

CONSTITUTIONAL DAMAGES: A CALL FOR THE DEVELOPMENT OF A FRAMEWORK IN SOUTH AFRICA

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1 Introduction

This paper explores whether the positive duties placed on the state by the Constitution of South Africa,¹ particularly the South African Police Service (hereinafter 'SAPS'), are adequately represented by the doctrine of vicarious liability. The doctrine was developed in a private law setting and since the inception of the Constitution it has been stretched to vindicate the Bill of Rights. This stretching has resulted in a number of tears in the law's fabric and the best solution which comes to mind is to patch the tears with the doctrine of constitutional damages.

It is argued in this paper that the doctrine of constitutional damages is a viable alternative to vicarious liability in certain circumstances. This is achieved by identifying some of the pertinent difficulties associated with the application of vicarious liability to cases where institutional failures have resulted in the police causing physical injury to citizens. It is not argued that vicarious liability has no application. It will still apply where a factual nexus shows a relationship between the state official and the plaintiff that is characteristically private, a simple example being an on-duty policeman negligently riding his bicycle into a citizen who suffers broken ribs from the accident. Further, recent developments to the doctrine of Charter damages in Canada are used to show how a general framework for constitutional damages can be established. Canada is a good comparator for two reasons. First, there is a stark similarity between section 24(1) of the Canadian Charter of Freedoms and Rights and section 38 of the Constitution. Secondly, Canada, like South Africa, permits civil suits against the police via vicarious liability. Ultimately it is submitted that where the police cause physical injury and the relationship between the state official and plaintiff is vertical in nature or no specific member(s) of SAPS

¹ Constitution of the Republic of South Africa, 1996 (the "Constitution") ss 1, 7, 205.

can be identified as the cause of injury, constitutional damages serve as a more 'appropriate relief' than vicarious liability.

First, vicarious liability as it currently operates will be explained. Next the issues that have arisen through its use in four cases involving the SAPS will be discussed. Then the South African doctrine of constitutional damages will be explained. This will be followed by an explanation of a similar doctrine in Canada and how it can be used to establish a South African framework for constitutional damages.

2 Vicarious Liability

The use of the vicarious liability doctrine to hold the South African government liable for the wrongs of its employees acting within the scope of their authority is derived from the State Liability Act 20 of 1957 which prescribes its exclusive use in this regard.² This is a model example of a mixed legal system.³ South Africa's use of vicarious liability flows from its English heritage, however it is infused with the Roman-Dutch principles of delict. The use of vicarious liability is a manifestation of Dicey's "equality principle" which envisages state liability being regulated through private law doctrines.⁴ The result of the 'equality principle' is the state being treated as any other private person under the law.⁵ What this fails to account for are the positive duties placed on the South African state by section 7(1) of the Constitution.⁶ As du Bois puts it, 'the state is regarded as having a special responsibility, different to private persons – its *raison d'être* lies in serving and protecting the public'.⁷ Before looking at the difficulties this has caused, it is necessary to understand how the state is currently held liable. This will be done using the SAPS as an example. When the SAPS cause members of the public to suffer physical injury - whether caused by a sole member of the police, a number of policemen or through an omission of the enterprise generally - the state can only be held vicariously liable.⁸ The necessary, and together sufficient, conditions to hold the state vicariously liable are:

² S 1.

³ F du Bois "State Liability in South Africa: A Constitutional Remix" (2010) 25 *Tulane Euro Civ LF* 139 147-148.

⁴ 147-148.

⁵ 147-148.

⁶ Du Bois (2010) *Tulane Euro Civ LF* 174-5; T Cornford *Towards a Public Law of Tort* (2008) 11.

⁷ Du Bois (2010) *Tulane Euro Civ LF* 170.

⁸ Du Bois (2010) *Tulane Euro Civ LF* 170; *K v Minister of Safety and Security* 2005 6 SA 419 (CC); *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA).

- 1) A *delict* was committed against the plaintiff *by the employee*;
- 2) This person was at the time of the *delict* an employee of the defendant; and
- 3) This person was acting *in the course and scope of his or her employment*.⁹

The first condition requires that a *delict* was committed against the plaintiff *by the employee*. In South Africa a person is liable in *delict* where his or her culpable conduct caused proximate harm to the plaintiff and the conduct was 'wrongful' in a delictual sense.¹⁰ The second and third conditions require that the employee had committed the *delict* whilst acting in the course and scope of his employment. Where these conditions are met delictual liability is strictly imputed onto the state due to its relationship with the tortfeasor.¹¹

3 A closer look at post-constitutional vicarious liability

The two ground-breaking judgments of *Carmichele v Minister of Safety and Security*¹² and *K v Minister of Safety and Security*¹³ shed new light on how the courts are to approach the issue of state liability in the current constitutional setting. Importantly the cases endorsed the traditional approach of vicarious liability for negligent and intentional wrongs respectively, notwithstanding the inherent resistance the private law doctrines posed.¹⁴ In attempting to fit state liability into a traditionally private law doctrine the Constitutional Court had to adjust the vicarious liability doctrine accordingly. This, as will be shown, led to the Court to commit some irreconcilable doctrinal errors. First, *Carmichele* and *Minister of Safety and Security v van Duivenboden*¹⁵ will be discussed and the errors which have been identified considered. Thereafter I will discuss the *K v Minister of Safety and Security*¹⁶ in the same light.

The *Carmichele* case, and following it *van Duivenboden*, established the South African approach to state liability for police failing to safeguard citizens from physical harm. In *Carmichele* the Constitutional Court subtly endorsed the vicarious liability

⁹ D Visser "Delict" in F du Bois (ed) *Wille's Principles of South African Law* (2007) 1089 1217-1218; L Boonzaier "State Liability in South Africa" (2013) 130 SALJ 330 330-331.

¹⁰ Visser "Delict" in *Wille's Principles* 1096.

¹¹ *K v Minister of Safety and Security* 2005 6 SA 419 (CC) 431; Visser "Delict" in *Wille's Principles* 1216.

