS TO JUSTICE (Jo Crichton ed.) at http://www.grc-exchange.org/g_themes/ssaj_transitionaljustice.html (last visited Feb. 20, 2005). Three recent works address socio-economic rights in the context of transitional justice; RAMA MANI, *BEYOND RETRIBUTION: SEEKING JUSTICE IN THE SHADOWS OF WAR* (2002); JANE ALEXANDER, *A SCOPING STUDY OF TRANSITIONAL JUSTICE AND POVERTY REDUCTION, FINAL REPORT FOR THE DEPARTMENT OF INTERNATIONAL DEVELOPMENT* (2003), available at <http://www.grc-exchange.org/docs/SSAJ56.pdf> (last visited Feb. 20, 2005); and Gross, *supra* note 5, at 49, 82-92, 92-96. *See also* Christopher J. Roederer, 'Living Well is the Best Revenge' – *If One Can*, 15 S. AFR. J. HUM. RTS. 75 (1999).

relatively clear in the cases of unjust takings of property and unfair labor/employment practices. Here restitution and affirmative action/employment equity policies are clearly mandated.

However, to the extent that it is now the accepted wisdom that the communist (or state socialist) project is unviable and that democratic transitions are about liberalization then large-scale redistribution in the economic sphere is often seen as antithetical to the transition and its goals. The liberal approach is to leave this to the “private sphere” and to private law (e.g. contracts, torts, family law and business law). If one thinks of the project of democratization as being the equivalent of liberalization then it is no mystery why the bulk of the private sphere and private law are left out of the equation.¹⁴ Liberalization is about getting the government out of the private sphere: privatizing, deregulating, and returning to the post of a neutral referee in the “free-market” economy.¹⁵

This is particularly apt in the context of South Africa where, under apartheid, the areas of contract and torts (delict) were considered to be very liberal, if not libertarian.¹⁶ If this is so, then one might be forgiven for thinking that there is no need to transform these areas of the common law.¹⁷ What is needed is to dismantle the old public law system and to transform the

¹⁴ See, e.g., Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46 (1992) (viewing the right to democracy almost entirely from the thin liberal perspective. But see Susan Marks, *The End of History? Reflections on Some International Legal Theses*, 8 EUR. J. INT’L L. 449 (1997) (criticizing the view that one can equate democracy with liberalism); Gross, *supra* note 5, at 50, 52-3.(criticizing transitional justice theory that confines itself to the liberal framework).

¹⁵ Note that “In our Western societies the democratic franchise was not installed until after the liberal society and the liberal state were firmly established. Democracy came as a top dressing. It had to accommodate itself to the soil that had already been prepared by the operation of the competitive, individualist, market society, and by the operation of the liberal state, which served that society through a system of competing though not democratic political parties. It was the liberal state that was democratized, and in the process, democracy was liberalized.” C.B. MACPHERSON, *THE REAL WORLD OF DEMOCRACY* 5 (1966).

¹⁶ I defend this view below.

¹⁷ As I argue below, this assumption is misguided.

Constitution, criminal justice system, and administration, as well as to provide for prosecutions, truth and reconciliation, reparations and perhaps some affirmative action.¹⁸

For reasons that will be clear below, I do not think that Teitel's questions are adequate for the consolidation of democracy in South Africa. "Commitment to the rule of law" has not been, nor should it be, the main focus of South African society in completing its transition and consolidating its democracy.¹⁹ As the South African experience shows, there are many legal acts with transformative significance that are outside of the public law. Post-apartheid law in South Africa embodies a somewhat unique deconstruction of the public/private split which is so entrenched in liberal thought.²⁰ The goal has not been merely to create a "liberal order." The Constitution not only contains the foundational value of the rule of law, but also the values of achieving equality, dignity, the advancement of human rights and freedoms as well as non-racialism and non-sexism.²¹ In addition to having a number of socio-economic rights provisions, the Constitution also allows for its extensive set of rights (set forth in the Bill of Rights) to apply

¹⁸ As if giving the victims the rough equivalent of forty acres and a mule along with their civil and political rights will solve everything.

¹⁹ This point is argued in Christopher J. Roederer, *Post-matrix Legal Reasoning: Horizontality and the Rule of Values in South African Law*, 19 S. AFR. J. HUM. RTS. 57 (2003) [hereinafter Roederer, *Post-matrix*]. Frank Michelman argues that the coupling of the supremacy clause with the rule of law in section 1(c) of the Constitution ("Supremacy of the constitution and the rule of law"), along with the other values of section 1, means that "the rule of law" signifies not just the rule of rules but the rule of justice, as the Final Constitution envisions justice. "Supremacy of the Constitution and the rule of law" signifies the unity of the legal system in the service of transformation by, under, and according to law." Frank Michelman, *The Rule of Law, Legality and the Supremacy of the Constitution*, in CONSTITUTIONAL LAW OF SOUTH AFRICA 11-38 (S. Woolman et al eds., 2d ed., forthcoming 2005).

²⁰ Germany also has a similar value-based approach to their "basic law" that cuts across the public and private law divide. See Hector L. MacQueen, *Delict, Contract, and the Bill of Rights: A Perspective from the United Kingdom*, 121(2) S. AFR. L.J. 359, 361-62 (2005) (noting the 1958 Lüth decision of Germany's federal constitutional court, *Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 7, 198 (F.R.G.)* (establishing indirect horizontal application of the Basic Law to private law)). MacQueen also notes the similarity between South Africa and former Communist Eastern European countries that have adopted the direct application of their constitutional rights to the private law. *Id.* at 362 (referring to Olha Cherednychenko, *Human Rights and Private Law*, 10 MAASTRICHT J. EUR. & COMP. L. 301 (2003)). See also Hector MacQueen, *Human Rights and Private Law in Scotland: A Response to President Barak*, 78 Tul. L. Rev. 363 (2003).

²¹ S. AFR. CONST. (Act 108 of 1996) [hereinafter Final Constitution] ch. 1 (Founding Provisions), § 1. Act 108 of 1996 is referred to generally as the "Final Constitution."

to the private sphere – i.e. to natural and juristic persons.²² Further, the Constitution mandates that every development of the private common law must promote the spirit, purport and objects of the Bill of Rights.²³ Thus, South African law allows for the transformation of the private law to take place in harmony with the broader transformation of the public law.

It is crucial to establish whether delict was infected by the apartheid cancer and/or if it failed to meet the needs of South African society, as this will provide a baseline from which to evaluate the extent to which delict has changed or should change in order to meet the present needs of society.²⁴

However, to stop here would be to look at delict and private law in isolation from the broader changes that have taken place in other areas of the law. The question remains: Even if the private law was not infected by apartheid, given the broader changes that have taken place and the needs, values and aspirations of the transition, is the private law, and delict in particular, changing enough to meet these needs, values and aspirations? Is it furthering or hindering the transformation.

Rather than surveying the entire history of delict under apartheid, a reasonable place to start is the final decade of apartheid. The analysis will begin with a sympathetic view of that decade in the work of Peter Kutner and then will continue with a significantly less sympathetic view. In 1992, Peter Kutner published an article on the top ten “tort” cases from the Appellate

²² “A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right.” S. AFR. CONST. (Act 108 of 1996) ch. 2 (Bill of Rights), § 8(2).

²³ “When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.” S. AFR. CONST. (Act 108 of 1996) ch. 2 (Bill of Rights), § 39(2). Note that legislation includes the Constitution of the Republic of South Africa (Act 108 of 1996). This is not to say that the law or the Constitution can solve all of South Africa’s problems or eliminate all the vestiges of apartheid. Heinz Klug reminds us that most of the country’s wealth, which is concentrated in companies, mines, stocks, bonds, and urban housing, has not been affected by redistribution efforts. HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM, AND SOUTH AFRICA’S POLITICAL RECONSTRUCTION 138 (2000).

²⁴ For instance, Jonathan Burchell has claimed that “delict is dynamic — it can, and does, develop to meet the needs of a changing society.” JONATHAN BURCHELL, PRINCIPLES OF DELICT, at v (1992).

Division of South Africa.²⁵ That piece focused on the contribution made by South African courts to the development of the “common law.” Kutner’s thesis was that since 1910, the Supreme Court of South Africa had made significant contributions to the common law, yet to that day (the early 1990s) those contributions had gone unnoticed by common law jurisdictions.

This was a brave study to undertake in the last decade of apartheid and there have not been any similar studies done in American journals on the changes in the law of tort/ delict in South Africa since.²⁶ Much has changed since then: the release of Nelson Mandela, an Interim and Final Constitution, as well as two democratic elections – in short – a decade of democracy. There is no question that along with these changes came a transformation, if not a revolution, of South African public law.²⁷ But the question remains: What of the private law? According to some commentators, like Kutner, one should not expect a radical transformation of delict in post-apartheid South Africa. As he stated in his conclusion:

The validity and significance of such research is not impaired by the major constitutional and political changes on the horizon in South Africa. In tort law and numerous other fields, one should expect a large measure of continuity with the past, not radical alteration of substantive law or applicable legal philosophy. Also, cases pre-dating any legislative alteration of the law will retain their validity as precedents for common law.²⁸

²⁵ Peter Kutner, *Tort Cases in the South African Appellate Division: A Top Ten of the Eighties*, 6 TEMP. INT’L & COMP. L.J. 311 (1992) [hereinafter Kutner, *Top Ten*] (Decisions from the appellate division were cited as “A.D.” or simply “A,” but are now cited as “S.C.A.,” the Supreme Court of Appeals). It should be noted at the outset that Kutner’s purpose was to show that South African “torts” was not out of step with common law jurisdictions in general. His article drew on a more substantial project that culminated in COMMON LAW IN SOUTH AFRICA: CONFLICT OF LAWS AND TORTS PRECEDENTS (1990) [hereinafter KUTNER, COMMON LAW]. He was largely successful in the endeavor, and in fact if any system was out of step with general trends in the common law it was the U.S., rather than South Africa. The differences in purpose between our projects should be taken to temper any criticism of his work below.

²⁶ Vivien Goldberg has written a short piece on the effect of the new Constitution on family law in South Africa in *South Africa: Private Law in Transition/Effect of the New Constitution*, 33 U. LOUISVILLE J. FAM. L. 495 (1995).

²⁷ J. DE WAAL ET AL., THE BILL OF RIGHTS HANDBOOK 2 (4th ed. 2001) [hereinafter DE WAAL ET AL., HANDBOOK 4TH] (describing the constitutional changes in South Africa as a “Legal Revolution”).

²⁸ Kutner, *Top Ten*, *supra* note 25, at 363. This last statement was premature as all pre-constitutional precedent is brought into question by the Final Constitution. See Roederer, *Post-matrix*, *supra* note 19, at 61. See also DE WAAL ET AL., HANDBOOK 4TH, *supra* note 27, at 325 n.62 (stating, “...the pre-constitutional judgements were decided without reference to the Bill of Rights and are no longer binding.”). But see *Afrox Health Care Bpk v.*

The view that the private common law would not be seriously affected by the oncoming democratic transition must be based on the notion it was not in need of transformation at the end of apartheid.²⁹ There may be a number of reasons for this view, all of which are problematic, including: (1) apartheid law was not as evil as is commonly thought; (2) even if apartheid law was evil, the evil laws of apartheid were largely confined to public law legislation; (3) apartheid judges remained (largely) neutral and independent of the apartheid state; (4) private common law tends to work itself pure³⁰ regardless of the political context in which it is situated.³¹

Kutner claims that the main impact of apartheid on private law was a lack of access to the political power necessary to initiate changes to doctrine and to the administration of law.³² This underestimates the case-by-case distortions that may have taken place in the administration of “justice” in both public and private law matters.³³ Even if the law was neutral on its face it could

Strydom, 2002 (6) SA 21 (SCA) at 27-29 (holding that the High Court was bound under the doctrine of stare decisis by pre-constitutional apartheid judgments unless there was either a direct conflict with the Constitution or if the pre-constitutional decision was based on policy considerations such as boni mores or the public interest (e.g. in cases involving the issue of wrongfulness). See S. Woolman & D. Brand, *Is There a Constitution in This Courtroom?: Constitutional Jurisdiction After Afrox and Walters*, 18 S. AFR. PUB. L. 37 (2003) (providing a sustained critical appraisal of the judgment). Although not clearly overruling *Afrox*, the case of *N. K. v. Minister of Safety & Security* has brought into question the existence of any case that would fall in the ground carved out by the Supreme Court of Appeal (between direct conflict and policy based decisions) as being governed by apartheid stare decisis. CCT 52/04 para. 22 (CC Jun. 13, 2005) (O’Regan, J.) (calling into question whether any area of the law can be said to be free of policy considerations and thereby insulated from the reach of constitutional values), available at <http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT52-04>.

²⁹ ‘Private common law’ is used to distinguish it from public common law, e.g. criminal law. South Africans use the term common law in the same way we do. See Final Constitution, §§ 8, 39.

³⁰ The phrase “the common law works itself pure” is Lord Mansfield’s. According to Harold J. Berman the expression was first articulated by Lord Mansfield as solicitor general in the case of *Omychund v. Barker*, 1 Atkyns 21, 33 (K.B. 1744) (shortened version reported in 22 Eng. Rep. 339). Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 Yale L.J. 1651, 1712 n.163 (1994).

³¹ U.S. common law originated under undemocratic conditions in England and flourished in this country for the greater part of its history under undemocratic conditions. At best, we became a democracy in 1920 with women’s suffrage, but realistically, it was not until the 1960s that we had a system that was worthy of the title “democracy.” It is unclear if we have yet become a democratic state. As George W. Bush stated in an interview on the prospects for democracy in Iraq, “...we’re now saying, democracy must flourish. And as I recall from my history, it took us quite a while here in the United States, but nevertheless we are making progress.” Interview by Tim Russert, NBC, Meet the Press (Feb. 7, 2004), available at: <http://www.msnbc.msn.com/id/4179618/> (last visited on Jul. 4, 2005).

³² Kutner, *Top Ten*, *supra* note 25, at 312.

³³ Is it credible to suppose that equal justice would be dispensed in a courtroom that segregated “European” practitioners from “non-European” practitioners? Chief Justice Steyn, upheld the practice of segregating the

always be applied to the facts in a discriminatory manner.³⁴ This also begs the question as to what changes South Africans would have made if the majority had such access. Kutner's focus is on cases he considers important for comparative purposes, yet he never evaluates the larger picture of which cases were not being heard, or what developments had not taken place.³⁵

While the private common law of South Africa was not poisoned by apartheid to the same degree as were areas of public law, South African private law was nonetheless distorted, and at the very least its development was arrested under apartheid. Although Kutner does not see it or acknowledge it, even his selected cases show signs of arrested development. This failure to see the adverse effects of apartheid in the area of private law evidences a failure to completely understand how apartheid functioned, how the authoritarian public law worked in concert with the libertarian private law to further the harms of apartheid.

Kutner notes three reasons for the neglect of the South African law of delict among common law countries. The most obvious, although not most important, reason has to do with problems of language (i.e., the percentage of judgments and academic literature written in Afrikaans, a derivation of Dutch) and accessibility.³⁶ However, as more and more of these materials have become readily available in English and over the internet, this problem has

courtroom so that "non-European" practitioners would have to represent their clients from a different table than that used by "European" practitioners. *R. v. Pitje*, 1960 (4) SA 709 (A) (Appellate Division). This sent a clear message "that the highest court of the land did not perceive a black lawyer as equal before the law." DAVID DYZENHAUS, *TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER* 156 (1998).

³⁴ Cases are not heard by juries in South Africa, not even in criminal matters after the *Abolition of Juries Act* 34 of 1969 (BSRSA) (S. Afr.).

³⁵ In fact he fails to mention one of the worst cases of apartheid, *Pakendorf v. DeLamingh*, 1982 (3) SA 146 (A). Kutner exclude the case because it was based on the Roman-Dutch legal principles (personal communication with author). Prior to *Pakendorf* the delict of defamation required the intentional infringement of a person's good name. NEETHLING ET AL., *LAW OF DELICT* 338, 348 (J.C. Knoble trans. & ed., 4th ed. 2001). After *Pakendorf*, media defendants (owners, publishers, printers and editors of newspapers) were held strictly liable unless they could establish that the publication was both true and in the public interest. This case is a classic example of the judiciary supporting the apartheid policy of silencing the media by making it much more risky for the media to publish anything critical of the apartheid government. Interestingly, Neethling et al. blame the influence of English law for leading the courts down the path to this deviant approach to defamation. *Id.* at 348.

³⁶ There are still a significant number of cases reported in Afrikaans, about five percent or so over the last five years in the area of delict.

significantly diminished.³⁷ The more substantial reasons for the neglect are caused by the perception that since South African law is based on Roman-Dutch law, comparisons or lessons are not fruitful; the discussion is about different kinds of fruit from different kinds of trees. Secondly, even if the discussion is not about apples and oranges but only apples, even if the fruit were comparable, South African law, from the late 1940s to the early 1990s was grossly distorted by apartheid. To make the point somewhat more forcefully than Kutner, the fruit was poisoned or rotten. No one wants to look to the rotten apple for lessons on how to develop or perfect the common law. Few if any academics or judges writing in the 1980s would want to cite South African decisions as providing good lessons or insights into the common law for adoption in their jurisdiction, even if good lessons were there to draw from.

Although obstacles to Kutner's argument for relevance, these are not obstacles for us. Let it suffice to say that anyone who is familiar with torts should be able to understand, with some difficulty, the average delict case. Although some would see the constitutionalization of the private law of delict as making it less appropriate for comparisons to the common law of torts, this development leads to some of the most interesting opportunities for comparing and contrasting the law of delict with our law of torts. Even if it is difficult to compare and contrast particular doctrinal rules it is very fruitful to compare and contrast the larger trends and changes that have taken place along with the democratic transformation of South Africa

³⁷ All Constitutional Court cases and most Supreme Court of Appeal cases are reported in English. Juta publishes English translations of South African cases reported in Afrikaans, although they are about two years behind. There remains a number of journals that are predominately Afrikaans, but more and more Afrikaans academics are publishing in English. For instance, LAW OF DELICT, NEETHLING ET AL., *supra* note 35, was originally written in Afrikaans as DELICTREG (4th ed. 2001). Judgments of the Constitutional Court from 1995 until the present are available online at http://www.concourt.gov.za/judgment.php?case_id=12717 (last visited Apr. 4, 2005) and those of the Supreme Court of Appeal from 1999 to the present are available at <http://wwwserver.law.wits.ac.za/sca/index.php> (last visited Apr. 4, 2005). Both these and other links to South African law are hosted by the University of the Witwatersrand School of Law website at <http://www.law.wits.ac.za>.

In Part II I argue that even if the private common law of South Africa was not infected by the apartheid cancer, it acted as a carrier and facilitator of apartheid values and policies, perpetuating the inequities of apartheid. In Part III I evaluate Peter Kutner's top ten cases from the 1980s and demonstrate that there is evidence of the cancer even in his chosen cases. Evidence of infection is rife when we turn to an evaluation of what was missing from the record in Part IV. Here I show that the development of the law of delict was arrested under apartheid in that a number of progressive developments that took place in the United States during this period did not occur in South Africa. I also show that numerous developments have occurred in these areas since the fall of apartheid. In Part V, I argue that even if parts of the law of delict were not infected by the apartheid cancer, the values that animated the law of delict under apartheid are inconsistent with the values, goals and aspirations of the democratic transformation of South Africa. Part V details both the values of the democratic transformation as well as the constitutional mechanisms for the harmonization of delict with those values. Part VI details several developments in the law of delict beyond those mentioned in Part IV. In sum, the transformation of South Africa has helped propel the transformation of delict, and this in turn has added fuel to the transformation, helping to further consolidate South Africa's democracy.

II. THE CANCER OF APARTHEID: HOW SOUTH AFRICAN PRIVATE LAW CARRIED AND SPREAD THE INFECTION EVEN IF IT DID NOT CONTRACT THE DISEASE

As noted, the second substantive problem Kutner addressed was the question of how much apartheid tainted, distorted, or thwarted the common law of delict. His answer is that although apartheid may have had a serious impact on public law, he does not believe it had such an impact on private law, particularly the law of delict.³⁸ Further, he did not believe that the impending democratic changes would radically alter the law of delict. As he stated, "In all probability, a

³⁸ Kutner, *Top Ten*, *supra* note 25, at 311.

democratic South Africa will maintain and refine the tort law it has inherited, not radically alter it.”³⁹

Kutner is not alone in thinking that the apartheid cancer was primarily confined to public law and some legislative inroads into the private law.⁴⁰ While Kutner’s position is not facially ideological, given the context in which he was writing, it is difficult avoid the ideological presuppositions and potential impact that such a position entails.

A. The Apartheid Cancer and the Role of Judges

One reason for thinking that the apartheid cancer did not infect the common law might be based on the notion of separation of powers, and the relative independence of the judiciary from the political branches. This was a hotly debated issue in South Africa during the 1980s. The South African debate over how far the apartheid cancer had spread and the role of judges in such a system was started by Raymond Wacks,⁴¹ and it drew responses from several prominent jurists in South Africa.⁴²

In Wacks’s view, judges working under the apartheid system should have resigned because it was not possible for them to faithfully carry out their duties as judges and to dispense actual justice at the same time. Wacks’s argument was based on the principled effect that

³⁹ *Id.* at 312.

⁴⁰ P.J. Visser states:

The current law of delict is the result of developments spanning thousands of years in order to achieve a just balance between various interests by providing remedies when specific requirements are met. The bill of rights must not be seen as a system aimed at replacing the current law of delict. In practical terms, this means that the constitution must generally be used sparingly and wisely in changing and developing the content and scope of the law of delict.

P.J. Visser, *Some Remarks on the Relevance of the Bill of Rights on the Law of Delict*, TYDSKRIF VIR DIE SUID-AFRIKAANSE REG [Journal of South African Law] 529, 536 (1998).

⁴¹ Raymond Wacks, *Judges and Injustice*, Inaugural Lecture Delivered in the University of Natal, Durban (Mar. 23, 1983), in 101 S. AFR. L.J. 266 (1984) and SUNDAY TRIBUNE, March 27, 1983 [hereinafter Wacks, *Judges and Injustice*].