¹² 2001 4 SA 938 (CC).

¹³ 2005 6 SA 419 (CC).

¹⁴ *F v Minister of Safety and Security* 2012 1 SA 536 (CC) 558: Froneman JA's dissent.

¹⁵ *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA).

¹⁶ 2005 6 SA 419 (CC).

doctrine by allowing the claim to remain founded in delict.¹⁷ Here the plaintiff sought to hold the state vicariously liable for the police and prosecuting authorities' failure to properly oppose the pre-trial release of her assailant.¹⁸ The focus of the judgment fell on whether the SAPS and state prosecutors owed her a legal duty to protect her rights, including the rights to life, dignity, freedom and security, and privacy.¹⁹ The plaintiff argued that the court should develop the common law test for wrongfulness (which establishes whether a legal duty was owed to the plaintiff by the defendant) to include considerations of the state's positive duties to uphold the Bill of Rights.²⁰ Answering this, the Court held that the court *a quo* was incorrect in applying a test devoid of these considerations and remitted the case back to the High Court.²¹ This showed that the Constitution required the state's duties to differ from that of private persons – a distinct break from the English ideology which underpinned the vicarious liability doctrine up until this point. However, maintaining the use of delict and vicarious liability introduced its own difficulty: the courts did not distinguish between the duties owed by the tortfeasor and the duties owed by the state. Establishing whether a duty is owed by the tortfeasor falls within the first requirement of vicarious liability. Whether the state owes a legal duty to the plaintiff is irrelevant because liability is strictly imputed.²²

Following *Carmichele* was the *van Duivenboden* judgment which heeded the Constitutional Court's call.²³ Here the plaintiff successfully sought damages vicariously from the state for *certain* police officers negligently failing to confiscate a firearm from a man who was clearly unfit to bear it and who subsequently shot the plaintiff.²⁴ The Court found that a legal duty was owed by the state to the plaintiff by recognising that there was an infringement of the plaintiff's rights;²⁵ that the state had a positive constitutional duty to protect the rights in the Bill of Rights;²⁶ and that a novel norm of accountability rested on the state.²⁷ Further, the Court held that where no other effective remedies except an action for damages exist, the norm will

¹⁷ *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) 950.

¹⁸ 950.

¹⁹ 951 and 957.

²⁰ 951.

²¹ 971.

²² A Fagan "Reconsidering *Carmichele*" (2008) 125 *SALJ* 659 659.

²³ *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) 444-445.

²⁴ 437.

²⁵ 447: Where Nugent JA identifies the rights to human dignity, life and security of the person.

²⁶ 446.

²⁷ 446; simply put, the norm of accountability entails the state being held responsible for the performance of their constitutional duties and can be read with s 41 of the Constitution.

'ordinarily demand the recognition of a legal duty'.²⁸ What is important to note is that the Court used the duties owed by the *state* and the norm of accountability resting on the *state* to establish the wrongfulness of the conduct of the identifiable tortfeasors. This line of reasoning again disregards the first necessary condition of vicarious liability: that the delict perpetrated against the plaintiff must be committed by a person *other* than the defendant. It conflates the wrongfulness of the state's conduct with that of the wrongfulness of the policemen's conduct.²⁹ Fagan identifies that imposing the state's duties onto the employee in order to hold the state liable 'instrumentalises' the employee.³⁰ This ignores the right to human dignity of the employee.³¹ Boonzaier also exposes that the South African approach to state liability has become circular in nature:

"Bizarrely, the state can be held liable only if an employee has committed a delict, and yet our courts are now finding that such employee [sic] has committed a delict only if they mean to hold the state liable."³²

This is a difficulty which has arisen for South African courts in attempting to use a private law doctrine to regulate state liability in the post-constitutional era.³³ The problem also manifested itself in *Van Eeden v Minister of Safety and Security*.³⁴ Here the plaintiff sued the state vicariously for their negligent failure to prevent the escape of her assailant from police custody.³⁵ The facts do not establish a specific policeman responsible for the failure but rather the SAPS generally.³⁶ This presents the problem of how the state is to be held vicariously liable for failures which are institutional in nature. It is in this context that the doctrine of constitutional damages is a viable alternative to vicarious liability. However, the Court chose to hold the state

²⁸ 447.

²⁹ Fagan (2008) SALJ 659; Boonzaier (2013) SALJ 339-342.

³⁰ Fagan (2008) SALJ 668-669.

³¹ Fagan (2008) SALJ 668-669; Also see Marias JA's dissent in *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) 452-453: "...usually the omissions of individual functionaries of the State which render it potentially liable. If one is minded to hold the State liable, one will at the same time be holding the individual functionary liable. That he or she may never be called upon to pay is not a good reason for ignoring the concomitant personal liability which will be inherent in finding the State liable...It is simply a reminder that more is at stake than imposing liability upon an amorphous entity such as the State".

³² Boonzaier (2013) SALJ 342.

³³ Du Bois (2010) *Tulane Euro Civ LF* 174-5.

³⁴ 2003 1 SA 398 (SCA).

³⁵ 394.

³⁶ *Van Eeden v Minister of Safety and Security* 2003 1 SA 398 (SCA) 400; Also see Boonzaier (2013) SALJ 342.

liable using vicarious liability, in line with the *van Duivenboden* judgment, even though it is wholly unsuited to accomplish this.

The second difficulty involves the application of the third aforementioned requirement of the vicarious liability doctrine. This requires that the tortfeasor committed the delict whilst acting *in the course and scope of his or her employment*.³⁷ The seminal case in this regard is *K v Minister of Safety and Security*³⁸ which laid down the current constitutionally inspired approach to this requirement in deviation cases. An employee is acting within the course and scope of his or her employment if:

1. the delict was done solely for the purpose of the employee; and
2. there was a real and sufficiently close connection between the delict committed and the business or purposes of their employer.³⁹

It is the second condition which has led to difficulty when applied in *K v Minister of Safety and Security*⁴⁰ and subsequently in *F v Minister of Safety and Security*.⁴¹ In the *K v Minister of Safety and Security*⁴² the plaintiff had been raped by three on-duty policemen who had agreed to give her a lift home.⁴³ This clearly establishes that the first element was satisfied.⁴⁴ In establishing that a sufficiently close connection existed, the Court relied on two premises. The first premise relied on the fact that the policemen breached their constitutional duty to prevent crime and protect members of the public.⁴⁵ Secondly, their employment as policemen had led to the plaintiff to trust them and it was this trust which gave rise to the opportunity of the rape.⁴⁶ It is the first premise which creates a problem. As Fagan illustrates, it “defies common sense” to rely on the fact that a breach of a duty of employment shows that an employee’s delict has a “close connection” to their employer’s business or purpose.⁴⁷ If one endorses this line of reasoning, it leads to the absurd result that a policeman

³⁷ *K v Minister of Safety and Security* 2005 6 SA 419 (CC) 431.

³⁸ 2005 6 SA 419 (CC).

³⁹ *K v Minister of Safety and Security* 2005 6 SA 419 (CC) 436; *F v Minister of Safety and Security* 2012 1 SA 536 (CC) 549.

⁴⁰ 2005 6 SA 419 (CC).

⁴¹ *F v Minister of Safety and Security* 2012 1 SA 536 (CC).

⁴² 2005 6 SA 419 (CC).

⁴³ *K v Minister of Safety and Security* 2005 6 SA 419 (CC) 423-4.

⁴⁴ 443.

⁴⁵ 443.

⁴⁶ 443.

⁴⁷ A Fagan “The Confusions of K” (2009) 126 *SALJ* 156 195.

who constantly commits crimes has a closer connection to the Minister of Police than a conscientious policeman.⁴⁸ As Froneman JA puts in in his dissent in the *F v Minister of Safety and Security 2012 1 SA 536 (CC)*, “it is no part of the work of policemen to rape women”.⁴⁹

It is submitted that these problems, and others,⁵⁰ are a result of forcing a relationship characterised as vertical – that between the state and its citizens – into a mechanism designed to regulate horizontal relationships – that between two private persons.⁵¹ The reason given by the courts for using delict and vicarious liability is the lack of alternatives. In *van Eeden* it was said:

“An important consideration in favour of recognising delictual liability for damages on the part of the State in circumstances such as the present is that there is no other practical and effective remedy available to the victim of violent crime. Conventional remedies such as review and mandamus or interdict do not afford the victim of crime any relief at all. The only effective remedy is a private law delictual action for damages.”⁵²

Similarly, in *van Duivenboden* where delictual damages were awarded it was said, “there is no effective way to hold the state to account in the present case other than by way of an action for damages”.⁵³ It is submitted that vicarious liability is no longer the only form of effective relief available. This is due to the development of the doctrine of constitutional damages in South Africa and abroad, specifically Canada.

4 Constitutional damages in South Africa

The starting point for a claim for constitutional damages in South Africa is section 38 of the Constitution.⁵⁴ The section provides that:

“Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.”⁵⁵

⁴⁸ 196.

⁴⁹ *F v Minister of Safety and Security 2012 1 SA 536 (CC) 557.*

⁵⁰ For more criticisms and difficulties which have been identified see Fagan (2008) *SALJ* and Fagan (2009) *SALJ* and Boonzaier (2013) *SALJ*.

⁵¹ *F v Minister of Safety and Security 2012 1 SA 536 (CC) 558*; Du Bois (2010) *Tulane Euro Civ LF* 174-5.

⁵² *Van Eeden v Minister of Safety and Security 2003 1 SA 398 (SCA) 399.*

⁵³ *Minister of Safety and Security v Van Duivenboden 2002 6 SA 431 (SCA) 447-448.*

⁵⁴ *Fose v Minister of Safety and Security 1997 3 SA 786 (CC).*

Before dealing with the cases concerned with this section, it is necessary to discuss *Fose v Minister of Safety and Security*⁵⁶ which dealt with a provision, with the same effect, under the Interim Constitution Act 200 of 1993, namely section 7(4)(a). Here the plaintiff had allegedly been assaulted by various policemen.⁵⁷ He sought punitive constitutional damages from the state for the violations of his rights, over and above the delictual damages claimed for the same conduct.⁵⁸ The legal issue was whether it was “appropriate” to award constitutional damages assuming that the plaintiff had already received compensatory damages.⁵⁹ Ultimately the Court held that such “punitive” damages were not appropriate in the circumstances as they would not succeed in vindicating the infringed rights nor would it deter future violations.⁶⁰ What is important for our purposes is that the Court explicitly left open the questions whether vicarious liability was an adequate basis for state liability and generally whether South African law relating to state liability was, then, consistent with the Interim Constitution, specifically whether it provided “appropriate relief”.⁶¹ This is significant because vicarious liability and the State Liability Act were not directly tested against constitutional muster in this regard. Further, the Court in an *obiter* statement regarding constitutional damages said that “there is no reason in principle why appropriate relief should not include an award of damages, where such an award is necessary to protect and enforce rights”.⁶² Before determining what “appropriate relief” entails, it is necessary to understand why the Court in *Fose*, and following it *Carmichele* and *van Duivenboden*, assumed that delict was appropriate.

In *Fose*, Ackermann JA acknowledged that “in many cases the common law will be broad enough to provide all the relief that would be “appropriate” for a breach of constitutional rights”.⁶³ Bishop further identifies that the courts in the current constitutional era have adopted a principle of subsidiarity whereby private law remedies, which adequately vindicate the Bill of Rights, should be favoured over novel constitutional law remedies such as constitutional damages.⁶⁴ This approach

⁵⁵ Constitution of the Republic of South Africa, 1996 s 38.

⁵⁶ *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC).

⁵⁷ 795.

⁵⁸ 795.

⁵⁹ 795.

⁶⁰ 828.