⁴² E. Mureinik’s views can be found in *Dworkin and Apartheid*, in LAW AND SOCIAL PRACTICE (Hugh Corder ed. 1988) [hereinafter Mureinik, *Dworkin*]. John Dugard wrote his response in *Should Judges Resign? – A Reply to Professor Wacks*, 101 S. AFR. L.J. 286 (1984). This inspired DAVID DYZENHAUS, *HARD CASES IN WICKED LEGAL SYSTEMS: SOUTH AFRICAN LAW IN THE PERSPECTIVE OF LEGAL PHILOSOPHY* (1991).

apartheid should have on the entire system and not so much on the actual spread of the apartheid cancer. His argument was also based on Ronald Dworkin's notion of law as integrity,⁴³ the idea that judges have institutional duties to decide like cases in a like manner. Every hard case, every development of the common law, would need to take place against the background of the principles that justified the system. The more unjust the system, the more clear it is that the only principles that justify the unjust system are unjust principles. Thus, if one is a judge in a wicked legal system then there is little that she can do to bring justice to that system without abandoning her duties to the system.⁴⁴ Few judges took up Wacks's call to resign,⁴⁵ perhaps because they were comforted by the responses of commentators such as Eteine Mureinik who persuasively argued that judges could do justice within the system and that resigning was less honorable than doing what they could within the system.⁴⁶ Some, no doubt, did not resign because they supported the apartheid system. Which path was the most honorable depended both on how the judge's role was to be perceived and just how far, wide and deep the evil cancer had spread.

⁴³ R. Wacks, *supra* note 41 at 282; R. WACKS, LAW, MORALITY AND THE PRIVATE DOMAIN 58 (2000).

⁴⁴ According to Dworkin, the judges' choices then are to either protest, lie, or resign. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 326-27 (1978).

⁴⁵ In 1987 Justice L. W. H. Ackermann, now a Justice on the Constitutional Court, did resign to take up a chair in Human Rights. Is it possible to conceive the resignation of Justice Rex van Schalkwyk's in 1996 as a result of affirmative action on the bench and the release of certain prisoners as also a response to Wacks's call? *See* Wacks, *Judges and Injustice*, *supra* note 41, at 6 n.22 (noting the resignation).

⁴⁶ As Mureinik said:

If there is no point in being a conscientious judge, there is no point in being a conscientious advocate, because the arguments of a conscientious advocate are calculated to persuade only conscientious judges... And if there is no point in being a conscientious judge or a conscientious advocate or a conscientious attorney, there can be little point in being a conscientious academic lawyer, because the most important kind of legal research is addressed to conscientious judges and practitioners, and teaching is a worthless activity unless it is addressed to conscientious students; and there can be no point in being a conscientious law student, because you would be preparing yourself for nothing.

Mureinik, *Dworkin*, *supra* note 42, at 183.

While it is clear that apartheid was evil and that the new South African legal system is to be founded on values that are opposed to the evils of apartheid, the extent and depth of the evil is in no sense settled. As the late Justice Mahomed stated in *S. v. Makwanyane*:

The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from and ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution.⁴⁷

While there were many clear cases where the laws and policies needed to be reversed, the question of how far and deep the cancer spread into the common law remains controversial. How much of it affected the way that the judge's role was conceived, of the way that judges reasoned (and often continue to reason) about the law?

B. Did the cancer spread into the common law?

In a recent article Jeremy Sarkin asks whether the common law in South Africa was pro-apartheid or pro-democracy?⁴⁸ His conclusion appears to be that it was pro-apartheid as he stated:

To conclude, in the majority of cases during the apartheid era, Parliament rode roughshod over the common law rights to individual liberty.⁴⁹ The courts generally served as a rubber stamp for the legislature as they upheld and sanctioned government encroachment on personal freedom.

Therefore, while it is obvious that the common law had strands that were compatible with human rights, the statutory laws of apartheid in South Africa overwhelmed the common law. Consequently, the residual common law rights were of minimal effect.⁵⁰

⁴⁷ 1995 (3) SA 391 para. 262 (CC).

⁴⁸ Jeremy Sarkin, *The Common Law in South Africa: Pro Apartheid or Pro Democracy?*, 23 HASTINGS INT'L & COMP. L. REV. 1 (1999).

⁴⁹ In support of this proposition Sarkin refers to M.G. Cowling, *Judges and the Protection of Human Rights in South Africa: Articulating the Inarticulate Premise*, 3 S. AFR. J. HUM. RTS. 169 (1995). *Id.* at 11 n.54.

⁵⁰ *Id.* at 11-12.

This conclusion needs clarification in a number of respects. First, Sarkin is not concerned with the general concept of democracy, but merely individual rights based democracy or liberalism.⁵¹ It would be more appropriate to say that he was asking whether or not judges during the apartheid era were willing and able to protect individual rights against the apartheid cancer. The answer to that question was mixed, for he does provide some evidence that at least certain judges were willing and able to use common law presumptions and remedies to counteract, read down, or narrowly construe apartheid legislation that adversely affected individual rights.⁵² David Dyzenhaus refers to these principles as fundamental principles of legality; principles that are part of the inner logic of the law or part of the fundamental building blocks of the rule of law.⁵³

⁵¹ Sarkin rephrases the question as: “The role of the legislature and the courts during the apartheid years needs to be examined to determine whether the supposed libertarian strands were upheld or whether it was the common law that permitted the apartheid system to trample on the rights of the majority.” *Id.* at 6.

⁵² The tools at the judges disposal included: natural justice (due process), equality before the law, impartiality, the *audi alteram partem* rule, the *in favorem libertatis* (in favor of liberty) presumption, the right to bring a writ of Habeas Coprus, the presumption that the legislature does not intend to change the existing law more than is necessary, and that it does not intend to oust the jurisdiction of the courts. *Id.* at 3-4. Sarkin refers to an emerging consciousness among judges in the late 1970s and early 1980s that the legal system was perceived to be a part of the apartheid machinery of oppression. *Id.* at 7 (referring to The Hoexter Commission Report (1984); the Human Sciences Research Report of 1985, and JOHN DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER 487 (1978)). One justice, Justice A.J. Milne, went so far as to claim that:

Judges must bring certain presumptions to bear in . . . interpreting the legislature's intention. They look at precedent and what can only be called the general inherited spirit of our laws. It is here that I find the Universal Declaration of Human Rights particularly interesting reading. A great many of the fundamental presumptions that guide our interpretation of what the legislature intended are contained in the Declaration.

Id. at 7-8. (quoting Justice A.J. Milne, Address to Lawyers for Human Rights (Aug. 6, 1983), in 3 Law & Hum. Rts. Bull. 48 (1984)).

⁵³ DYZENHAUS, *supra* note 33, at 151. In addition to the principles stated above, his list includes the presumption that policy should be implemented in a reasonable or non-discriminatory fashion, that if legislation requires that an official must have a reason to believe x before acting, the official should be required to provide reasons or evidence to justify the belief, and that legislation giving sweeping powers must be defensible in a court on the basis that the reasons or purpose stated for the legislation must be demonstrated to exist and the means or powers invoked for achieving the stated purpose must be related to the purpose. *Id.* Dyzenhaus’ notion of the inner logic of law follows the notion as developed by L. Lon Fuller, in *Positivism and Fidelity to Law – A Reply to Professor Hart* 71 HARV. L. REV. 630-672 (1958).

Despite some positive evidence, the bulk of the evidence is of judges failing to use common law remedies and presumptions and seemingly rubber stamping apartheid legislation.⁵⁴ Further, when judges failed to toe the line, the state responded with clearer, more pervasive security legislation⁵⁵ as well as by packing the Appellate division.⁵⁶

While it is true that apartheid had a clearly detrimental effect on the common law, the effect as captured by Sarkin, and to some degree Dyzenhaus, was primarily in the area of public common law, or the vertical relationship between the State and the individual. Sarkin's cases all involve the State, be it the Minister of Justice, the Minister of Law and Order, the Minister of Prisons, or the Minister of Native Affairs. Sarkin does not look at the horizontal relation between individuals within the state. Thus it may still be maintained that, even though the State and the judiciary were not pro-democracy but were pro-apartheid in cases of vertical conflict,

⁵⁴ In *Rossouw v. Sachs*, Justice Thompson read Act 37 of 1963 purposely to fill in the gap in the Act which made it unclear whether the appellant was empowered by the Act to make regulations depriving the plaintiff, advocate Sachs, of reading and writing materials. 1964 (2) SA 551 (A). Given that the purpose of the section in question was to compel the detainee to speak, Justice Ogilvie Thompson read the Act as denying any right of detainees to "relieve the tedium of their detention with reading and writing material." *Id.* at 564-65. Dyzenhaus lends fuel to this concern in his analysis of the legal community's role in the apartheid 'order' and their avoidance of confronting that role in the Legal Hearing before the Truth and Reconciliation Commission. DYZENHAUS, *supra* note 33. He is particularly critical of the judiciary and charges it with a dereliction of duty. *See id.* ch. 4.3.

⁵⁵ The Internal Security Act 74 (1982) was passed in response to the Rabie Commission of Inquiry. Rabie was the Chief Justice of South Africa during the 1980s. The report addressed the various inadequacies of existing legislation. *See* John Dugard, "A Triumph for Executive Power – An Examination of the Rabie Report and Internal Security Act 74 of 1982," 99 S. AFR. L.J. 589 (1982). The above presumptions could be overridden by "clear" legislation to that effect. South African judges learned early on that they did not have the authority of judicial review outside of cases involving procedural irregularity. In 1895 Chief Justice Kotze attempted to introduce American style judicial review in the Transvaal. This resulted in his dismissal by President Paul Kruger, who stated that, "the testing right is a principle of the devil." Charles Villa-Vicencio, *Whither South Africa?: Constitutionalism and Law Making*, 40 EMORY L.J. 141, 150 (1991) (citing JOHN DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER 24 (1978)).

⁵⁶ Dyzenhaus aptly notes that the packing of the court was presaged by the appointment of L.C. Steyn to the bench in 1951. DYZENHAUS, *supra* note 33, at 154. Steyn's appointment is worth noting because he was appointed from the civil service rather than senior council at the bar, which was unusual and he was appointed a few years after the publishing of his book on statutory interpretation, *DIE UTLEG VAN WETTE* (1946), in which he strongly criticized the use of common law presumptions (the principles above). His appointment to the Appellate Division came with the 1955 court-packing, where the Appellate Division was enlarged from six to eleven members and a quorum of all eleven was required to determine the validity of a statute. *Id.* (referring to the Appellate Division Quorum Act 1955). For a critical evaluation of the impact of L.C. Steyn on South African Law see E. Cameron, *Legal Chauvinism, Executive-Mindedness and Justice – L.C. Steyn's Impact on South African Law* 99 S. AFR. L.J. 38 (1982). L.C. Steyn embodied Wacks' worry about what would happen if judges did not resign. Chief Justice Rabie, who took over the role of Chief Justice in the 1980s, was no better than Steyn. DYZENHAUS, *supra* note 33, at 158.

this did not affect the judiciary carrying out its common law functions in cases of horizontal conflict, conflict between individuals.

This fits in with Kutner's analysis of the law of delict in the 1980s. He did not find any of the cases to be horribly out of step with common law developments elsewhere. Although some of the cases he surveyed could be considered "good" cases that made valuable contributions to the common law, a number of the cases he positively reviewed were anything but progressive. A number of them evidence a *libertarian* bias, which is evidenced by a bias towards contracts over delict or over tort. At least one of the cases endorses gender-based discrimination and/or discrimination on the basis of marital status. More importantly, his survey does not include any analysis of what is missing from the law of delict in the 1980s.

It is not surprising that areas of private law like delict, which deal primarily with the relations between individuals rather than between individuals and the State, would not be as clearly and thoroughly tainted by apartheid. In many cases, the principles which underlay this authoritarian, racist regime did not have a clear impact on relations between relatively equally situated parties (for instance two corporations or two white male professionals).⁵⁷ In fact, under apartheid the private law operated under a veneer of libertarianism which is the antithesis of authoritarianism. Looking only on the surface, one may be forgiven for thinking that the private law tradition in South Africa was not tainted by the authoritarian regime. But if one cuts through the surface it becomes clear that it was tainted. This is so in part because South Africa operated as a severely truncated liberal democracy. This truncated democracy allowed for the use of the rhetoric of libertarianism and the rule of law while that very libertarianism empowered the private sector to further the authoritarian and racist apartheid mandate. The system worked

⁵⁷ The apartheid system was also sexist, heterosexist, and relatively unsympathetic to those with disabilities.

efficiently to this end in part because of the veneer of libertarianism, democracy and the rule of law. Liberty is exalted in the common law with a bias towards freedom of contract over notions of social responsibility (i.e. contract over delict). Individuals are presumed to be free and equal and fully able to determine their own legal relationships under the state enforced law of contracts. People are expected to take their hard knocks in the risky world (or to protect themselves against them). Apartheid defined many of the parameters within which injustice could flourish – and flourish under the protection of the State. On the one hand, the apartheid laws provided a protective arena for white domination and consequently black oppression; while on the other hand they provided springboards for further domination and oppression.

Alfred Cockrell, in *The Hegemony of Contract*,⁵⁸ has persuasively argued that the law of contract occupied a position of privilege in South African law and that “its supremacy has served to check the expansionist ambitions of rival compartment of law.”⁵⁹ Cockrell surveys the hegemony of contract over a number of areas of the law including delict.⁶⁰ He even notes that some commentators have maintained that contract law was insulated from the fundamental rights in the Interim Constitution.⁶¹

In the second half of his article Cockrell looks at the justifications for this hegemony and finds them in the following ideas:

Liberty is the prime political virtue, and coercion is prima facie an evil. The law should be reluctant to impose affirmative duties on individuals unless those duties have been voluntarily assumed. Since individuals are the best assessors of their private desires and preferences, legal rules should create the maximum free space

⁵⁸ 115 S. AFR. L.J. 286 (1998).

⁵⁹ *Id.* at 286.

⁶⁰ In the section dealing with delict, Cockrell deals primarily with the *Lillicrap* decision, 1983 2 SA 157 (Witwatersrand Local Div.). See *infra* Section V for an extensive treatment of the case. He also surveys unjust enrichment, estoppel by representation, and administrative law.

⁶¹ Cockrell refers by example to J. D. van der Vyver, *Constitutional Free Speech and the Law of Defamation*, 112 S. AFR. L.J. 572, 577 (1995) (arguing that contracts “cannot be tested against the provisions of the Chapter on Fundamental Rights in the interim Constitution”). *Id.* at 303 n.104.

to allow for the satisfaction of those wants...Finally, the court's role is an essentially facilitative one of giving effect to the wishes of the parties.⁶²

This idea is echoed by the authors of the leading South African book on the law of delict when they state that, "The *fundamental premise* in law is that *damage (harm) rests where it falls*, that is each person must bear the damage he suffers (*res perit domino*)."⁶³ In other words, the hegemony of contract is based on the idea that the values of arm's length dealings in the market should triumph over values of "neighborliness,"⁶⁴ and of the "political community."⁶⁵ We are fundamentally individuals who compete in a marketplace rather than good neighbors who are expected to help each other out or who are expected to cooperate in the greater good of our political community. This libertarian view of the legal system was couched within the authoritarian apartheid regime. The result is in many ways the best of both worlds for the privileged and the worst of both worlds for the disadvantaged.

Take an example of the law that Cockrell does not mention, but which was also dominated by the "free market" values of contract, namely -- employment or labor law.⁶⁶ Under apartheid black workers were excluded from collective bargaining under the Labour Relations Act 28 of 1956, and were instead subjected to a committee system under the Bantu Labour (Settlement of Disputes) Act 48 of 1953. Black unions were not afforded the same legal protection and benefits that white unions were given. Employers were not required to recognize

⁶² *Id.* at 309.

⁶³ NEETHLING ET AL., *supra* note 35, at 3 (emphasis in original) (referencing J.C. VAN DER WALT & J.R. MIDGLEY, DELICT: PRINCIPLES AND CASES 19 (1997)).

⁶⁴ Cockrell, *supra* note 58, at 311 (quoting from PETER CANE, TORT LAW AND ECONOMIC INTERESTS 478 (1991)).

⁶⁵ *Id.* at 312.

⁶⁶ The racially discriminatory labor policies of the late 1950s and early 1960s raised concerns for the International Labor Organization (ILO) which did not subside with South Africa's withdrawal in 1964. Between 1964 and 1979 the ILO compiled twenty-two reports and made a number of resolutions regarding the unfair labor practices of South Africa. David Woolfrey, *The Application of International Labour Norms to South African Law*, 12 S. AFR. Y.B. INT'L L. 135, 140 (1986-1987). See also MARTIN BRASSEY, EMPLOYMENT AND LABOUR LAW VOL. I A1:36-42 (1998) (providing a concise history of South African labor law from 1948 – 1977).

the black unions and as a result they were able to harass and victimize those who attempted to exercise their rights to association (such harassment often being assisted by the police). Further, black workers were not allowed to strike under the Bantu Labour (Settlement of Disputes) Act 48 of 1953.⁶⁷ Many jobs, especially skilled and semi-skilled jobs, were reserved for whites - for example those under the Mines and Works Act 12 of 1911 and also the Conciliation Act 28 of 1956.⁶⁸ The systematic racial discrimination in the workplace was further entrenched by the absence of legislation providing for fair discipline and dismissal of workers. The plight of black employees was worsened since they could be dismissed for any reason whatsoever under the common law. Finally, the influx control and residential segregation laws placed black workers at an even further disadvantage in the labor market.

The consequences of a system like this are predictable. The denial of access to legally recognized trade unions and their bargaining power mixed with an extremely liberal regime for discipline and dismissal resulted in a labor regime that systematically discriminated against black workers, leading to an exploitative work environment.⁶⁹ Dissatisfied workers had to either live with their dissatisfaction or else participate in illegal strikes which often resulted in arrest and detention coupled with mass dismissals.

It is not surprising that in such a system, the courts would not emphasize such concepts as good faith and unconscienability in contracts⁷⁰ and that they would be conservative when it came

⁶⁷ BRASSEY, *supra* note 66, at A1:38.

⁶⁸ *Id.*; Woolfrey, *supra* note 66, at 141.

⁶⁹ For instance, in 1967 the average monthly wage for a white mine employee was R282 while it was only R17 for a black employee. John Dugard, *The legal framework of apartheid*, in SOUTH AFRICAN DIALOGUE 89 n.46 (N.J. Rhodie ed., 1972) (citing SOUTH AFRICAN INSTITUTE OF RACE RELATIONS, A SURVEY OF RACE RELATIONS IN SOUTH AFRICA 104 (1968)).

⁷⁰ Gerhard Lubbe, *Taking Fundamental Rights Seriously: The Bill of Rights and Its Implications for the Development of Contract Law*, 121 S. Afr. J. L. 385 (2004) (referring to two post apartheid cases that rejected the notion of a good faith defense to contract law: *Brisley v. Drotzky*, 2002 (4) SA 1 (SCA) (involving the contractual requirement that all variations to the contract be in writing and signed) and *Afrox Health Care Bpk v. Strydom*, 2002 (6) SA 21 (SCA) (involving an exemption of liability clause in the contract)). In *Brisley*, the Court held that there

to expanding tort or delictual liability. They might be expected to fail to include mechanisms that make it more affordable to sue in delict or to make it easier to prove a claim in delict. This greatly benefits those who have access to information, power and the ability to cover any losses they may suffer, and greatly disadvantages those who do not. It allows the powerful who have economic means to dictate the terms of contracts, and it binds those who sign or agree to the contract through the sanctity of contract. Those who can afford to protect themselves in the risk laden society have a great advantage over those who cannot.

In a society where people have relatively equal access to education, decent accommodation, health care, food, water and income opportunities, the libertarian approach has some attraction. But when one lives in a society that includes separate and radically unequal opportunities based on apartheid legislation that runs the gamut from education laws, laws that govern what jobs one can and cannot take, where one can live, what services one gets, etc.,⁷¹ the freedom that is exalted in the private sphere is a ruse. It merely acts as a secondary source of further inequality.

was “no general equitable discretion enabling a court to refuse to enforce a non-variation clause, or indeed any other contractual provision, merely on the grounds of it being unreasonable, unconscionable or against good faith.” *Id.* at 397 (citing *Brisley*, 2002 (4) SA 1, 121 para. 12 (SCA)). Lubbe further notes that this is contrary to the approach taken in section 242 of the German BGB. *Id.* The *Afrox* court rejected the argument for the good faith defense. 2002 (6) SA 21, 41B para. 32 (SCA). *Afrox* left the door open for cases involving extreme unfairness which may render a contract unenforceable due to public policy. Lubbe, *supra*, at 398-99 (citing *Afrox*, 2002 (6) SA 21, 34G-I para. 10 (SCA)).

⁷¹ Further examples of these types of legislation include the Natives Land Act of 1913 (restricting black ownership of land to thirteen percent of the territory); Population Registration Act 30 of 1950 (classifying South Africans as Black, Coloured, Indian or White); Group Areas Act 41 of 1950 (segregating cities and towns based on ‘racial’ categories); Prohibition of Mixed Marriages Act 55 of 1949 (prohibiting marriage between the ‘races’); Immorality Act 23 of 1957 (prohibiting sexual intercourse between races); Black Education Act 47 of 1953, Indians Education Act 60 of 1965; Coloureds Education Act 47 of 1963 (segregating education for non-whites); Black (Urban Areas) Consolidation Act 25 of 1945; Blacks (Abolition of Passes and co-ordination of Documents) Act 67 of 1952; Prevention of Illegal Squatting Act 52 of 1951 (requiring non-whites to carry pass books). For a representative list of racist apartheid legislation, see e.g. J. de Waal, *Constitutional Law, in* INTRODUCTION TO THE LAW OF SOUTH AFRICA 58 (C.G. van der Merwe & J. E. du Plessis eds., 2004).

III. EVIDENCE OF INFECTION: EVALUATING THE RECORD IN KUTNER'S TOP TEN DELICT CASES FROM THE 1980S

As noted, Kutner reviewed what he considered to be the top ten cases in the law of delict in South Africa during the last decade of apartheid. Of the ten cases reviewed by Kutner from the 1980s, most of them are sound cases that are still good law to this day. These include *Union National South British Insurance Co. v. Vitoria*,⁷² *General Accident Insurance Co. S.A. v. Summers*,⁷³ *Minister of Police v. Rabie*,⁷⁴ *Dhlomo, N.O. v. Natal Newspapers (Pty.) Ltd.*,⁷⁵ *Joubert v. Venter*,⁷⁶ *Schultz v. Butt*⁷⁷ and even *Siman & Co. (Pty) v. Barclays National Bank*

⁷² 1982 1 SA 444 (AD), *aff'g* *Vitoria v. Union Nat'l So. British Ins. Co.*, 1980 4 SA 406 (Transvaal Prov. Div.). In *Vitoria*, the Appellate Division held that the plaintiff's failure to wear a seatbelt amounted to contributory negligence under Section 1 of the Apportionment of Damages Act. No. 34 of 1956 (S. Afr.). *Id.* at 460. Further, it held that the award would only be reduced if it was shown that the injuries suffered were more severe than if the seatbelt had been worn. See NEETHLING ET AL., *supra* note 35, at 143, 164 (proposing that this is still good law).