⁶¹ 820-821.

⁶² 821.

⁶³ 820.

⁶⁴ M Bishop “Remedies” in M Bishop & S Woolman (eds) *Constitutional Law of South Africa* (2007) 79-81.

was seen as particularly fitting in the South African law of delict because, unlike tort law of other Commonwealth jurisdictions, constitutional rights can be effectively vindicated through acknowledging them in the “open-ended” wrongfulness inquiry.⁶⁵ Furthermore section 39(2) of the Constitution allows the courts to develop any private law remedies which do not live up to the standards required by the Bill of Rights. This approach is particularly favourable where the infringement arises between private persons. However, as was shown above, the courts have had conceptual difficulty in using vicarious liability where the state is a defendant and the breach of rights is due to an institutional failure. It is submitted that the question, left open in *Fose*, whether the current law regulating state liability provides “appropriate relief” must now be considered.

When considering what appropriate relief entails in South Africa, three guiding principles can be discerned from the *Fose* judgment: effectiveness, suitability and just relief. These principles are not mutually exclusive and necessarily overlap. The Court stated that in order to protect and enforce the Constitution relief must be *effective*.⁶⁶ This relates to the extent to which the remedy vindicates the Bill of Rights and deters future violations.⁶⁷ Effectiveness is paramount in a country where so few have access to courts to vindicate their rights and endemic rights violations exist.⁶⁸ In this regard, the courts have a responsibility to vindicate rights effectively and “are obliged to forge new tools and shape innovative remedies, if needs be, to achieve this goal”.⁶⁹ Moving onto *suitability*, Kriegler JA stated that the meaning of “appropriate” in this context is “specially fitted or suitable”.⁷⁰ This requires the relief to fit the nature of the infringement, including its probable impact.⁷¹ *Just relief* was imported from Canadian jurisprudence because the Court held on a purposive interpretation there is no material difference between the Canadian Charter and section 7(4)(a) of the Interim Constitution regarding the requirement of just relief.⁷² This demands that the interests of all those affected by the remedy are accounted

⁶⁵ Du Bois (2010) *Tulane Euro Civ LF* 164, 166.

⁶⁶ *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) 826; Also see *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)*; *President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 6 SA 40 (SCA) 26.

⁶⁷ *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) 826.

⁶⁸ 826.

⁶⁹ 826.

⁷⁰ 836.

⁷¹ 836.

⁷² 807.

for.⁷³ In this regard it must be noted that vindication goes beyond the person who suffered harm to society as a whole.⁷⁴ This is because violations to a citizen's rights "impair public confidence and diminish public faith in the efficacy of the protection".⁷⁵ Although the concept of a "just" remedy is not included in section 38 of the Constitution, it is submitted that section 172(1)(b) of the Constitution, which provides that when deciding a constitutional matter a court may make an order which is "just and equitable", must be read with it.⁷⁶

The first instance where the South African courts have awarded constitutional damages was in the line of cases leading up to *President of the Republic of South Africa v Modderklip Boerdery*.⁷⁷ The case involved the illegal occupation of the Modderklip farm by 40 000 residents of the neighbouring informal settlement. This violated the farm owner's right not to be deprived of their property.⁷⁸ The farm owner sought an eviction order, however, in this instance this would infringe the residents' right to access to housing.⁷⁹ The Court also considered expropriation but suggested that it was not within the court's jurisdiction to order the state to expropriate land.⁸⁰ Due to a lack of alternative remedies the Constitutional Court approved the court a *quo's* decision to award constitutional damages to the farm owner for the violation to their rights as the most appropriate relief. What must be noted is that the Court was willing to compare different remedies and determined that constitutional damages was the most appropriate in the circumstances. The following quote from the Supreme Court of Appeal judgment in the *Modderklip* case is apposite to the inquiry generally:

"They [courts] should 'attempt to synchronise the real world with the ideal construct of a constitutional world' and they have a duty to mould an order that will provide effective relief to those affected by a constitutional breach."⁸¹

⁷³ 807.

⁷⁴ 830.

⁷⁵ 830.

⁷⁶ The Constitution of the Republic of South Africa, 1996 s 38 and s 172(1)(b).

⁷⁷ *President of The Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and others, Amici Curiae)* 2005 5 SA 3 (CC).

⁷⁸ 9.

⁷⁹ 9.

⁸⁰ 27.

⁸¹ *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA And Legal Resources Centre, Amici Curiae)* 2004 6 SA 40 (SCA) 61.

Likewise, in *MEC, Department of Welfare, Eastern Cape v Kate*⁸² the Court considered the appropriateness of awarding constitutional damages but within the context of socio-economic rights. The case deals the violation of section 27(1)(c) of the Constitution, namely, the right to access to social security.⁸³ The Court recognised that the availability of all remedies must be considered but, importantly, held that the relief envisaged by section 38 of the Constitution is not a remedy of last resort.⁸⁴ Constitutional damages can be claimed directly even where other remedies exist, including where indirect means, such as vicarious liability, exist.⁸⁵

To sum up: section 38 of the Constitution allows the courts to grant “appropriate relief” to a plaintiff who alleges that a right in the Bill of Rights has been infringed. Appropriate relief can be understood as being effective, suitable and just. These principles together require that the relief vindicate the Bill of Rights; deter future violations; fit the nature of the infringement; and accounts for all the interests of affected parties. Further, relief derived from section 38 is not a remedy of last resort. The doctrine of constitutional damages derives its force from section 38 and has been deemed appropriate in the *Modderklip* and *Kate* cases.