⁷³ 1987 3 SA 577 (AD), *aff'g* *Summers v. Gen. Accident Ins. Co., S.A.*, 1985 3 SA 418 (Cape Prov. Div.). *Summers* involved the question of whether the discounting of a lump advance payment for future losses should start at the date of the delict or the date of the judgment. The court held that damages for expenses and losses between the time of the delict and trial should not be discounted and that discounting should run from the time of the trial onwards. *Gen. Accident Ins. Co. S.A. v. Summers*, 1987 3 SA 615 (AD). See P.J. VISSER & J.M. POTGIETER, *THE LAW OF DAMAGES* 132-33 (2d ed. 2003) (proposing that this is still good law).

⁷⁴ 1986 1 SA 117 (AD), *aff'g* *Rabie v. Minister of Police*, 1984 1 SA 786 (Witwatersrand Local Div.). *Rabie* held the Minister of Police vicariously liable for the actions of an off duty police mechanic who wrongfully assaulted, arrested and detained the plaintiff. NEETHLING ET AL., *supra* note 35, at 377-79. See *id.* at 373-74, 377-79 (proposing that this is still good law). Notice that this is a relatively progressive case for the 1980s. Note that the vicarious liability was introduced into South African law from English law. *Id.* at 373. P.Q.R. Boberg describes this as "perhaps the most comprehensive and far-reaching innovation we have taken from English law." P. Q. R. Boberg, *Oak Tree or Acorn?--Conflicting Approaches to Our Law of Delict*, 83 S. AFR. L.J. 150, at 169 (1966).

⁷⁵ 1989 1 SA 945 (AD), *rev'g* *Dhlomo, N.O. v. Natal Newspapers (Pty.) Ltd.*, 1988 4 SA 63 (Durban Div.). The Appellate Division held that non-trading corporations can bring defamation actions if the defamatory statement was "...calculated to cause financial prejudice." Kutner, *Top Ten*, *supra* note 25, at 342 n.339 (citing *Dhlomo*, 1989 1 SA at 954). See NEETHLING ET AL., *supra* note 35, at 329 (proposing that this is still good law).

⁷⁶ 1985 1 SA 654 (AD). *Joubert* recognized a qualified privilege for defamatory statements made in the process of litigation if the statements were made without improper motive, were relevant, and were supported by reasonable grounds. *Id.* at 704-05. See NEETHLING ET AL., *supra* note 35, at 344 (proposing that this is still good law). Kutner is slightly critical of this case in that he thinks the privilege should be wider, i.e., one that is closer to our common law. See Kutner, *Top Ten*, *supra* note 25, at 349.

⁷⁷ 1986 3 SA 667 (AD), *aff'g* *Butt v. Schultz*, 1984 3 SA 568 (E. Cape Div.). In *Schultz*, the Appellate division found that the use of a competitor's catamaran boat hull mould to make competing boats amounted to unlawful competition. The trial court case at least partially relied on *International News Service v. Associated Press*, 248 U.S. 215 (1918). 1984 3 SA at 578. This was approved by the Appellate Division. 1986 3 SA at 682-83. See NEETHLING ET AL., *supra* note 35, at 321 (proposing that this is still good law and describing the case as falling under the misappropriation of a competitor's performance). Kutner is critical of this case as *International News* has had a mixed reaction in the U.S. and has not been adopted in common law jurisdictions outside the U.S. See Kutner, *Top Ten*, *supra* note 25, at 352-53. There appears to be more recent U.S. Supreme Court authority that is contrary to *International News*. See e.g., *Bonito Boats v. Thunder Craft Boats*, 489 U.S. 141 (1989) (involving the copying of a

*Ltd.*⁷⁸ The remaining three cases are problematic from the standpoint of the transformation of South African Law. Kutner either concurs with these cases or at least concurs in part with these cases. To the extent that he dissents, he takes on a less progressive standpoint than the South African Appellate Division itself. Reading his work one may have the impression that apartheid delict was not all that bad. Given the arguments above, there is good reason to be skeptical of this view. This section will more closely scrutinize some of the cases to determine if they were not in fact tainted by apartheid. The next section will look beyond these few cases to the broader context of the law in order to further demonstrate the breadth and depth of the apartheid cancer in tort law. Throughout, I will be drawing on developments that occurred in the United States but did not occur in South Africa.

A. “Illegal” Income

*Santam Insurance Ltd. v. Ferguson*⁷⁹ was brought by a widow claiming loss of support and funeral expenses that resulted from the death of her spouse in a traffic accident.⁸⁰ Santam Insurance Ltd. defended the claim by arguing that the plaintiff’s spouse’s income was derived from the illegal activity of operating an auto body shop without a license.⁸¹ In coming to its decision, the trial court distinguished a case that barred recovery of lost income for a food

boat hull). Relying on *Bonito*, Kutner argues that the courts should not protect material that is not subject to legislative copyright protection. Kutner, *Top Ten, supra* note 25, at 354. Finally, he thinks that allowing some copying from the public domain is better for competition than forcing new entrants to “reinvent the boat” – so to speak. *Id.* at 353. On this point, I am in agreement with Kutner. However, it is likely the case that this will be to the disadvantage of less sophisticated designers who fail to register their designs as opposed to their more sophisticated counterparts whose lawyers will do so as a matter of course.

⁷⁸ 1984 2 SA 888 (AD). This case involved the question of whether the failure of the defendant’s employee to arrange cover against fluctuations in the rate of the South African Rand (its official currency) and the fact that the employee erroneously stated to the plaintiff that cover could not be arranged was the cause of the plaintiff’s loss. Since the defendant did not have a duty to provide the cover, and it was doubtful that the defendant could arrange cover from another source on the Friday in question, the court held that the actions of the employee did not cause the loss in question. *Id.* at 901, 905-07 (3-2 decision) (Nicholas, A.J.A, and Trollip, A.J.A., with concurrence by Wessels, J.A.; Corbett, J.A. and Miller, J.A., dissenting). The strong dissents in this case make it less firm as precedent than the cases above.

⁷⁹ 1985 4 SA 843(AD).

⁸⁰ *Id.* at 845.

⁸¹ *Id.*

hawker who operated without a license.⁸² The trial court further distinguished this case from cases involving moral turpis such as robbery⁸³ and awarded her damages for both her loss of support and funeral costs.⁸⁴ The Appellate Division overturned the ruling as to the loss of support, but awarded her the funeral costs.⁸⁵

Although Kutner notes the criticism of this case by South African academics⁸⁶ and registers his sympathy, he did not think it followed that the decision was wrong.⁸⁷ As he stated, “There is much to be said for the view that no benefit should be derived from unlawful activity – by the lawbreaker or by anyone else; in assessing damages courts should put plaintiffs in the position they would have been in had all persons conducted themselves lawfully.”⁸⁸ As he further stated:

[T]o conduct a trade without a license or in unsuitable places does, in many instances, threaten the public health or safety. It is not necessarily a mere failure to comply with a legal technicality or to surmount a bureaucratic hurdle. The licensing requirement in *Ferguson* was no more of a technicality and no less supported by considerations of the public interest and safety than the licensing requirement in *Dhlamini* [the food hawker case].⁸⁹

To his credit, Kutner does point out that the way around *Ferguson* is to either show that the deceased had lawfully earned income before and would likely have earned lawful income after, or to show that the legal infringement was not contrary to the “public interest.”⁹⁰ This has been

⁸² *Dhlamini v. Protea Assurance Co.*, 1974 4 SA 906 (AD).

⁸³ *Id.* at 208.

⁸⁴ *Dhlamini*, 1985 1 SA at 208-09.

⁸⁵ *Santam Ins. Ltd.*, 1985 4 SA at 852.

⁸⁶ Kutner, *Top Ten*, *supra* note 25, at 321 (citing Mervyn Dendy, *Damages for Loss of Support out of Illegally Earned Income: Visiting the Sins of the Fathers*, 104 S. AFR. L.J. 243 (1987)); *see e.g.*, Roos & Clark, *The Law of Delict and the Illegal Breadwinner*, 50 T.H.R.-H.R.91 (1987); P.Q.R. BOBERG, *THE LAW OF DELICT: VOL. I AQUILLIAN LIABILITY* (1984, revised reprint 1989) at 591-94; A.K. Blommaert, *Booyesen v. Shield Insurance Co.*, 1981 T.S.A.R. 176. Kutner does make the connection between apartheid and illegal income in another section of the article. Kutner, *Top Ten*, *supra* note 25 at 312, n2.

⁸⁷ Kutner, *Top Ten*, *supra* note 25 at 321.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Kutner, *Top Ten*, *supra* note 25, at 322.

captured as looking to the issues of one's earning capacity (rather than lost income) and to public policy.⁹¹

This allows for a great deal of flexibility, but that flexibility will either allow a judge to avoid *Ferguson* or to bring more factual situations within its scope. If the court is unsympathetic to the dependant and/or to the deceased it can find the activity contrary to the public interest and find that the breadwinner had few prospects for legally earned income.

For instance, most every licensing scheme can be argued to be in the public interest and most every violation of the law, including illegal parking, can be argued to be contrary to public policy. From a racist or simply a privileged conservative point of view, a great deal of black South African income was contrary to law and "public policy" (based on contravening liquor laws, hawking and taxi licensing requirements). From the view of a privileged white person, one could argue that violations of these laws and regulations caused serious health and safety problems (e.g. unsafe working conditions, unsanitary food, and unsafe taxis). Violations of these laws and regulations would confirm the views of some racists that it was the black South African who was to blame for her or his inability to earn "lawful" income. In other words, a racist judge would be less likely to see the black decedent as having lawful income earning potential.

Of course, a progressive judge could reason that all black South Africans had legal earning potential and that it was the apartheid system that was to blame for their illegal status.⁹² In other words, it was due to the lack of decent lawful employment opportunities as well as a lack of decent lawful and affordable services that forced so many black South Africans to

⁹¹ NEETHLING ET AL., *supra* note 35, at 240-41.

⁹² The South Africa Marketing Council looks to the "unregulated" informal economy as a source of untapped potential when it says, "The country's bustling informal economy, largely unmeasured and unregulated, has developed alongside its sophisticated industrial economy, and represents untapped potential for the country's future economic development." South Africa: economic overview *at* http://www.southafrica.info/doing_business/economy/econoverview.htm (last visited Mar. 24, 2005).

operate taxis, sell food, open auto body and repair shops, and to sell liquor without licenses (not to mention, selling one's body, drugs and other more dangerous illegal activities).⁹³ Poor people not only need access to income but also to cheap food, transportation and other services.

For so many people living and working in the informal economy there simply is not a viable "licensed" or "legal" alternative. It is through cases like *Ferguson* that the delict system reinforces the gross inequities of apartheid. While the surviving dependant of a rich person who made millions exploiting black labor is richly compensated for loss of support, the poor dependant whose breadwinner eked out a living as an unlicensed fruit hawker, auto body worker, domestic worker or prostitute gets nothing but funeral expenses.⁹⁴

B. Fortunate Orphans and Unfortunate but Remarriageable Widows-(Surviving Spouses)

In the case of *Constantia Versekeringsmaatskappy Bpk. v. Victor, N.O.*,⁹⁵ the Appellate Division leaned in a more progressive direction than Professor Kutner cared to accept. The Court sought to distinguish the present case from the accepted rule that a claim for loss of support by a "remarriageable widow" needed to be reduced by the chances that the widow may get remarried (and thus not need the compensation).⁹⁶ The appellant argued that the surviving dependant child's claim for loss of support should be reduced due to the subsequent adoption of

⁹³ For instance, the Constitutional Court in *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill*, 2000(1) SA 732 (CC), noted that under apartheid liquor and liquor regulations were a means of social control over black South Africans. *Id.* at para. 31.

⁹⁴ It is only recently that domestic workers have been guaranteed a minimum wage and a host of labor rights. See Basic Conditions of Employment Act 75 of 1997: Sectoral Determination 7: Domestic Worker Sector, South Africa, available at

<http://www.labour.gov.za/download/9855/Sectoral%20Determination%207%20Domestic%20Workers.doc> (last visited Apr. 4, 2005). (The Minister of Labour, in terms of section 51(1) of the Basic Conditions of Employment Act 75 of 1997, makes a Sectoral Determination establishing conditions of employment and minimum wages for employees in the Domestic Worker Sector, South Africa, which appears in the schedule hereto and determines September 1, 2002 as the date from which the provisions of this Sectoral Determination shall be binding).

⁹⁵ 1986 1 SA 601 (AD). Note that the analysis in this section draws heavily from my work in *Review*, 120 S. Afr. L.J. 903 (2003) (reviewing VISSER & POTGIETER, *supra* note 73); see also VISSER & POTGIETER, *supra* note 73.

⁹⁶ Kutner, *Top Ten*, *supra* note 25 at 323 (citing *Constantia*, 1986 1 SA at 614).

the child,⁹⁷ But the Court distinguished the case based on the idea that the adoption was more like a separate gift than a benefit that flowed from the wrongful death.⁹⁸ Thus, the Court held that the claim for loss of support by the dependant adopted child was not to be reduced.⁹⁹

According to Kutner, the court did not extend the rule to this case “...because it doubted the soundness of the widow's remarriage rule.”¹⁰⁰ This would have been wise. However, the court retreated from this view and was content to assume that “...a widow's remarriage or chance of remarrying was to be brought into the assessment of damages in fatal accident cases.”¹⁰¹ One may have expected Kutner to embrace this decision. The generous gift of adoption should not relieve the defendant of its obligation to pay for the support of the child when that support was lost through a wrongfully and negligently caused death. The adoption is a completely separate transaction that is only tangentially caused by the wrongful death. The same is true of remarrying and in particular having a court diminish one’s damages for loss of support based on a court’s assessment of the dependant’s likelihood of remarrying. A new marriage is a completely separate transaction; and while the death technically causes one to be eligible to remarry, it is not the real cause.¹⁰² In both the case of adoption and a remarriage there is an intimate, almost sacred, covenant that is being entered into and the wrongful and negligent defendant should not get the benefit of this collateral source of support.

⁹⁷ *Id.* at 322 (citing *Constantia*, 1986 1 SA at 606).

⁹⁸ The term used was “ex caritate” or that done out of love or affection. *Id.* at 322 (citing *Constantia*, 1986 1 SA at 613).

⁹⁹ *Id.* at 323 (citing *Constantia*, 1986 1 SA at 613).

¹⁰⁰ *Id.* at 322 (citing *Constantia*, 1986 1 SA at 614). Kutner has written extensively on the remarriage issue (or set of issues) in *Reforming Wrongful Death Law*, 7 TORTS L.J. 46 (1999) [hereinafter Kutner, *Wrongful Death Law*].

¹⁰¹ *Id.* at 324 (citing *Constantia*, 1986 1 SA at 615-16).

¹⁰² Outside of sarcastic remarks, would anyone refer to the death of a spouse as the reason or cause of marrying someone else?

Kutner does not embrace the above view. Not only does he not think that there should be a distinction between the two cases,¹⁰³ he argues that:

The real loss to the survivor is the difference between the support that would have been provided by the deceased spouse or parent and the support that will be provided by the new spouse or parent. Awarding a greater amount of damages puts the dependant in a better economic position than if the death had not occurred.... Limiting the defendant's liability to the actual loss that the dependant will sustain does not constitute an unwarranted benefit to the defendant. It is true that over-compensation would be avoided if damages were calculated without regard to remarriage or adoption and then applied to support the spouse or child, but this would relieve the new spouse or adoptive parent of the obligation of support. Should a person wish to have the benefit of a marital or parental relationship, he should be prepared to bear the normal obligation of support and not try to avoid it because his spouse or adopted child can receive an award of damages on account of a prior relationship.¹⁰⁴

This has the equities wrong. It is inequitable to require the adoptive parent or new spouse to bear the “normal burden” while the defendant who wrongfully and negligently caused the “burden” is relieved of that burden. The primary benefits and burdens of marriage and adoption are not financial but are physical, emotional and psychological, and the defendant bears none of these burdens.¹⁰⁵

The remarriageability rule is arguably still “good law”, although it is constitutionally suspect. P.J. Visser and J.M. Potgieter, in *The Law of Damages*, list the rule under ‘dependant widow.’¹⁰⁶ Categorizing the rule in this way, rather than as ‘dependant spouse,’ in itself should raise concerns. The concerns multiply and intensify once one sees how the rule functions. The authors cite T. Davel for a list of factors that the courts consider in assessing the

¹⁰³ Kutner, *Top Ten*, *supra* note 25, at 324.

¹⁰⁴ *Id.* at 324-25 (footnote omitted).

¹⁰⁵ In South Africa, a dependant child or spouse cannot claim for the sentimental damages connected with a wrongful death under the Aquilian action. *See Union Gov’t v. Warneke*, 1911 AD 657 (denying a claim of loss of ‘comfort and society’ of the plaintiff’s wife who had been killed in a negligently caused railway accident). *See also* BOBERG, *DELICT*, *supra* note 86, at 495.

¹⁰⁶ VISSER & POTGIETER, *supra* note 73, at 225 § 10.8.5.

‘remarriageability’ of the dependant survivor.¹⁰⁷ The factors are: (1) age, (2) character, (3) appearance, (4) ‘the duration and happiness of the marriage with the deceased,’ (5) ‘the presence of small children which may hinder social intercourse,’ (6) the existence of a relationship at the time of trial, (7) the plaintiff’s own views on remarriage, (8) the fact that the receipt of damages apparently increases the prospects of remarriage, (9) high esteem for the deceased, (10) health, and (11) statistical facts regarding remarriage.¹⁰⁸

The fact that a judge evaluates the marriage prospects of a dependant widow or spouse is a prima facie affront to that person’s dignity.¹⁰⁹ With one or two exceptions, the factors used envisage a highly speculative and deeply personal assessment of what characteristics of a person make her or him remarriageable. In addition to offending the rule of law by being speculative and arbitrary,¹¹⁰ the exercise raises problems with regard to dignity, freedom of association,¹¹¹ freedom and security of the person,¹¹² and particularly the right not to be unfairly discriminated against on the basis of one’s marital status.¹¹³

Factor 8 captures much of why this exercise is problematic. If giving full compensation leads to a higher chance of remarriage, then reducing the award will also reduce the chances of remarriage. Thus, on the basis of this alone, the court is caught over-compensating or under-compensating on the stated probabilities. The problem does not end here. If the court chooses to under-compensate, because in its estimation there is a good chance that the dependant widow or widower will remarry, then depending on the level of financial dependency, she or he will be put

¹⁰⁷ See *id.* (citing SKADEVERGOEDING AAN AFHANKLIKES 125-26 (1987)).

¹⁰⁸ VISSER & POTGIETER, *supra* note 73, at 224-26 n.153.

¹⁰⁹ The Final Constitution includes the right to have one’s dignity respected and protected. S. AFR. CONST. (Act 108 of 1996) ch. 2 (Bill of Rights), § 10.

¹¹⁰ See *id.* at ch. 1 (Founding Provisions), § 1(c).

¹¹¹ *Id.* at ch. 2 (Bill of Rights), § 18.

¹¹² *Id.* at § 12.

¹¹³ *Id.* at § 9(3).

in a position where she or he is pressured to seek remarriage.¹¹⁴ One who is fully compensated has the luxury of not needing to find a spouse for support and can base marriage decisions on other considerations, e.g. love. The dependant widow or widower who needs support and is denied that support because the court believes her or him to have good marriage prospects, will have the compounded problem of not only needing to find a spouse for support but also being less marriageable because of the reduced award.¹¹⁵

Kutner may be forgiven for being unable to anticipate the provisions of the Final Constitution, but one does not need an explicit right to dignity and a right not to be discriminated against based on one's marital status to see the problems with the rule. In the U.S., it is relatively well established that not only is remarriageability irrelevant to the amount that should be awarded for loss of support,¹¹⁶ but even if the dependant spouse has remarried, this fact is not to be taken into account in the award of damages.¹¹⁷ The support offered for this view is said to

¹¹⁴ While many households have both spouses contributing to the economic welfare of the family, for many households in South Africa, the loss of a breadwinner is not the loss of "extra" income but of income that is essential to meet the minimal needs of the family.

¹¹⁵ While I think the entire process is so offensive to the Constitution that it ought to be abandoned, at the very least some attention to the Constitution would reshape the analysis. While VISSER & POTGIETER note criticism of the practice, they support T. DAVEL in the view that the courts should not abandon their consideration of the prospects of remarriage as it is a 'relevant factor.' See VISSER & POTGIETER, *supra* note 73, at 226 n.156 (citing T. DAVEL, AFHANKLIKES at 128, and accompanying text). At the very least, the court should not be allowed to perform a personal assessment of a person's 'remarriageability.' Perhaps actuarial evidence mixed with a strong element of deference to the views and aspirations of the plaintiff might render the practice justifiable. On this view, if a widow or widower clearly did not want to remarry, then the court should not make any reduction in the award on this ground. The reason is that if the court reduced the award, it would pressure the plaintiff to remarry, and this offends the rights not to be discriminated against on the basis of marital status. Further, using evidence of one's associations in order to establish remarriageability (factor 6 above) interferes with freedom of association and may entail a bias against relationships that fall short of marriage or of a duty of mutual financial support. Notice, that such a rule would also put pressure on people not to remarry, or at least to attempt to convince the court that remarriage was not their intention.

¹¹⁶ See 22 AM. JUR. 2D *Death* § 268; *id.* at nn.1-2 (citing to §§ 376-78); see also Annotation, *Admissibility of Evidence of, or Propriety of Comment as to, Plaintiff Spouse's Remarriage, or Possibility Thereof, in Action for Damages for Death of Other Spouse*, 88 A.L.R.3D 926 § 4 (2004).

¹¹⁷ See 22 AM. JUR. 2D *Death* § 268; see also *id.* at n.3 (citing numerous cases in support of this positions). In fairness, Kutner notes that U.S. law was relatively unique among common law countries in holding this view. (personal communication). See also Kutner, *Wrongful Death Law*, *supra* note 100.

be twofold: 1) the wrongdoer should not get the benefit of the reduction,¹¹⁸ and 2) the cause of action arises and damages are fixed at the time of decedent's death and thus a later marriage is irrelevant.¹¹⁹ The cases referred to in the A.L.R. reveal a third justification and that is the speculative nature of the exercise, even in cases where remarriage has taken place.¹²⁰ If it is speculative in cases of actual remarriage, then inquiring into remarriageability is exponentially speculative.