In what follows I will use these principles to discuss whether constitutional damages are an appropriate form of relief where due to an institutional failure the police violate *inter alia* a citizen’s right to life, human dignity, freedom and security. Again it must be noted that the principles are not mutually exclusive and as such when determining “appropriateness” the reasoning may overlap. Are constitutional damages suitable given the nature of the infringement? Where the police infringe the citizen’s rights in the aforementioned cases the relationship is characterized as “vertical”. It is vertical because, as is trite, the state, and those people through whom it governs, is more powerful than private persons. In *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*⁸⁶ - a US case – Brennan J lucidly shows the differences between interactions between citizens *inter se* and those between the state and its citizens.⁸⁷ Here US federal narcotics agents had infringed a US citizen’s rights by unlawfully searching the plaintiff’s premises and arresting him without a warrant.⁸⁸ The Court said:

⁸² 2006 4 SA 478 (SCA).

⁸³ 489.

⁸⁴ 489.

⁸⁵ 489.

⁸⁶ 403 US 388 (1971).

⁸⁷ 391-392.

⁸⁸ 391-392.

“Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting - albeit unconstitutionally - in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.”⁸⁹

This power asymmetry can be seen in the *K v Minister of Safety and Security*⁹⁰ where O’Reagan JA places emphasis on the trust that the plaintiff placed on the policemen.⁹¹ Being state officials gave the policeman an opportunity that other citizens would not have had. This is significant because delictual liability has been historically developed to regulate relationships of citizens *inter se* and, as was shown above, vicarious liability struggles to incorporate the vertical nature of the relationship between the state and its citizens.⁹² In contrast, using a constitutional remedy such as constitutional damages against the state will naturally recognise the vertical nature of the relationship. This can be illustrated by comparing the so-called norm of accountability with section 7 of the Constitution. Section 7(1) of the Constitution states:

“This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”

Section 7 (2) states that “the state must respect, protect, promote and fulfil the rights in the Bill of Rights”. In *van Duivenboden* the court translated these provisions into the “norm of accountability” in order for it to accord with private law jurisprudence. It further held that where there is no effective remedy other than an

⁸⁹ 391-392: “. . . (W)e may bar the door against an unwelcome private intruder, or call the police if he persists in seeking entrance. The availability of such alternative means for the protection of privacy may lead the state to restrict imposition of liability for any consequent trespass. A private citizen, asserting no authority other than his own, will not normally be liable in trespass if he demands, and is granted, admission to another's house. . . . But one who demands admission under a claim of federal authority stands in a far different position. . . . The mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest by resort to the local police; and a claim of authority to enter is likely to unlock the door as well... In such cases...there remains to [the citizen] but the alternative of resistance, which may amount to crime.”.

⁹⁰ 2005 6 SA 419 (CC).

⁹¹ *K v Minister of Safety and Security* 2005 6 SA 419 (CC) 443.

⁹² *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) 835; Also see *Ferreira v Levin* 1996 1 SA 984 (SA) at 229.

action for delictual damages, the norm will ordinarily demand the recognition of a legal duty on the state to protect citizens from rights violations. In contrast, a constitutional damages inquiry, as will be seen below, simply asks whether the state has respected, protected, promoted and fulfilled the rights in the Bill of Rights. In my view the Constitution is more suitably vindicated through this direct inquiry.

Secondly, constitutional damages is appropriate due to its effective vindication of rights. Consider the differences between the objects of delictual remedies as opposed to constitutional remedies. Delictual relief is primarily corrective in nature in the sense that it seeks to place the plaintiff back into the position as if the wrong had not occurred. However, the Constitution has been described as an “aspirational or transformative” document which seeks to promote distributive justice.⁹³ Where delictual remedies focus on compensating the individual’s loss, constitutional remedies aim to vindicate the Bill of Rights and deter future violations.⁹⁴ Broader vindication is necessary because as Kriegler J, in *Fose*, articulates: “the rights violator not only harms a particular person, but impedes the fuller realisation of our constitutional promise”.⁹⁵ Vicarious liability ignores this by seeking to translate constitutional duties owed to society into private law duties owed to individuals.⁹⁶ In South Africa where the Constitution is supreme and puts distinct obligations on the state, damages for the SAPS institutional failures should serve constitutional purposes not the purposes of delict.⁹⁷ This would result in government liability vindicating rights more effectively.⁹⁸

Furthermore, the effectiveness of vicarious liability is undermined by the difficulties outlined earlier in the paper. Although vicarious liability can vindicate the right through compensation to the plaintiff, in order to achieve this it must infringe the rights of the state employees who become jointly liable simply because they are state employees. This cannot be said to be effective vindication. Another result of the doctrinal errors is that well deserving plaintiffs’ claims could fail.⁹⁹ For example,

⁹³ A Price “The Influence of Human Rights on Private Common Law” (2012) 129 SALJ 330 363.

⁹⁴ *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) 798; Also see A Price *The Impact of the Bill of Rights on State Delictual Liability for Negligence in South Africa* (2010) unpublished paper presented at the *Obligations V Conference: Rights and Private Law* hosted by St Anne’s College, Oxford University 15.

⁹⁵ *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) 835.

⁹⁶ Du Bois (2010) *Tulane Euro Civ LF* 146.

⁹⁷ Roach argues that the supremacy of the Canadian Charter entails that its purposes should be advanced rather than the purposes of tort law which is merely prescribed by the various Crown Liability Acts; K Roach *Constitutional Remedies in Canada* (1994) 11-24.

⁹⁸ 11-25.

⁹⁹ Boonzaier (2013) SALJ 344.

where the infringement was caused by an institutional problem there is no specific official to ground vicarious liability on.¹⁰⁰ This would be detrimental not only to the plaintiff's claim for compensation, but also result in the rights not being effectively vindicated.

Third, vicarious liability does not adequately take into account all the stakeholders affected by rights violations and in that sense it is not "just". As already noted, the effect of rights violations goes beyond the compensation of the harmed individual, especially where violations are institutional or endemic in nature. Whereas vicarious liability (properly applied) tends to focus on the employees' duties and then the relationship between the employee and the employer, constitutional damages has the advantage of explicitly recognising the state's constitutional duties and contingent issues, such as scarce resources, to hold them accountable and liable. Under the doctrine of constitutional damages the state's positive constitutional duties would naturally be taken into account and, accordingly, so would the norm of accountability – without the difficulties surrounding vicarious liability. Furthermore, constitutional damages would provide a more legitimate ground for state liability because it derives from the Constitution itself,¹⁰¹ in contrast to the pre-constitutionally enacted State Liability Act.