C. The overlap of contract and delict – “pure economic loss” vs. physical loss

The last case that Kutner addresses is *Lillicrap, Wassenaar and Partners v. Pilkington Brothers (S.A.) (Pty.) Ltd.*¹²¹ Kutner makes his view of the case plain when he says, “If there is any South African case that deserves the title “Delict Case of the Eighties,” it is *Lillicrap, Wassenaar and Partners v. Pilkington Brothers (S.A.) (Pty.)*.”¹²²

The plaintiff in this case was a glass manufacturer who contracted with the defendant, an engineering consultant firm, to carry out a subsoil investigation to determine the suitability of the site for the erection of a float glass plant, as well as to design and supervise the construction of the plant.¹²³ The defendant did all three.¹²⁴ After the plant was finished and glass production

¹¹⁸ See 88 A.L.R.3D 926 § 2 n.4 “Summary” (citing *Reynolds v. Willis*, 209 A.2d 760 (Del. 1965); *McFarland v. Ill. Cent. R.R. Co.*, 127 So. 2d 183 (La. 1961); 87 A.L.R.2D 246 (1961)).

¹¹⁹ See 88 A.L.R. 3D, *supra* note 118 at n.5 “Summary” (citing *Riley v. Cal. Erectors, Inc.*, 111 Cal Rptr. 459, (1st Dist. 1973); *Pape v. Kan. Power & Light Co.*, 647 P.2d 320 (Kan. 1982)).

¹²⁰ All three rationales are stated in *Benwell v. Dean*, 57 Cal. Rptr 394 (Cal. Ct. App. 1967). See also *Hightower v. Dr. Pepper Bottling Co.* 117 So. 2d 642 (La. Ct. App. 1959) (remarriage is inadmissible on the question of damages because considering it would involve speculation as to the amount of support to be provided by the new spouse as contrasted with the decedent); *Kimery v. Pub. Serv. Co.* 562 P.2d 858 (Okla. 1977) (referring to three reasons for the exclusion: that it was speculative, that it was a collateral source of evidence, and that damages are fixed and determinable as of the date of death); *Smith v. Wells*, 188 S.E.2d 470 (SC 1972) (evidence of remarriage correctly excluded by the trial court as it would introduce a highly speculative inquiry that would confuse the issues).

¹²¹ 1985 1 SA 475 (AD), *rev'g Pilkington Bros. (S.A.) (Pty.) Ltd. v. Lillicrap, Wassenaar & Partners*, 1983 2 SA 157 (Witwatersrand Local Div.).

¹²² Kutner, *Top Ten*, *supra* note 25, at 355.

¹²³ *Lillicrap*, 1985 1 SA 475 at 494.

¹²⁴ *Pilkington*, 1983 2 SA at 158.

began, it was clear that the soil was not suitable for the plant as there was movement in the furnace, bath and lehr.¹²⁵ It cost about 3.5 million rands to get the plant into a condition in which it was suitable for making glass.¹²⁶ Although the plaintiff would likely have had a good claim in contract, it sued in delict because his contract claim prescribed while his delict claim did not.¹²⁷

The plaintiff alleged that the defendant was negligent in its soil investigation, in its design of the works, and in its supervision of construction.¹²⁸ The trial court judge, Judge Margo, categorized this as a fairly straight forward case of physical damage caused by the negligent design and negligent supervision of the construction of the plant.¹²⁹ The main issue in the case was whether or not there was a legal duty of care owed to the plaintiff by the defendant (the issue of wrongfulness in delict). In his decision, Judge Margo did not see the contractual relation as an obstacle to the claim in delict.¹³⁰ The parties had not included an exclusion clause in the contract,¹³¹ and there were no policy reasons against holding that the defendant had a duty of care toward the plaintiff. Margo noted that the relevant considerations included policy considerations such as the relationship of the parties and the question of indeterminate liability,¹³² and that in this case there was no worry of indeterminate liability.¹³³

¹²⁵ BOBERG, DELICT, *supra* note 86, at 3.

¹²⁶ *Id.* at 4.

¹²⁷ *Id.* According to Boberg, the prescription period was three years for both, but under the 1969 Act, the period began at the time of the breach or debt while for all other claims the period did not begin to toll until the debt or wrong and the person responsible for it were identified. See Prescription Act 68 of 1969. This anomaly was corrected in the Prescription Amendment Act 11 of 1984. BOBERG, DELICT, *supra* note 86, at 15.

¹²⁸ *Pilkington*, 1983 2 SA at 158.

¹²⁹ *Id.* at 161-63 (following *Dutton v. Bognor Regis Urban Dist. Council*, 1 Q.B. 373, 396 (Eng. C.A. 1972) (Lord Denning, M.R.)).

¹³⁰ *Id.* at 169.

¹³¹ *Id.* at 171.

¹³² *Id.* at 164. The main worry in economic loss cases is that the loss may spread to an indeterminate class of plaintiffs suing for indeterminate amounts of money. See NEETHLING ET AL., *supra* note 35, at 298-301. Other factors include knowledge of the damage, measures that were available to avoid the damage, professional knowledge and competence, the extent of the risk of harm, the extent of loss, and any statutory provisions that might impose a duty. *Id.*

The Appellate Division held that this was a case of pure economic loss.¹³⁴ If it were a case of physical damages the question of wrongfulness or legal duty would be trite. Although the court acknowledged that South African law recognized claims for pure economic loss,¹³⁵ it did not believe that there was a duty in this case that could be separated from the contractual duty.¹³⁶ There was no independent right that was violated.¹³⁷

The court further noted that this was a case of first impression dealing with whether the “...negligent performance of professional services rendered pursuant to a contract, can give rise to the action legis Aquilae”¹³⁸ and that South African law takes a conservative approach to developing the law of delict.¹³⁹ Rather than asking, as Judge Margo did, if there were policy reasons against extending a remedy to this case, Acting Justice Grosskopf asked if there was any need to extend liability in this case.¹⁴⁰ He reasoned that since they both had adequate remedies under contract law there was no need to recognize the action in delict.¹⁴¹ He argued further that “...in general, contracting parties contemplate that their contract should lay down the ambit of their reciprocal rights and obligations. To that end they would define, expressly or tacitly the nature and quality of the performance required from each party.”¹⁴² He saw no reason why the law of delict should be used to enforce the contractual duty.¹⁴³ His view was that if one wanted to bind a party in delict then it should be put into the contract.

¹³³ *Pilkington*, 1983 2 SA at 171-72.

¹³⁴ *Lillicrap*, 1985 1 SA at 503.

¹³⁵ *Id.* at 498 (referring to *Administrateur Natal v. Trust Ban van Afrika Bpk.*, 1979(3) SA 824 (A)).

¹³⁶ *Lillicrap*, 1985 1 SA at 499 (distinguishing this case from the case of *Van Wyk v. Lewis*, 1924 AD 438, in which the doctor would have had a duty to take care of the patient even if there was no contract between them).

¹³⁷ *See id.*

¹³⁸ *Id.* at 500.

¹³⁹ *Id.* In a later part of the judgment the court notes the difference between the British approach which it considered to be liberal in extending to the duty of care (the approach taken by Judge Margo) and the conservative approach of South African Law. *Id.* at 504.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 501.

The decision prompted a strong dissent by Acting Justice Smuts. Justice Smuts largely agreed with Judge Margo that, should the parties want to be exempted from liability in delict, they can put that into the contract.¹⁴⁴ Otherwise,

where a person is by circumstances, which may include the conclusion of a contract with another, placed in a position where it would be clear to a reasonable man that the failure to exercise care is likely to result in unlawful harm being done to another, a failure to exercise that care, with resultant harm to another, will entail delictual liability...¹⁴⁵

While the contract brought the two into this relationship, there is still a duty to take care in a situation like this where a negligently conducted soil test will foreseeably result in damage.¹⁴⁶

Lillicrap is generally regarded as a conservative case by South African academics.¹⁴⁷

The defendant was a highly skilled professional on whom the plaintiff reasonably relied to carry out the soil inspection with due care. A reasonable person in the position of the defendant would foresee considerable harm that could result from improperly carrying out the tests and designing and supervising the building of a glass plant on unsuitable soil. No one was in a better position to know the risks of harm involved. Further, the harm done was to the physical plant that was constructed improperly for the soil that was beneath it and to the glass that could not be properly made.

¹⁴⁴ *Id.* at 508.

¹⁴⁵ *Id.* at 509.

¹⁴⁶ *Id.* at 510.

¹⁴⁷ Boberg calls this a conservative case and notes that most of the commentary on the case is negative. BOBERG, DELICT, *supra* note 86, at 15-16. Kutner also acknowledges this. Kutner, *Top Ten, supra* note 25, at 362. (referring to Andrew Beck, *Delictual Liability for Breach of Contract*, 102 S. AFR. L.J. 222, 225 (1985); P. Q. R. Boberg, *Back to Winterbottom v. Wright?-- Not Quite!*, 102 S. AFR. L.J. 213, 217 (1985); Jonathan Burchell & Mervyn Dendy, *Law of Delict*, in 1985 ANNUAL SURVEY OF SOUTH AFRICAN LAW 181-87; Deborah Pearmain, *A Delictual Remedy for Breach of Contract--To Be or Not to Be?*, 7 DE JURE AC LEGIBUS 22 (1985)). *But see* Paul van Warmelo, *Liability in Contract and in Delict*, 102 S. AFR. L.J. 227 (1985) (supporting judgment's distinction of delictual and contractual liability) (cited in Kutner, *Top Ten, supra* note 25, at 362). Boberg refers to most of this commentary but adds Dale Hutchison & D. P. Visser, '*Lillicrap Revisited: Further Thoughts on Pure Economic Loss and Concurrence of Actions*,' 102 S. AFR. L.J. 587 (1985). For further criticism of the case see BURCHELL, *supra* note 24, at 3-9; Dale Hutchison & Belinda van Heerden, *The Tort/Contract Divide Seen from the South African Perspective*, in THE LIMITS OF THE LAW OF OBLIGATIONS 100 (Daniel Visser ed. 1997); Mervyn Dendy, *Wrongs to the Pocket XIII: Life After Lillicrap*, 21 BUSINESSMAN'S LAW at 45 (1991); Mervyn Dendy, *Reflections on Reading Bernstein's 'Economic Loss*,' 111 S. AFR. L.J. at 592 (1994)).

Despite the clearly conservative nature of the case, Kutner concludes:

Notwithstanding the differences between South African law and English law referred to¹⁴⁸ -- which have been narrowed considerably by cases subsequent to *Junior Books*¹⁴⁹ -- the majority judgment in *Lillicrap* warrants favorable consideration in common law jurisdictions when the question of liability for economic loss caused by negligence is addressed.¹⁵⁰

Since the *Lillicrap* decision, some courts have read *Lillicrap* narrowly to allow for concurrent delictual and contractual pure economic claims based on the finding that *Lillicrap* did not foreclose such claims if a delictual duty could be made out. For instance, as noted by the court in *Holtzhausen v. Absa Bank Limited*,¹⁵¹

“in *Durr v. ABSA Bank Ltd.*, a case which concerned the duties of an investment advisor recommending investment in debt-financing instruments, Schutz JA found no difficulty in saying: “The claim pleaded relied upon contract, alternatively delict, but as the case was presented as one in delict, and as nothing turns upon the precise cause of action, I shall treat it as such.”¹⁵²

Other courts have sought to distinguish the case based on the parties. Thus in *Pinshaw v Nexus Securities (Pty) Ltd.*,¹⁵³ the court refused to extend *Lillicrap* to *quasi*-professionals offering financial services arguing that, “The cases in this developing area of the law, in this

¹⁴⁸ Kutner, *Top Ten*, *supra* note 25, at 362 n.552.

¹⁴⁹ *Id.* at n.553.

¹⁵⁰ *Id.* at 362. Kutner’s support for the decision is based on the opportunity for the parties to allocate the risk in question through the contract. *Id.*

¹⁵¹ Case No. 280/03 (SCA Sep. 17, 2004), available at <http://wwwserver.law.wits.ac.za/sca/files/28003/28003.doc?PHPSESSID=48001398c2aa5d9198cd9db6fa61382c> (last visited Mar. 25, 2005). (An action is maintainable in delict for a negligent misstatement causing pure pecuniary loss even if a concurrent action is available in contract. The denial of an action in delict in 1985 (1) SA 475 (A) (*Lillicrap*) is limited to the case where the negligence alleged consists in the breach of a term of a contract (unreported but “reportable”).

¹⁵² *Id.* at para. 7 (quoting *Durr* 1997 (3) SA 448, 453G (SCA)) (citation omitted)).

¹⁵³ 2002 (2) SA 510 (C). Plaintiff sued (as the second defendant) a director of an investment company (Nexus, the first defendant) in delict for pure economic loss occasioned by the bad investment by him of funds she had entrusted to the company.

country and elsewhere, do not indicate a need to extend the *Lillicrap* embargo to a broader class of defendants.”¹⁵⁴

The court in *Holtzhausen* criticized this case for misunderstanding the scope of *Lillicrap*.¹⁵⁵ The court in *Holtzhausen* also clarified how *Standard Chartered Bank of Canada v. Nedperm Bank Ltd.*,¹⁵⁶ (where the defendant bank was held liable for pure economic loss in the context of a contract to perform services) could be reconciled with *Lillicrap*, stating “The difference between the two cases is simply this. In *Standard Chartered Bank* the negligence relied on did not consist in the breach of a contractual term. In *Lillicrap*, it did.”¹⁵⁷ In other words, the result in *Lillicrap* was caused by the failure to make a delictual complaint.¹⁵⁸ Thus, the way to avoid *Lillicrap* is to properly frame the breach as a breach of one’s delictual duties and to frame the damages in delictual terms.

As a result, South Africa no longer views pure economic loss cases with prejudice and no longer sees pure economic loss cases as being primarily governed by contract. Thus, one need not write delictual liability into the contract to preserve it.

This case may not have come out differently in the U.S. While, as a general rule, U.S. law does not preclude a plaintiff from pursuing a tort claim in lieu of a contract claim if both arise from the same conduct,¹⁵⁹ U.S. law is conservative when it comes to pure economic loss claims. The general rule defines the boundary between the overlapping theories of tort and contract law by barring the recovery of purely economic loss in tort, particularly in strict liability

¹⁵⁴ *Id.* at 535 (discussing *Lillicrap*, 1985 1 SA 475 (AD)) (citations omitted)).

¹⁵⁵ *Holtzhausen*, *supra* note 151, at para. 9.

¹⁵⁶ *Standard Chartered Bank of Canada v. Nedperm Bank Ltd.*, 1994 (4) SA 747 (A).

¹⁵⁷ *Id.* at para. 10.

¹⁵⁸ *Id.* at para. 6 (quoting *Lillicrap*, 1985 1 SA 475 at 499D-F).

¹⁵⁹ See R. Joseph Barton, *Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims*, 41 WM. & MARY L. REV. 1789, 1797 (2000).

and negligence cases.¹⁶⁰ The doctrine provides that those seeking damages may only collect that which is allowable under contract law and the Uniform Commercial Code, to the exclusion of any tort remedies for purely economic damage.¹⁶¹ However, the majority of jurisdictions recognize exceptions to this rule, including fraud and misrepresentation, as well as design and contractor liability.¹⁶² The majority rule is known as the “modern rule” or the “foreseeability doctrine.”¹⁶³ This rule provides that the contractor is liable for injury or damage to a third person as a result of the condition of the work, even after completion and acceptance by the owner where it was reasonably foreseeable that a third person would be injured due to the contractor's negligence or failure to disclose a known dangerous condition.¹⁶⁴ There is no requirement that actual injury occur; only that the danger was known but not disclosed by the contractor.¹⁶⁵

IV. ARRESTED DEVELOPMENT: WHAT IS MISSING FROM THE RECORD -- THE ABSENCE OF PROGRESSIVE DELICT REFORM UNDER APARTHEID

This section looks at the broader context of the law of delict under apartheid. In particular, it looks at what was missing from Kutner's analysis and more importantly, what was

¹⁶⁰ *See id.*

¹⁶¹ *See* Steven C. Tourek, et. al., *Bucking the “Trend”: The Uniform Commercial Code, the Economic Loss Doctrine, and Common Law Causes of Action for Fraud and Misrepresentation*, 84 Iowa L. Rev. 875 (1999).

¹⁶² *Id.* at 876; *see also* Patrick O'Connor, Jr., *The Rights and Responsibilities of Design Professionals*, in CONSTRUCTION BRIEFINGS No. 2002-4 at 17 (2002).

¹⁶³ *See* Emmanuel S. Tapon, L.L.M., L.L.B, Annotation, *Modern Status of Rules Regarding Tort Liability of Building or Construction Contractor for Injury or Damage to Third Person Occurring after Completion and Acceptance of Work; “Foreseeability” or “Modern Rule,”* 75 A.L.R. 5th 413 (2004) (citing *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (1916)).

¹⁶⁴ *See id.* at § 3-58.

¹⁶⁵ *See id.* While the minority rule is a bit antiquated in light of increased building regulations, safety and liability requirements, a few states still hold to the “completed and accepted rule” or “acceptance rule,” providing no liability for injury or damage to a third person as a result of the condition of the work, after completion, and after its acceptance by the owner, even if the injury was a direct result of contractor's negligence. *See id.* (citing *Minton v. Krish*, 642 A.2d 18 (Conn. App. 1994)). Unless the defective condition was dangerously, inherently, or imminently dangerous, and the contractor conceals defects in the work from the owner, or where the work constitutes a nuisance per se, thereby triggering strict liability in tort, there is otherwise no liability. *See id.*

missing from the law of delict under apartheid.¹⁶⁶ To narrow the universe down a bit it will focus on a number of changes that have taken place in American tort law as a result of democratization that have not taken place in South Africa. Those changes include:

- 1) class actions,
- 2) strict liability/ products liability and related doctrines like *res ipsa loquitur*,
- 3) punitive damages,
- 4) contingency fees (as opposed to loser pay costs awards), and
- 5) consumer protection law.

I will not only address what was missing under apartheid but will also bring out the changes that have taken place in these areas since the end of apartheid.

A. Class Actions

Prior to the Interim and Final Constitutions, class actions were generally barred in South Africa.¹⁶⁷ This is because under the common law there are problems with standing for class actions. The general rule in South Africa is that only the party who has suffered a legal injury personally can approach the court for relief.¹⁶⁸ There have been exceptions. In the case of *Wood and others v. Ondanwagwa Tribal Authority and another*,¹⁶⁹ the Appellate Division allowed church leaders to bring an interdict in the name of a large group of persons who feared that they

¹⁶⁶ This is not intended as a criticism of Kutner's work. It is unfair to criticize an author for failing to address a topic, particularly when that topic is not relevant to his thesis. The point here is to further show how the development of the law of delict was arrested under apartheid.

¹⁶⁷ SOUTH AFRICAN LAW COMMISSION (SALC), *The Recognition of Class Actions and Public Interest Actions in South Africa* (1998) at ch.3 § 2 (Lack of standing at common law), at http://www.doj.gov.za/salrc/reports/r_prj88_classact_1998aug.pdf (last visited Mar. 26, 2005) [hereinafter SALC, Class Actions].

¹⁶⁸ *Ibid.*

¹⁶⁹ 1975 2 SA 294 (A) (allowing church leaders to bring an interdict in the name of a large group of persons who feared that they would be illegally arrested, detained, tried and subjected to summary punishment due to their political affiliations).

would be illegally arrested, detained, tried and subjected to summary punishment due to their political affiliations. However, in subsequent cases, organizations have not been allowed to bring claims on behalf of their members; but rather individual members have been required to bring the claims.¹⁷⁰ One post-apartheid decision has held that outside of constitutional claims, South African law does not permit representative or class actions.¹⁷¹

In 1998 The South African Law Commission called for the urgent introduction of legislation allowing for class actions and public interest actions in addition to those that are allowed under the Constitution for Bill of Rights matters.¹⁷² Class actions are also allowed under the Promotion of Equality and Prevention of Unfair Discrimination Act¹⁷³ The Act follows the language of the Final Constitution, which provides for very broad standing. The Act reads:

20. (1) Proceedings under this Act may be instituted by –
- a) any person acting in their own interest;
 - b) any person acting on behalf of another person who cannot act in their own name;
 - c) any person acting as a member of, or in the interest of, a group or class of persons;
 - d) any person acting in the public interest;
 - e) any association acting in the interest of its members;
 - f) the South African Human Rights Commission, or the Commission for Gender Equality.

The definitions section broadens this by defining “person” as including a juristic person, a non-juristic entity, a group or category of person.¹⁷⁴

¹⁷⁰ *Ahmadiya Anjuman Ihaati Lahore (S. Afr.) & another v. Muslim Judicial Council (Cape) & others*, 1983 4 SA 855, 864 E-F (C); *S. Afr. Optometric Ass’n v. Frames Distrib. (Pty) Ltd.*, 1985 3 SA 100, 103F-105C (O); *Natal Fresh Produce Growers’ Ass’n & others v. Agroserve (Pty) Ltd. & others*, 1990 4 SA 749, 758 G -759 D (N). *See C Loots Keeping Locus Standing in Chains*, 3 S. Afr. J. Hum. Rts. 66 (1987).

¹⁷¹ *Contralesa v. Minister for Local Gov’t, E. Cape*, 1996 2 SA 898, 903, 905E-H (TkSC).

¹⁷² SALC *Class Actions*, *supra note 167*. at ch.3 (Need for Legislation).

¹⁷³ Act No. 4 of 2000 (“the Equality Act”).Ch. 4 (Equality Courts), § 20 (Institution of proceedings in terms of or under Act).

¹⁷⁴ *Id.* at ch. 1 § 1.

The Final Constitution's standing provisions mirror those of the Equality Act, save the omission of standing for the Gender and Human Rights Commissions.¹⁷⁵ Persons under the Final Constitution include juristic persons and the Bill of Rights applies to such persons "to the extent required by the nature of the rights and the nature of that juristic person."¹⁷⁶

Note that Equality Act proceedings deal exclusively with issues of unfair discrimination, hate speech and harassment while the Bill of Rights has a broader scope. The proposed legislation would allow for both public interest litigation, which it recommends would not result in *res judicata*, and normal class actions, which would.¹⁷⁷ Public interest actions need not even benefit the petitioner as they may be brought in the interest of the public at large, even for mistreated animals.¹⁷⁸

B. The Relative Absence of Strict Liability and Related Doctrines in Delict.

As a general rule there is no liability without fault in the South African law of delict.¹⁷⁹ The exceptions are, vicarious liability,¹⁸⁰ statutory based strict liability (e.g for: fire caused by

¹⁷⁵ S. AFR. CONST. (Act 108 of 1996) ch. 2 (Bill of Rights), § 38 (Enforcement of Rights).