Possible criticisms of constitutional damages should now be addressed. Importantly, the State Liability Act prescribes the use of vicarious liability. It must be noted that the State Liability Act was enacted in the pre-constitutional era and based on a now abandoned Diceyan ideology, and as such, is ripe to be challenged. This is not difficult to accept when keeping in mind what has been shown thus far. For example, a plaintiff's rights would most definitely be unjustifiably infringed if it were to fail on one of the abovementioned technical grounds. Also, it is interesting to note that the Court in *Kate* and in *Modderklip* avoided this issue altogether when awarding constitutional damages against the state. Further, if it is accepted that constitutional damages are a more appropriate form of relief, the legislature should consider itself bound to amend the Act in order to fulfil their constitutional duty to uphold the Bill of Rights.¹⁰²

The doctrine of constitutional damages, although awarded in *Modderklip* and *Kate*, remains a vague doctrine in South African law. Boonzaier argues that direct

¹⁰⁰ Roach *Constitutional Remedies* 11-22 and 11-25.

¹⁰¹ Price (2012) *SALJ* 357.

¹⁰² The Constitution of the Republic of South Africa, 1996 s 7(2) and s 8(1).

delictual liability is a more appropriate relief than constitutional damages where state liability is concerned.¹⁰³ He contends that maintaining the use of delict accords with the courts current culture of reliance on common law over direct reliance of the Constitution where possible.¹⁰⁴ He proposes that this legal culture is based on *inter alia* the idea that the value of the long-developed and intricately balanced private-law principles is higher than the “nebulous” doctrine of constitutional damages.¹⁰⁵ What this argument fails to acknowledge is the ability of courts to retain the balance of the so-called “sophisticated private-law principles” in new constitutional remedies. Courts will engage with the private law concepts that previously would have applied and where necessary retain suitable concepts by analogy.¹⁰⁶ Another important tool which can be utilised to maintain the “sophistication” is suitable comparative analysis. For this reason it is necessary to look to recent developments in Canadian law.

5 The recent development of Charter damages in Canada

The recent development in *Vancouver (City) v Ward*¹⁰⁷ has significantly advanced the doctrine of Charter damages in Canada. Although it has received praise, it must be noted that this development is not entrenched and its future remains in doubt.¹⁰⁸ Before discussing the case the caution raised in *Fose* regarding comparative analysis must be addressed.¹⁰⁹ There are significant differences between the Canadian law of tort and the South African law of delict. For example, where Canada has narrower grounds to hold the state vicariously liable under the torts of misfeasance in a public office and the tort of negligent investigation,¹¹⁰ the South African law of delict has the ability to find the state liable on a wider range of grounds.¹¹¹ Second, sovereign immunity and state liability are treated differently in these jurisdictions, although Canada, like South Africa, does not recognise immunity

¹⁰³ Boonzaier (2013) *SALJ* 364.

¹⁰⁴ 364.

¹⁰⁵ 364.

¹⁰⁶ The Supreme Court of Canada did this explicitly when developing the doctrine of Charter damages: *Vancouver (City) v Ward* 2010 SCC 27 40.

¹⁰⁷ *Vancouver (City) v Ward* 2010 SCC 27.

¹⁰⁸ A Linden “Charter Damages Claims: New Dawn Or Mirage” (2012) 39 *The Advocates’ Quarterly* 426.

¹⁰⁹ *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) 810.

¹¹⁰ C Brannagan “Police Misconduct and Public Accountability: A Commentary on Recent Trends in the Canadian Justice System” (2011) 30 *Windsor Review of Legal and Social Issues* 61 81-86.

¹¹¹ Price *State Delictual Liability* 17; Du Bois (2010) *Tulane Euro Civ LF* 164.

for the police.¹¹² Last, the constitutional dispensations differ by nature and history.¹¹³ It is submitted that the purpose of addressing this Canadian case is to provide an example of how a framework for Charter damages has been developed, not when it is appropriate to use it in a South African context. As such, although the differences must be kept in mind, they will not affect the usefulness of the comparison. Also the general structure for state liability in Canada is similar to South Africa in the sense that the police are traditionally held vicariously liable in tort for civil redress.¹¹⁴ Further the significant similarity between section 38 of the Constitution and section 24(1) of the Charter, recognised in *Fose*, improves the usefulness of the comparison. Section 24(1) provides:

“Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.”

The *Ward* case involved a plaintiff who had his car seized, was detained and strip searched without legal cause.¹¹⁵ The court *a quo* found that the city had breached the plaintiff’s right not to be arbitrarily detained or imprisoned and thereby committed the tort of wrongful imprisonment (which generally falls under intentional torts) by holding the plaintiff in lockup for longer than necessary and as a result was awarded damages (vicariously).¹¹⁶ However, the Court found that the car seizure and strip search breached the plaintiff’s right to be secure against unreasonable search or seizure and awarded him Charter damages.¹¹⁷ It was the award of Charter damages which was the focus of the appeal in *Ward*.¹¹⁸ The first point of interest is how the Supreme Court of Canada interpreted what an “appropriate and just” remedy entails. The Court per McLachlin CJ emphasized the broad discretion that s24 (1) gives courts and that it would improper for any court to reduce it.¹¹⁹ Clarification on what it entails would not reduce this discretion.¹²⁰ Following earlier Canadian case law the

¹¹² Roach *Constitutional Remedies* 2-17 and 2-18; Brannagan (2011) *Windsor Review of Legal and Social Issues* 81; *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129, 2007 SCC 41.

¹¹³ Roach *Constitutional Remedies* 2-1.

¹¹⁴ Brannagan (2011) *Windsor Review of Legal and Social Issues* 81.

¹¹⁵ *Vancouver (City) v Ward* 2010 SCC 27 36.