¹⁷⁶ *Id.* at § 8(4).

¹⁷⁷ SALC, *Class Actions*, *supra* note 167, at 32.

¹⁷⁸ *Id.* at 6.

¹⁷⁹ For instance in Boberg's classic, *DELICT*, *supra* note 86 the chapter on fault is titled "Fault: Mainly Negligence" and it addresses negligence and some intentional torts. *See id.* at ch.3. There is almost no treatment of strict liability in the text. He refers to one commentator who does not believe that strict liability cases fall under delict at all. *See id.* at 16 (citing N.J. VAN DER MERVE & P.J.J. OLIVIER, *DIE ONREGMATIGE DAAD IN DE SUID AFRIKAANSE REG* (4th ed. 1980)).

¹⁸⁰ South African courts have continued to shift between a conservative and expansive approach to frolic cases. The Supreme Court of Appeal itself has swung back and forth on the issue. The unprincipled approach to this area of the law was criticized by this author in *Law of Delict*, in 2000 ANNUAL SURVEY OF SOUTH AFRICAN LAW 328 [hereinafter Roederer, *Delict* 2000]; and *Law of Delict*, in 2001 ANNUAL SURVEY OF SOUTH AFRICAN LAW 356 [hereinafter Roederer, *Delict* 2001]. The conservative approach was taken by the Supreme Court of Appeal in *K. v. Minister of Safety & Security*, 2005 (3) SA 179 (SCA) holding the State was not vicariously liable for the rape of a stranded woman by three on duty uniformed police officers who offered to give her a ride home on the basis that the men were on a frolic of their own, based on the interest theory and subjective approach to vicarious liability. This was overruled in *N. K. v. Minister of Safety & Security*, Case CCT 52/04 (CC Jun. 13, 2005) (holding the State vicariously liable on the basis of the risk theory and the objective approach to vicarious liability along with the constitutional rights of the victim, the constitutional and statutory duties of the police, and the values of the South African Constitution).

trains,¹⁸¹ damage by aircraft,¹⁸² nuclear energy providers,¹⁸³ electricity providers,¹⁸⁴ and to telecommunications lines and call office boxes),¹⁸⁵ a few roman based actions, (e.g. for domestic animals (the *actio de pauperie*), wild animals (*actio de feris*), grazing animals (*actio de pastu*), for things thrown out windows (*actio de effusis vel deiectis*) and falling off or out of buildings (action *positi vel suspensi*)),¹⁸⁶ and actions in the area of injuria (i.e. wrongful deprivation of property and liberty and until 1998 for defamation by media defendants).¹⁸⁷

¹⁸¹ Legal Succession to the South African Transport Services Act 9 of 1989 provides for the strict liability of railways for damage caused by locomotives. *Id.* Schedule 1 § 2 para. 2. See also NEETHLING ET AL., *supra* note 35, at 381. The legal progress in this area moved from a rebuttable presumption of fault under the 1919 § 70 of the Railways and Harbours Regulation Control and Management Act 22 of 1916, to one of strict liability under an amendment to the act by Act 14 of 1943. *Id.* There remained inconsistencies in the legislation which were cured by legislation in the early 1980s (Act 65 of 1981). *Id.* at 381-82. The strict liability provisions of the Act only apply if the railway is notified within three days of the event and if one does not have a firebreak on one's property one can only receive half of the damages. See Roederer, *Delict* 2000, *supra* note 180, at 345. The court in *Swanepoel en 'n ander v. Transnet Bpk*, 2000 (2) SA 191 (T), indicated in dicta that the three day prescription period might be contrary to the right to have one's case adjudicated by a court under section 34 of the Final Constitution. *Id.* at 197-98.

¹⁸² Strict liability for damage by aircraft was introduced in 1923 by section 9 of the Aviation Act 16 of 1923, and this continues in section 11(2) of Act 74 of 1962. See also NEETHLING ET AL., *supra* note 35, at 282. It does allow for a defense based on the fault of the plaintiff in section 11(3) of Act 74 of 1962 (*ibid.*).

¹⁸³ See § 61(1) of Nuclear Energy Act 131 of 1993. Fault on the part of the plaintiff is not generally a defense under the Act. The only defenses are based on the unauthorized presence of a plaintiff, and intent. *Id.* at § 61(4)(a).

¹⁸⁴ In the case of electricity providers, early legislation provided for liability without fault. See § 49 of Act 42 of 1922; § 50(1) of the Electricity Act 40 of 1958. However, the strict liability of electricity providers was changed to a rebuttable presumption of negligence in section 19 of Act 54 of 1989. See *Grootboom v. Graaff-Reinet Municipality*, 2001 (3) SA 373 (E). Neethling et al., criticize this as step in the wrong direction. See NEETHLING ET AL., *supra* note 35, at 383 n.172.

¹⁸⁵ See § 108 of the Post Office Act 44 of 1968 (cited in NEETHLING ET AL., *supra* note 35, at 383) (a wrongdoer who negligently causes this damage is guilty of a criminal offense under § 108).

¹⁸⁶ See NEETHLING ET AL., *supra* note 35 at 365-71. The position on nuisance is unclear as there is some authority for the proposition that liability is strict (based on English authority) and some for the proposition that there is a presumption of fault. *Id.* at 371-72.

¹⁸⁷ Before *Pakendorf*, 1982 (3) SA 146 (A), the rule was that one needed to establish intent to defame or *animus iniuriandi*. NEETHLING ET AL., *supra* note 35, at 347. If the publication was defamatory with regard to the plaintiff there was a presumption that there was intent to defame. *Id.* at 347. In *Pakendorf*, the requirement of *animus iniuriandi* was replaced with strict liability for media defendants. 1982 3 SA at 156-58. This was overruled in *National Media Ltd. v. Bogoshi*, 1998 4 SA 1196 (SCA), on the ground that democracy required a free press. *Id.* at 1210-11. *Bogoshi* established a defense of reasonable publication to the presumption of *animus iniuriandi*. *Id.* Some have argued that this established a negligence standard for media defendants. See e.g., NEETHLING ET AL., *supra* note 35, at 348. It is more correct to say that reasonableness is a positive defense to the presumption that one has intentionally defamed another. The intent to defame is still established by intentionally publishing defamatory material. The reasonableness defense for the publication primarily acts as an alternative to the defense of truth and public interest. It comes in when one has published a false defamatory statement that was nonetheless reasonable to publish based on such factors as the reasonable checking of sources and the urgency and importance of the publication.

Outside of these areas there are a number of doctrinal developments that took place in England and in the U.S. that did not take root in South Africa. The rule in *Rylands v. Fletcher*,¹⁸⁸ that established strict liability for the escape of dangerous things from the land that one owned or occupied, was not received in South Africa.¹⁸⁹ The doctrine of *res ipsa loquitor*, although developed in South Africa, only gives rise to an inference of negligence and up until recently, never a presumption.¹⁹⁰ Additionally, South Africa never developed strict liability in the area of products liability.¹⁹¹

While it is the case that manufacturers have a duty to not produce defective products, one must still show that the manufacturer was negligent in its breach of that duty.¹⁹² The first step is to show that the product in question is defective. However, this alone is not sufficient; for a finding of liability it must also be shown that there was fault on the part of the manufacturer,¹⁹³ that damage was reasonably foreseeable and preventable.¹⁹⁴

In cases where it is difficult to prove that the manufacturer was negligent, the doctrine of *res ipsa loquitor* may come in to aid the plaintiff.¹⁹⁵ However, under South African law, the

¹⁸⁸ *Rylands v. Fletcher*, (1868) LR 3 HL 330.

¹⁸⁹ BOBERG, DELICT, *supra* note 86, at 17.

¹⁹⁰ See *infra* note 313 for discussion of *Wagener v. Pharmicare Ltd.*; *Cuttings v. Pharmicare Ltd.*, 2003 (4) SA 285 (SCA).

¹⁹¹ Although Boberg references a considerable mass of South African scholarship arguing in favor of strict liability in the area of products liability, he does not endorse the idea himself. BOBERG, DELICT, *supra* note 86, at 196. In spite of a good deal of academic literature arguing that the doctrine of *res ipsa loquitor* is not sufficient to safeguard the South African consumer, Boberg still argued that this device was sufficient. *Id.* This is particularly odd given the weakness of the doctrine under South African law. Boberg was of the opinion that if this doctrine did not suffice, it would be for the legislature to cure the problem, but this did not occur. *See id.*

¹⁹² NEETHLING ET AL., *supra* note 35, at 323. Neethling et al. note that South Africa is still in its infancy in this area of the law. *Id.* This in one area in which the authors acknowledge that much could be learned from comparative law, particularly the development in this area in the U.S. and England. *Id.* at 323-24. This is noteworthy given the general hesitation of the authors to embrace the English influence on the South African law of delict. *Id.* at 5. *See also* DEPARTMENT OF TRADE AND INDUSTRY SOUTH AFRICA, DRAFT GREEN PAPER ON THE CONSUMER POLICY FRAMEWORK 31-32, at www.dti.gov.za/ccrdlawreview/conslawreview.htm [hereinafter GREEN PAPER].

¹⁹³ NEETHLING ET AL., *supra* note 35, at 324.

¹⁹⁴ *Id.* at 325.

¹⁹⁵ *Id.*

doctrine has merely given rise to an inference of negligence,¹⁹⁶ not a prima facie case nor a shift in the burden of proof,¹⁹⁷ which remained on the plaintiff.¹⁹⁸

The decision of Justice Coetzee in *A. Gibb & Sons (Pty) Ltd. v. Taylor & Mitchell Timber Supply Co. (Pty) Ltd.*¹⁹⁹ provides an interesting window into this area of the law from the South African perspective. Justice Coetzee was presented with a case of first instance in which the plaintiff was attempting to hold a merchant seller liable for putting a defective product in the market (a board used for scaffolding broke when used by the plaintiff's employee).²⁰⁰ At that time there was only one short essay published in South African on the issue.²⁰¹ Thus he turned to the U.S., noting the rapid development of products liability since Cardozo's famous 1916 opinion in *McPherson v. Buick Motor Co.* disposing of the privity of contract requirement in cases of dangerous products.²⁰² The privity issue never was a bar to a delict action in South Africa; so to some extent South Africa was ahead of the U.S. and England.²⁰³ However, as Justice Coetzee noted, "further development can be summed up by saying that, after overtaking us, America outstripped us."²⁰⁴ By this time, most jurisdictions in the U.S. had already adopted strict liability.²⁰⁵ Further, Justice Coetzee marveled at the way U.S. courts in jurisdictions where fault remained the standard had found a variety of ways to expand the duty of care owed by defendants.²⁰⁶ He referenced a distinct difference in attitude between a wary and hesitant South

¹⁹⁶ See e.g., *id.* at 151-52, 326; *Bayer South Africa (Pty.) Ltd. v. Viljoen*, 1990 2 SA 647, 661-62 (A).

¹⁹⁷ NEETHLING ET AL., *supra* note 35, at 152.

¹⁹⁸ *Id.* at 152. See also BOBERG, DELICT, *supra* note 86 at 378

¹⁹⁹ *A. Gibb & Sons (Pty) Ltd v. Taylor & Mitchell Timber Supply Co. (Pty) Ltd.*, 1975 (2) SA 457 (W).

²⁰⁰ BOBERG, DELICT, *supra* note 86 at 197.

²⁰¹ The court refers to 83 S. AFR. L.J. 87 (1966) and an unpublished paper by J.C. Van der Walt. 1975 (2) SA at 461, *discussed in* BOBERG, DELICT, *supra*. note 86, at 198.

²⁰² 1975 (2) SA at 461 (noting *McPherson*, 111 N.E. 1050 (NY 1916).

²⁰³ Note that South Africa never required privity. See e.g., BOBERG, DELICT, *supra* note 86, at 53; *Cape Town Municipality v. Paine*, 1923 AD 207, 216-17, *reprinted in* BOBERG, DELICT, *supra* note 86, at 41- 45. The English court system rid itself of the doctrine in *Donahue v. Stevens*, 1932 AC 562 (HL) (SC).

²⁰⁴ 1975 (2) SA at 461, *discussed in* BOBERG, DELICT, *supra*. note 86, at 198.

²⁰⁵ See *id.* (referring to PROSSER, HANDBOOK OF THE LAW OF TORTS § 96, at 641 (4th ed. 1941)).

²⁰⁶ 1975 (2) SA at 461, *discussed in* BOBERG, DELICT, *supra*. note 86, at 198.

African judiciary and that of America (particularly California)²⁰⁷ which had produced this “unbelievably brisk” transition.²⁰⁸ He went so far as to say that this may represent the high water mark to South African eyes.²⁰⁹

Recent developments in Res Ipsa Loquitor

In a case heard on exception, the Supreme Court of Appeal in *Wagener v. Pharmacare Ltd; Cuttings v. Pharmacare Ltd.*,²¹⁰ declined the invitation to develop the common law in light of the constitutional right to bodily integrity in section 12(2) of the Constitution so as to impose strict liability in products manufacturing cases. Justice Howie, for a unanimous Court, recognized that the section 12(2) right to bodily integrity was both constitutionally entrenched and protected by the common law.²¹¹ The Court considered it unnecessary to develop the common law so as to render a manufacturer strictly liability on the basis that the Court could take the less drastic measure of taking a more liberal approach to the doctrine of res ipsa loquitor by, for instance, allowing for the onus to shift to defendants to rebut a presumption of negligence in such cases.²¹²

²⁰⁷ He is referring to the developments in California which began with Judge Traynor’s concurrence in *Escola v. Coca-Cola Bottling Co.*, 24 Cal.2d 453 (1944). G. Edward White, in *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* (expanded ed., Oxford 2003) references the reliance of Judge Traynor, on Prosser’s 1941 treatise where he argued that there were still serious obstacles for a plaintiff to prove negligence even under the doctrine of res ipsa loquitor. See BOBERG, DELICT, *supra* note 86, at 198 (citing PROSSER, *supra* note 205, at 689). The majority in *Escola* rested its opinion on the doctrine of res ipsa loquitor while Judge Traynor argued for strict liability in his concurrence. See WHITE, *supra*, at 198. It was not until *Greenman v. Yuba Power Products*, 59 Cal. 2d 57 (1963), some nineteen years later that Judge Traynor’s view won the day and the California Supreme Court unanimously adopted strict liability for the manufacturer of a defective power tool. See WHITE, *supra*, at 202.

²⁰⁸ 1975 (2) SA at 461, *discussed in* BOBERG, DELICT, *supra* note 86, at 199.

²⁰⁹ *Id.* He quoted extensively from section 402A of the Restatement of the Law of Torts (2d ed.) concerning the special rule of strict liability for sellers of articles for consumption. *Id.* at 462, *discussed in* BOBERG, DELICT, *supra* note 86, at 200-01. He also addresses the English law on this point which he notes has not been as frantic as in America. *Id.* at 463 *discussed in* BOBERG, DELICT, *supra* note 86, at 201.

²¹⁰ 2003 (4) SA 285 (SCA).

²¹¹ *Id.* at para. 17.

²¹² *Id.* at paras. 14 & 19-21.

The Court went on to express the view, in *obiter dicta*, that if product liability was to be rendered strict liability, it would be preferable for the legislature to effect that change.²¹³ Justice Howie recognized that strict liability might have to be imposed, “in compliance with the Constitution were a situation to arise in respect of which there was no remedy at all in existence or a patently inadequate one, and the dictates of the Constitution led to the need for change.”²¹⁴

C. Punitive Damages

Although punitive or exemplary damages were introduced into South African Law via the English influence,²¹⁵ it is settled that “[i]t is no longer possible to recover or award an amount to punish someone by means of an action for damages.”²¹⁶ Van der Walt asserts that “in principle all factors and circumstances tending to introduce penal features should be rigorously excluded from such assessment.”²¹⁷ His view is based on at least three ideas: 1) the notion that it is the function of criminal law to punish and deter and of delict to compensate; 2) there is undue enrichment to a victim if punitive damages are awarded; and 3) there is a risk of undue punishment, or double jeopardy of punishment if one can be punished under both civil and criminal law.²¹⁸

²¹³ *Id.* at paras. 26-38.

²¹⁴ *Id.* at para. 30.

²¹⁵ Visser & Potgieter note that the “English principles of *aggravated, punitive, vindictive, penal and exemplary damages* had a considerable influence on our [South African] law. VISSER & POTGIETER, *supra* note 73, at 174. They mention that there were early references to nominal and special damages in *Breda v. Miller*, (1829) 1 Menz 425 (trespass on land); *Hart & Constatt v. Norden*, (1845) 3 Menz 548; *Cawoods v. Simpson*, (1845) 3 Menz 542 (breach of contract not causing damage); and a reference to “vindictive damages” in *Keyter v. Le Roux*, (1841) 3 Menz 23, 31. *Id.* at 12). Exemplary or punitive damages were introduced in *De Villiers v. Van Zyl*, 1880 Ford 77. *Id.* at 13.

²¹⁶ *Id.* at 174.

²¹⁷ J. C. VAN DER WALT, *DELICT: PRINCIPLES AND CASES* 6 (1979).

²¹⁸ *Id.*

The Constitutional Court in *Fose v. Minister for Safety and Security*²¹⁹ (a case alleging torture of the plaintiff by the police) followed the view of Van der Walt²²⁰ when it found that the plaintiff did not need further Constitutional damages, nor punitive damages to vindicate the constitutional rights that allegedly had been violated by police.²²¹ The damages sought in *Fose* were 50,000 rands for pain and suffering; 50,000 rands for loss of enjoyment of the amenities of life and shock; 10,000 rands for contumelia;²²² and 20,000 rands for past and future medical expenses.²²³ They also asked for 200,000 rands in constitutional damages which were said to include “an element of punitive damages.”²²⁴

Justice Ackermann, writing for the Court noted the difficulty in drawing the line between “an award of aggravated, but still basically compensatory damages” and “the award of punitive damages in the strict and narrow sense of the word.”²²⁵ For the Court, cases involving damages for contumelia (i.e. those involving solatium or seeking satisfaction) were awards of

²¹⁹ *Fose* was heard on appeal from the Witwatersrand Local Division of the Supreme Court (*Fose v. Minister of Safety & Sec.*, 1996 (2) BCLR 232). *Fose*, 1997 (3) SA 786 at para. 1. The case arose out of an alleged series of assaults by the police. *Id.* at para. 11. The plaintiff claimed that the assaults were a violation of his fundamental rights as found in the Interim Constitution. Act 200 of 1993 (“Interim Constitution”). *Id.* at para. 12. Those rights included human dignity at section 10 of Act 200 of 1993 (Interim Constitution); freedom and security of the person at section 11(1)-(2); privacy at § 13; and the right not to be arrested or detained, except in accordance with sections 25(1)-(2) of the Interim Constitution. *See Fose*, 1997 (3) SA 786 at para. 12. The plaintiff further alleged in paragraph 16 of his pleadings that the violations were part of a wide-spread and persistent pattern of similar infringements by the police at the station in question. *Id.* at para. 12.

²²⁰ Van der Walt’s views are favorably quoted in *Fose*, 1997 (3) SA 786 at para. 63.

²²¹ *Fose*, 1997 (3) SA 786 at paras. 67-73. It is only Justice Krieger in his concurrence who appropriately describes the facts as they were asserted by the plaintiffs, namely that this was an allegation of widespread, systematic, and pervasive pattern of “brutal torture” by members of the South African Police Services. *Id.* at paras. 101-02 (referring to the plaintiffs pleadings in paragraphs 9-11 containing a “litany of brutal torture.”).

²²² Contumelia may be said to be contempt for one’s person. NEETHLING ET AL., *supra* note 35, at 15. Or it may be an insult to one’s dignity or self respect. VISSER & POTGIETER, *supra* note 73, at 465. Damages for it are available under the *actio iniuriarum*. NEETHLING ET AL., *supra* note 35, at 16. The *actio iniuriarum* includes wrongful and intentional damage to or insult to one’s *corpus* (body), *fama* (reputation), or *dignitas* (dignity). *Id.*

²²³ *Id.* at para. 13. The exchange rate between the rand and dollar in 1997 was between 4.64 and 4.87 to the dollar (monthly rates for 1997 are available at <http://www.x-rates.com/d/ZAR/USD/hist1997.html> (last visited Apr. 4, 2005)). Thus, the dollar amounts would be approximately 1/5 of these amounts (\$24,000) which is low for a “litany of brutal torture.”

²²⁴ *Fose*, 1997 (3) SA 786 at para.13. This is approximately \$40,000.

²²⁵ *Id.* at para. 62.

“aggravated, but still basically compensatory damages.”²²⁶ Here the plaintiff clearly distinguished the two by asking both for 10,000 rands for the contumelia and for 200,000 rands for “Constitutional/punitive” damages.

The Court in *Fose* reviewed the situation in the U.S., Canada, the U.K., Trinidad and Tobago, New Zealand, Ireland, India Sri Lanka, Germany, and under the European Convention for the Protection of Human Rights, and concluded that while most of the countries studied did allow for punitive damages as part of constitutional damages (with the exception of Germany),²²⁷ the academic literature from such countries noted problems with focusing on the punitive and deterrent features of such a remedy.²²⁸ The Court made it clear that it did not think that punitive damages would be an effective deterrent against the government²²⁹ and that money from the public purse could be put to better uses in order to eliminate or reduce the cause of infringements.²³⁰

In his concurring opinion, Justice Didcott clarified that *Fose* did not extend to claims against individuals, particularly corporations. He pointed out that such a case would be significantly different for two reasons, “The first difference is that no award would be payable from the public coffers. The second is the appreciably enhanced plausibility and effectiveness of deterrence.”²³¹ Thus for Justice Didcott it followed that “...the argument in favour of punitive or exemplary damages would be stronger, were they not sought against the state.”²³²

²²⁶ The court also remarked that the comments in the submitted cases were obiter dicta and that “in the past number of decades they [nominal damages] have very seldom if ever been awarded in delictual claims.” *Id.*

²²⁷ *Id.* at para. 64.

²²⁸ *Id.* at para. 66.

²²⁹ *Id.* at para. 71.

²³⁰ *Id.* at para. 72. This was particularly true given that the plaintiff was fully compensated.

²³¹ *See id.* at para. 88. Justice Kriegler in his concurrence also made it clear that “we should refrain from any broad rejection of any particular remedies in other circumstances.” *Id.* at para. 91. In fact, Kriegler would not foreclose punitive damages being available in other cases against the State to vindicate constitutional rights. *Id.* at paras. 92, 103, 104.

²³² *Id.* at para. 88.

D. Contingency Fees

Contingency fees in the U.S. are sometimes blamed for our litigiousness. However, without contingency fees many plaintiffs who lack the resources to pay for lawyer's fees up front would be denied access to justice. If this is true in the so called "land of opportunity," imagine the case of South Africa which in 2000 had fifty percent of its population living below the poverty line²³³ and as of 1995 had one of the world's worst Gini indexes (an index that reflects the amount of disparity between rich and poor in a country).²³⁴ However, under Apartheid, South Africa did not allow for contingency fees and in fact, should one lose her or his case that party would be required to pay the opposing party's legal fees.

South Africa finally enacted the Contingency Fees Act 66 of 1997 upon the recommendation of the South African Law Commission on Speculative and Contingency Fees.²³⁵ The Act removes the common law prohibition on contingency fees except in family law and criminal proceedings.²³⁶ It is important to note that the Act does not remove the requirement

²³³ See CENTRAL INTELLIGENCE AGENCY, CIA WORLD FACTBOOK *at* www.cia.gov/cia/publications/factbook/print/sf.html (last visited Mar. 28, 2005). According to the same source the U.S. has 12% of its population living below the poverty line as of 2003. *Id.* *at* www.cia.gov/cia/publications/factbook/geos/us.html.

²³⁴ The CIA World Factbook put it at 59.3 (based on data from 1993-94). Factbook-South Africa. The UNDP concurs in its Human Development Reports (2003) (based on its 1995 survey) *at* www.undp.org/hdr2003/indicator/indic_126_2_1.html. The Factbook put the Gini index for the U.S. at 45 as of 2004, while the UNDP put it at 40.8 (as of 1997). The U.S. ranked seventh in the world in human development rankings while South Africa ranked 111th (UNDP). The Gini index measures the degree of economic inequality in a given country with an index of zero being absolute equality and one hundred being absolute inequality. *Id.* A recent fact sheet says that the index rose to .69 in 1996, and up to .77 by 2001. CRAIG SCHWABE, SOUTH AFRICAN HUMAN SCIENCES RESEARCH COUNCIL, GIS CENTRE, *Poverty in South Africa* (July 26, 2004) *available at* <http://www.sarpn.org.za/documents/d0000990/index.php> (last visited Mar. 29, 2005) (provided by Southern Africa Regional Poverty Network).

²³⁵ Project 93 Report of 1996. The Act is administered by the Department of Justice and went into effect on April 23, 1999. Contingency Fee Act 66 of 1997, *available at* <http://www.info.gov.za/gazette/acts/1997/a66-97.pdf> (last visited Mar. 29, 2005).

²³⁶ Section (v) of Contingency Fee Act 66 of 1997, *supra* note 235.

that the losing party of the law suit pay the cost of the prevailing party.²³⁷ Undoubtedly the contingency fee will make it more affordable to bring a claim with merit. However, if the claim does not have merit, then lawyer who takes the case risks being uncompensated. Furthermore, the losing party is still generally required to pay opponents legal fees even if she or he is not required to pay her or his own lawyer.²³⁸

E. General Consumer Protection Law

Following the publication of the commissioned Consumer Law Benchmark Study in May of 2004,²³⁹ the Department of Trade and Industry published its Draft Green Paper on the Consumer Policy Framework.²⁴⁰ Concededly, much of the recommended legislation does not squarely deal with delict, but with contracts and regulations. However, consumer protection law requiring fair contract terms, especially in the case of standard form contracts, limits the ability of merchants to contract out of delictual liability. Regulations promoting safety and disclosure will inevitably lead to a reduction in the delicts that occur. Promoting easier access to courts and/or to alternative dispute mechanisms as well as imposing strict liability on retailers and manufacturers has a considerable impact on the law of delict and on the efficacy of the law of delict.

²³⁷ Section 3(b)(ii) requires that the contingency fee agreement contain a clause stating that the client was informed of the normal rule that should the client be unsuccessful that he/she/it may be required to pay the costs of his/her/its opponent in the proceedings. *Id.* at § 3(b)(ii).

²³⁸ The SALC Class Actions Report recommends that courts not require unsuccessful plaintiffs to pay for cost when they lose public interest actions unless special circumstances apply. *See supra* note 167, at 31.

²³⁹ BOTHA & KUNENE ADVISORS, DEPARTMENT OF TRADE & INDUSTRY at www.dti.gov.za/ConsumerLawBenchmarkStudy.pdf (last visited on Mar. 29, 2005) [hereinafter BENCHMARK].

²⁴⁰ *See supra* note 192. Most legislation in South Africa starts with the distribution of a Green Paper from the Ministry in charge of the area of legislation. The Green Paper is a paper setting out policy options for the area in need of legislation. After comments are received the Green Paper is followed by a White Paper which again is circulated for comment. The next step is a draft Bill which may be circulated in the Gazette for further comment before the final Bill is put before parliament. For an explanation of the South African legislative process see www.polity.org.za/html/govdocs/legislation/process.html (last visited Mar. 29, 2005). Note that important policy shifting legislation often begins with the research and reports of the Law Reform Commission.

The Benchmark report recommended a legislative strict liability regime for both manufacturers and retailers.²⁴¹ It recommended a consumer bill of rights,²⁴² regulation of standard form contracts and unfair contract terms,²⁴³ disclosure and labeling legislations,²⁴⁴ as well as legislation that governs guarantees and warranties.²⁴⁵ The draft Green Paper notes that “The apartheid government and its policies deprived the majority of South African[s] of political, economic and human rights...Historically disadvantaged South Africans were prevented from becoming active participants in the market, other than as a source for cheap (sic) labour.The apartheid legacy also included a disregard for consumer rights.”²⁴⁶ It notes that “[t]he current body of consumer law in South Africa is fragmented, outdated and predicated on principles that are not applicable in a democratic and developing society.”²⁴⁷ It notes that the absence of a comprehensive law dates back to the 1980s and the apartheid free market mentality which only intervened in the market in areas where problems emerged.²⁴⁸

The Green Paper reports consumer needs ranging from non-misleading marketing and selling practices; adequate disclosure of information; fair contract terms; safe products and a better product liability regime; guarantees and warranties for product quality, and aftercare; respect for their privacy; better access to tribunals for redress (including alternative dispute resolution mechanisms); awareness and education.²⁴⁹ While South Africa does have safety standards with regards to medicines, foodstuffs and electrical goods, it does not have legislation for other manufactured goods, e.g. legislation requiring safety standards for children’s

²⁴¹ BENCHMARK, *supra* note 239, at 82, 150.

²⁴² *Id.* at 143.

²⁴³ *Id.* at 144-45.

²⁴⁴ *Id.* at 147.

²⁴⁵ *Id.* at 151-52.

²⁴⁶ GREEN PAPER, *supra* note 192, at 22.

²⁴⁷ *Id.* at 23.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 22-48.

clothing.²⁵⁰ “Furthermore, consumers do not have some of the most basic rights, such as a right to fair contract terms and fair and transparent advertising and marketing.”²⁵¹

F. Summary

Although Kutner did not have the benefit of hindsight provided by the many changes that took place in the law of delict after the fall of apartheid, he may be faulted for failing to see how much was missing in South Africa in comparison to what was available to the plaintiff in the U.S. Across the board, South Africans were denied the same level of access to justice afforded the American tort victim, be it by way of class actions, contingency fees, favorable products liability laws, consumer protections laws and punitive damages. Finally, as illustrated by *Fose* above, damage awards in South Africa are exceptionally low in comparison to U.S. awards.

V. POST- APARTHEID TRANSFORMATION OF THE COMMON LAW: THE CONSTITUTIONAL IMPACT ON THE DEVELOPMENT OF THE COMMON LAW IN SOUTH AFRICA

A. South Africa’s Transformative Values

Even if it can be maintained that certain parts of the law of delict were not tainted by apartheid, it does not follow that the law of delict as it stood at the end of apartheid was compatible with the values, and aspirations of the democratic transformation of South African law and society. If South Africa’s democratic transformation was a liberal or libertarian transformation then there may be good arguments that the private common law did not require

²⁵⁰ *Id.* at 31.

²⁵¹ *Id.* at 24.

any change.²⁵² If the Final Constitution was found to echo the values of libertarianism found under the hegemony of contract law then we should not expect much change under the hegemony of constitutional values. However, the values of the transformation as contained in the Founding Provisions, throughout the Bill of Rights, and the Constitution as a whole are not limited to the values of liberty or freedom from intervention. Quite the contrary, they include such values as dignity and equality,²⁵³ and ridding the country of its various forms of discrimination and inequality.²⁵⁴ The extensive list of rights in the Bill of Rights, which includes not only traditional, liberal civil and political rights but also social, cultural and economic rights,²⁵⁵ is a clear indication that the new spirit underlying South African law is not merely one of the value of freedom in the market, but one of good neighbourliness and of being a

²⁵² Note, however, that libertarian theories that are historically based would still recognize that if present holding were the result of unjust acquisitions and transfers of property then there would need to be redistribution of that property. See e.g. R NOZICK ANARCHY STATE AND UTOPIA (1974).

²⁵³ As Justice Kriegler stated in *President of the RSA and another v. Hugo*, 1997 (4) SA 1997 (CC), “The South African Constitution is primarily and emphatically an egalitarian Constitution... [I]n light of our own particular history, and our vision for the future, a Constitution was written with equality at its centre. Equality is our Constitution’s focus and its organizing principle.” *Id.* at para. 74.

²⁵⁴ Section 9(2) of the equality clause specifically allows for “affirmative action” where it states: “To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”

²⁵⁵ Chapter 2 of the Constitution includes substantive rights under the following headings: Equality, Human Dignity, Life, Freedom and Security of the Person, Slavery, Servitude and Forced Labour, Privacy, Freedom of Religion, Belief and Opinion, Freedom of Expression, Assembly, Demonstration, Picket and Petition, Freedom of Association, Political Rights, Citizenship, Freedom of Movement and Residence, Freedom of Trade, Occupation and Profession, Labour Relations, Environment, Property, Housing, Health Care, Food Water and Social Security, Children, Education, Language and Culture, Cultural, Religious and Linguistic Communities, Access to Information, Just Administrative Action, Access to Courts, Arrested, Detained and Accused Persons. S. AFR. CONST. (Act 108 of 1996) ch. 2 (Bill of Rights).

cooperating member of the political community.²⁵⁶ The Constitution envisions accountable, transparent governance under what some have termed a culture of justification.²⁵⁷

The Constitution not only contains negative rights, but also positive duties. The postamble to the Interim Constitution contained a reference to the term *ubuntu*.²⁵⁸ As Pieterse writes, “The Nguni word *ubuntu* represents notions of universal human interdependence, solidarity and communalism which can be traced to small-scale communities in pre-colonial Africa, and which underlie virtually every indigenous African culture.”²⁵⁹ In *S v Makwanyane*,²⁶⁰ justice Langa said the following of the concept:

[*Ubuntu*] is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person’s status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such a person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it

²⁵⁶ Note that the South African Constitution directs its interpreters to the values of dignity, equality and freedom as well as to both comparative law and to international law when interpreting the Bill of Rights. It states:

When interpreting the Bill of Rights, a court, tribunal or forum

- a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- b. must consider international law; and
- c. may consider foreign law.

S. AFR. CONST. (Act 108 of 1996) ch. 2 (Bill of Rights) § 39(1).

²⁵⁷ As Etien Mureinik states, the new dispensation is based on “...a culture of justification - a culture in which every exercise of power is expected to be justified.” E. Mureinik, *A Bridge to Where: Introducing the Interim Bill of Rights*, 10 S. AFR. J. HUM. RTS. 31, 32 (1994). The idea is that the new dispensation makes a break from the authoritarian ethos of apartheid under which the exercise of power by the State was neither justified nor justifiable. Mureinik draws from Ronald Dworkin’s notion that the overall point of law is to justify state coercion. See RONALD DWORKIN, *LAW’S EMPIRE* 93, 109-10, 127, 190, 400 (1986). One of the mechanisms that clearly support this culture of justification is section 36 of the Final Constitution, which requires that rights can only be limited by laws of general application, and only to the extent that the law is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. S. AFR. CONST. (Act 108 of 1996). These ideals are found in the Constitution in section 1(d), and affirmed in section 41(1)(c), which provides, “All Spheres of government and all organs of state within each sphere must -- ... provide effective, transparent accountable and coherent government for the Republic as a whole.” They are reiterated in *Rail Commuters Action Group & Others v. Transnet Ltd. t/a Metrorail & Others*, 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) paras. 74-78.

²⁵⁸ It states that South Africa’s legacy of “gross violations of human rights, the transgression of humanitarian principles in violent conflicts and . . . hatred, fear, guilt and revenge” could now be addressed “on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.” S. AFR. CONST. (Act 200 of 1993)).

²⁵⁹ M. Pieterse, “Traditional” African Jurisprudence, in JURISPRUDENCE 441 (Christopher J. Roederer & D. Moellndorf eds., 2004).

²⁶⁰ 1995 (3) SA 391 (CC) (holding unconstitutional the death penalty).

regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all. . . .²⁶¹

Finally, the provisions of the Constitution that bind individuals and which provide for the harmonization of the common law with the Constitution reinforce the fact that the values of the new South African political community do not stop at the door of the private realm and cannot be excluded by the private law. In a sense there is no more private realm which is sealed off from public values. What exists is a Constitution with the potential to transform all of South African law.²⁶²

B. The Constitutional Mechanisms for Developing the Common Law

The South African Constitution is somewhat unique in that it has explicit provisions that allow for the harmonization of the private law with the values, spirit, purport and objects of the Constitution. Over the last couple of years there have been substantial changes in the law of delict that have been made in light of the new constitutional regime. Although the courts were slow to embrace the duty to develop the common law in light of the Constitution, there has been steady progress in this regard. There were some developments prior to the constitutional case of

²⁶¹ *Id.* at paras. 224-25. Justices Mahomed (at para. 263) and Mokgoro (at para. 308) also addressed the meaning of the concept, both emphasizing the notion of humaneness and reciprocity, and the latter emphasizing the centrality of the notion to the development of South Africa's democracy. Justice O'Regan drew on these values in *N.K. v. Minister of Safety & Security*, CCT 52/04 (CC Jun. 13, 2005), at <http://www.constitutionalcourt.org.za/uhtbin/cgiisirs/x/0/5?searchdata1=CCT52/04#top>. In *N.K.*, O'Regan addressed the fact that the notion of vicarious liability is not alien to the South African customary law tradition, for under customary law the Kraalhead is liable for all the delictual acts of inhabitants of the Kraal. *N.K.*, CCT 52/04 at para. 24 n30.

²⁶² Carl Klare has argued that the new South African constitutionalism is a post liberal, redistributive, egalitarian and caring form of constitutionalism. *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146, 151, 153 (1998). Klare was writing in the context of the Interim Constitution, but the Final Constitution is no less progressive. He notes the following elements found in the Interim Constitution in support of his view: 1) social rights and substantive equality, 2) affirmative state duties, 3) horizontality, 4) participatory, decentralized and transparent governance, 5) multi-culturalism, and 6) historical self consciousness. *Id.* at 153. All of these values can be found in the Final Constitution.

Carmichele v. Minister of Safety and Security,²⁶³ however, that case provided a watershed for the constitutionally inspired development of the common law. The case of *Carmichele* has acted as a watershed because prior to that case the lower courts and the Supreme Court of Appeal acted as if the evaluation/ re-evaluation of the common law in light of the Constitution was optional, at best.²⁶⁴ For instance, the Supreme Court of Appeal in *Mostert v. Cape Town City Council* acknowledged that constitutional arguments might be relevant to deciding the case but also noted that they had not been made by counsel and thus the decision would have to be made in accordance with the “common law.”²⁶⁵ Justice Swart in *Van Eeden v. Minister of Safety and Security* responded to an attempt by counsel to raise a constitutional argument in that case with the remark, “The law of delict is to be found in the law of delict.”²⁶⁶ In *Carmichele*, the

²⁶³ 2001 (4) SA 938 (CC). The few decisions that drew on the Constitution when developing the common law included: *Holomisa v. Argus Newspapers Ltd.*, 1996 (2) SA 40 (T) (Transvaal local division) (Cameron, J.); *Nat'l Media Ltd. v. Bogoshi*, 1998 (4) SA 1196 (SCA) (although the Court claimed that it was not relying on the Constitution when changing the common law of defamation it dealt with the constitutional analysis put forward by Justice Cameron in *Holomisa*); *Amod v. Multilateral Motor Vehicle Accidents Fund* (Commission for Gender Equality Intervening, 1999 (4) SA 1319 (SCA) (Mahomed, J.); and *Faircape Prop. Developers (Pty) Ltd. v. Premier, Western Cape*, 2000 (2) SA 54(CPD) (Davis, J.). All of these judges had impressive human rights resumes before joining the bench. Both Justices Davis and Cameron had previously worked for the Centre for Applied Legal Studies (a human rights public interest legal center at the University of the Witwatersrand Faculty of Law). Justice Davis was the director of the centre during the 1990s. Justice Cameron became an acting member of the Constitutional Court (1999-2000) and is now on the Supreme Court of Appeal. Justice Mahomed was an acting justice on the Constitutional Court from 1995-1998 and then he served as the Chief Justice of the Supreme Court of Appeal from 1998 to 2000, when he passed away. Although there were more cases in 2001 that addressed the Constitution and its impact on the law of delict, Justices Cameron and Davis are responsible for most of them.

²⁶⁴ See *Carmichele*, 2001 (4) SA 938 (CC). As noted in Roederer, *Delict* 2000:

The question of whether the common law and its development comport with the values of the Bill of Rights is a thorny and contentious issue. Without the aid of good advocacy it is understandably difficult for judges in the High Court and Supreme Court of Appeal to adequately address the issue (particularly given their heavy case load, the conventions of an adversarial system and the fact that they do not have their own researchers). Nonetheless, the duty remains.

Supra note 180, at 282.

²⁶⁵ 2000 4 All SA 379 para. 28 (A).

²⁶⁶ 2001 (4) SA 646, 658D (T). Francois du Bois notes the tension among judges between characterizing their actions as developing the common law according to traditional common law practices versus doing so in light of the Constitution's mandates. *Introduction to INTRODUCTION TO THE LAW OF SOUTH AFRICA 7* (C.G. van der Merwe & J.E. du Plessis eds., 2004). See also Michelman, *supra* note 19, at 14-23 (detailing the tussle between the Supreme Court of Appeal and the Constitutional Court, and between approaching the development of the common law in terms of the Constitution or merely the common law). The latter approach by the high courts or the Supreme Court of Appeal may be used as a way of insulating cases from constitutional review by the Constitutional Court.

Constitutional Court made it clear that these approaches to the common law were no longer appropriate. As it stated:

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.²⁶⁷

There are at least three, if not four, constitutionally inspired approaches to the common law and its development. They may be viewed as falling on a spectrum ranging from:

1. direct constitutional application with a direct constitutional remedy,
2. direct constitutional application with an indirect constitutional remedy,
3. indirect constitutional application with an indirect constitutional remedy, and
4. simply constitutionally compatible or inspired.²⁶⁸

The first approach takes section 8(1) of the Final Constitution seriously on its own as binding the judiciary in cases where rights in the Bill of Rights are in issue. Section 8(1) reads, “The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.” People have argued that a weaker version of this provision in the Interim Constitution,

²⁶⁷ *Carmichele*, 2001 (4) SA 938 (CC) at para. 39. This is reinforced by section 237, which states that “[a]ll constitutional obligations must be performed diligently and without delay.” There has been resistance by the Supreme Court of Appeal to the pervasive application of the Constitution to the private law. For instance, in the case of *K. v. Minister of Safety & Security*, 2005 (3) SA 179 (SCA), the Supreme Court of Appeal argued that cases like *Carmichele*, which addressed the issue of wrongfulness of police conduct, were not applicable to cases involving the application of the “frolic rule” in vicarious liability cases involving the police. *K.*, 2005 (3) SA 179 (SCA) at para 8. The Supreme Court of Appeal argued that the case before it was merely a case of factual application of the frolic rule and did not involve issues of public policy or constitutional values. *Id.* at para. 8. Justice O’Regan, in *N.K.*, rejected this limitation on the reach of the Constitution into the law of delict. *N.K.*, CCT 52/04 at para. 19. She clarified that the obligations of section 39(2) not only included cases where a completely new common law rule is developed but when incremental extensions of existing rules to new facts take place. *Id.* at para. 17. This effectively collapses the distinction between simply applying the existing rule to a new set of facts and creating a new rule and deprives the Supreme Court of Appeal the strategy of de-constitutionalizing cases by categorizing them as merely ‘factual’ or application cases.

²⁶⁸ Although it is my view that one can generally achieve the same substantive outcome through all four routes some judges may be more open to the different approaches. It might be wise in some cases to argue the different approaches in the alternative.

which did not specifically bind the judiciary, could be read to have significant horizontal impact.²⁶⁹ This interpretation of the provision was rejected by the majority of the Court in *DuPlessis v. De Klerk* under the Interim Constitution.²⁷⁰ The argument was revived with more strength under the Final Constitution by some academics²⁷¹ and was argued before the Court in the case of *Khumalo v. Holomisa*.²⁷²

However, this separate direct horizontal application approach was rejected by the Constitutional Court because it would render section 8(2) and 8(3) superfluous or redundant.²⁷³ Section 8(2) specifically addresses horizontal application, that is, it specifically states that natural and juristic persons are bound by the Bill of Rights, under certain conditions, and section 8(3) specifically states that, when there is no existing adequate remedy under the common law or in legislation, the remedy for a section 8(2) violation is to develop the common law. This is what is sometimes called direct-indirect horizontal application or direct-mediated horizontal application. The Constitution directly applies and persons are directly bound by section 8(2), but the remedy is not a separate constitutional remedy, but rather a remedy that integrates or infuses what is constitutionally required with the development of the common law under section 8(3). This is the approach adopted by the Constitutional Court in *Khumalo*. It ensures that there is not a

²⁶⁹ For example justice Kriegler's dissent in *DuPlessis v. De Klerk*, 1996 (3) SA 850 (CC) was based on the idea that all law was subject to the Constitution including the common law when either party tried to raise the law to defend his, her or its position (914-915). S. Woolman notes that every commentator on the application of the Bill of Rights under the Interim Constitution prior to *DuPlessis* held the view that anytime a party in a private dispute raised a statute, it was subject to constitutional review. See S. Woolman, *Application*, in CONSTITUTIONAL LAW OF SOUTH AFRICA 31.1 (M Chaskalson et al eds., 2d ed. forthcoming 2005).