¹¹⁶ 36.

¹¹⁷ 36.

¹¹⁸ 36.

¹¹⁹ 38.

¹²⁰ 38.

Court held that an “appropriate and just” order will *inter alia* meaningfully and legitimately vindicate the rights and freedoms of the claimant and be fair to the party the order is made against.¹²¹ These broadly reflect the abovementioned principles enunciated in *Fose*. McLachlin CJ held that Charter damages meet these conditions but because is a new remedy it will have to be incrementally developed.¹²² This shows that the Court saw it as their endeavour to lay down the foundational framework, not necessarily a comprehensive one.

Secondly, the Court in *Ward* identified the distinct nature of Charter damages. The Court explicitly stated that it is a direct claim against the state in order to distinguish it from vicarious liability.¹²³ Nonetheless, the Court was not deterred from utilising the relevant underlying policy considerations of vicarious liability as a conceptual aid to informing the Charter damages inquiry.¹²⁴ This was most clear when the Court was determining the quantum of damages.¹²⁵

Next, the Court laid down a four step test to determine when Charter damages may be awarded which could serve as an example of how South Africa could establish a framework for constitutional damages for state liability under section 38 of the Constitution. Each step will be explained and suggestions made on how these are apposite to South African law. The steps are as follows:

1. Proof of a Charter Breach;
2. Functional Justification of Damages;
3. Countervailing Factors; and
4. Quantum of Charter Damages.

The first step is for the plaintiff to prove that one or more of their Charter rights were breached by the state.¹²⁶ The Supreme Court in *Ward* did not elaborate on this step and simply accepted the trial judge’s finding that the strip search and seizure was a violation of the Charter.¹²⁷ It is submitted that this step could be developed to include a causation element.¹²⁸ In South African law it would be articulated as whether the state has breached one or more of the plaintiff’s rights contained in the

¹²¹ 39.

¹²² 39.

¹²³ 40.

¹²⁴ 40.

¹²⁵ 50-53.

¹²⁶ 50-53.

¹²⁷ Linden (2012) *Advocates’ Quarterly* 431.

¹²⁸ K Cooper-Stephenson *Charter Damage Claims* (1990) 84 and 97-98.

Bill of Rights and would normally be *prima facie* satisfied. The courts should, as the Court in *Ward* indicated it was willing to do, use the already established concepts of causation in delict and criminal law, where relevant, to inform this step by analogy.¹²⁹ For example the law of delict has developed extensive tests for legal causation which can be used as a conceptual guide for whether the state had breached the plaintiff's rights.¹³⁰ This would allow the courts space to determine the appropriate boundary for liability for the doctrine of constitutional damages.

The second step, named "functional justification of damages", requires that the damages sought serve a "useful function or purpose".¹³¹ For Charter damages this entails furthering the general objects of the Charter by remedying the personal loss caused by the rights violation via compensation; vindicating Charter rights to affirm constitutional values; and deterring future violations by the state.¹³² Essentially this step seeks to prove that the Charter damages are "appropriate and just".¹³³ It is submitted that although "functional justification for damages" is foreign to South African law, translated into South African jurisprudence the step essentially entails showing that damages would be "appropriate relief" in the circumstances. This could be achieved by reference to the abovementioned principles of effectiveness, suitability and just relief which flow from section 38 of the Constitution.

It is important to note that at this stage in the test, if the plaintiff was successful in the previous two steps, a *prima facie* case is established against the state.¹³⁴ This means that at this point the onus lies on the state to show other factors which would render Charter damages as inappropriate or unjust in step three.¹³⁵ The *prima facie* liability accords with the positive constitutional duties on the South African state and the so-called norm of accountability.

The third step is for the state to establish that there are countervailing factors which point away from awarding damages being "appropriate and just", in other words the state has the opportunity to refute the *prima facie* case.¹³⁶ The Court in *Ward* only establishes two considerations but recognised that the law in this regard must be left open for further development.¹³⁷ First, if the state can prove the

¹²⁹ Roach *Constitutional Remedies* 11-22.

¹³⁰ Visser "Delict" in *Wille's Principles* 1130-1133.

¹³¹ 1130-1133.

¹³² *Vancouver (City) v Ward* 2010 SCC 27 41-44.

¹³³ *Vancouver (City) v Ward* 2010 SCC 27 44; Linden (2012) *Advocates' Quarterly* 431-432.

¹³⁴ Linden (2012) *Advocates' Quarterly* 432.

¹³⁵ 432.

¹³⁶ *Vancouver (City) v Ward* 2010 SCC 27 44.

¹³⁷ 44.

existence of an alternative remedy that serves the same function as Charter damages, it can avoid liability.¹³⁸ This consideration is a practical one which seeks to avoid double compensation.¹³⁹ The Court stated that the alternative remedy must successfully and sufficiently cure the breach - the mere fact that another remedy, private or constitutional, exists is not sufficient.¹⁴⁰ This consideration is relevant to South African law because in certain circumstances both vicarious liability and constitutional damages could concurrently apply. Whichever the Court considers most appropriate must result in the other being barred from the claimant as grounds for relief.

The second consideration is “good governance”. The Court boldly stated that the argument which holds that an award of damages has a “chilling effect” on effective governance cannot alone avoid liability.¹⁴¹ The Court declared that damages will in fact promote good governance in the sense that it improves compliance with the Charter.¹⁴² The Court required that the claimant must show a “minimum threshold of gravity” to exclude the state from arguing that damages would interfere with good governance.¹⁴³ Effective governance raises complex separation of powers issues for South African law. It also straddles administrative law’s territory. Whereas section 33 of the South African Bill of Rights contains the right to just administrative action, the Canadian Charter does not contain a corresponding right. In South Africa, section 33 is vindicated through administrative law, specifically through the Promotion of Administrative Justice Act 3 of 2000. What complicates the issue further is the fact that damages has been awarded as a remedy under the PAJA in *Darson Construction v City of Cape Town*.¹⁴⁴ It is submitted that recourse to the PAJA would be more appropriate where such issues are raised.