²⁷⁰ 1996 (3) SA 850 (CC). For sustained critique of the majority decision see, e.g. S. Woolman, *Application*, in CONSTITUTIONAL LAW OF SOUTH AFRICA §§ 10.3(a)(i), 10.3(a)(v), 10.3(b) (S. Woolman et al eds., 1999) and S. Woolman & D. Davis, *The Last Laugh: Du Plessis v De Klerk, Classical Liberalism and the Application of Fundamental Rights Under the Interim and Final Constitutions*, 12 S. AFR. J. HUM. RTS. 36 (1996).

²⁷¹ E.g. Woolman & Davis, *supra* note 270.

²⁷² 2002 (5) SA 401 (CC) para. 30.

²⁷³ *Id.* at para. 32.

separate constitutional tract; rather, the dictates of the Constitution are fulfilled through the development of the common law.²⁷⁴

Nonetheless, there are two other routes to the same substantive outcome.²⁷⁵ The third route, known as indirect application, existed under the Interim Constitution in section 35 and was replicated in section 39 of the Final Constitution. This route appears less constitutional because it is not phrased in terms of binding provisions, but in terms of interpreting and developing the common law in light of the spirit, purport and objects of the Bill of Rights. However “un-law – like” those provisions may sound, the Constitutional Court has held that section 39 cases are constitutional,²⁷⁶ and the Constitutional Court in *Khumalo* held that the development of the common law under section 39 is substantially equivalent to the development of the common law under section 8(2) and 8(3). In other words, if these two approaches are carried out properly, the result is the same.

By implication, the Constitutional Court also endorsed any case in which the common law development reflected the appropriate constitutionally inspired balance of competing rights and/or values.²⁷⁷ In such cases rights and/or values may simply inform and add weight to existing common law rights and duties through traditional common law mechanisms (e.g. the balance between freedom of expression and dignity and reputation in defamation cases as well as

²⁷⁴ The idea of there being separate tracts was in part due to the structure of the courts under the Interim Constitution scheme where it was determined that horizontal application was purely indirect. *See Du Plessis v. De Klerk*, 1996 (3) SA 850 (CC). The Supreme Court of Appeal was the crown of a court system that dealt largely with non-constitutional issues while the Constitutional Court was separate from that system and was to deal with constitutional issues. The Final Constitution integrated the courts so that every high court can (and now must) address constitutional matters.

²⁷⁵ Both of these other approaches were endorsed by the Constitutional Court in *Khumalo*.

²⁷⁶ *Carmichele*, 2001 (4) SA 938 at paras. 50-55.

²⁷⁷ This is because the court embraced the substantive considerations made by the court in *Bogoshi* which did not rely on the section 35 Interim Constitution analysis to found its decision, but rather held that the *Pakendorf* decision had had the balance wrong all along. It did not matter that the court in *Bogoshi* declined to use the Constitution since its reasoning and its decision was supportable in light of those values.

notions such as the “legal convictions of the community,”²⁷⁸ “boni mores,” “public policy,” and “reasonableness”).

This allows for the harmonization of the common law in general and delict in particular with the values and aspiration of the democratic transition as embodied in the Constitution. In effect it deconstructs the public and private law divide. As stated by the Constitutional Court in *Ex Parte President of the Republic of South Africa: In Re Pharmaceuticals Manufacturers Association of South Africa*:

There are not two systems of law, ... each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the constitution and is subject to constitutional control.²⁷⁹

This ensures that the private law is a partner in the consolidation of democracy in South Africa. The legislation and case law below will further elucidate the values of the transition and show how the law of delict may be infused with those values so as to aid in the transformation of South Africa’s law and society and in the consolidation of democracy.

²⁷⁸ This is a common formulation of the test for legal wrongfulness in delict as is the boni mores and public policy. Reasonableness is a factor in both the wrongfulness/duty of care analysis as well as in negligence. It is common to argue that values of the Constitution now embody the legal convictions of the community. *See, e.g.* Faircape Prop. Developers (Pty) Ltd. v. Premier, Western Cape, 2000(2) SA 54, 65 (CPD) (Davis, J.).

²⁷⁹ (2000) (2) SA 674 (CC), (2000) BCLR 241 (CC) para. 44. Frank Michelman argues that it is a mistake to claim that all law derives its force from the Constitution for the force of law comes from pre-legal understandings of the “ultimate rule of recognition.” Michelman, *supra* note 19, at 11-41. While the force of law may not derive from the text of the Constitution, it does not follow that it does not derive from the Constitution. If the Constitution is “the legal embodiment of the values of post apartheid South Africa...[as] nothing less than South Africa in legal form” then the proposition makes more sense. *See* Roederer, *Post-Matrix*, *supra* note 19, at 80-81. Michelman comes close to embracing this idea when he concludes his chapter with the following observation:

We merely suggest that when the CC spoke in *Pharmaceutical Manufacturers* of all law deriving its force from the Final Constitution, it may have been giving expression to that side of its mind that decidedly favours having constitutional values (post-matrix) drive the enquiry into the adequacy of all other law, rather than the reverse. This may have been the CC's way of conveying that there remains in South Africa no trace of law that does not act discursively like the law of the Final Constitution; no law that does not, in that sense, bear the Final Constitution's genes. ..To say that is to say something significantly more than that all law has to harmonize with the spirit, purport, and objects of the Final Constitution. Michelman, *supra* note 19, .at 11-44.

VI. CONSTITUTIONALLY INSPIRED CHANGES IN THE LAW OF DELICT

A. Legislation

As noted above, section 8(3) of the Final Constitution provides that the courts should develop the common law to fashion a remedy when a constitutionally appropriate remedy is not available through either existing legislation or the common law. As this indicates, the courts are not envisioned as the only, or even the primary, developers of the law. As detailed *supra*, Section IV, there is a considerable amount of legislative reform that is either being considered or is taking place in South Africa that will impact private law in general and delict in particular, ranging from class actions, public interest actions, contingency fee arrangements, and consumer protection laws. One piece of legislation, however, stands out as representing a truly transformative development in the overlap of public and private law. This development, taking place in principle in 2000 and in fact in 2003, is the Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000 as Amended by Act No. 52 of 2002.²⁸⁰ Act No. 4 was mandated by section 9 of the Final Constitution to give further effect to the equality provisions of the Constitution.²⁸¹ The need for this type of legislation is acknowledged in the preamble to Act No. 4 of 2000:

The consolidation of democracy in our country requires the eradication of social and economic inequalities, especially those that are systemic in nature,

²⁸⁰ The Act remained dormant until June 13, 2003, when the President signed the Proclamation that brought sections 4(1), 7- 23, 30, 31 and 34(2) into operation (Proclamation No. R 49 of 2003). These provisions came into effect on the 16th of June when the regulations relating to the prevention of unfair discrimination were also promulgated (Regulation Gazette No. 7683 Vol. 456 No. 25065). Sections 1, 2, 3, 4(2), 5, 6, 29 (with the exception of subsection (2)), 32, 33 and 34(1) were put into operation in 2000. Chapter 5 of the Act (sections 24-28) which relates to the promotion of equality and its regulations have not yet come into effect, but draft regulations came out in 2004 and are available at http://www.doj.gov.za/2004dojsite/eqact/legislation/20040428_eqc_draf%20reg_ch5.pdf (last visited Apr. 5, 2005).

²⁸¹ “No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.” S. AFR. CONST. (Act 108 of 1996) ch. 2 (Bill of Rights), § 9(4).

which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people;

Although significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy....

This Act endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom,...

Among other things, the Act seeks “to provide remedies for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been infringed.”²⁸²

The Act utilizes a number of novel mechanisms for achieving these ends. It has specific provisions dealing with the prohibition of unfair discrimination by the State and by persons²⁸³ on a wide range of grounds,²⁸⁴ as well as provisions on the promotion of equality by the State and persons through affirmative action and equality plans.²⁸⁵ The Act also has provisions prohibiting hate speech,²⁸⁶ harassment,²⁸⁷ and the dissemination of information that unfairly discriminates.²⁸⁸

²⁸² Section 2(e) (Objectives) of Act 4 of 2000.

²⁸³ Section 6. Discrimination in the act is defined broadly as “unless the context indicates otherwise -- ...(viii) “discrimination” means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly –

- (a) imposes burdens, obligations or disadvantage on; or
- (b) withholds benefits, opportunities or advantages from,

any person on one or more of the prohibited grounds.” *Id.* at § 1(viii).

²⁸⁴ The Act also provides that, “unless the context indicates otherwise -- ...

(xxii) “prohibited grounds” are—

(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; and

(b) any other ground where discrimination based on that other ground—

(i) causes or perpetuates systemic disadvantage;

(ii) undermines human dignity; or

(iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).” *Id.* at § 1(xxii).

²⁸⁵ Chapter 5, §§ 24-38.

²⁸⁶ Section 10.

²⁸⁷ Section 11.

²⁸⁸ Section 12.

Other mechanisms include broad standing provisions,²⁸⁹ and relaxed procedures and evidentiary rules. The regulations to the Act provide that, “The inquiry must be conducted in an expeditious and informal manner which facilitates and promotes participation by the parties.”²⁹⁰ The court is given broad inquisitorial powers under sections 10(5)(b)-(c) and 10(10)(b)-(c), and the normal procedures of the court hearing the case may be altered in the interest of justice in order to give effect to the guiding principles of the Act.²⁹¹ Likewise, the rules of evidence may also be altered so that “fairness, the right to equality, and the interest of justice” prevail over “mere technicalities.”²⁹²

Parties may be represented by an attorney, an advocate, or anyone of their choice (e.g. a paralegal, academic, minister, etc.),²⁹³ and are to be notified of their rights to representation at their own cost unless they cannot afford one, in which case they are to be informed that they may apply to legal aid or other institutions for legal assistance.²⁹⁴

The Act provides for a variety of innovative remedies going well beyond anything seen in the field of delict in South Africa thus far. As noted in the guiding principles, the remedies in the Act are not only corrective but also are meant to have a deterrent and restorative effect.²⁹⁵ Some of the more innovative remedies include:

- (e) after hearing the views of the parties or, in the absence of the respondent, the views of the claimant in the matter, an order for the payment of damages in the form of an award to an appropriate body or organisation;
- (g) an order to make specific opportunities and privileges unfairly denied in the circumstances, available to the complainant in question;

²⁸⁹ Section 20. As noted *supra*, Part V, the standing provisions mirror the Constitution’s standing provisions.

²⁹⁰ Section 10(1) of Regulations Pertaining to the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (in effect June 16, 2003), *available at*: http://www.doj.gov.za/2004dojsite/eqact/legislation/eqc_1final_reg_eng.pdf (last visited on Apr. 5, 2005). Notice that the regulations largely follow section 4 (Guiding Principles) of the Act.

²⁹¹ *Id.* at § 10(5)(d).

²⁹² *Id.* at § 10(7).

²⁹³ *Id.* at § 10(9)(a).

²⁹⁴ *Id.* at § 10(5)(e)(i). There are also no court fees for equality court proceedings. *Id.* at § 12(1).

²⁹⁵ Section 4(1)(d) of Act 4 of 2000.

- (h) an order for the implementation of special measures to address the unfair discrimination, hate speech or harassment in questions;
- (i) an order directing the reasonable accommodation of a group or class of persons by the respondent;
- (j) an order that an unconditional apology be made;
- (k) an order requiring the respondent to undergo an audit of specific policies or practices as determined by the court;
- (l) an appropriate order of a deterrent nature, including the recommendation to the appropriate authority, to suspend or revoke the licence of a person;
- (m) a directive requiring the respondent to make regular progress reports to the court or to the relevant constitutional institution regarding the implementation of the court's order...²⁹⁶

Notice that the list of remedies is not exhaustive; it would not preclude punitive damages if they were appropriate for the purpose of deterrence and the section explicitly allows for a court to require that a defendant pay an award to an organization other than the primary victim.²⁹⁷ This remedy is particularly novel and allows the court to make an award which may go some way in addressing the broader social harms of inequality and unfair discrimination by putting money into the hands of organizations committed to combating these broader social harms.²⁹⁸

B. Case Law

As noted above, prior to *Carmichele* in 2001 there were not many cases embracing the Constitution's mandate to develop the common law in light of the values of the Constitution and even fewer cases that attempted the section 8(2) direct horizontal application of the Bill of Rights to persons. Although the *Carmichele* watershed has not created a waterfall of cases, the numbers

²⁹⁶ Section 21(2) .

²⁹⁷ Section 21(2)(e).

²⁹⁸ See, e.g. the case of *Race settlement confirmed by equality court*, February 11, 2004, Sapa, available at: <http://www.gmax.co.za/look04/02/11-SAequalitycourt.html> (last visited Apr. 20, 2005), in which Mr. Pillay, the colored same sex partner of Professor Pierre de Vos (a human right law professor from the Western Cape), was excluded from a night club in Cape Town because he was not white. The case settled with the owners giving apologies to the couple along with 10,000 rands to a gay rights organization (Siyazenzela). Note there have not been any reported cases under the Act.

of cases in which the courts have applied their mind to the subject has increased. As may have been expected, most of the cases have been in the areas of the duty of the State to act to safeguard the people within its jurisdiction (e.g. the police,²⁹⁹ the provincial premier,³⁰⁰ the state

²⁹⁹ *Dersley v. Minister van Veiligheid en Sekuriteit*, 2000 1 ALL SA 484 (T) (Van Dyk, J.) (using the Police Service Act 68 of 1995 and the Constitution as factors in determining that the police owed the plaintiff a legal duty of care in a case involving the negligent misrepresentation by the police that a given car was not a stolen car vehicle, resulting in the plaintiff purchasing the vehicle and the police subsequently confiscating the vehicle from the plaintiff as stolen property); *Van Duivenboden v. Minister of Safety & Sec.*, [2001] 4 All SA 127 (C) (Davis, J.) (holding that section 11(1) of the Arms and Ammunition Act 75 of 1969 along with the Constitution placed a duty on the police to institute proceedings in terms of section 11(1) to have an assailant's fire arm license revoked by the police Commissioner, the failure of which resulted in the assailant subsequently using the firearm to kill his wife and one child and to shoot and injure the plaintiff), *aff'd*, *Minister of Safety & Sec. v. Van Duivenboden*, 2002 (6) SA 431 (SCA) (Nugent, J.) (providing not only a highly informative tour of English, Australian and New Zealand law on the topic (paras.13-16), but also providing a very thoughtful and thorough analysis of the impact of the Constitution in cases where the State fails to act); *Van Eeden v. Minister of Safety & Sec. (Women's Legal Centre Trust, as Amicus Curiae)*, 2003 (1) SA 389 (SCA) (holding that the police did have a duty to protect the plaintiff from violent harm and that it violated that duty when it negligently allowed a violent sexual predator to escape from its custody resulting in the rape of the plaintiff at gun point (basing the duty on the constitutionally inspired legal convictions of the community; the right of freedom and security of the person entrenched in section 12(1)(c) of the Constitution, along with section 7(2) of the Constitution, which imposed a duty on the State to "respect, protect, promote and fulfill the Rights in the Bill of Rights;" the section 39(1)(b) provisions which imposed the duty on the State to recognize its obligation under international law to protect women against violent crime and against the gender discrimination inherent in violence against women, as well as section 205(3) of the Constitution and the Police Service Act 68 of 1995 which made it clear that the functions of the police included the maintenance of law and order and the prevention of crime; and finally, the fact that there was no other practical and effective remedy available to the victim of violent crime)), *rev'g Van Eeden v. Minister of Safety & Sec.*, 2001 (4) SA 646 (T) (Swart, J.) (holding that the Constitution was irrelevant to the question as to whether the police owed the plaintiff a legal duty when it negligently allowed a violent sexual predator to escape from its custody and who later raped the plaintiff at gun point); *Geldenhuis v. Minister of Safety & Sec.*, 2002 (4) SA 719 C (Davis, J.) (applying the Constitution to find a duty on the police to keep the plaintiff, who was in police custody when he sustained serious bodily injuries, safe from physical harm and finding that they failed in their duty by failing to timeously and properly investigate the nature and extent of the plaintiff's injuries and to summon assistance); *Carmichele v. Minister of Safety & Sec.*, 2001 (4) SA 938 (CC) (applying the Constitution to find that a legal duty may have existed on the police and prosecutor and that they may have breached that duty when they recommended the release without bail of a Mr. Coetzee without placing before the magistrate any information regarding Coetzee's previous convictions and history of sexual violence where Mr. Coetzee subsequently violently attacked the plaintiff), *remanded to* 2003 (2) SA 656 (C) (Chetty, J.) (finding that the police and prosecution owed the plaintiff a legal duty and had failed in carrying out the duty); *N. K. v. Minister of Safety & Sec.*, Case CCT 52/04 (CC Jun. 13, 2005) (holding the State vicariously liable for the rape of a stranded women by three on duty uniformed police officers who offered to give her a ride home on the basis of the risk theory and the objective approach to vicarious liability along with the constitutional rights of the victim, the constitutional and statutory duties of the police, and the values of the South African Constitution), *rev'g K. v. Minister of Safety & Sec.*, 2005 (3) SA 179 (SCA) (holding the State was not vicariously liable on the basis that the men were on a frolic of their own, based on the interest theory and subjective approach to vicarious liability and on the dubious exclusion of constitutional considerations).

³⁰⁰ *Premier, Western Cape v. Faircape Prop. Developers (Pty) Ltd.*, 2003 (6) SA 13 (SCA) (holding that the Premier of the Western Cape was not vicariously liable for damages caused by a negligent decision of one of his ministers to grant an application to remove a title deed restriction on Faircape's property because Faircape was the one who applied for the removal and they should have been aware of the defect in question), *rev'g* 2002 (6) SA 180 (C) (Davis, J.) (holding the Provincial Premier vicariously liable for damages caused by a negligent decision of one of his ministers to grant an application to remove a title deed restriction on Faircape's property based in part on the

tender board,³⁰¹ and the state transit authority³⁰²), and cases involving defamation, which clearly involve the rights to dignity, reputation and freedom of expression.³⁰³ Outside of these areas there have been a few cases that have drawn from the Constitution, including cases involving dependants' actions,³⁰⁴ remedies,³⁰⁵ the fault standard for products liability,³⁰⁶ and even vicarious liability.³⁰⁷

notion of a culture of justification and the need to hold the government accountable to the people for harm caused by its negligence).

³⁰¹ *Olitzki Prop. Holding v. State Tender Board & Another*, 2001 (3) SA 1247 (SCA) (Cameron, J.) (holding that a breach by the State, or one of its organs, of duties imposed by section 187 of the Interim Constitution, which required the legislature to set out a tendering scheme for government contracts/ procurements in accordance with its provisions, did not constitute a civil wrong entitling an unsuccessful tenderer to sue for damages for lost profits, but only provided for "review, interdict or out-of-pocket losses").

³⁰² *Rail Commuter Action Group & Others v. Transnet Ltd. t/a Metrorail & Others*, CCT56/03 (CC Nov. 26, 2004), available at <http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT56-03> (last visited June 11, 2005) (holding that Transnet Ltd. had a legal duty to keep its passengers reasonably safe from crime on its trains running in Cape Town), *rev'g* 2003 (6) SA 349 (SCA) (holding that Transnet Ltd. did not have a legal duty to keep its passengers safe from crime, for that duty was one placed generally on the shoulders of the police services), *rev'g* 2003 (5) SA 518 (C) (Davis & Van Heerden, JJ.) (holding that Transnet did have such a duty).

³⁰³ See e.g. *Sokhulu v. New Afr. Publ'n Ltd. & Others*, 2001 (4) SA 1351 (WLD) (holding that statements made about a television celebrity regarding the birth of her child out of wedlock and her cohabitation for two years with the child's father were not capable of giving raise to a claim of defamation, insult to dignity, or *contumelia*, given the new societal values enshrined in the Constitution, noting that since one could not discriminate against anyone on these bases under section 9 of the Constitution, the mentioning of them could not be defamatory or injure one's dignity); *Marais v. Groenewald en 'n Ander*, 2001 (1) SA 634 (T) (developing in dicta the common law in light of section 39 in a defamation case involving a non media defendant by holding that even if the court was in error in finding that the plaintiff had the requisite intent and was merely negligent, that a fault requirement of negligence rather than intent achieved the proper balance between the constitutionally protected personality right to a good name (section 10) and the right to freedom of speech (section 16(1)) (following *Nat'l Media Ltd. v. Bogoshi*, 1998 4 SA 1196 (SCA))); *Van der Berg v. Coopers & Lybrand Trust (Pty) Ltd. & Others*, 2001 (2) SA 242 (SCA) (balancing the right to dignity in section 10 against the right to freedom of expression in section 16 to help determine if the defamatory words were sufficiently relevant to the privileged occasion for them to fall under the privilege in a case involving a defamatory statement made in the context of legal proceedings; *Selemela & Others v. Indep. Newspaper Group Ltd. & Others*, 2001 (4) SA 987 (NC) (following *Bogoshi* and denying a motion that would require that the plaintiff plead and establish the truthfulness of the alleged defamatory statements made by the defendant about the plaintiffs, who were public officials); *Botha & Another v. Mthjyane & Another*, 2002 (1) SA 289 (W) (addressing whether a defense of qualified privilege and fair comment would stand against a claim of defamation where the defendant wrote letters to top officials of the South African Broadcasting Company (SABC) and to the Human Rights Commission containing allegations of racism and corruption on the part of SABC's Language Dubbing Department, and holding that the letters, although defamatory concerned the fundamental right to equality and were written for the common convenience and welfare of society and thus were covered by the privilege whereas articles printed in the press based on interviews with the defendant were not covered by the privilege); *Holomisa v. Khumalo*, 2002 (3) SA 38 (TPD) and *Khumalo v. Holomisa*, 2002 (5) SA 401 (CC) (following *Bogoshi* and holding there is no significant difference between horizontal application under section 8 and section 39 of the Constitution).

³⁰⁴ *Amod v. Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)*, 1999 (4) SA 1319 (SCA) (holding that the Multilateral Motor Vehicle Accidents Fund was required to compensate the Muslim widow of its insured accident victim for loss of support even though the marriage was not recognized under South African law (as Muslim marriages were potentially polygamous), finding the duty of support was worthy of

Cases involving the State

The trend in cases involving the State is to increase the accountability of the State and its organs for harms caused to the people of South Africa. This has meant imposing positive duties on the State and finding special relationships that support those duties in cases that would not have traditionally supported liability.³⁰⁸ It also means requiring the State to act reasonably in

protection as the spouse had such a duty in Islamic marriage law, the marriage was de facto monogamous and to hold otherwise would be to privilege Christian marriages and this was inconsistent with the new ethos of tolerance, pluralism and religious freedom which had consolidated itself even before the adoption of the Interim and Final Constitutions); *Metiso v. Padongelukfonds*, 2001 (3) SA 1142 (T) (applying *Amod* and considering the present case as the next step in the development of the common law in holding that the defendant insurer of the deceased was liable to pay out on the loss of support claim of the adopted children of the deceased even though the adoption was legally defective under the common as it was effective under customary law and to hold otherwise would be contrary to the best interest of the children); *Du Plessis v. Motorvoertuigongelukkefonds*, 2002 (4) SA 596 (T) (holding that a stable, long-standing homosexual cohabitation relationship, such as that of husband and wife, did not establish a duty of support for the purposes of a claim for loss of support, even where other requirements for liability are satisfied. *But see* *Satchwell v. President of the Republic of S. Afr. & Another*, 2002 (6) SA 1 (CC) (holding that although section 9 generally does not require benefits provided to spouses to be extended to all same-sex partners where no reciprocal duties of support have been undertaken (as the Constitution cannot impose obligations where those partners themselves have failed to undertake such obligations), such a duty of support may be inferred as a matter of fact in certain cases of persons involved in permanent, same-sex life partnerships in a society where the range of family formations has widened).

³⁰⁵ *Fose v. Minister for Safety & Sec.*, 1997 (3) SA 786 (denying constitutional and punitive damages for the violation of fundamental rights by the State under the Constitution), discussed *supra*, Part VI, § C. *Mineworkers Investment Co. (Pty) Ltd. v. Modibane*, 2002 (6) SA 512 (W) (holding that the remedy of amende honorable (public apology) as an alternative remedy to money damages in defamation cases is consistent with section 39(2) of the Constitution).

³⁰⁶ *Wagener v. Pharmicare Ltd.; Cuttings v. Pharmicare Ltd.*, 2003 (4) SA 285 (SCA) (declining the invitation to develop the law in terms of the constitutional right to bodily integrity (section 12(2) of the Constitution of the Republic of South Africa Act 108 of 1996) with respect to products liability so as to impose strict liability on manufacturers, but rather endorsing a more liberal approach to the doctrine of *res ipsa loquitur* for such cases).

³⁰⁷ *N. K. v. Minister of Safety & Sec.*, Case CCT 52/04 (CC Jun. 13, 2005) (holding the State vicariously liable for the rape of a stranded women by three on duty uniformed police officers who offered to give her a ride home on the basis of the risk theory and the objective approach to vicarious liability along with the constitutional rights of the victim, the constitutional and statutory duties of the police, and the values of the South African Constitution, *rev'g* *K. v. Minister of Safety & Sec.*, 2005 (3) SA 179 (SCA) (holding the State was not vicariously liable on the basis that the men were on a frolic of their own, based on the interest theory and subjective approach to vicarious liability as well as the dubious exclusion of constitutional considerations).

³⁰⁸ Note that when *Carmichele* was remanded, the High Court did not mention the requirement of a special relationship. 2003 (2) SA 656 (C). One may argue that under the Final Constitution no "special relationship" is required, or that the Constitution itself embodies the "special relationship" that is required. That special relationship is embodied in the new covenant between the whole of the population of South Africa and its government, as well as between each other. It may be argued that the constitutional regime is based on a new and different kind of society - one that no longer accepts a mere minimal laissez faire state where, at best, one has negative rights to be left to one's own devices, but rather, one in which the people can legitimately expect more from each other and more from the State by way of positive duties.

cases where the courts may have traditionally found there to be discretion as to whether the State was required to act at all.³⁰⁹

Defamation cases

Post-apartheid developments in the law of defamation have seen the overruling of the strict liability rule for media defendants in order to give effect to the right to freedom of expression. However, the courts have not elevated freedom of expression to the level of the paramount right. Neither the values of the free market nor of the market place of ideas are paramount in South Africa. In the case of *Khumalo*, Justice O'Regan noted the media's special role as both a bearer of the right to freedom of expression and as a bearer of duties.³¹⁰ She noted the important watchdog role that the media plays in ensuring that government is "open, responsive and accountable to the people as the founding values of our Constitution require."³¹¹ Yet, in spite of what appears to be a lofty exaltation of the role of the media and the right to freedom of expression, Justice O'Regan went on to hold that the right to freedom of expression is not paramount.³¹² She held, it must "be construed in the context of the other values enshrined in our Constitution. In particular, the values of human dignity, freedom and equality."³¹³ Next, she analyzed the often competing right to dignity. If not paramount, dignity is foundational.³¹⁴ By way of amplification, Justice O'Regan quoted the decision of the Constitutional Court in

Dawood v. Minister of Home Affairs:

The value of dignity in our Constitutional framework cannot . . . be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest

³⁰⁹ See, e.g., *Van Duivenboden*, 2002 (6) SA 431 (SCA); *Carmichele*, 2001 (4) SA 938 (CC).

³¹⁰ *Khumalo*, 2002 (5) SA 401 (CC) at para. 22.

³¹¹ *Id.* at para. 23.

³¹² *Id.* at para. 25.

³¹³ *Id.* at para. 25. Justice O'Regan refers to the discussion in *S. v. Mamabolo*, 2001 (3) SA 409 (CC) paras. 40-1.

³¹⁴ *Id.* at para. 25 (citing section 1 of the Final Constitution.).

in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels.³¹⁵

According to Justice O'Regan, dignity underlies and weaves together the protection of reputation, dignitas and privacy in the law of delict.³¹⁶

Thus, the question of the constitutionality of the existing law of defamation, which places the onus of establishing the defense of truth on the media defendant, was answered by asking “whether an appropriate balance is struck between the protection of freedom of expression on the one hand, and the value of human dignity on the other.”³¹⁷ She found that the proper balance was struck by placing the onus on the defendant to either establish truth and public interest or that publication was reasonable.³¹⁸

In further defense of the substantive outcome here, it may be noted that the balancing of the freedom of expression with that of respecting the dignity of those affected by one's expression, along with the defense of reasonableness, is conducive to deliberative democracy and its values.³¹⁹ In other words, public discussions are not simply free-for-alls; they are not battles

³¹⁵ 2000 (3) SA 936 (CC) para. 35.

³¹⁶ *Khumalo*, 2002 (5) SA 401 (CC) at para. 27.

³¹⁷ *Id.* at para. 28.

³¹⁸ *Id.* at paras 43-45. Justice O'Regan addressed the arguments by the applicant that the U.S. rule announced in *New York Times Co. v. Sullivan*, 376 US 254 (1964), at 279-80, should apply in South Africa. She noted that this case was the high water mark for foreign jurisprudence in protecting freedom of expression and many jurisdictions ranging from Canada, Australia, the U.K. and Germany have not followed the U.S. approach. *Id.* at para. 40. Here the applicants were not arguing that the plaintiff show actual malice, but merely that the plaintiff should have the burden of establishing that the statement was untrue. Nonetheless, O'Regan was not persuaded. U.S. law is quite different given that in the U.S., freedom of expression is paramount and there is no real countervailing right to dignity. As O'Regan points out, in South Africa, the protection of freedom of expression must be balanced against the competing right to dignity. *Id.* at para. 41; see also Stephen Gardbaum, *The “Horizontal Effect,”* 102 MICH. L. REV. 387, 439-42 (2003) (comparing the law of Canada, Germany and South Africa (in *Du Plessis*) and noting that these countries do not adopt the *New York Times* rule).

³¹⁹ As Gutmann and Thompson state, “No subject has been more discussed in political theory in the last two decades than deliberative democracy.” A. GUTMANN & D. THOMPSON, *WHY DELIBERATIVE DEMOCRACY*, at vii (2004). They give Habermas credit for reviving the idea of deliberation and grounding it in democracy, *id.* at 9, but they also note that Habermas is not too distant from Rawls in his views. *Id.* They draw from John Rawls's views in J. RAWLS, *POLITICAL LIBERALISM* 1993 when they state:

Most fundamentally, deliberative democracy affirms the need to justify decisions made by citizens and their representatives. Both are expected to justify the laws they would impose on one another.... The reasons that deliberative democracy asks citizens and their representatives to give should appeal to

in the market of ideas where anything goes and one is allowed to win based on any tactic, no matter how true or false, reasonable or unreasonable, fair or damaging. To be justified, damaging statements should be true and in the public interest, and when they are not they are justified only when it is reasonable under the circumstances to publish them. To hold otherwise would be at best to foster distracting noise into our discourse, and at worst false, damaging and misleading information that undermines not only our ability to actively and responsibly participate in the political community.

Dependant claims

Developments in the area of dependant claims have meant the recognition of the duty of support in situations where the duty was unrecognized under apartheid law. They include the duties of support by those in Muslim marriages, those who have adopted under customary law, and those in permanent same-sex life partnerships. The former were previously denied recognition because they were potentially polygamous and because of religious bias while the latter were denied, largely due to heterosexist bias. Customary law duties of support were generally recognized unless they conflicted with the common law (e.g. in the case of adoption). In all of these developments, the substance of the relationship came to trump the form of the relationship. In other words, what was important was that a duty of support was present, not whether the formal arrangement for that support was defective from the standpoint of the previous common law rule.

Remedies

principles that individuals who are trying to find fair terms of cooperation cannot reasonably reject...They are reasons that should be accepted by free and equal persons seeking fair terms of cooperation. GUTMANN & THOMPSON, *supra*, at 3. They further state, "What makes deliberative democracy democratic is an expansive definition of who is included in the process of deliberation – an inclusive answer to the question of who has the right (and effective opportunity) to deliberate or choose the deliberators, and to whom do the deliberators owe their justification." *Id.* at 9-10.

There have not been a great number of developments in the area of remedies, but there has been some movement to include the restorative justice remedy of an apology as well as to consider whether constitutional and punitive damages might be required to vindicate the infringement of rights by persons other than the State. Some of the more creative remedies found under the Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000 may be developed under the common law in the future.

Manufacturers' liability

As noted above, although there is no strict liability in products liability cases the Supreme Court of Appeal has at least recognized the possibility of endorsing a more liberal approach to the doctrine of *res ipsa loquitur* which would make it considerably easier for consumers damaged by products to bring successful claims against manufacturers. This is in keeping with the more comprehensive consumer protection legislation that is on the horizon.

Vicarious Liability

Finally, the constitutionally inspired approach to vicarious liability by Justice O'Regan in *N.K. v. Minister of Safety and Security* has resulted in the adoption of the risk theory of vicarious liability over the traditional interest theory of vicarious liability. As noted above, the courts in South Africa have gone back and forth between a narrow view of "scope of employment" and a broad view of "scope of employment."³²⁰ The narrow view is often associated with the interest theory, which limits the liability of an employer for the conduct of its employees to that which further the interests of the employer. This is the more libertarian view; and from this view, vicarious liability is an exception to the general rule that one is to look out for her or him self and

³²⁰ See *supra* note 180.

no one else.³²¹ They are not their brother's keepers and the only way to justify holding them accountable for the actions of their brother's or sisters is if their brother or sister is going about his or her employer's business and furthering her or his interests.³²² The Supreme Court of Appeal adopted this view when it held that the State was not vicariously liable for the rape of a young stranded woman by three uniformed on-duty police officers who offered her a ride home.

In contrast, the worldview that underlies the risk theory of vicarious liability sees the person as a cooperating member of the community, who not only competes for whatever she or he can take from the community but who is nurtured by that community and who has duties to the members of that community. Those duties include being responsible for the dangers and risks that they impose on the community and paying for the harm that is caused by the increased risks that they impose.³²³

In her opinion, Justice O'Regan drew heavily from the Court in *Carmichele* for a number of constitutional values that are relevant to the present case.³²⁴ Those values are in part found in the provisions of the Constitution and The South African Police Service Act, which not only give women like Ms. N.K. rights but also impose duties on the State. These rights and duties include the rights to security of the person, dignity, privacy and substantive equality, as well as the duties found in section 205 of the Constitution and the Preamble of The South African Police

³²¹ The Supreme Court of Appeal in *K. v. Minister of Safety and Security* briefly captured the policy considerations behind the rule as "serving to maintain a balance between imputing liability without fault (which runs counter to general legal principles) and the need to make amends to an injured person who might otherwise not be recompensed. From the innocent employer's point of view, the greater the deviation the less justification there can be for holding him or her liable." *K.*, 2005 (3) SA 179 (SCA) at para. 4.n.181.

³²² These values support what Neethling et al refer to as the interest or profit theory of strict liability. NEETHLING ET AL., *supra* note 35, at 364.

³²³ This underlies the risk theory of vicarious liability. See NEETHLING ET AL., *supra* note 35, at 364, 374.

³²⁴ *N.K.*, CCT 52/04 at para. 18. The Supreme Court of Appeal distinguished the impact of such cases as *Carmichele*, 2001 (4) SA 938 (CC), on the basis that those cases dealt with the issue of wrongfulness, with the implication that the section 39(2) mandate only applied to the issue of wrongfulness or lawfulness. *Id.* at para. 8). Justice O'Regan rejected this limitation on the reach of the Constitution into the law of delict. *Id.* at para. 19.

Service.³²⁵ Justice O'Regan quoted *Carmichele* at length which emphasized the importance of being free from sexual violence as a prerequisite for equality and self determination, and of the responsibilities of the police to protect women from such violence.³²⁶ She identified the policy reasons for the rule as affording claimants efficacious remedies, inciting employers to take active steps to prevent their employees from causing harm to the public, as well as holding employers liable only when it is fair to do so.³²⁷

There are other reasons for vicarious liability not mentioned by Justice O'Regan, including the balancing of equities between a victim and an employer who:

1. either generally or specifically profits from the deeds of her or his employees,³²⁸ and/or
- or
2. who creates greater risks to the public through her or his employees,³²⁹
3. who provides the opportunity and/or tools to her or his employees who cause

³²⁵ *Id.* at para. 18.

³²⁶ In fact, sexual violence was recorded as being the greatest single threat to the self determination of South African women. *Id.* (quoting *Carmichele*, 2001 (4) SA 938 (CC) at para. 62).

³²⁷ *Id.* at para. 21.

³²⁸ See, e.g. DAN B. DOBBS, *THE LAW OF TORTS* 910 (2000).

³²⁹ Neethling et al see this as the better justification for strict liability. *Supra* note 35, at 364, 374. I don't see any reason why the different reasons cannot be combined. See *Rabie*, which comes close to elevating the risk theory to the rule in the case and thereby supplanting the need for a 'within the scope of one's duty test.' 1986 1 SA 117 (AD) at 134-135. But see *Minister of Law and Order v. Ngobo*, 1992 (4) SA 822 (A) (clarifying that the risk justification for the rule is not the same as the rule); see also *Ess Kay Electronics Pte Ltd. & Another v. First Bank of S. Afr. Ltd.*, 2001 (1) SA 1214 (SCA) at para. 10 (refusing to follow the *Rabie* test ([8]) arguing that, 'what seems to require continual emphasis, therefore, is that the rule and the reason for its existence must not be confused. The risk referred to, and considerations of public policy, have to do with the reason for the rule. They are not elements of the rule and they do not inform its content.'). However, it does not follow that the above two-part test set out in *Rabie* was incorrect. See *N.K.*, CCT 52/04 at para. 31 n.39. It further does not follow that the reasons for the rule 'do not inform its content.' The Court put it so: "what seems to require continual emphasis, therefore, is that the rule and the reason for its existence must not be confused. The risk referred to, and considerations of public policy, have to do with the reason for the rule. They are not elements of the rule and they do not inform its content." *Ess Kay*, at para. 10. As noted in Roederer, *Delict* 2001, "If risk to the public is one of the underlying rationales for imposing vicarious liability then it follows that, all things being equal, the more risk an employer places on the public the more reason for imposing liability. Even the Court in *Ngobo* recognized it as one of the factors to be taken into consideration (*Ngobo* at 828-834)." *Supra* note 180, at 348.

- harm,³³⁰ and
4. who is in a better place to not only bear and spread the cost of the harm,³³¹
 5. but who also is in a better place to deter the harmful conduct that takes place.³³²

These are the typical justifications found in common law jurisdictions and they combine notions of corrective justice, economic efficiency, and deterrence to outweigh the ‘normal rule’ that one is not responsible for the delicts of others, but only responsible for her or his own delicts. Further justifications or principles that might justify the imposition of vicarious liability in the context of post-apartheid South Africa include such ideals as public accountability,³³³ non-delegable duties,³³⁴ human rights, ubuntu,³³⁵ and the overall transformation of South African law and society from one that is founded on the laissez faire values of freedom and autonomy to one

³³⁰ This is a subcategory of the risk theory. For the view under U.S. law see, e.g. *Restatement Second of Agency* § 219(2)(d); DOBBS, *supra* note 328, at 910, 914 (referring to the case of *Costos v. Coconut Island Corp.*, 137 F.3d 46 (1st Cir. 1998) (holding the owners of an inn vicariously liable for the rape of a tenant by its employee based on the view that the employment made the tort possible and/or aided in the accomplishment of the tort)).

³³¹ See, e.g. George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 LEGAL STUD. 447, 461 (1985).

³³² See, e.g. Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231 (1984). This principle is broader than ‘control’ particularly when an employer has a range of devices available to her to deter harmful conduct, including, training, supervision and other mechanisms or procedures to encourage safety and to curb harmful conduct. The point is that an employer is often better placed than the employee him or her self to deter or limit harmful conduct. Sykes’s and Richard Epstein’s work combine points four and five above with arguments about the cost of identifying and suing employee plaintiffs, cheaper insurance under vicarious liability and overall security against harm. RICHARD EPSTEIN, TORTS 240-41 (1999).

³³³ Justice O’Regan discusses this value in the context of identifying the issue as a legal issue rather than merely a factual issue but does not address it in the context of the holding the State vicariously liable. In my critique of *Mkhatswa v. Minister of Defence*, 2000 (1) SA 1104 (SCA) (where the Court found the State was not vicariously liable for the actions of its employees when one of its employees left the base with an unauthorized vehicle and an indeterminate number of rifles that were in the possession and control of on duty sentries in order to exact revenge on innocent victims), I argued that the decision “[could] not be in keeping with any notion of government accountability. ... This would provide little incentive for the Minister to impose discipline in the ranks, thus leading to less and less accountability. This cannot be in keeping with the spirit of the Bills of Rights.” Roederer, *Delict* 2000, *supra* note 180, at 328.

³³⁴ For U.S. authority see *Stropes v. Heritage House Childrens Ct*, 547 NE 2d 244 (Ind. 1989).

³³⁵ Justice O’Regan draws on the fact that vicarious liability is a common feature of traditional society in South Africa. She notes that the Kraalhead is liable for all the delictual acts of inhabitants of the Kraal. *N.K.*, CCT 52/04 at para. 24 n.30.

founded on equality, dignity, freedom, mutual respect, and caring cooperation in the achievement of self determination for all South Africans.³³⁶

In conclusion, Justice O'Regan held that the opportunity to commit the crime arose because of the trust put in the policemen, a trust that was constitutionally mandated, and the breach of that trust constituted a breach of their duties and an infringement of her rights to dignity and security of the person.³³⁷ The delict was held to be intimately connected with the purpose of the employer rendering the State vicariously liable.³³⁸

VII CONCLUSION

Delict was seriously affected by, and its development seriously limited by, apartheid. The limitations did not generally consist of blatant racist or sexist laws and decisions (although that was sometimes the case), but consisted in a conservative libertarian approach to the common law that assumed the freedom and equality of persons while the apartheid apparatus ensured the opposite was true. The cancer worked by limiting access to justice by inhibiting reforms allowing for class actions, contingency fees, products liability and general consumer protection laws. It worked by limiting damages for loss of support by invoking the doctrine of "illegal income," and by failing to recognize the obligations of support by certain segments of society. These mechanisms also limited the deterrent effect of delict by failing to hold wrongdoers accountable. Both the compensatory and deterrent functions of delict were limited by awarding

³³⁶ See section 1 of the Constitution as well as Karl Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146 (1998); Woolman & Davis, *Last Laugh*, *supra* note 270; H. Corder, *Prisoner, Partisan and Patriarch: Transforming the Law in South Africa 1985-2000*, 118 S. AFR. L.J. 772 (2001); A. Chaskalson, *The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of our Constitutional Order*, 16 S. AFR. J. HUM. RTS. 193 (2000); D. Moseneke, *The Fourth Bram Fischer Lecture: Transformative Adjudication*, 18 S. AFR. J. HUM. RTS. 309 (2002); Roederer, *Post-matrix*, *supra* note 19, at 67. Respect for the rule of law is fostered by holding the guardians of the law responsible for the violations of the law by their employees. *N.K.*, CCT 52/04 at para. 52.

³³⁷ *Id.* at para. 57.

³³⁸ *Id.*

paltry non-economic damages, and by excluding punitive damages altogether. It worked through a conservative approach to vicarious liability, and through a conservative approach to holding the State accountable for its actions generally.

We can also see the potential for the transformation of the private law, and delict in particular, that comes with a shift to a more democratic society. Carrying through the legal transformation from public law to private law takes one considerably further in the consolidation of democracy. Democratic values, ranging from the rule of law, access to justice, participation, deliberation, and accountability are all strengthened by the integration of the common law with the Constitution and its values. South Africa's Constitution embodies the value of freedom, but the value of freedom is tempered and balanced with the values of equality and dignity. The equality legislation, as legislation that was not only inspired by but mandated by the Constitution, might also act as a beacon for the courts in their development of the common law outside of the areas covered by the Equality Act. In particular, it might inspire such developments in the common law as broader standing, easier procedures for class actions or public interest actions, as well as the whole host of constitutionally inspired remedies.

Many of the delict cases that have invoked the Constitution and its values have allowed the people of South Africa to bring successful claims against the State and to thereby hold the State accountable for its actions as well as for its inactions. Legislation and case law have not only extended rights to those previously denied those rights, but have also extended the duties that people owe to each other, making South Africans more accountable to each other. In sum, just as delict was part of the cancer of apartheid, it is now part of the cure. The transformation of South Africa has propelled changes in the law of delict and those changes in turn have added fuel to the transformation, helping to further consolidate South Africa's democracy.