A defence which would most likely be raised under this step if it were applied in South Africa is the problem of government resource constraints. This can be seen in the so called “municipality cases”, for example *McIntosh v Premiere, Kwazulu-Natal*,¹⁴⁵ where the municipality sought to avoid being held vicariously liable by

¹³⁸ 44-46.

¹³⁹ 44-46.

¹⁴⁰ 44-46.

¹⁴¹ 44-46.

¹⁴² 44-46.

¹⁴³ 44-46.

¹⁴⁴ *Darson Construction v City of Cape Town* 2007 4 SA 488 (C): Selikowitz J awarded damages under under s 8 (1) (C) (ii) (bb) of PAJA.

¹⁴⁵ *McIntosh v Premier, Kwazulu-Natal and Another* 2008 6 SA 1 (SCA).

arguing their conduct was not negligent due to resource constraints.¹⁴⁶ It is possible to maintain the line of reasoning the Court engaged in by requiring a separate step requiring fault. Roach and Cooper-Stephenson in their respective books on Canadian Charter damages argue that fault, including negligence, could be a distinct step in the Charter damages inquiry. In South Africa, constitutional damages test whether the state has lived up to the requirements of section 7 of the Constitution, or as articulated in *van Duivenboden*, the norm of accountability. Resource constraints are naturally a barrier for the state to meet its section 7 requirements. It follows that the state should have the opportunity to show that the violation occurred due to lack of resources. This could take the form of proving a valid defence under “countervailing measures” or showing that the state was not at fault.

The last step is to determine the quantum of damages.¹⁴⁷ Quantification of damages for rights violations is a complex area of the law. In *Ward* the Court recognised that quantum must correspond to the spirit of section 24(1) which provides that relief must be appropriate and just. In a similar vein, quantum must also be fair to the plaintiff and the state.¹⁴⁸ When considering what is fair the Court identified the following concerns:

1. that large awards and the consequent diversion of public funds may not serve the needs of the claimant;
2. the public interest in good governance;
3. the danger of deterring government from undertaking new policies; and
4. the diversion of funds from public programs to private interests.

The measure of damages was categorised into compensation, vindication and deterrence. Generally compensation will be the primary mode of restitution with vindication and deterrence playing “supporting roles”.¹⁴⁹ The Court stated that both pecuniary loss and non-pecuniary loss would be claimable under compensation. Pecuniary loss, including physical and psychological injuries, would be calculated according to the trite *restitutio in integrum maxim*.¹⁵⁰ Non-pecuniary loss, for pain

¹⁴⁶ For a fuller evaluation of the law in this regard see Boonzaier (2013) SALJ 346-52.

¹⁴⁷ *Vancouver (City) v Ward* 2010 SCC 27 50.

¹⁴⁸ 51-2.

¹⁴⁹ 50.

¹⁵⁰ 51.

and suffering, would also follow the private law “modest conventional rate”.¹⁵¹ Damages serving vindication and deterrence would be calculated using rationality and proportionality.¹⁵² The key consideration would be “the seriousness of the breach evaluated with regard to the impact of the breach on the claimant and the seriousness of the state misconduct”.¹⁵³ The Court noted that vindication and deterrence could take on a “punitive aspect”.

In South Africa pecuniary and non-pecuniary compensation to the plaintiff would also clearly be available. However, *Fose* rejected any notion of punitive damages where the plaintiff had been compensated for losses.¹⁵⁴ The reasons for this are sound. The Court held that for damages to have any deterring effect on government it would have to be substantial.¹⁵⁵ This would not be fair to society writ large and would be an inappropriate diversion of state funds.¹⁵⁶ On the other end of the scale, the Court saw nominal awards to trivialise the rights involved.¹⁵⁷ Hence it would seem that the measure in South Africa, for now, would remain compensatory. However, the vindicatory aspect can be seen as an implicit declaration in step one of the inquiry.

The purpose of reviewing the *Ward* case was to see an example of how Canada has begun to develop a framework to regulate the use of Charter damages and how South African legal concepts suit such an inquiry. The framework would improve the certainty of the application of constitutional damages. Further, legal causation in step one, countervailing factors in step three and the restricted quantum of damages in step four avoid concerns of the primordial legal “floodgates” opening. However, like South Africa, the advent of Charter damages has not resulted in an overhaul of state liability in Canada due to the availability and historic use of vicarious liability. Nonetheless, it is submitted that this framework could be a step in the direction of a uniform doctrine of state liability in South Africa’s legal system.

6 Conclusion

¹⁵¹ 51.

¹⁵² 51.

¹⁵³ 51.

¹⁵⁴ *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) 827-828.

¹⁵⁵ 827-828.

¹⁵⁶ 827-828.

¹⁵⁷ 827-828.

Section 205 (1) of the Constitution of South Africa states that the police must prevent crime, protect citizens and uphold the law. Section 1 states *inter alia* that the South African state is founded on the advancements of rights and freedoms. Section 2 states that the Constitution is the supreme law and that the obligations it imposes must be fulfilled. Section 7 states that the Bill of Rights is the cornerstone of South Africa's democracy and that the state must respect, protect, promote and fulfil the rights in the Bill of Rights. These provisions create a distinct state personality far detached from the Diceyan ideology of old. The establishment of a general framework for constitutional damages will better serve the South African constitutional dispensation by vindicating the rights infringed by the state effectively and directly. The framework will portray the state's distinct character rather than obscuring it through vicarious liability. It further avoids the difficulties of vicarious liability and is in a better position to promote a society based on freedom and respect for human rights. It will aid in the constitutional transformative dream. Furthermore, by using the example set by Canada and allowing already established concepts from private law to guide its development, the doctrine of constitutional damages can retain the intricately balanced interests of all stakeholders. A defined doctrine of constitutional damages will provide a step forward in realising the constitutional vision of South Africa by ensuring the state plays the role the Constitution evinced.